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THE COMCAST/NBC UNIVERSAL MERGER: WHAT DOES THE FUTURE HOLD FOR COMPETITION AND CONSUMERS?

HEARING

BEFORE THE

SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY AND CONSUMER RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

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THE COMCAST/NBC UNIVERSAL MERGER: WHAT DOES THE FUTURE HOLD FOR COMPETITION AND CONSUMERS?

THURSDAY, FEBRUARY 4, 2010

U.S. SENATE,
SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY,
AND CONSUMER RIGHTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 2:36 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Herb Kohl, Chairman of the Subcommittee, presiding.

Present: Senators Kohl, Feingold, Klobuchar, Kaufman, Specter, Franken, and Hatch.

OPENING STATEMENT OF HON. HERB KOHL, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Chairman KOHL. All right. We will commence the hearing at this time. I need to notify all here that at around 3 o'clock we will have two votes, and we will try to see to it that the votes do not interfere unnecessarily with this hearing, although there may be some modest interruption.

Today we examine the merger between Comcast and NBC Universal. The combination of NBC's content holdings with Comcast's distribution power would create a media powerhouse of unmatched size and scope which, if approved, will have far-reaching consequences for competition and consumers.

Comcast is the Nation's largest and most powerful cable television company—with 24 million pay TV subscribers and the dominant share of customers in the markets it serves. It now seeks to acquire NBC Universal, which includes the family of NBC broadcasting and cable networks, 25 local NBC and Telemundo stations in some of the Nation's largest cities, and the Universal Pictures Movie Studios. NBC has some of the most popular programs on television—from the Olympics, to NFL football, to NBC news programming, to entertainment programs ranging from "The Tonight Show" to "The Office," to give just a few examples. We are witnessing the creation of a media conglomerate which is likely to greatly impact both what consumers pay for cable television and the ability of other pay television companies to compete fairly in the market.

The highly concentrated nature of the cable TV industry and the limited choices available to consumers have long concerned this

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Subcommittee. Rather than compete with each other, large incumbent cable companies have often divided the country into regional clusters in which their market share of pay TV viewers reach as much as 70 percent or higher. Consumers suffer from annual cable rate increases running for the last decade about triple the rate of inflation. While recent years have seen the emergence of satellite and phone company competitors, these competitors face considerable obstacles, including difficulties obtaining programming owned by the cable giants and steep price increases when they are able to obtain that programming. Now, because of NBC's must-have programming, many fear this merger has the potential to make these obstacles even worse.

There are four principal areas of concern raised by this merger. First, will this deal create the possibility that Comcast will deny "must-have" NBC programming to its rival pay TV services or unreasonably raise the price of this programming? Second, will Comcast move NBC programming now enjoyed by millions of Americans on free broadcast TV to pay cable TV? Third, will this deal make it significantly more difficult for independent programmers to have Comcast carry their new cable networks?

And, fourth, we must pay particular attention to the effects of this merger on a new and promising form of competition, namely, video programming on the Internet. The widespread deployment of broadband Internet in millions of consumers' homes has led to a growing phenomenon of "cord cutting"—consumers dropping their pay TV subscriptions and watching full-length television programming via high-speed Internet connections. But we have recently heard concerns from programmers that cable TV companies are demanding restrictions on their ability to show their programming on the Internet. We must be vigilant to ensure that the market strength created by this merger does not give the combined company the ability to stifle this new innovative form of competition over the Internet. Moreover, NBC owns a significant share in Hulu, one of the largest providers of video content on the Internet, and there are real concerns regarding its future and its ability to access NBC content after the merger.

So the role of the antitrust regulators at the Justice Department and the FCC will be vital to preserving competition. Should these agencies decide to allow this merger, we believe it is essential that they insist on strong conditions to protect consumers. Comcast has already pledged to adhere to a number of commitments with respect to this merger. We appreciate that effort. However, those commitments are only a starting point to determine what conditions will be necessary to protect consumers. And it is essential, in our opinion, that you, Mr. Roberts and Mr. Zucker, explain to us today and the American people how the creation of this media conglomerate will serve the interests of the American people, not just the interests of your companies. I know you feel the same way about it, and it is in that spirit that we are conducting this hearing.

We now turn to the Subcommittee's Ranking Member, Senator Hatch.

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Well, thank you, Mr. Chairman. I welcome all of you here today to help us to understand this better. Thank you, Mr. Chairman, for holding this hearing and for your continued willingness to conduct these proceedings in a fair and bipartisan manner. I have enjoyed the spirit of cooperation and openness that has permeated in all of this Subcommittee's business, and I look forward to working with you for another year.

If only more people in Washington would follow our example here in the Senate Antitrust Committee, the world would be a much better place, as far as I am concerned. However, I do have Senator Schumer now working with us on another matter. That is a very good thing. And, Franken, I am looking toward you now.

[Laughter.]

Senator HATCH. Now, as we kick off another year of work on issues relating to competition and consumer protection, we turn to what I believe is an interesting and important issue, namely, the proposed merger between Comcast and NBC Universal. Both of these companies are iconic in their respective industries, and this transaction has inspired no small amount of interest and concern in the media and among consumers. And, in many respects, I believe these worries are justified.

In recent years, even as more competitors have entered the video distribution market, and as we have seen improvements in innovation and technology, cable prices have continued to rise at rates that are difficult to understand. This market is by all accounts a dog-eat-dog world, and over the past few years, we have seen companies, including Comcast, use every advantage at their disposal to beat out their competitors. In many respects, this is to be expected. After all, competition is the essence of our free market system. But in this particular industry, these tactics can have a tendency to harm consumers by increasing their prices or affecting their services.

Over the course of this hearing, I hope to get a little better picture as to how this merger will affect this dynamic. And while this proposed union has some horizontal implications, it appears to me to be predominantly a vertical merger.

True enough, both Comcast and NBC Universal are players in the video content market, and there are legitimate questions regarding the potential impact of putting their respective content under the same banner. However, at this point I think the more important questions arise when the vertical aspects of the merger are examined.

The implications of the vertical integration of the country's leading video distributor and one of its leading content providers happen to be significant and more than worthy of our attention. While horizontal mergers tend to receive more criticism and scrutiny, vertical mergers also have the potential to result in significant foreclosure of competition and violation of our Nation's antitrust laws. That being the case, I have a number of questions as to whether as a result of this merger consumers will benefit because of increased efficiencies or whether Comcast will be able to use NBC

Universal's content as a weapon to harm competitors and, as a result, pass along costs to consumers.

When it comes to reviewing mergers, the Congress plays a secondary role. Both the Justice Department and the FCC are charged with preserving competition and protecting consumers, and I am confident that this transaction will receive a full and exhaustive review by them.

Today I expect we will have an open and robust debate over the relevant issues which should give us an idea as to what issues the reviewing agencies will consider when they go over the data.

Thank you once again, Mr. Chairman, and I look forward to examining these issues in today's proceedings.

Chairman KOHL. Thank you very much, Senator Hatch.

We will turn to other members of the Committee for their opening statements, and we hope you will be relatively brief. Senator Klobuchar.

STATEMENT OF HON. AMY KLOBUCHAR, A U.S. SENATOR FROM THE STATE OF MINNESOTA

Senator KLOBUCHAR. We will be brief, Senator Kohl, because I understand we want to get the witnesses started before the votes. Thank you for convening this important hearing. This is the Subcommittee on Antitrust, Competition Policy, and Consumer Rights. That is a name that we take seriously. We are interested in figuring out what the impact of this merger will be on the consumer and not just on business.

On the one hand, you do have an industry, as Senator Hatch acknowledged, that is rapidly changing. We know that the television and video markets are in a state of flux. But we also know that consumers, especially younger consumers, want to be able to watch programming at a time and place that is convenient to them. They use DVRs and video on demand. They stream content over the Internet. They watch television shows on mobile devices. So we understand that traditional cable delivery is not what it used to be. But, on the other hand, we also know that we have seen increased cable rates from $22.35 per month in 1995 to $49.65 per month in 2008. So there is a balance of concerns here, and I am looking very forward to hearing from the witnesses as we evaluate this merger.

Chairman KOHL. Thank you very much.

Senator Kaufman.

STATEMENT OF HON. EDWARD E. KAUFMAN, A U.S. SENATOR FROM THE STATE OF DELAWARE

Senator KAUFMAN. Thank you, Chairman Kohl.

When I look at my home State of Delaware, I am deeply concerned about competition in the video content distribution market. While there are alternative video players in Delaware, Comcast is by far the largest in my State. My major concern is that Delawareans have access to the widest range of programming, whether they receive the programming through cable, satellite, or Internet. I am skeptical about how merging NBC into Comcast will help and am worried that it will ultimately harm independent content producers.

I am sure that the Department of Justice and the FCC have good people who are taking great care to review this merger as we speak, and I genuinely and eagerly await their comments and judgment. In the event that they approve the merger, I look forward to seeing what conditions they propose to ensure that this merger serves the public interest by leading to greater choice and more diverse content, lower prices, and improved customer service.

In the meantime, I want to thank you, Mr. Chairman, for holding this hearing so we can talk to the witnesses and get information. Thank you.

Chairman KOHL. Thank you, Senator Kaufman.

Senator Specter.

STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Thank you, Mr. Chairman.

I approach the hearing with a little different perspective because I know Comcast and I know Brian Roberts and I know his father, Ralph Roberts. So I am in a position to attest to a number of critical factors evaluating whether this merger ought to occur.

One factor that I can attest to is they are really very good corporate citizens. Another I can attest to is that the competency of their management is brilliant. Ralph Roberts, the distinguished gentleman sitting behind Brian Roberts, founded this company in 1963 in a small town in Mississippi with 1,200 customers, and they have grown in size to have almost 24 million customers and 100,000 employees operating in 40 States and the District of Columbia because of their competency and the service which they have provided. They have a tower which now distinguishes the Philadelphia skyline, and they have a great deal to offer and a great record.

Just a little on a personal note. Several years ago, I noted that Comcast borrowed $7 billion, and I was a little surprised because I knew of Ralph Roberts, I knew of Brian Roberts. Brian plays squash with my son. They were Gold Medal winners at the Maccabean squash tournament. And when I next saw Ralph and Brian, and I said, "Hey, I am a little worried about you guys, $7 billion? Are you going to be able to pay it back?" And the winds have been at their back and they are risk takers. So when Senator Hatch talks about competition, that is America, and this company are competitors. But they also are servers. They did not get almost 24 million customers when there is a lot of competition out there without being able to provide good service.

General Electric is their partner, a 49-percent partner. I always wonder why anyone goes into a business at 49-percent, especially General Electric. And the answer is that General Electric has a lot of confidence in Brian Roberts and Comcast, and they are willing to take a lesser position because they want this company to manage a big chunk of their assets. And it speaks very well of Comcast.

I could speak longer, but I see the red light is on, and I know what it is like to chair from that central position, so I will cease and desist now. But the questions posed by the members so far are very valid questions, and I have had extensive discussions and have confidence that they have very comprehensive answers.

Thank you, Mr. Chairman.

Chairman KOHL. Thank you very much, Senator Specter.

Senator Franken.

Senator FRANKEN. Thank you, Mr. Chairman.

Like Senator Specter, I come to this hearing with a slightly different perspective. As some of you may know, though I am on the Judiciary Committee, I am not a lawyer. But I used to be in show business. In fact, I worked for years for NBC, and I really feel I owe a lot to NBC.

But what I know from my previous career has given me reason to be concerned—and let me phrase that "very concerned"—about the potential merger of Comcast and NBC Universal.

Let me start with something pretty basic. It matters who runs our media companies. The media are our source of entertainment. They are also the way we get our information about the world. So when the same company that produces the programs runs the pipes that bring us those programs, we have a reason to be nervous.

I was at NBC in the 1970s, 1980s, and 1990s—but in the 1990s, that is when fin-syn, the financial interest and syndication rules—most commonly known as fin-syn—were relaxed and then essentially eliminated. And until then, fin-syn rules had prevented networks from owning more than a very small portion of the programs that they aired. This was to prevent an inherent conflict of interest.

At that time NBC executives, including Rick Cotton over there, testified that gutting fin-syn would not lead the network to favor its own programming. To the contrary, the NBC President at the time declared, "It is in our self-interest to do everything we can do to promote a strong, independent production community." But by 1992, NBC was the single largest supplier of its own prime-time programming. Today, if an independent producer wants to get its show on NBC's schedule, or any network's schedule, it is routine practice—and you guys know it—for the network to demand at least part ownership of the show. It will affect your placement on the schedule, whether you are on the schedule or not, and where in the schedule you are. And that is just a fact. And this was completely contrary to what NBC and the other networks said they would do when they were trying to get fin-syn rescinded.

So while I commend NBCU and Comcast for making voluntary commitments as part of this merger, you will have to excuse me if I don't trust these promises. And that is from experience in this business.

Now, to make matters worse, after fin-syn was rescinded, studios started buying up networks. It opened the way for the studios to buy the networks. Disney bought ABC. Viacom, which owns Paramount, bought CBS. And I am worried that this merger could set off another round of media consolidation. The next thing we know, AT&T and Verizon may decide that they also have to buy a Hollywood studio and a network in order to compete. And that would hurt the ability of Minnesotans and people around the country to get access to important information, and it will make their cable bills go up.

I look forward to hearing today's testimony and the opportunity to discuss some of these important issues with you all in more depth.

Thank you.

Chairman KOHL. Thank you, Senator Franken.

Senator FEINGOLD. Mr. Chairman, I know we are deep into the vote, so let me just say a couple of words.

The proposal to combine NBC Universal and Comcast clearly has both vertical and horizontal competition concerns. In addition to the content produced by the NBC broadcast network, both NBC Universal and Comcast have a significant number of profitable cable networks on both sides of the ledger, including USA, Bravo, E!, and the regional sports channels. The dangers of this horizontal consolidation are significantly compounded by the vertical combination of content and distribution that the joint written statement of Comcast and NBC Universal not only admits but touts.

So while Mr. Zucker and Mr. Roberts believe that this vertical integration is not a problem, I have been concerned with these types of vertical alliances of behemoths, both in media and elsewhere, for some time. They often seem to be harmful, unsuccessful, or both. For example, the vertical combination of Clear Channel's radio stations, concert venues, and promotion was unfair to musical artists, small business competitors, and ultimately to concert goers and radio listeners.

Mr. Chairman, I would ask that the rest of my statement be placed in the record.

[The prepared statement of Senator Feingold appears as a submission for the record.]

Senator HATCH. Mr. Chairman, could I put a statement for Senator Cornyn in the record?

Chairman KOHL. Without objection on both counts.

Senator HATCH. Thank you.

[The prepared statement of Senator Cornyn appears as a submission for the record.]

Chairman KOHL. We will have some brief introductions before we have to recess, and we hope the recess will not be very long. The first introduction will be Brian Roberts, and Senator Specter will make that introduction.

Senator SPECTER. Well, thank you, Mr. Chairman.

Mr. Roberts is on the Board of Directors of the National Cable and Telecommunications Association. In his third term as Chairman of Cable Labs, the research and development consortium for the cable industry, he has a long litany of prizes and awards. He has really an extraordinary record.

I think the fastest way, Mr. Chairman, is to ask consent that it be included in the record, and I have already given personal comments about Mr. Brian Roberts and his family, which I think will suffice.

Thank you.

[The information referred to appears as a submission for the record.]

Chairman KOHL. Thank you very much, Senator Specter.

The next witness after Mr. Roberts will be Jeff Zucker. Mr. Zucker has spent his career at NBC Universal and has held his

current position as President and CEO since 2007. He joined NBC straight out of college in 1986 and has held numerous positions in the company, including executive producer of the "Today" show as well as President of NBC Universal Television Group.

Following Mr. Zucker will be Colleen Abdoulah. Ms. Abdoulah is President and CEO of WOW! Internet, Cable & Phone. Before joining WOW! in 2002, she was Executive Vice President of Wireline Services at AT&T Broadband and served in a number of positions at TCI Communications, Inc.

After that, our witness will be Mark Cooper. Dr. Cooper is Director of Research at the Consumer Federation of America. In this role, he has provided policy analysis and advocacy on behalf of consumers in policy areas, including telecommunications media and digital rights. Dr. Cooper also serves as a fellow at four prestigious universities and has published extensively on the energy, telecommunications, and high-tech industries.

Our final witness today will be Andrew Jay Schwartzman. Mr. Schwartzman is the President and CEO of Media Access Project, a nonprofit, public interest law firm and advocacy organization. He has directed the project for over 30 years and regularly appears before Congress and the FCC on its behalf. Mr. Schwartzman is also a faculty member of the Johns Hopkins University School of Arts and Sciences.

After we recess briefly, we will be back, and we will begin our testimony.

[Recess 3 p.m. to 3:25 p.m.]

Chairman KOHL. We will resume the hearing at this time. Before we accept testimony, I would like to swear you all in. Would you stand and raise your right hand? Do you swear that the testimony that you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. ROBERTS. I do.

Mr. ZUCKER. I do.

Ms. ABDOULAH. I do.

Mr. COOPER. I do.

Mr. SCHWARTZMAN. I do.

Chairman KOHL. Mr. Roberts, we will begin with you.

STATEMENT OF BRIAN L. ROBERTS, CHAIRMAN AND CEO, COMCAST CORPORATION, PHILADELPHIA, PENNSYLVANIA

Mr. ROBERTS. Mr. Chairman and members of the Committee, it is a privilege to come here today to talk about Comcast's planned joint venture with GE regarding NBC Universal.

As has been mentioned, my father, Ralph, sitting just behind me, started Comcast almost half a century ago. I want to thank you, Senator Specter, for those nice remarks. Ralph has built a company from a single small cable system in Tupelo, Mississippi, to where we are today. And with this combination, we are taking the next step in our improbable journey. This is indeed an important moment in Comcast's history.

Let me briefly summarize the transaction. Under our agreement Comcast will become majority owner of NBC Universal. We will create a new venture that combines NBCU's broadcast TV, cable programming, movie studio, and theme park businesses with

Comcast's limited video programming channels. Comcast will hold 51 percent of the venture and will manage it while 49 percent will remain with GE.

This transaction puts two great American communications companies under one roof. It will help to preserve traditional broadcast television, a business that faces serious challenges. And it will also help to accelerate a truly amazing digital future for consumers. Together, Comcast and NBCU can help to deliver the anytime, anywhere, multi-platform video experience Americans want.

In combination, we will be a more creative and innovative company that will meet customer demands. And our success will stimulate our competitors to be more innovative, too. So this joint venture should be good for consumers, innovation, and competition.

To leave no doubt about the benefits of the new NBCU, we have made a series of public interest commitments detailing how we will bring more local programming, more children's programming, and more diverse programming on more platforms. We have also made commitments to reassure our competitors that we will compete fairly in the marketplace. Let me offer two examples.

First, the program access rules have never applied to retransmission consent negotiations, but we volunteer to have the key components of these rules apply to our retransmission negotiations for NBC stations.

Second, we want independent programmers with quality content to know we are committed to help them reach an audience, so we have committed to add at least two new independently owned cable channels to our systems every year beginning in 2011.

The combination of NBCU and Comcast, with no significant overlap between the assets of the companies, is primarily vertical, which generally poses fewer antitrust concerns. That also means no massive layoffs, no closure of facilities, nothing to produce hundreds of millions of dollars of "synergies." That is why some on Wall Street have not initially fallen in love with this deal, but the same lack of overlap is why Washington can, because we will grow these great American businesses over the long term and make them more successful, not cut them.

Congress has recognized the benefits of vertical integration before and adopted rules in 1992 to address potential risks. At that time there was almost no competition to cable, and more than half of the channels were owned by cable companies. So Congress created program access and program carriage rules to ensure that a company which owns both cable content and distribution cannot treat competitors unfairly. Those rules have worked in the past and will continue to work.

In the last week, some have suggested that our several-year-old legal challenge to certain portions of the program access rules is inconsistent with our commitments in connection with this transaction. But while we have argued and believed that today's marketplace is sufficiently competitive to do away with program access rules, we did not pursue this transaction with the intention of not following those rules, and we do not intend to behave any differently. So we are willing to discuss with the FCC making the program access rules binding on us even if they were to be overturned by the courts.

In the past decade, Comcast has come to Washington twice to seek merger approvals when we acquired cable systems from AT&T and Adelphia. Each time we explained how consumers would benefit, and in each case I believe we have delivered. We spent billions of dollars upgrading cable systems to make them state-of-the-art. We created video on demand, which our customers have used 14 billion times. And from a standing start 4 years ago, we now give millions of Americans their first real phone choice. Once again we have described how consumers will benefit, and I want to assure you that we will deliver.

Mr. Chairman, we are asking for the opportunity to make one of the great icons of American broadcasting and communications part of the Comcast family. We promise to be reliable stewards for the national treasures of NBC and NBC News. It is a breathtaking and humbling moment in our history, and we hope to have your support.

Thank you.

Chairman KOHL. Thank you very much, Mr. Roberts.

Mr. Zucker.

STATEMENT OF JEFF ZUCKER, PRESIDENT AND CHIEF EXECUTIVE OFFICER, NBC UNIVERSAL, NEW YORK, NEW YORK

Mr. ZUCKER. Mr. Chairman, members of the Subcommittee, thank you for the opportunity to testify today.

As the President and CEO of NBC Universal, I am proud to lead, as Senator Hatch described it, an iconic media company shaped by two great American brands: NBC and Universal. I am grateful for the opportunity to tell you how the proposed venture between Comcast and GE will help NBC Universal thrive and also benefit our local communities, our employees, and the American consumers who enjoy our content.

In today's intensely competitive, unpredictable, and dynamic media markets, this deal is critical to realizing these benefits. The marketplace that I live in is a media free-for-all, a media donnybrook, whether you look at the overall media marketplace, the cable channels, broadcast networks, or the Internet. There will be more change in our space in the next 5 years than there has been in the last 50.

This deal will not change the fundamental competitive dynamic or the extraordinary rate of technological change, but it will help NBC Universal compete in the new media world.

Why is this transaction good for NBC Universal, for the U.S. economy, and for the consumers we serve? My answer can be captured in two words: investment and innovation, both of which I believe are essential if we are to remain a vigorous competitor in the 21st century media market and a growing source of high-wage jobs in an economy starved for employment.

First, investment. The creative programming that lies at the heart of our business is neither easy nor inexpensive to produce. The entertainment programming on our broadcast and cable networks will require an investment this year of nearly $4.5 billion. Every year we invest another $1 billion in news gathering and news production. An investment of half a billion dollars annually

makes Telemundo the leading U.S. producer of Spanish-language programming.

In a highly competitive, unpredictable, and dynamic media marketplace, Comcast's desire to expand our business and invest in programming will benefit NBC Universal, the American consumer, and the U.S. economy.

Also with regards to investment, Comcast's written commitment to over-the-air broadcasting has been widely underappreciated. In addition, Comcast has expressed a willingness to play a constructive role in the business negotiations between broadcast stations and MVPDs. Those two positions could play a pivotal role in finding a sustainable new business model for the struggling broadcast business.

Second, innovation. We believe that Comcast's history of delivery innovation and technological vision will help us better serve the 21st century consumer. We must find a sustainable business model to meet consumer demands for access to programming anytime, anywhere. We need to be more nimble in taking advantage of new digital distribution capabilities: on demand, online, mobile, and beyond.

This venture with Comcast positions NBCU to be a leading innovator in delivering content to consumers where they want it, when they want it, and how they want it. In this extraordinarily competitive industry, sustained investment and innovation will be the keys to remaining a vigorous competitor.

This is not your father's media market. Less than 40 years ago, three companies enjoyed 90 percent of all television viewing. Oh, how simple it was. Today the world could not be more different. Each of the five largest media companies in America now only account for between 5 and 10 percent of all viewing, and a multitude of smaller competitors actually account for half of all television viewing. The new NBCU's cable channel business, where we will add Comcast networks, will account for just 7 percent of total viewing and be fourth by revenue among owners of national cable networks.

Television is also a shrinking proportion of the media market. People today choose not only between broadcast and cable television, but also increasingly the Internet, Xbox, iPhone, PlayStation, and so many other new platforms and technologies for their media choices. Very simply, this transaction will not change the tidal wave of competition inundating today's media market. The big winner here is the consumer. More investment leads to more and better content. More innovation leads to more access, anytime, anywhere.

Let me close by saying how grateful I am for GE's excellent stewardship of NBC Universal. GE has invested more than $22 billion since 2000 and built NBCU into the diversified and vibrant broadcast, film, cable, programming, and media company that we are today. With this deal GE will have billions of dollars to invest in new technologies and jobs in its core businesses.

I could not be more excited about the future of this company. This deal will give us the resources and the tools to innovate and adapt in an unpredictable media world and meet the needs of 21st century consumers.

Thank you for the opportunity to testify, and I look forward to answering any questions that you may have.

[The prepared statement of Messrs. Roberts and Zucker appears as a submission for the record.]

Chairman KOHL. Thank you, Mr. Zucker.

Ms. Abdoulah.

STATEMENT OF COLLEEN ABDOULAH, PRESIDENT AND CHIEF EXECUTIVE OFFICER, WOW! INTERNET, CABLE & PHONE, DENVER, COLORADO, AND BOARD MEMBER, AMERICAN CABLE ASSOCIATION

Ms. ABDOULAH. Hi. I am very proud to be here to represent WOW! and the American Cable Association. We are a broadband competitor in five markets in the Midwest. A million of the households that we pass directly compete with Comcast in Michigan and Illinois. Customers appreciate the competitive provider choice that they have, and they do not choose WOW! as the low-cost provider, because we are not. We differentiate ourselves based on the service experience that we offer, and customers recognize it with ten J.D. Power Awards and recently in Consumer Reports voted us No. 1 Internet, phone, and cable operator.

I do not tell you this to brag. I tell you to illustrate simply that the areas of our operation that we have influence over and some control over, we are able to be incredibly customer centric and focused on customer needs. Yet when it comes to being a buyer of content, both cable and online, we face a whole different set of challenges. We buy most of our content from a handful of very large content providers who have significant market power and leverage.

The prospect of having Comcast and NBCU as the largest vertically integrated content provider as our direct competitor for customers concerns me. It concerns me because the combined entity will have powerful abilities and incentives to hurt a competitor like ourselves and to increase our costs.

I have these concerns not because of the "what if." These are based on current behaviors that we experience today. Since the reality is that whether the medium is broadcast, cable, online, or portability, video content is key to our business. So content negotiations for us are critical.

Some of the things that we encounter today: Specifically, price/value. Not all content is created equal. Yet when content providers come to us and they have a large amount of market power, they present their network offerings in a bundle, in a package, and it is sort of an all-or-nothing, take-it-or-leave-it kind of fashion. What this means is low-value networks that customers do not want, and are not asking for, are associated with high-value networks that we have to have in order to compete. And why this is an issue for us is that we end up having to use channel space for networks that customers do not want and do not want to pay for; channel space that we could give to independent networks that customers are asking for; and it consumes valuable bandwidth that we would prefer to allocate to advanced services that we know customers want, like high definition, video on demand, interactive, and especially faster online speeds.

And then there is carriage availability. Content providers with significant market power withhold or delay launch timing by slow-rolling the negotiations. Two examples. One, online content, this would be with the concept of TV Everywhere. It involves packaging some cable networks and offering them to the broadband consumer. In the past, we have gone to—several months ago, we went to Comcast and tried to receive the rights to offer their networks to our broadband customers. We also went to the other TV Everywhere cable networks and asked them for the rights. To date, we have been denied those rights.

We were negotiating recently with a network that Comcast has a significant ownership stake in. During that negotiation the network refused to include the advanced services that they were developing.

The bottom line is this. We are not here to whine or to ask for special advantages because we are the smaller operator. We also believe in competition. It does breed creativity and innovation and a clear focus on the customer. Our J.D. Power and Consumer Reports ratings, I think, validate that. We simply ask for a thorough and thoughtful review and consideration of the special conditions that may be imposed so that we can continue to preserve and promote the competitive choice that we provide today, and that Congress sought in the 1992 and 1996 acts.

The terms and conditions that we would like to have considered are that all terms and conditions for access to content—cable, online, or otherwise—should be the same terms and conditions that are available to Comcast. And then business is business. If we do run into loggerheads and we find that discriminating behavior occurs, or market power is exerted inappropriately, we would simply like to ask for a remedy structure that is meaningful and accessible for companies like WOW!. The current retransmission consent and program access complaint procedures do not help us. An outside arbitration process does not help us. And the reason for this is the timing of these processes are consuming—very time-consuming, they are very costly; they generally do not ensure continued carriage while in dispute; and especially they place the burden of proof on the complainant who does not have the access to the data we need since there is no price transparency.

So to protect competition and consumers from this combination, regulators must impose different and better remedies, and we look forward to participating in that process. Thanks for giving me an opportunity.

[The prepared statement of Ms. Abdoulah appears as a submission for the record.]

Chairman KOHL. Thank you, Ms. Abdoulah.

Mr. Cooper.

STATEMENT OF MARK COOPER, DIRECTOR OF RESEARCH, CONSUMER FEDERATION OF AMERICA, WASHINGTON, D.C.

Mr. COOPER. Thank you, Mr. Chairman and members of the Committee, for the opportunity to offer a public interest, antitrust analysis of a merger that is unique in the history of the video marketplace and will go a long way toward determining whether or not

the future of video viewing in America is more competitive and consumer friendly than in the past.

Comcast straddles the dominant video distribution platform of the 20th century as the Nation's largest cable operator and the emerging video distribution platform of the 21st century as the Nation's largest broadband Internet service provider. In its cable franchise territories, its market share of these two vital distribution platforms is in excess of 50 percent. Allowing it to acquire one of the Nation's premier video content producers will radically alter the structure of the video marketplace, triggering a bevy of anticompetitive effects that will result in higher prices, fewer choices, and increase the likelihood that the ugly business model of the cable cartel will be strengthened and extended to the Internet.

There are huge horizontal problems with this merger. Broadcasters and cable companies have a natural competitive rivalry we see every day. They argue about the price, channel location, and carriage of content. The rivalry is so intense that each side has attempted to enter the rival's market in an effort to diminish their market power. They have been and are disruptive new entrants. This merger would eliminate one of the major sources of that competitive rivalry in the industry.

These two companies compete for audiences and advertisers in a dozen of the Nation's most important local video markets, reaching about a fifth of the Nation's population. In fact, they compete head to head for more eyeballs where NBC owns O&Os than in the O&O stations that NBC does not compete with Comcast. These two companies compete in the video programming market where Comcast regional sports and news production compete with NBC's news and sports output. In three-quarters of the local markets where Comcast and NBC compete directly for eyeballs, Comcast has rolled out its regional marquee sports programs. If that ain't competition, nothing is.

These two companies also compete in cyberspace where NBC has funded an alternative distribution platform as well as numerous websites for its own media properties, and, of course, Comcast has launched its video portal and the plan for TV Everywhere. If that is not competition, nothing is.

By combining its distribution market power with the huge portfolio of content, the merger would dramatically increase Comcast's incentive and ability to raise prices, discriminate in carriage, foreclose and block competitive entry, and force programming bundles onto other cable systems, larger bundles at higher prices. The likely response to the huge advantage that Comcast would gain with this merger would be to convince the other members of the industry to try and muscle up as well, to create similar vertically integrated entities to try and match the bargaining power of Comcast, and that would diminish competition.

The best indicator of the danger we face is the TV-everywhere proposal, which is a blatant market division scheme in which the two cable operators who have never overbuilt one another, never competed head to head in physical space, would like to extend that anticompetitive gentleman's agreement into cyberspace. And if they succeed, they will induce the other members of the industry to go along.

For decades, the Congress has labored to bring consumer price competition into the video market by opening the door to technology and new business models. But in every instance, policy mistakes were made that allowed the cable industry to extend and preserve its market power. This is the first big policy moment for the Internet as the alternative video platform that can compete with cable. If policymakers allow this merger to go forward, the prospects for a consumer-friendly, competition-friendly, multi-channel video market will be dealt a severe setback.

This hearing should be the beginning of a long process and rigorous review that ends, in our opinion, with the rejection of this merger as anticompetitive and anti-consumer.

Thank you.

[The prepared statement of Mr. Cooper appears as a submission for the record.]

Chairman KOHL. Thank you, Mr. Cooper.

Mr. Schwartzman.

STATEMENT OF ANDREW JAY SCHWARTZMAN, PRESIDENT AND CHIEF EXECUTIVE OFFICER, MEDIA ACCESS PROJECT, WASHINGTON, D.C.

Mr. SCHWARTZMAN. Thank you, Senator. This is the most important media merger since Lucy met Desi. Comcast seeks to combine its huge cable and Internet footprint with NBC content assets.

Senator Specter, even though I have problems with his labor management practices and his corporate governance structure, I recognize that Mr. Roberts is motivated by business considerations and not some sort of design to undermine American democracy. But the consequences of this deal, nonetheless, could have precisely that effect.

Concentration of control in the mass media poses unique questions for policymakers and regulators. As Judge Greene said when he considered the AT&T consent decree, the values underlying the First Amendment coincide with the policy of the antitrust laws.

Approval of this merger would increase Comcast's power to squeeze out independent programmers with diverse editorial perspectives. There are scores of cable networks which have been unable to obtain carriage on Comcast and other cable systems. I am here—and they are not—because some of these companies have told me they are afraid of retaliation. An acquisition of NBC's stable of cable networks will greatly exacerbate the existing imbalance of power.

If Comcast is permitted to purchase the NBC TV stations and its highly viewed cable networks, Comcast will be able to bundle unwanted programming when it seeks carriage deals with other MVPDs. The problem is even greater with respect to carriage on Comcast's own cable systems.

After the acquisition, Comcast would have even more networks to favor. This means higher prices for all Americans, not just Comcast customers.

There ought to be a law against such abuse. And, in fact, there is. Section 616 of the Communications Act is supposed to prohibit cable companies from discriminating in favor of their own programming. While Comcast argues that existing law is sufficient to pro-

tect independent programmers and the public, it is important to point out that it has argued that enforcement of Section 616 is unconstitutional.

Now, the rules surely pass constitutional muster. But they have not worked. Program carriage litigation is prohibitively expensive, and the FCC has adopted almost insuperable legal hurdles for complainants. Complaints and appeals are stalled at the FCC for years while programmers remain shut out.

Combining NBC and Universal content with Comcast's cable and Internet distribution systems will also give the merged company vastly increased power over content distribution markets. Depending on the circumstance, Comcast could choose to withhold its programming or force it on competitors at inflated prices. This in turn will increase cable bills and deprive customers of access to programming from diverse sources.

While the FCC has program rules which are supposed to stop such practices, Comcast has gone to court to challenge the FCC's basic legal authority to continue enforcing the program access rules.

Now, today for the first time, Mr. Roberts says that it may consider agreeing to be bound by the program access rules voluntarily. But there are many reasons why the program access rules in place are insufficient.

First, they expire in 2 years, and there is no assurance they will be extended. In any event, as Ms. Abdoulah has said, the program access regime does not preclude bundling. Although the law prohibits discrimination against competitors in this instance, it simply means that as long as Comcast overcharges itself, it can overcharge everyone else. And the cost and delay in enforcing program access rules makes it a right without a remedy.

Retransmission consent rules are even less reliable as a tool for video competitors. The statutory mandate is simply "good faith," and it does not prohibit price or packaging discrimination.

The good news is that Internet technology offers the prospect of creating vibrant and high distribution channels for video programming. Members of the public can, or soon will be able to, receive high-definition video on the Internet. But Comcast has already taken steps to kill off such competition, and acquisition of NBC's content will greatly enhance that campaign.

The prospect of consumers canceling their cable subscriptions and relying on the Internet poses an existential threat to the cable industry. Comcast's answer is XFinity, which allows Comcast customers to view video over the Internet without extra charge. The catch, which is a very big catch indeed, is that you must keep your cable TV subscription.

XFinity permits Comcast to cut off the flow of programming to potential new competitors while preserving the cable TV revenue stream indefinitely. Stripped of slick marketing, XFinity consists of agreements among competitors to divide markets, raise prices, exclude new competitors, and tie products.

Comcast's ownership in Hulu is especially important here. It can cripple Hulu by withdrawing NBC content, or it may choose to make the NBC content exclusive to Hulu and withhold it from new

Internet-delivered video competitors. Either way it is bad for the public.

There is more, but no more time. I urge you to oppose approval of this merger.

[The prepared statement of Mr. Schwartzman follows:]

Chairman KOHL. Thank you very much, Mr. Schwartzman. We will now have rounds of questions of 8 minutes.

Mr. Roberts, we have heard a lot of concern about what will happen to the price charged to rival cable systems for NBC programming once Comcast and NBC come under common ownership. Today, when negotiating contracts for carriage, Comcast and NBC are at opposite ends of the bargaining table. NBC is seeking to get the highest prices it can for its programming while Comcast is trying to keep its programming costs as low as possible.

But the deals critics argue that after the merger things will change radically. Comcast will now have the incentive to raise the cost of NBC programming because this will not cost Comcast anything. It will just be paying money from one pocket to the other.

But in doing so, Comcast will be able to raise the programming costs to all of its cable and satellite rivals, and these programming costs obviously will be passed on ultimately to the consumer.

What is your response, Mr. Roberts? Won't Comcast have the incentive to raise its rivals's costs by raising the cost of NBC programming if this merger is completed?

Mr. ROBERTS. Well, I respectfully disagree with that theory, as you might expect, and the logic is simple as follows. The program access rules, if we were to set an artificially higher price, are designed for the FCC to look at that behavior. So someone would come in and say, "I have a program access complaint." In doing so, the FCC and an independent judge would look at what all the other companies are charging for similar type programming.

To put it in perspective, six out of seven channels that Comcast carries after the deal will not be owned by Comcast. We have agreements with all those unaffiliated companies. About 88 percent of the programming that is in the marketplace is not owned by NBCU or Comcast.

So there are robust distributors—DirecTV, Dish Network, Time Warner, Ms. Abdoulah's company—all negotiating with other programmers. There is a very defined marketplace and a third party to adjudicate whether somebody is playing games, as was the suggestion perhaps that you would do, so you would overcharge. That would not be available to do, the way I understand how the process has worked, and that is not the intention.

In fact, today, NBC can charge freely anything it wants in the marketplace and whatever the market will bear. If and when we come together, we would fall under the program access rules, which then allow a third party to review whether that is a fair pricing. And so I think it actually works the other way here because it is going to be harder for NBC to have pricing flexibility, not easier.

Chairman KOHL. But you have never been a supporter of the program access rules, and you have often made the point that they should be allowed to expire and not be enforced. Now you are talking that the program access rules exist, they are good, you support

them. I suppose you are saying they should not be allowed to expire. That is pretty inconsistent with what you said prior, isn't it?

Mr. ROBERTS. Well, if I might, let us look at where the program access rules started. It was 1992—nearly 20 years ago—and at that time over half the cable channels were owned by cable companies. And at that time there was no satellite. It was at that time that Congress passed the law that helped create the satellite industry, and at the same time it created the program access rules.

If you fast-forward to today, 15 percent of all the cable channels are owned by cable companies, and so the market is very different. We don't just have one company distributing; but every consumer has choices of two satellites, a phone company, and possibly a fifth provider like Ms. Abdoulah's company. So it is a very different marketplace.

A couple years ago, we and others said it was time to sunset the rules, and that is a review the FCC periodically makes. When we said that we would like to join forces with NBC Universal, we have always planned that we would continue the behavior that we have the last 20 years. We have successfully gone into the cable programming business with channels like The Golf Channel and E! Entertainment, and we do not find those rules burdensome because our behavior has never been inconsistent with them. So we are not troubled by seeing them extended given this potential merger.

Chairman KOHL. I appreciate that.

Ms. Abdoulah, what would you say? Would you expect that your programming from NBC is going to increase if this merger is completed?

Ms. ABDOULAH. Well, I have two concerns. One is carriage demands. Currently we carry 20 of the combined companies' product, and there are 24 when they combine. There is no reason to believe that when we are negotiating renewals that they do not ask us to carry the four that we do not carry. Of the 20 we do carry, we do not carry them across all our systems, so there is often in negotiations the request—again, in brackets, in quotes—to say we would like you to carry our services everywhere. So I think there will be an increased demand of carriage of products we do not want.

For example, the 20 that we do carry today, four of them we would never have put on if we could have negotiated so. Eight of them we would put in our lower tier. Eight would probably stay where they are.

But that just goes to show that we do not have much leverage in saying where we want to carry the networks today, which ones we want to carry. So those things would be a concern.

You asked specifically about price. I find it interesting when I hear terms like "what the market will bear" and that it is not—because it is not market-based pricing. We have no pricing transparency. The pricing is not based on ratings or consumer viewership. It is based on whatever the programmer tells us is the price. And many times during negotiations with both these companies and others, rate increases can be as high as 20 percent to as high as 156 percent.

That is the kind of increases that we are facing with very little leverage in negotiating.

Chairman KOHL. What about Mr. Roberts' argument that the FCC rules will prevent unreasonable price increases?

Ms. ABDOULAH. Yes, thank you for that, sir. I forgot. The problem I have with that, as I understand the process, is what I said in my testimony. The burden of proof, if we file a complaint, the burden of proof is on us to show that it is an egregious price increase. Well, I have no transparency to price because of confidentiality clauses in our agreements. There are no MFNs. There is no way for me to have that kind of burden to prove. I cannot. I do not have the data. The burden of proof should be on the programmer who is asking for these egregious increases.

Chairman KOHL. Dr. Cooper, do you have a comment on that?

Mr. COOPER. Well, the buzz words, the key words are "incentive" and "ability" here. Today Comcast has zero interest in increasing retrans fees or bigger bundles. Tomorrow they will own one of the major networks, one of the four major networks. They will have an interest in higher retrans fees and bigger bundles.

Today NBC has to negotiate with 100 percent of the cable operators in the country to get carriage. Tomorrow they will only have to negotiate with 75 percent. They have a guaranteed access to a quarter of the industry. They have a stronger bargaining position. You change the incentive, you change the ability, and you end up with more stations being pushed on more systems at higher prices.

Chairman KOHL. Thank you very much.

Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Mr. Roberts, the testimony by Mr. Schwartzman is that you can squeeze out your competitors, and he amplifies that by saying you can set a high cost for the programming, and as the comment has been made, one pocket to another, so far as Comcast is concerned.

How do you deal with that specific in terms of Mr. Schwartzman's broad charge of squeezing out your competitors?

Mr. ROBERTS. I want to use this opportunity to say that I think this is misunderstood, our motivation for why we would want to do this transaction. The video marketplace, going back to 1992, using that as one date, has changed radically over the last 20 years. We have much more competition. Just in the last 2 years, Comcast lost about a million and a half of our customers, and we have gone into the phone business, we have gone into the broadband business, we have diversified.

At the same time we have had an explosion of choices so we must keep this in mind as we talk about independent programmers and people who have the diversity of voice. Going back to 1963, there were three TV channels when Ralph started the company, and today there are hundreds of channels and tens of thousands of shows on demand. So I guess I start with a different point of view as to what the last 20, 30, or 40 years have all been about.

So our motivation is not to try to change the explosion that is happening, as Jeff described in his testimony, technologically. That is not possible. That is not our motivation. We think content is a great business. If we can keep it lawful and legal and protected through these new technologies, we think we can give customers access anytime, anywhere. We are saying today you can only watch HBO on your TV, "True Blood." Now, if you are subscribing to

HBO, you can watch it on your PC from anywhere. I think that is a great consumer benefit, and HBO knows that their content is secure and is not going to be pirated.

So I do not believe, Senator, that our plan is, as I said to the Chairman, to be motivated to change the behavior that is happening in the market as one company with 12 percent of the programming and 24 percent of the distribution. It is to participate in the convergence, the technological explosion, and, frankly, the business diversification.

Senator SPECTER. Mr. Schwartzman's prepared testimony, Mr. Roberts, points out that you are making a contention that Section 616 is unconstitutional. It involves some complex litigation which is now in the Court of Appeals for the District of Columbia, and this question might better be directed to your counsel. But is it the contention that Section 616 is unconstitutional or that the market is sufficiently competitive that you feel that limitation is no longer in the public interest?

Mr. ROBERTS. Well, as I testified, Senator, there is a set of specific things that have been challenged in terms of whether the market is changed, whether the FCC adequately has reviewed changes and whether the courts agree or disagree with that judgment. But as we have lived with those rules for nearly 20 years and we have built a successful, but small, set of program channels, we are comfortable, working it out with the FCC and voluntarily continuing those rules whether the court throws them out or not.

Senator SPECTER. So you are saying that you would be willing to be bound by Section 616 and make that commitment as a condition of the——

Mr. ROBERTS. The only hesitation is I am not familiar with the section number, Senator, so if I may call it "program access"——

Senator SPECTER. That is the program access——

Mr. ROBERTS. I just want to be sure that I am familiar with the right section. But, yes, you know, we are comfortable making the program access rules binding on us, even if they were to be overturned by the courts as part of the——

Senator SPECTER. So the assertion by some that you are saying you may do it is not accurate. You are saying you will do it, and you will be agreeable to making that commitment to the FCC.

Mr. ROBERTS. Yes.

Senator SPECTER. Mr. Schwartzman, does that assuage your fears a little?

Mr. SCHWARTZMAN. No, it does not. But, first of all——

Senator SPECTER. Why not?

Mr. SCHWARTZMAN. Well, first let me say that Mr. Roberts' question was well placed because you have confused two different provisions of the Communications Act. The case that is in court involves the program access provisions, which is Section 628. The challenge to Section 616, which is the program carriage rules, was made at the FCC.

That minor confusion aside, as I have explained in my written testimony in greater detail, both the program access and program carriage rules are rights without remedies. There is no standstill provision that allows carriage during the pendency of litigation. Litigation goes on for months and years. In fact, I am unaware——

Senator SPECTER. Mr. Schwartzman, I do not mean to unduly interrupt, but I have got less than 2 minutes left. What kind of assurances would you like from Mr. Roberts to satisfy the concerns you have stated?

Mr. SCHWARTZMAN. Well, I am not sure that any concerns would satisfy me. I would point out that neither of those two sections applies to video on demand, which is a critical part of the milieu.

Senator SPECTER. Well, if nothing would satisfy you, let me move to Dr. Cooper in the minute I have left. Would anything satisfy you?

Mr. COOPER. Frankly, we believe that the anticompetitive effects that I have described are just too difficult to unravel. The remedies and promises are unenforceable in many cases.

Senator SPECTER. Why? Why unenforceable?

Mr. COOPER. Well, we have had two decades, and the FCC is constantly chasing around scofflaws who challenge the legality in court, engage in anticompetitive practices, and eventually get caught and say, "Well, we will be good." So the answer is that we have suffered through decades of rising prices, of anticompetitive practices, and the set of policies we have on the books has not been able to prevent those practices in the market today. There is no reason to believe that a company with that much incentive and vertical integration will be tamed by the rules we have on the books.

Senator SPECTER. So, Dr. Cooper, what you are saying is that there are some assurances which, if enforced, would be sufficient, but you doubt the FCC's capability of enforcing them?

Mr. COOPER. I certainly doubt the FCC's capability of enforcing under the current statute as written. And so this merger—they want to proceed as quickly as possible under the current law. They promise they will obey the current law even if they overturn it in court.

Senator SPECTER. My red light is not yet on, so I am going to ask Ms. Abdoulah if there is anything which would satisfy her. You can ask the question before the red light goes on. The rest is on you.

Ms. ABDOULAH. OK, thank you. Absolutely, there is. Absolutely, there is. If this merger goes through, just the two things I said, that the terms and conditions for access to content are the same for Comcast as they are for the rest of us; and, secondarily, that there is a remedy structure that works so that when we do get into a bind, we need somewhere to go that we can have a hearing on what the issues are, have it within a reasonable timeframe at a reasonable cost, ensure that the product can continue to go on while there is the dispute, and—what is the other one? Oh, burden of proof, of course, that there be some pricing transparency from the DOJ that it is required to—the program is required to come and prove that their market pricing is truly competitive.

Senator SPECTER. Thank you.

Thank you, Mr. Chairman.

Chairman KOHL. Thank you, Senator Specter.

Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much, Mr. Chairman.

Why don't we start with where Ms. Abdoulah was, with Mr. Zucker or maybe specifically Mr. Roberts. I know that Ms.

Abdoulah mentioned the access issue, which I know you have been asked about, but how about the pricing transparency, something that should be a concern for consumers?

Mr. ROBERTS. I want to just make some points about what Ms. Abdoulah just said, if I may. She said that arbitration is unfair because it puts the burden on the complaining distributor. We do not think that is true. The rule requires both the complaining distributor and the programmer to submit final offers, and each party has an equal burden to show that its final offer reflects the fair-market value of programming.

In terms of the timing, the FCC specifically established arbitration as a streamlined remedy, and under the rules the arbitrator is supposed to issue his decision within 30 days. In terms of keeping the content on the air, once the distributor triggers arbitration, the distributor is guaranteed continued carriage of the network——

Senator KLOBUCHAR. Okay. I was more interested in the transparency issue.

Mr. ROBERTS. And so both sides put in their best offer, and they have to defend it to the arbitrator, which encourages you to have to make that case.

And then, finally, I want to just state that the FCC under Chairman Genachowski has underway a proceeding to look at how the rules are working. We are participating in that process, and I hope you are as well, to try to tell the FCC how to improve it.

Senator KLOBUCHAR. How about these issues that Mr. Cooper raised about just the price that I raised in my opening statement? How do you respond to this, the quadrupling of the price in some places? And what effect do you think this merger would have on the price for your average consumer for their cable?

Mr. ROBERTS. So I think you have to say what are the consumer benefits here, and I believe using technology and innovation to deliver more content is what this deal is all about. Preservation of free broadcast, over-the-air television, which, as Mr. Zucker said, is not a sure thing, and additional investment.

As to cable prices, I think we have a market structure existing today. Some of the issues that have been raised by some of the other witnesses are industry-wide issues. And I think that they are not really affected by this transition. We are not getting any larger in cable distribution here with this because NBC is not in our business, and we are not really in their business. I think that these are always questions that seem to be constantly evolving.

Senator KLOBUCHAR. But do you have any prediction on how this would affect consumer rates, their monthly payment?

Mr. ROBERTS. I do not believe this transaction affects that question. I think that question has been and is a relevant question, and I think that it is best directed to the entire industry. There are more distributors than ever before, which is putting more growth in content and has allowed an understanding that you do not just carry these channels. We pay $6 billion a year or so to buy cable channels. So there is a robust market, and there are more distributors, more supply and demand changes all the time. And I think that that is an industry-wide question, not specifically changed by this merger in——

Senator KLOBUCHAR. I am going to ask Dr. Cooper and Mr. Schwartzman for their response to that, but just one other thing here is that on jobs, you know, we are very focused on jobs right now, if you have not noticed, in Washington, and with our unofficial unemployment rates 10 percent now nationwide, do you see this transaction as resulting in job loss? And, also, one of the public interest commitments you have made regarding this merger is that Comcast will honor NBC Universal's collective bargaining agreements. Is that correct?

Mr. ROBERTS. Yes, it is on the last part. We will honor those agreements. I think that is one of the best parts of this story, is that it is not based on eliminating jobs. It is a risk and a bet that America's economy is turning around, advertising is going to come back, that content is going to be copy protected, and that business models will be found that are successful in the future and make this a good investment. There is no guarantee of that, and it is not based on elimination of jobs.

Senator KLOBUCHAR. Okay. One last question before I turn to them. One of the advantages with nbc.com—I have used it myself—is the free—you can watch "Saturday Night Live" the next morning. Is that going to change with the proposed purchase and the hulu.com and those other attributes of nbc.com?

Mr. ROBERTS. I would like to say—and maybe Mr. Zucker wants to comment on it as well—but I would say from Comcast's perspective, we have no intention of changing any of the behavior that NBC has had. I think that regarding the Internet and video over the Internet, there were 30 billion videos last month over the Internet. Of all video viewed online; NBC has less than 1 percent; Comcast has less than half of 1 percent; Hulu has less than 4 percent; and Google has over 50 percent. It is a dynamic, rapidly changing market, but as a broadband company, we want to encourage as much video as possible because the fastest growing part of our company is broadband. We are now investing $1 billion to build something called wideband at 50 megabits a second and beyond. And when you say, "What are you going to do with wideband?" The answer is, "We are not sure yet." But we are making that investment now because we know consumers want more and more bandwidth for their——

Senator KLOBUCHAR. I want to give Dr. Cooper and Mr. Schwartzman a chance to respond. Just quickly, Mr. Zucker, on this issue of hulu.com and NBC.

Mr. ZUCKER. You will still be able to watch "Saturday Night Live" on Sunday morning.

Senator KLOBUCHAR. All right. Very good.

Mr. Cooper and Mr. Schwartzman, I think specifically the response to this issue about how it will not affect the monthly cable rates.

Mr. COOPER. Well, I have worked the numbers. I have shown you why there is an incentive to raise the prices. There is the ability to raise the prices. And let me work them one more time so you really can understand how the future is at stake here in terms of the Internet.

TV Everywhere is not TV anybody. Comcast will only sell its Internet product to current subscribers of Comcast; that is, they

will sell it to one-quarter of the people in this country. They are dividing the market.

Hulu and all of NBC's products on the Internet are available to 100 percent of the people in this country. And so you have this different incentive.

If they take NBC in and they have made some vague promises about what they will do with NBC's content, their objective is to extend the geographic division they have accomplished by refusing to ever overbuild a competitor. They have never overbuilt. That raises consumers' prices because it diminishes competition.

Senator KLOBUCHAR. Okay. Mr. Schwartzman, and then we will give them 1 minute to respond.

Mr. SCHWARTZMAN. Senator Klobuchar, first of all, Mr. Roberts misstated what the program access rules require. The program access rules do not require arbitration, and that is not what Comcast's written commitment to the FCC is. The arbitration provide to which you referred is part of a condition to the Adelphia merger, which expires in about a year and a half, and they did not commit to the FCC to the arbitration regime.

Second, with respect to Hulu—excuse me, with respect to NBC programming, Hulu has denied access to—NBC and Hulu have denied access to NBC programming to existing over-the top video provider Roku. That is not hypothetical. That is a fact. So there is every reason to expect that the combined entity will have even greater reason to make that content unavailable to Internet competitors such as more networks, which is going to do a virtual cable network online. And they have every reason to withhold NBC programming from those online-only competitors.

Senator KLOBUCHAR. Okay. Mr. Zucker, just 10 seconds, 20 seconds.

Mr. ZUCKER. Thank you, Senator Klobuchar. The fact is from our perspective we license our content online to a multitude of distributors. They have to qualify in certain areas. They have to have an economic model that makes sense for us. They have to technically be able to distribute the content. It has to be in an environment that we want our content to be in. And they have to step up and protect our intellectual property. Assuming they meet all four criteria, we are open to that conversation with everybody, with anybody, but not everybody is capable of satisfying all four criteria.

Mr. ROBERTS. If I may, just to correct the record so there is no misunderstanding. In response to Ms. Abdoulah, there was a specific sports network, I believe, in the Midwest that you were referring to, which is under that Adelphia order, and that is what she was, I believe—referring to.

Senator KLOBUCHAR. We will try to clarify that afterward with maybe some letters and responses so we can get it clarified. Thank you very much, all of you.

Chairman KOHL. Thank you, Senator Klobuchar.

Senator Franken.

Senator FRANKEN. Thank you, Mr. Chairman. Mr. Roberts, last week you came to my office to talk about the potential merger. I told you that I was worried that the merger would hurt consumers, but you assured me that the FCC has regulations called program carriage rules—these are not the access rules; these are the pro-

gram carriage rules—that protect consumers. You said that those rules will make sure that you always have a wide variety of programs because they forbid you from discriminating against other companies' programs.

Now, I have here Comcast's argument from *NFL Enterprises* v. *Comcast*, a 2008 case in front of the FCC, where Comcast argued that, "The Commission simply is not equipped or constitutionally empowered to make an independent assessment of the myriad, complex, and dynamic considerations that affect carriage, tiering, and pricing decisions. Thus, the First Amendment requires that the Commission exercise extreme caution before interfering with any carriage decision."

So, in 2008, Comcast argued that the First Amendment precluded the FCC from enforcing its program carriage rules. In other words, looking to get approval for this merger, you sat there in my office and told me to my face that these rules would protect consumers. But your lawyers had just finished arguing in front of the Commission that it would be unconstitutional to apply these rules.

Then, to add insult to injury, I asked you, right after you made this assertion in my office, whether you were aware that your company had litigated this, and you said, "I do not know." And so I said, "Why don't we ask one of your lawyers?" because you had a number of lawyers there. And we turned to your lawyer, and you lawyer said, "Yeah, yeah, we did that. We did this."

And then you in your written testimony—and this is over a week ago that you came to my office in your written testimony, you again assert the same thing twice. "Moreover, the FCC's rules governing program access, program carriage, and retransmission consent provide further safeguards for consumers. . ." That is on page 4. Then on page 7, you do it again. Now, that was your written testimony that was submitted today. I noticed that today you added something about voluntarily being subject to the rules because you probably read Mr. Schwartzman's and Mr. Cooper's testimony which called you on this. But I have been through this fin-syn thing.

Now, you came into my office—I am a United States Senator representing the people of Minnesota, people who buy cable, whose cable bills have gone up at three times the rate of inflation since 1995. And my job is to protect the interests of the people of Minnesota.

Now, how are Minnesotans to trust you when you come in and to my face say something that either you know was not true or you did not know—and I do not know which is worse. How are the people of Minnesota supposed to trust you?

Mr. ROBERTS. Senator, first of all, our company has been doing business for a long time, and I think our reputation has——

Senator FRANKEN. Your reputation——

Mr. ROBERTS. Well, if I may, our reputation and our practices I think have been at the top of our industry, our innovation, and what we have achieved. When we met, perhaps I was confused. I thought we were talking about program access. Now you are talking about program carriage. I think in both cases——

Senator FRANKEN. Your lawyer confirmed to me that they have litigated that, and you know that. You were in the room when your lawyer confirmed that. Did he not?

Mr. ROBERTS. We were talking program access. You are talking about program carriage. I do not think that we are litigating the program carriage rules. The NFL list brought an arbitration or a program carriage question and——

Senator FRANKEN. Okay. Whether it was program access or program carriage, did you not say that this rule protects the people of Minnesota? And then did I not ask your lawyer, oh, aren't you saying that it is unconstitutional in court? And then you said you did not know that, and then you write in your testimony, your written testimony for today, that these rules protect us.

Mr. ROBERTS. Because our intentions, as I told you from the beginning, were not to change the way we have behaved for the last 20 years——

Senator FRANKEN. Well, I think Minnesotans have their answers. Thank you very much.

Let me go to Mr. Zucker. Look, we are friends, and I worked for a number of years with your wife, Karen, who is lovely, at "Saturday Night Live," and she is a lot of fun and a great woman. And I loved my time at NBC, and I want you to know that. But as I said in my opening statement, I remember what happened in fin-syn, and I think my characterization is pretty accurate, don't you?

Mr. ZUCKER. [pause] It is a long time ago, and I think there are a lot of factors that went into what happened back then. But——

Senator FRANKEN. Come on.

Mr. ZUCKER. Well——

Senator FRANKEN. I mean, come on. You guys said, "We are in the business of ratings. Why would we favor our own programming?" And it was 2 years later that your guys were saying to your stockholders that, "We are going to own most of our own programming." And you know that. And you know that to get a program on your network that you often, very, very often say, "Well, we want to be partners in this."

Mr. ZUCKER. Well, I can tell you about what is happening today, and I think that that is probably most relevant here, and the most relevant fact of that is that NBC has just ordered 20 pilots for new shows next year. As you well know, NBC needs some better shows, so we have ordered 20 new potential programs.

Senator FRANKEN. I think what you did was put an NBC produced show on at 10 o'clock for five nights a week, that's what I think you did. But let me—what I am saying——

Mr. ZUCKER. Can I just——

Senator FRANKEN. Since the promises of fin-syn were not kept, what conditions would you have the Government put on you to make sure that what happened is fin-syn does not happen again?

Mr. ZUCKER. I do not necessarily agree that the promises of fin-syn were not kept. I think that it is a very complicated——

Senator FRANKEN. Can I ask Mr. Cooper then about that?

Mr. ZUCKER. Well, am I able to answer the question?

Senator FRANKEN. No, because I want to ask Mr. Cooper that, and then you can answer the question. How is that?

Mr. COOPER. If you go back in the record, you will find the same kinds of promises about how there would be all this independent programming, and if you look at the quality of independent programming that was put on the air during fin-syn, it was magnificent, and I will submit a report I did for the Independent Family Television——

Senator FRANKEN. Well, let us just speak to the——

Mr. COOPER. So the simple fact of the matter is that they said they would use independents. They drove them off the air, and that is when the quality of programming began to decline.

Senator FRANKEN. Okay. So what——

Mr. ZUCKER. So what I would say is——

Senator FRANKEN. What restrictions would you have?

Mr. ZUCKER. Let me make two points.

Senator FRANKEN. Conditions, I mean.

Mr. ZUCKER. Let me make two points, which is that if you look at the pilots that we just have ordered for next year, we have ordered 18 pilots. Seven of those 18 have nothing to do with NBC or NBC Universal, completely non-affiliated, meaning 39 percent. So 40 percent of all the programs that we are trying to put on the air for next year have no affiliation, we have no financial interest whatsoever in those programs.

Senator FRANKEN. So you have 60—you have an interest in 60 percent.

Mr. ZUCKER. Well, I would argue that 40 percent non-affiliated is a substantial number, and the fact is the burden and the risk of the financial burden that is required today, for us to take on 60 percent is still quite high.

Senator FRANKEN. Well, we are way over time, and I am sorry. I wanted to get to what conditions you thought we could put on if this thing went through to make this work, and then I wanted to ask the others what they thought of that.

Chairman KOHL. Thank you very much, Senator Franken.

Mr. Roberts, in your own FCC filing, you state that the NBC broadcast network is "an American icon," which, of course, is very true. And, best of all, of course, it is available entirely free all across the country. Many are now worried about what the merger would mean for the future of free, over-the-air television.

In your FCC merger filing, you have committed to "continuing to provide free, over-the-air television." But this commitment also states that, "Comcast will continue its cooperative dialog with its affiliates toward a business model to sustain free, over-the-air service that can be workable in the evolving economic and technological environment."

We need to know what that means, Mr. Roberts. Do we have reason to worry that Comcast in the future will move the best programming ideas to NBC cable networks? And won't Comcast have an incentive to do this? Because, obviously, it charges its customers for cable. Over-the-air is free.

Mr. ROBERTS. Well, first of all, that is not our plan. We have never been in broadcasting, as you know, and we are committed—and that was our first commitment—to leaving and creating a vibrant NBC, trying to restore some of its glory, as Jeff just said, and

get back to better shows. Hopefully some of those pilots will take off.

We will be hopefully able to help play a constructive role in retransmission consent, because today free, over-the-air television, as we know, is not as it was 20 years ago. On New Year's Eve we saw Time Warner Cable and Fox hold an independent negotiation between an independent broadcaster and an independent cable distributor over retransmission fees. There is a change in the marketplace happening where cash payments are occurring for broadcast television to the broadcasters, which is, I am sure, quite welcome by the broadcasters.

So we are committed to working with the NBC affiliates, trying to invest in the programming, and trying to build NBC, because the advertising model of NBC is so much different than the advertising model of a cable channel. And there is a great suite of cable channels that NBC has, but NBC itself is a huge priority both for local programming and for network programming to improve. And if I might, Mr. Zucker is more of an expert on it than I am, and he is already well equipped with knowledge of how retransmission consent is going. But by being both a cable company and a broadcaster, we think we can play a unique role in—even though there will be plenty of independent negotiations that we are not involved in,—trying to find constructive models to help the broadcast business thrive in the future.

Mr. ZUCKER. If I may, Senator, I would say a couple things in response to your question, and then I would like to follow up on what Mr. Roberts said.

The fact is the commitment to free, over-the-air broadcasting here is incredibly important, and maintaining that I think is probably the most exciting thing that Comcast has come to this joint venture with.

The reach that NBC has, our ability to sell advertising on NBC as opposed to what we bring in on the cable networks, the fact that we do not only determine whether or not sports rights will be on NBC, but that is decided by leagues that give us the rights and things like that, I think this should give you and the Committee confidence that we want NBC to be strong and vibrant. Ten million people a night watch Brian Williams on "NBC Nightly News." Six million people a morning watch the "Today" show and get their news from that.

The reach of these incredibly important programs is something that we are incredibly proud of and that we will continue.

With regard to broadcasting, I tried to make this point in my remarks earlier. Broadcasting has been troubled. The economics of broadcasting are not as good as the cable side. That is what we are talking about. But the fact that Mr. Roberts and Comcast have said that they are willing to step up and play a constructive role in the retransmission consent negotiations gives me more hope about the future of NBC than I have had in a long time. And I actually feel better about the future of broadcasting today.

Chairman KOHL. I just want to ask you this question, though. There is no doubt that you offer compelling must-have programming on NBC, as we know. What is to stop Comcast, in any legal way what is to stop them if this merger is completed from moving

NBC broadcast content to cable? Is there anything in this deal that is going down that legally will prevent Comcast from taking any and every show or whatever they decide from NBC to cable?

Mr. ZUCKER. But that would not be in their interest. There is nothing legally. Yes, I understand.

Chairman KOHL. I understand that. But is there anything that would prevent that legally from happening? The answer is clearly no.

Mr. ZUCKER. Legally, I do not believe—legally, no, sir.

Chairman KOHL. I want to hear that from you, that if it makes economic sense at some point—which you say it never will, but if it does, there is nothing that would prevent Comcast from moving whatever they wish from NBC to cable, legally nothing to prevent them. Correct?

Mr. ROBERTS. I think we have made a commitment; however, Senator, I guess there is always an extreme that you could say that something is theoretically possible someday. But I will tell you the commitment we intend to make binding with the FCC is our commitment to a robust NBC network similar to the kind of programming that it has today, free, over-the-air, and with a strong affiliate model. I am not quite sure how much you can do because certain rights holders decide where they want to put their programming and other things like that. But our goal, I believe our commitment and our actions are to restore NBC, and to invest in NBC. And that is the constructive dialog we are actually having with the NBC affiliates,—which is how to get that moving in the right direction.

Chairman KOHL. Good. Thank you so much.

Yes, Ms. Abdoulah.

Ms. ABDOULAH. I was not going to bring up retrans, but since it has come to the forefront, I would like to just ask about that or comment about it. When I hear Comcast is going to play a constructive role, I mean, I do not know how we can make that retrans process constructive other than redoing it. In the 1992 act, when retrans was formed, I was in the business. I know why it happened. We had a lot of clout as cable operators, and the small broadcasters needed some protection. It made some sense.

What has happened since then is the whole balance of power has gone totally upside down, and now these networks can come in and now negotiate retrans with us. As a matter of fact, in the past 2 years—or in the last cycle of negotiations, WOW!'s retrans costs increased over 100 percent because these broadcasters can come in and demand not only carriage, if they went with "must carry," but demand prices that nobody has any control over and very few of us have any leverage on.

So retrans is a huge issue and needs to be reviewed and revised.

Chairman KOHL. Yes, Mr. Schwartzman.

Mr. SCHWARTZMAN. Senator, I want to make sure everybody understands what Mr. Roberts was saying. By playing a constructive role in retransmission consent, he means paying more for NBC programming. The industry standard are MFN agreements by which other network affiliates can charge the same rates. That gets passed on to Comcast and to every other cable operator in the

country. In short, Mr. Roberts just promised to raise everybody's cable rates.

Chairman KOHL. Oh, my goodness. Mr. Roberts, did you do that? [Laughter.]

Mr. ROBERTS. No, I did not, Senator, and I believe that in light of some of the issues that Ms. Abdoulah raised, I just want to put things back in perspective for Mr. Schwartzman and others. We are still 80 percent a cable company after this transaction, and we have some of the same issues and same concerns. But we also now recognize that there are broadcast needs and cable needs. Congress, I believe, at some point, or others at the FCC will want to have discussions that affect the entire industry—both industries—and we can be a voice among many other voices to try to forge creative solutions. I was not referring to what he said.

Ms. ABDOULAH. Good.

Mr. ROBERTS. Thank you.

Chairman KOHL. Before I pass it on to Senator Specter, I assume what you are saying is that programs like "NBC News," the Olympics, "Sunday Night Football," "The Tonight Show," and "The Office," for example, these things are going to stay on NBC.

Mr. ROBERTS. Yes.

Chairman KOHL. They are not going to be cable-ized.

Mr. ROBERTS. That is certainly my hope—absolutely.

Chairman KOHL. Well, hope is——

Mr. ROBERTS. Absolutely yes.

Chairman KOHL. Yes.

Mr. ROBERTS. And the only one that is up to somebody other than NBC would be NFL Football. They control those rights, not NBC. But "The Office" and "Saturday Night Live" are—certainly that is the intention, and, Jeff, you can speak for yourself.

Chairman KOHL. Jeff, is that right?

Mr. ZUCKER. Yes, sir.

Chairman KOHL. Good. Senator Specter.

Senator SPECTER. Mr. Roberts, when you were testifying earlier, you were trying to make a distinction between program access and program carriage, which you did not get a chance to conclude. What point were you trying to make on that?

Mr. ROBERTS. Thank you. After the deal, six out of seven channels that Comcast carries—I am talking program carriage—are unaffiliated.

The second point is that there are choices customers now have that were not around 20 years ago or even 10 years ago. So if we do not carry popular shows, such as the NFL Network, customers can choose to go somewhere else where they can get that programming.

The third point is that regarding the cost of these channels, it is not just carriage the way it is with free broadcasting. As I mentioned, we spend about $6 billion a year. When a new network comes to us and says, "I want to be carried," the reason there is tension at all is, one, do we have the bandwidth; but, two, and usually the significant tension is what is the cost to our consumers. Ultimately we are purchasing on their behalf and putting it in one of the many packages that we offer.

So you factor in what is our competitors' behavior—satellite, phone company; what is the cost to the consumer; what is the quality of that programming; that in the end, 85 percent of the programming is owned by others; and we have got to be competitive, or else the customer is going to switch carriers.

Senator SPECTER. When Senator Franken was questioning you, there appeared to be substantial differences as to what had occurred during the course of the discussions you had with him in his office. Would you care to amplify what happened there and why you are saying that you were providing information which was entirely accurate and trustworthy?

Mr. ROBERTS. Yes. Well, first of all, it is the first time we have ever had a chance to meet in his office describing the deal. There is a couple-year-old appeal of whether the sunset rule should go away on program access. I did not remember that. To his point, it is an argument and fair question, as far as I am concerned, as to whether we would have these rules apply to us.

The genuine intention from the day we have done this deal was to say we are comfortable with the rules we have lived with for the last 20 years. Commenting on whether they should be upheld by the courts or not for constitutional reasons was never our intention—and they have not been stricken by the courts. There have been many legal challenges over those 20 years as the market continues to evolve. And the market will continue to evolve in the future. There are rights as a speaker that—whether they are constitutional or not—lawyers love to challenge all the time, and I think that is legitimate as well.

But from where I sit as a business person, our reason for wanting to buy NBC Universal is to invest in content, grow the business, preserve free broadcast television over the air, and to build a wonderful content company for the 21st century that will dynamically change Comcast from just a distributor. And we are very comfortable, and that is why today I wanted to clarify that, both in the written record and in this back-and-forth here.

Senator SPECTER. These hearings do not allow the kind of full exchange necessary to really get to the bottom of things. There are time limits and complex questions and, necessarily, interruptions to try to move through in a hurried way. And I discussed with Senator Franken, when we went to vote—Senator Franken, if I may have your attention. I was just saying that you and I had a brief discussion when we went to vote about sitting down in a more elongated discussion to have an exchange which is not limited in time to get a fuller understanding exactly where you stand and exactly what Senator Franken's concerns are. He is in a lot different position, having been an entertainer and on the TV shows. The best Senator Kohl and I do is C-SPAN2.

[Laughter.]

Senator SPECTER. So we are not in Senator Franken's league. I had a little trouble following some of it myself, and he did not get a chance to finish his questioning of you because the time is limited. But we do the best we can of making a public record here, and these hearings go on all the time. Do you want to—I just want to say I welcome that. I also understand the—I was never involved

in fin-syn. Comcast was not a producer of broadcast shows, and I do not know what those commitments were.

Senator SPECTER. Senator Franken is nodding in the affirmative. He agrees with you about something.

Mr. ROBERTS. Thank you, Senator Specter.

Senator SPECTER. You have heard, Mr. Roberts, quite a number of concerns expressed by Mr. Schwartzman, Dr. Cooper, and Ms. Abdoulah. On my time, would you care to identify any of them and respond at this moment?

Mr. ROBERTS. Well, I think we have had, you know, a healthy exchange and perhaps disagreement of whether this is really a vertical integration; whether the cable industry over the last 30 years has added great technological innovation; how competitive the industry has become; and where we might be headed in the future. In my opinion, companies need to take risks, make investments, and try to innovate. And what I see happening is an explosion of technological choices to the consumer and the wonderful content at NBC Universal. We want to try to accelerate how to make it more available, and our goal is to stimulate the technology that our company has traditionally built.

When we first went to 20 channels, people said, "Why do you need 20 channels?" When we went to 100 channels, people said, "Why do you need 100?" The first time we launched On Demand, we could not get movies. The main complaint, as you and I have talked in the past, that people have with our On Demand is how can we get more movies. Well, NBC Universal has 4,000 movies in their library.

So we will do our very best to push the technology and the content to try to give the consumer that which we know they want, in a business model that can work for all parties, and at the same time change our company, as companies need to evolve.

Senator SPECTER. Mr. Zucker, I will come to you in just a moment, in less than a moment.

Well, I think that is important reassurance. My television watching is limited, but Turner Classic Movies is one of my favorites. In fact, it is my favorite, aside from sports, on TV and they are the old movies. And Comcast movies on demand could use improvement.

[Laughter.]

Senator SPECTER. You could use a——

Mr. ROBERTS. Yes, sir.

Senator SPECTER. Now, Mr. Zucker, you may comment, and, Ms. Abdoulah, you had your hand up, you may comment on your own time because my red light is on.

Mr. ZUCKER. If I may, I just wanted to make one comment, which is that there was a comment made earlier in the opening remarks that this was the biggest or most important media merger since Lucy and Desi. And I would just argue that I long for those days, and I wish these were the times of Lucy and Desi. But the fact is we are in an incredibly different era, and competition is much greater, the cost of programming is so much higher, and if NBC and broadcasting is going to survive, then we are going to have these honest discussions about how that will happen. And I think that one of the great things here is Comcast's actual real commit-

ment to ensuring that NBC and broadcasting survive. And it is a very different era than Lucy and Desi.

Ms. ABDOULAH. Two quick things, if I may.

Mr. Roberts is right. As operators, when we are considering what programming to carry, we do think about what is the cost to the customer. Unfortunately, it not market-based pricing. Unfortunately, the customer does not get to know what it is costing to deliver them this product because we are not allowed to talk about price. We are restricted from talking about price to our consumers or to each other. The only reason I know we pay more is because I have been on the large company side, so I know that we pay at least 25 to 30 percent more than our competitor does. And I just do not understand how that is good for consumers.

I also do not understand, if the billions that are being spent in programming—which I respect and appreciate. The fact of the matter is a product is produced for a certain fixed cost, and then those costs are incurred by the operators. I do not understand why we as a smaller operator pay much more for that product—it is a fixed cost—than the larger operator does. It is very difficult to compete without that kind of transparency, without that kind of market-rationalized pricing, and it is wrong for consumers. They do not have the choice because we are told how to deliver the product. We are not able to deliver it in the way the customers have asked us to deliver it.

Specifically, sports, if people want to just watch sports and pay more for it, we would love to put that on a tier. We are not allowed to do that.

Family entertainment, if they just want a tier of family product entertainment, we are not allowed to tier that.

If we want to put it on digital instead of expanded basic, we are not allowed to do that. We are told by the programmer how we are to distribute that product.

That is not choice for the consumer.

Mr. COOPER. I would offer two revolutionary business model innovations, one extending Ms. Abdoulah's suggestion. If we want to talk about consumer choice, let us give them real choice. Let us give them a la carte choice. Instead of making them buy tiers, let us let them choose each channel they want to pay for. That would be a revolution.

The second revolution, let us sell TV to everybody. There are no franchised service territories in cyberspace. There are no building requirements in cyberspace. It is easy to sell TV to everybody. So let us let everybody sell TV to everybody else, instead of dividing the market as TV and everywhere does.

Those would be revolutionary, innovative business models which would shake this industry up something fierce compared to the modest rivalry you have today.

Senator SPECTER. Thank you, Mr. Chairman.

Chairman KOHL. Senator Franken.

Senator FRANKEN. Thank you, Mr. Chairman.

I would be happy to meet with you and Senator Specter, Mr. Roberts. We might include maybe Mr. Cooper in that conversation.

Mr. Cooper, Mr. Roberts was talking about the reputation of Comcast. You in your testimony said that Comcast is on record

lying to a Federal agency regarding whether they blocked Internet users' access to competing application for anticompetitive purposes. I assume you are referring to Comcast's testimony about blocking BitTorrent, a peer-to-peer file sharing application. Is that right?

Mr. COOPER. Yes, I think one of the incidents that Mr. Roberts does not point to in defense of his honor is this question of, Were they blocking? Well, they were not. Then they said they were. What were they doing?

In the end, they were interfering with the flow of video traffic, and they were not forthcoming about what happened. Obviously, that is another one of these court cases they are involved in, in which they——

Senator FRANKEN. Well, let us talk about these cases, and I do, Jeff, want to get back to the last question I asked you. But trying to resolve these things before the FCC, carriage complaints and access complaints, these are incredibly—it is like impossible, right? And the burden—do you want to go to this, Mr. Schwartzman?

Mr. SCHWARTZMAN. Yes. A promise to abide by the existing rules is a meaningless promise. I looked, and I may have missed something, but I am unaware of the FCC ever ruling in favor of a complainant in a program access case.

As Ms. Abdoulah explained, in order to pursue one of these complaints, you need information that you do not have, and if you cannot provide the information, you do not meet the very high initial burden that the FCC places on pursuing a complaint. The burden is on the complainants to provide information they do not have and cannot obtain. It is a right without a remedy.

Senator FRANKEN. And there is only one administrative law judge at the FCC now. Is that right?

Mr. SCHWARTZMAN. That is correct.

Senator FRANKEN. Okay. Look, I have had this history where I have seen NBC and I have seen other networks promise something and then do the 180-degree turn on it. There is no question about that. People in my industry—or my former industry—they know that. You came into my office, and you did tell me something that—and I asked you a question, and you did not know, and your lawyers confirmed that you had gone after the very rules that you said that would protect the consumer. That happened. It did.

Now I will go to Jeff. Given that it is really hard to trust you guys, from my point of view, and given that resolving these matters is so one-sided in favor of the big guy, and this merger makes you so big, what kind of commitments do you think you should be held to that can be made that would make it feasible for anyone looking at this objectively to feel good about it?

Mr. ZUCKER. I think you should hold us to the 17 commitments that we have made in our FCC filing that we have said we will abide by as a condition of this deal.

Senator FRANKEN. Okay. Mr. Cooper, do you think that that is sufficient? You have read those, have you?

Mr. COOPER. Well, they do not address the competitive problems, but I want to go to the enforcement question. He makes the commitment to you. You cannot do anything to him when he violates it. You have to find an agent to enforce that.

Senator FRANKEN. I could call him back here.

Mr. COOPER. You could call him back here and give him a hard time, but——

Senator FRANKEN. That is about it, right?

Mr. COOPER. The FCC cannot do it. The DOJ does not like to do it. So the real answer is: Do not let the market power be created if you cannot really enforce and police the commitments. And you cannot.

Senator FRANKEN. Now, let me ask you about this. This is a big issue about the cost to the consumer, your cable bill, and it has gone up about three times the rate of inflation, I think, over the last—since 1995. And this idea of—this is about access, program access rules. So now you have to—NBC and Comcast, by the rules, have to provide its programming to other cable carriers—all right?—and it has to charge them what they are charged, what NBCU is charged for the program, for the network, for NBC or CNBC or A&E, Bravo, whatever.

Did you, Mr. Cooper or Mr. Schwartzman, buy what Mr. Roberts said about them not being able to charge more and take it from one pocket into another pocket? Did you buy that at all, especially the part about now that they are together, they are even in less position to do it, because NBC now can charge whatever it wants to charge, but they would not be able to together, I mean, that actually by combining they would be less able to do this?

Mr. COOPER. Well, three-quarters of the pockets are not one pocket to the other. It is reaching into the consumer's pocket who is served by another cable operator. They increase their profit by raising the transmission——

Senator FRANKEN. I understand that, but what I am saying is that if they double what NBC costs to carry, they can charge themselves double, but it is going from one pocket to the other, but that means every other cable carrier is charged double for that, and their cable rates go up.

Mr. COOPER. Absolutely.

Senator FRANKEN. And the answer to that from Mr. Roberts was that he is actually in a worse position to do that. Does that hold water?

Mr. COOPER. It does not hold water. His prices have gone up. His profit margins on cable have gone up. And he has more than covered any increase in costs, so he can pass them through, and he ends up with more profit in his pocket when retrans——

Senator FRANKEN. We are talking about charging extra for NBC or charging extra for——

Mr. COOPER. Extra for NBC or bigger bundles and charging Ms. Abdoulah higher prices.

Senator FRANKEN. And Jeff is really raising his hand, and I should recognize him. But then I want to go back to Mr. Schwartzman to answer that as well.

Mr. ZUCKER. Thank you, Senator. I think you have to take a step back and realize the real world that we live in. I want my programming to be carried by every distributor, and if the price is too artificially high, that is not going to happen. So the real world that we live in, if the 3 distributors do not want to—if the price is too high, they are not going to carry out networks and our programs, and that is not—that is not in our interest.

Senator FRANKEN. If a cable company wants to carry "Saturday Night Live," and they cannot, they are not—no one is going to use that cable company. They have to—they have to get NBC. It would be death to any cable company. So you can—maybe you are not going to charge them ten times as much, but you can charge them twice as much.

Mr. SCHWARTZMAN. Well, my time is up, so I am sorry.

Chairman KOHL. Mr. Schwartzman can answer the question, and then we will——

Senator FRANKEN. Okay.

Mr. SCHWARTZMAN. Thank you, Mr. Chairman. This may be a first in the history of the Senate, but I do not have anything to add.

Ms. ABDOULAH. Could I take your time? I just want to acknowledge, video subscription revenue, our revenues on video have risen 35 percent. However, our programming costs have increased by 81 percent. We pay—it is very hard for us to compete for customers with a large competitor like Comcast who enjoys lower rates, lower costs than we do. They have promotions, for example, for digital cable, $30 a month. Our costs on that are close to $27, so we cannot do the same kind of offers.

Chairman KOHL. I have one question for you, Mr. Roberts, and then we will end the hearing. One bright spot for competition has been the development of the Internet as an alternative for consumers to view video content. Because of the rapid deployment of high-speed Internet connections, millions of consumers now access TV programming from websites such as Hulu or Apple TV without paying the cable or satellite companies anything. Some consumers have even cut the cord and rely solely on the Internet to watch programming. Competition in this area is an encouraging development.

However, we have recently heard from some programmers who allege that cable TV companies are demanding that the programmer refuse to make its programming available over the Internet as a condition to getting carried on cable TV. This applies to archives of old programming in addition to current content. And programmers are in no position but to accede to such a condition in order to reach the tens of millions of cable subscribers.

Does Comcast demand that programmers keep their content off non-Comcast Internet websites in order to be carried on Comcast in some circumstances? And will you pledge not to do so?

Mr. ROBERTS. I will tell you that what we have done and what I will pledge to do for sure and continue to do is to license content. We never say to anyone you cannot sell that content to anyone else. We have windows where there are certain times where that content may be just advertising supported. There are times when it is subscription. There are times when it is pay-per-view. So different types of content have different windows. That has been true for Hollywood movies, right to the cable channels that we carry today. So if you are taking a channel in its entirety and you are paying hundreds of millions of dollars a year to carry that channel—they are free to sell it to anybody they want to in the same manner that they sell it to us, or any other terms—to my knowledge we have never said they cannot sell it to some other area of distribution.

Sometimes they may create a new window, and there is a discussion of how long that window is until they want to change the model from a subscription model to an advertising-supported model. There are sometimes models windows ahead of us, which are the pay-per-view model.

We believe this is a burgeoning area, and we should all be trying to find a way to get this content in front of the consumer. We have a vision called Project Infinity that is literally any content you want, at any time you want, on any device you want. We leave it to the content company to establish the practices of whether that is pay, subscription, advertising-supported, or part of some other bundle. And our technology vision is how to make that happen faster and have unlimited access for the consumer to that amount of content.

Chairman KOHL. Good. Well, this will bring the hearing to a close. It has been very informative and we think very important for the Justice Department and the FCC to examine this issue very carefully, take into consideration the things that have been brought out in these hearings, and maybe perhaps if it decides to allow it, to establish what conditions to put on the deal. I do not know how it will develop, but that certainly is a possibility.

Thank you all for being here, and I particularly thank the witnesses.

[Whereupon, at 5:04 p.m., the Subcommittee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

U.S. Senate Committee on the Judiciary,
Subcommittee on Antitrust, Competition Policy, and Consumer Rights

Hearing on "The Comcast/NBC Universal Merger: What Does the Future Hold for Competition and Consumers?"
February 4, 2010

Questions for the record submitted by Senator Russell D. Feingold:

1 A. Mr. Zucker and Mr. Roberts, I see that nowhere in your statements do you mention lower cable rates as a consumer benefit of your merger, so at least you are not trying to sell us that bill of goods. But I'd like to know what you think the merger's impact will be on cable rates. Specifically, will you add a commitment #18 to your public interest commitments that would tie the increase in cable rates to inflation and will you also lock in the rates you charge for content either for cable network carriage or through retransmission consent?

B. Ms. Abdoulah, Mr. Cooper and Mr. Schwartzman: From your written statements you clearly have concerns about the merger. What harm do you foresee for consumers and especially the impact on subscription television rates?

WOW Response:

Assuming the merger is approved, Comcast-NBCU will be able to secure higher programming fees and expanded carriage commitments for its affiliated programming than either entity could secure today. For cable operators who are purchasers of this programming, our costs will increase. If our costs increase, then we will pass a portion of those expenses along to our customers. This will be the case throughout the country, but particularly in areas of the country served by a Comcast regional sports network and/or an NBC O&O television station.

2. A. Mr. Zucker and Mr. Roberts, I'm interested in how your two firms currently negotiate with other television providers to gain carriage of either cable networks or through retransmission consent for the NBC local stations. Specifically I wanted to know whether the price was the same for a larger cable operator like Time Warner or Charter and for a very small cable company that may cover just a single town or part of a couple of rural counties as is common in parts of Wisconsin. Are the rates currently different? Would you be willing to commit to charging the same rate for the same content as part of the merger?

   B. Ms. Abdoulah, Mr. Cooper and Mr. Schwartzman: Typically how much disparity between the prices paid by small and large cable systems for similar content from a cable network or through retransmission consent? Would the increased market power of a combined NBC/Comcast make this situation worse or otherwise encourage consolidation among the smaller cable systems?

   WOW Response:

   Although it is difficult to know definitely due to non disclosure agreements (which Comcast and NBC insist upon in all of their current programming agreements), we estimate that we pay programming rates that are between 20 and 30% greater than those paid by Comcast's cable affiliate, the country's largest pay television operator. With the added market power Comcast will have as a result of the proposed combination, you definitely can expect this gap to grow. It would also trigger some smaller cable systems to sell to other operators, or simply close down their business.

3. A. Mr. Zucker and Mr. Roberts, it is common practice now to require a television distributor like a rival cable company to carry several less popular cable channels in order to get a cable channel that they and consumers really want. Would you be willing to stop this practice and agree to offer fair rates for individual channels?

   B. Ms. Abdoulah, Mr. Cooper and Mr. Schwartzman: There have been proposals in the past to allow television subscribers to choose which channels they wish to receive "a la carte" instead of the typical bundles. Would this option for both subscription television systems from content providers and for consumers from the systems be a benefit for competition and/or help keep cable rates from increasing at as high a rate? What potential negative effects could providing a la carte options have?

   WOW Response:

   If cable operators were not forced to accept the programming bundles of media conglomerates like Comcast and NBC, operators would be able to save money at the wholesale level, and pass those savings along to their customers either by giving them greater choice or lower priced tiers. While selling programming to consumers on an a la carte basis may drive down the cost of some channels, it's likely to drive up the costs of certain channels in other cases. A la carte retail pricing would also threaten smaller, independent networks very existence, reducing the diversity of voices available to consumers.

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A. Mr. Zucker and Mr. Roberts, I noticed that in some of your public interest commitments you only agree to protections for a limited number of years or tied to FCC rules being in force. If these provisions are in the public interest and help prevent competitive harm, why aren't these indefinite commitments or permanent firewalls instead?

B. Ms. Abdoulah, Mr. Cooper and Mr. Schwartzman: Are there any combination of public interest commitments that NBC/Comcast could agree to that would eliminate your concerns about the merger such that you would no suggest that the DOJ block the merger? If so, should these commitments be indefinite? Do you have any concern if such commitments are for only a short time frame?

WOW Response:

Yes, we're optimistic that the harms of the Comcast/NBCU deal can be addressed through structural and behavioral remedies. While the conditions may not have to be indefinite, they should last for whatever time is required to remedy the harms caused by the proposed combination.

4. A. Mr. Zucker and Mr. Roberts: I have seen some concern expressed that the stake of the new company in Hulu could somehow be leveraged to Hulu's advantage or against other competitors in this emerging market. Would you consider divesting your internet television interests and staying out of this segment of the industry to alleviate these concerns? If not, what protections will you put in place to make sure the relationship doesn't stifle innovation?

B. Ms. Abdoulah, Mr. Cooper and Mr. Schwartzman: If the merger were approved, what divestment should be required? Can divestment alleviate your concerns about competition?

WOW Response:

We believe that the DOJ and FCC should consider any and all options to alleviate the harms of this deal, including divestitures. In order to address the horizontal harms that would occur as a result of this deal, the agencies should consider, in addition to behavioral remedies such as assuring continued access to programming on non-discriminatory terms and conditions during periods of dispute, requiring Comcast to divest itself of existing programming assets, including all of its regional sports networks and its national cable networks (i.e. E!, Style, Versus, Golf Channel, and G4). It also may be necessary to require Comcast to divest itself of NBCU's most popular networks (i.e. USA Network, SyFy, Bravo, MSNBC, CNBC, etc.) and its NBC and Telemundo O&O stations.

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5. Mr. Roberts: Comcast has been widely criticized for what many see as violations of net neutrality. Many have suggested that Comcast leveraged its control of the broadband infrastructure to limit another company that competed with your video entertainment offerings. This seems to suggest a willingness to leverage vertical relationships and makes me doubly concerned about the proposed merger. Can you explain this situation?

   B. Ms. Abdoulah, Mr. Cooper and Mr. Schwartzman: Please provide any thoughts you have on this issue.

   WOW Response:

   The deal will significantly increase Comcast's vertical integration, creating all sorts of perverse incentives for the company to engage in anticompetitive conduct within the cable and broadband markets and which we have already seen adversely impact access to Comcast's online programming content.

Senator Orrin Hatch

Questions for the Record
"The Comcast/NBC Universal Merger:
What Does the Future Hold for Competition and Consumers?"
Hearing before the Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights
February 4, 2010

For Ms. Abdoulah

1. One potentially horizontal aspect of this merger involves the combination of NBC-owned and Comcast-owned video content. In your written statement, you argued that, with ownership of NBC Universal, Comcast would have greater ability to increase prices on content and to bundle "must-have" content with less desirable and less marketable content. However, it seems to me that, at the current time, NBC Universal already has an incentive to maximize the licensing fees it charges for its content to the highest marketable level and to bundle content as well. And, according to Comcast and NBC Universal's Public Interest Statement filed with the FCC, the merger will not change NBC Universal's overall place in the content market.
This is an increase in concentration, to be sure. But, I'm not certain that it is significant enough to give Comcast the ability raise prices or bundle content any more than NBC Universal is already able to in the current market environment. Is this increased concentration in the content market really significant enough to give the new company more power to raise prices or bundle content?
WOW Response:

Yes, there would be a significant enough increase in market power from the combination of programming assets to give Comcast the ability to raise prices or bundle content beyond what NBC Universal is already able to in the current market environment, particularly in markets that are served by a Comcast regional sports network. As you're aware Comcast owns 10 regional sports network, channels that have been classified as "must-have" by the Federal Communications Commission. After Comcast acquires NBC Universal, the company will be able to negotiate their "must-have" RSN with their entire suite of NBCU's popular cable networks, which, especially when combined with the NBC O&O TV station in many of those same markets, would also be considered "must-have." Empirical evidence indicates that such a combination permits the owner to exact even greater rates than when the programming is sold separately. Moreover, to the extent that they also negotiate retransmission consent for their NBC affiliates in the future, another "must-have" channel as determined by the FCC, Comcast will have significant leverage at the bargaining table to demand much higher programming fees and/or more onerous terms and conditions for their programming (including their online content). An operator who refuses to accept Comcast's prices, terms, and conditions could be de-authorized which would cripple their business.

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Senator Kohl's Follow-Up Questions for Hearing On

"The Comcast/NBC Universal Merger: What Does the Future Hold for Competition and Consumers?"

For Colleen Abdoulah

1. If the price of NBC broadcast or cable programming was raised at the behest of Comcast after this merger, would you be forced to pass these cost increases on to consumers?

   WOW Response:

   While WOW makes every effort to minimize customer increases, like all other costs of operation a portion of these cost increases would be passed along to consumers.

2. Are you concerned that, as part of the "TV Everywhere" model, Comcast and the other large cable operators will sign exclusive deals with programmers with respect to internet delivery of programmers' content, making it more difficult for WOW to gain access to this content on your internet platform? Do you have any other concerns regarding Comcast's "TV Everywhere" model?

   WOW Response:

   Yes, based on past behavior I am concerned that Comcast and other cable operators will seek to sign exclusive deals with programmers with respect to the online delivery of programming that will prevent WOW! from offering its customers its own "TV Everywhere" product. Moreover, I am concerned that, even if the deals are non-exclusive, programmers affiliated with Comcast and other large cable operators will charge my company much higher (discriminatory) rates for access to this online content than they charge their affiliated cable operator even though there's no greater cost of providing the online content to Comcast as compared to WOW.

3. The FCC's program access rules contain what is known as the "terrestrial loophole." This means that programming a cable company owns that is delivered via wires on the ground does not have to be made available to its competitors. Comcast has made use of this loophole to deny its regional sports network in Philadelphia to its satellite TV competitors.
   Do you worry that Comcast will take advantage of the terrestrial loophole in the future by, for example, distributing "must have" NBC programming by terrestrial means so it can deny this programming to competitors such as WOW?

   WOW Response:

   Yes, I am especially concerned because Comcast has already taken advantage of the terrestrial loophole and has long opposed closing it. If this loophole is not eliminated, I expect that Comcast will take advantage of it to distribute NBC Universal's national cable networks and local broadcast stations by terrestrial means so that it can deny this programming to my company or only make it available at discriminatory rates.

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4. Please identify any conditions you believe that the Justice Department or FCC should place on the Comcast/NBC Universal deal should they decide to approve it.

WOW Response:

We have so far been focusing on identifying the horizontal and vertical harms from the proposed combination, and, as indicated in our testimony and at the hearing, believe they are significant. The FCC and Justice Department will need to adopt both behavioral and structural relief to address these harms. I should add that the current program access rules and the conditions placed on previous mergers by the FCC have proven inadequate and are insufficient to address the harms identified so far as the dispute resolution procedure is too costly, time consuming and, typically, fails to provide for ongoing carriage of the disputed programming while a complaint is pending. We are working on more robust set of remedies and will share these will the Committee and agencies shortly.

5. As a small cable operator also representing of the American Cable Association, does this merger have the potential to increase pricing for NBC programming to small and rural cable operators who do not compete with Comcast but who need to offer their customer's NBC's must-have programming?

WOW Response:

Yes, this merger will significantly enhance Comcast's power in the programming market allowing them to increase prices for all of their programming to small and rural cable operators who do not compete against Comcast. Pay television providers that operate in areas that include a Comcast regional sports network (RSN), a channel classified as "must-have" by the Federal Communications Commission, would be particularly vulnerable. After Comcast acquires NBC Universal, the company will be able to negotiate their "must-have" RSN with their entire suite of NBCU's popular cable networks, which combined can also be considered "must have." Moreover, to the extent that they negotiate retransmission consent for their NBC affiliates in the future, another "must-have" channel, Comcast will have significant leverage at the bargaining table to demand higher programming fees and/or more onerous terms and conditions on other pay television providers and their customers.

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U.S. Senate Committee on the Judiciary,
Subcommittee on Antitrust, Competition Policy, and Consumer Rights
Hearing on "The Comcast/NBC Universal Merger: What Does the Future Hold for Competition and Consumers?"

March 15, 2010

Responses to questions for the record submitted by Senator Russell D. Feingold:

1. **Mr. Zucker and Mr. Roberts, I see that nowhere in your statements do you mention lower cable rates as a consumer benefit of your merger, so at least you are not trying to sell us that bill of goods. But I'd like to know what you think the merger's impact will be on cable rates. Specifically, will you add a commitment #18 to your public interest commitments that would tie the increase in cable rates to inflation and will you also lock in the rates you charge for content either for cable network carriage or through retransmission consent?**

We do not think that such a commitment is necessary or appropriate. This transaction should not affect cable pricing to consumers. Competition is – and will remain – intense among cable programming networks and among multichannel video programming distributors ("MVPDs"). Comcast will have continuing incentives to offer the most compelling, innovative consumer experience possible, increase consumer choice, expand the amount, quality and diversity of programming available, and expand multiplatform options, while competing head-to-head in all of our markets with two nationwide satellite MVPDs (DirecTV and Dish Network), and in a growing number of markets with phone companies offering MVPD services (AT&T, Verizon, and many others) and "overbuilders" (RCN, WOW, SureWest, and many others).

There is little doubt that consumers are getting more for their money than they did in the past. Indeed, at a little over $2 a day, cable is about the price of a morning cup of coffee. On a monthly basis, standard cable is less expensive than taking a family of four to the movies once and a fraction of the price of taking the family to a single sporting event. The average cable household viewing time is 310.5 hours per month; compare that to one three-hour ballgame or a few hours at the movies. When adjusted for inflation, the "price per viewing hour" of cable service has decreased 26 percent over the last 10 years. Plus, the quality of the programs we deliver has increased, as has the versatility of the service (e.g., video-on-demand, which offers thousands of choices at no additional charge).

In addition, many of our customers take advantage of promotional or multi-product discounts. We offer High-Speed Internet and digital voice services in addition to video, and consumers who buy two- or three-product packages enjoy significant savings as compared to the prices for the services when purchased separately. Other customers receive promotional price discounts, e.g., when they first sign up for service or when they agree to a service-level upgrade. The growing use of such discounts is often omitted from cable price surveys, which skews the results.

Nothing about the transaction will increase Comcast's Cable's incentive or ability to increase prices to consumers. We will face no fewer MVPD competitors post-transaction than we do pre-

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transaction – and that typically means anywhere from two to four MVPD competitors (in addition to Comcast) in any given market. In just the past two years, cable companies have lost 1.6 million customers while our competitors have gained over 7.6 million new subscribers. That gives us every incentive to remain competitive in our consumer prices for video distribution.

Times are tough, and we are highly focused on controlling costs and improving value for the benefit of our customers. Like all of our competitors, however, we must adjust prices to account for our increased costs of doing business. Separate and apart from the proposed transaction, it is unfortunate that programming costs have risen. It is important to note that other leading MVPD competitors have increased their prices by as much or more than Comcast, though this competition has worked to constrain the relative size of the price increases and to improve consumer value.

2. **I'm interested in how your two firms currently negotiate with other television providers to gain carriage of either cable networks or through retransmission consent for the NBC local stations. Specifically I wanted to know whether the price was the same for a larger cable operator like Time Warner or Charter and for a very small cable company that may cover just a single town or part of a couple of rural counties as is common in parts of Wisconsin. Are the rates currently different? Would you be willing to commit to charging the same rate for the same content as part of the merger?**

As an initial matter, Comcast is not privy to the terms of NBC's deals with other MVPDs, so I don't know whether, and to what extent, different distributors pay different prices for NBC. Regardless, we think it would be inappropriate to commit to charging the same rates for content to all MVPDs when we sell programming, or to paying the same rates as other MVPDs when we buy programming. Volume discounts are a well-accepted fact in virtually every sector of the American economy, and the video programming business is no different. Even in deciding to introduce certain rules to regulate program access disputes nearly 20 years ago, Congress recognized that volume discounts are appropriate.

The rates that different operators pay for content are not publicly available and are closely guarded in the industry, as they are in almost every business. Pricing is but one of many factors, including tiering, duration of carriage, online and VOD rights, and long-term price protection that programmers and operators bargain for during carriage negotiations. Programmers naturally are willing to license their content on more favorable terms to a large operator for a variety of legitimate economic reasons, including the cost savings that result from securing distribution to large numbers of consumers through a single contract and the direct economic benefits that accrue to a network that contractually secures exposure to more consumers.

Nonetheless, small cable operators can and do aggregate their buying power through buying consortia, most notably through the National Cable Television Cooperative (NCTC) – a not-for-profit corporation that operates as a programming and hardware purchasing organization for many hundreds of small cable operators who serve somewhere between 12 and 20 million subscribers nationwide (public reports on the exact numbers vary widely). NCTC negotiates master agreements with programming networks on behalf of member companies. NCTC member companies get the benefit of volume-based discounts based on the aggregate number of

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subscribers of all members that have opted-in to a particular NCTC agreement. NCTC is a marketplace mechanism that delivers the benefits of volume purchasing to smaller operators far more efficiently than government rules could do.

It is important to note that NBCU has existing contractual carriage relationships that are ongoing, separate and apart from this transaction. Those contracts will be unaffected by the proposed transaction. Significantly, as a result of the transaction, NBCU's cable networks will become subject to the program access rules, which guard against improper discrimination in the sale of programming. Moreover, Comcast has agreed voluntarily to extend the FCC's program access rules to the signals of NBC and Telemundo O&O stations for as long as the program access rules remain in place. We think that, in combination, existing rules and the voluntary commitments that we made in writing to the FCC on January 28, 2010, are more than adequate to meet the interests of competing MVPDs.

3. It is common practice now to require a television distributor like a rival cable company to carry several less popular cable channels in order to get a cable channel that they and consumers really want. Would you be willing to stop this practice and agree to offer fair rates for individual channels?

At least with respect to Comcast, I don't think the premise of this question is correct. Comcast's networks are sold on an individual basis, and no MVPD is required to carry one channel to obtain another. My understanding is that NBCU currently is willing to license its networks individually but also, consistent with common practices in this industry and many others, offers discounts to distributors who agree to carry multiple networks (or to expand distribution of the networks they carry). Rather than causing any consumer harms, this practice makes programming more affordable and helps programmers launch and distribute new programming services, including niche services.

I do not foresee that the proposed transaction will cause any change in NBCU's current practices. The transaction will not increase NBCU's incentive or ability to force MVPDs to carry networks they do not want.

The concerns to which you allude have been expressed for years with regard to many program network owners, not just NBCU or Comcast. Consequently, we do not believe that these concerns are transaction-specific. There is nothing in the combination of these two companies' programming that will make these practices more prevalent. In addition, the FCC is currently considering these very issues in an industry-wide rulemaking proceeding, and we believe that is the appropriate place to address them in order to ensure fairness and consistency in policy.

4. I noticed that in some of your public interest commitments you only agree to protections for a limited number of years or tied to FCC rules being in force. If these provisions are in the public interest and help prevent competitive harm, why aren't these indefinite commitments or permanent firewalls instead?

The vast majority of our public interest commitments do not carry a time limit. But it is important to recognize that it is standard practice for the FCC to attach a finite time period for

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which conditions to a merger approval are effective, so those commitments that do include a time limit are in line with past FCC decisions. We have proposed a specific duration for our commitment to add two new independently-owned and -operated channels each year for three years because we see a window of opportunity for new channel launches as we complete our company-wide digital migration, and because we do not wish to unnecessarily bind ourselves as to future uses of cable bandwidth given ever-changing demand for services. We also have proposed that the two commitments that adopt certain aspects of the program access rules would apply "for as long as the Commission's current program access rules remain in place." We added this durational limit so that in the future, if the program access rules are found to be no longer necessary, we are not unnecessarily bound to rules that do not apply to our competitors. Nonetheless, as I said at the hearing, we are willing to discuss with the FCC making the program access rules binding in connection with approval of the transaction, no matter what happened in the pending appeal regarding the FCC's extension of the exclusivity prohibition. On March 12, the D.C. Circuit affirmed the FCC order extending the exclusivity prohibition.

5. **I have seen some concern expressed that the stake of the new company in Hulu could somehow be leveraged to Hulu's advantage or against other competitors in this emerging market. Would you consider divesting your Internet television interests and staying out of this segment of the industry to alleviate these concerns? If not, what protections will you put in place to make sure the relationship doesn't stifle innovation?**

We do not plan to divest our online interests – and we do not think there is any need to do so. The Internet has been the single most transformative communications technology in our lifetimes. In only a matter of years, the Internet has gone from its infancy as a government technology to a ubiquitous set of networks and applications that has brought about the information age. Comcast has played as large a role as any company in helping to bring about this revolution. After 14 years and tens of billions of dollars of investment with no guaranteed rate of return, Comcast has developed a state-of-the-art high-speed Internet service that covers 99.5% of its 39-state footprint. Comcast has also been a pioneer in making more content available online then ever before. One of the primary reasons that Comcast and NBCU have entered into this joint venture is because we believe that by marrying NBCU's content with Comcast's multiple distribution platforms, we can accelerate this "new media" entertainment. It would be unthinkable to forego full participation, and the opportunities to innovate to meet consumer demand, in the new Internet-empowered environment that we have helped to create.

I want to emphasize, however, that neither Comcast nor NBCU has any prospect of dominating online video. Comcast's websites account for less than one half of one percent of online video views. NBCU's websites account for less than one percent of online video views. Even Hulu, in which NBCU owns a 32-percent, non-controlling interest, accounts for only four percent of online video views. By contrast, websites controlled by Google account for over 50 percent of all video views online (excluding adult content).

In sum, the transaction will not in any way diminish competition or innovation in the highly competitive and dynamic online video marketplace. It would be unwise and unwarranted for Comcast to consider divesting these assets, and we are confident that our participation in that marketplace will drive, not "stifle," innovation.

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6. **Comcast has been widely criticized for what many see as violations of net neutrality. Many have suggested that Comcast leveraged its control of the broadband infrastructure to limit another company that competed with your video entertainment offerings. This seems to suggest a willingness to leverage vertical relationships and makes me doubly concerned about the proposed merger. Can you explain this situation?**

On our High-Speed Internet services, we treat all content equally whether that content is affiliated with Comcast or not. We always have operated our High-Speed Internet service in conformance with the FCC's Internet Policy Statement, taking the user anywhere she wants to go on the Internet. Our commitment to operating in this manner is unwavering.

If the "situation" to which you refer is the Free Press et al. complaint to the FCC in 2008, I'm happy to provide clarification. In response to a very small number of Comcast's users using a very bandwidth-intensive protocol known as peer-to-peer ("P2P"), Comcast managed, in limited circumstances and in a limited manner, those P2P protocols that had an objectively demonstrated history of generating excessive burdens on its network. Comcast took these measures in order to avoid massive-volume P2P usage that would degrade the Internet experience of all of Comcast's customers. We did not apply this management technique in an anticompetitive manner – we were simply trying to ease network congestion for all of our users.

It's worth noting that, in contrast to some wireless carriers and universities, which flatly prohibit P2P traffic, we have always provided a hospitable environment for P2P, carrying literally *billions* of P2P flows every day. Under our old network management practices, a small percentage of P2P traffic was *delayed*, usually for extremely brief periods in order to ensure that P2P users did not significantly degrade our other customers' Internet service. Our prior network management practices had nothing to do with limiting another company that competed with our video entertainment offerings, as you have suggested. In fact, after the FCC ruled and after he reviewed the detailed network management disclosures we filed with the FCC, a representative of Public Knowledge, one of the complainants, wrote, "it appears to me that Comcast did not block P2P for anticompetitive reasons." And more recently, a Google representative describing the history of the "net neutrality" debate confirmed Google's view that "[o]ur engineering level discussions led us to conclude that Comcast was engaging in inelegant network management, not anticompetitive blocking." We believe these observations are honest and hit the mark, and we are hopeful that the federal court will overturn the FCC's findings to the contrary.

In any event, our prior network management approach has been replaced for more than a year now with a network management regime that has been almost universally applauded.

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February 4th, 2010 - "U.S. Senate Committee on the Judiciary,
Subcommittee on Antitrust, Competition Policy, and Consumer Rights
Hearing on "The Comcast/NBC Universal Merger: What Does the Future Hold for Competition and Consumers?"

March 15, 2010

Responses to questions for the record submitted by Senator Al Franken:

1. **INTERNET VIDEO. The Internet is the future of the media business, and what happens to online programming will help determine the future of show business. Currently, NBC's shows are freely available to Internet viewers on websites such as Hulu.**

   a) **If this merger goes through, will you guarantee that the company won't remove NBC's or Comcast's current shows from the Internet?**

   Comcast's goal is to expand the availability of video content on the Internet. But because this a very new business and neither we nor anyone else has figured out how best to deliver video online to consumers, it would be premature to set in stone any plans with respect to putting content online in any particular fashion. Online video is an important part of our distribution strategy going forward, and we are expanding the capacity of our networks to support more and more online content, whether for services like Fancast or for scores of entirely unaffiliated services like YouTube, Netflix, iTunes and so on. The joint venture will accelerate our goal of making more, not less, content available online.

   This transaction does not change NBCU's participation in Hulu in any way. Although NBCU was a founding partner in Hulu, Hulu is a joint venture in which NBCU currently holds approximately a 32 percent, non-controlling, non-management interest, with limited governance rights – and none of this will change as a result of the proposed transaction. I can say this: Comcast has no intention of changing NBCU's relationship with Hulu or NBCU's decision to provide certain of its content to Hulu. We think Hulu is great. We've been a partner with Hulu through Fancast's free online service since Hulu launched. Forty percent of video views on Fancast are of Hulu content, and Fancast contributes three percent of Hulu's video viewers. Comcast is a supportive partner to Hulu, and we intend to be a driving force to bring more, not less, content to the Web and across platforms.

   That does not mean, however, that all NBCU shows (or all shows of any other programmer) are – or will be – available on the Internet, or that the "new NBCU" programming that appears on the Internet will be available – on an ad-supported basis. A number of programmers, NBCU included, have expressed concerns over whether online advertising revenues alone can support the creative infrastructure needed to produce premium video content. Business models are in an early stage of evolution, and content producers and aggregators are still experimenting to determine the best ways to support the enormous costs of creating high-quality video programming.

   b) **Can you also guarantee that the merged company won't provide them only to the company's cable subscribers?**

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In this dynamic marketplace, Comcast (and others) already provide some content to everyone online, while other content is only available online to our video customers. We do not plan to change that, but neither can we make guarantees about how the marketplace will evolve. In order for the production of high-quality programming to remain economically sustainable, content owners are searching for viable online business models and are experimenting with a several different approaches. We want to help find business solutions and models that work for program producers, distributors, and consumers. Comcast's Fancast Xfinity TV alone currently combines several different models: (1) advertising-supported: long-form and short-form videos available to Comcast subscribers and non-subscribers alike for free; (2) authentication: long-form and short-form videos available to Comcast Cable subscribers at no additional charge, with the content available to a particular subscriber being based on the content available to that subscriber as a result of his video subscription; (3) transactional: DVDs and VOD available for purchase at the Fancast store. Content owners may well decide to provide certain programming online only to viewers who have purchased a subscription, or to have "windows" when certain content is available only in certain ways. The decision how to distribute their content is ultimately up to these content owners.

That does not mean, however, that access to programming will generally be available only to the customers of a single MVPD. To the contrary, the general incentive of content owners is to license their products broadly, and Comcast expects to do so. With the possible exception of a single network that Comcast chooses not to license to two competitors (because they withhold exclusives from Comcast and other cable subscribers), when Comcast-owned networks elect to make programming available in an authenticated environment, we also will make it available to all MVPDs that have demonstrated an ability to authenticate subscribers and protect the value of high-quality content. Verizon, Time Warner Cable, and DirecTV all have indicated they are developing similar models, as one would expect in a competitive marketplace.

c) If this merger goes through, will you guarantee that the company will place any future shows it owns on the Internet?

No. That is not a guarantee that any owner of high-cost, high-quality programming has made or could responsibly make.

The competitive realities of the marketplace require Comcast to supply attractive programming that consumers demand, and the future is in making popular content available to consumers when they want, where they want, and on the devices they want. Providing content that consumers want online is essential to that effort. Comcast's goal is to dramatically expand the amount of content available online now and in the future, but it is premature to speculate as to whether any particular show will be made available online or what business models will make it viable to bring it online.

d) Can you also guarantee that the merged company won't provide them only to the company's cable subscribers?

As I said above, I don't want to set in stone any future plans with respect to putting content online in any particular fashion. The marketplace for online video is dynamic, with lots of competitors experimenting with various business models. While I can make no predictions as

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to the future, I can tell you that our goal is to maximize the distribution of content on multiple platforms. I do not see that goal changing.

2. **NET NEUTRALITY. Comcast and NBC Universal have argued that FCC program carriage rules will make sure that the company can't favor its own programming—but no such rules exist for Internet video. To make matters worse, a Comcast case currently in front of the D.C. Circuit Court of Appeals could prevent the FCC from being able to make such Internet regulations in the future.**

   a) **Do you promise not to discriminate against other companies' programming on the Internet, even if the FCC never promulgates net neutrality regulations?**

Yes. On our High-Speed Internet services, we treat all content equally whether that content is affiliated with Comcast or not. We always have operated our High-Speed Internet service in conformance with the FCC's Internet Policy Statement, and our commitment to operating in this manner is unwavering.

Specifically, Comcast does not treat Fancast content any differently than other video content delivered over the Internet. Fancast content is subject to the same byte cap (the rather massive 250 Gigabytes of usage per month permitted under our Terms of Service), congestion management practices, and other elements traditionally associated with the best-effort Internet, just the same as Netflix's streaming video service or other over-the-top video providers are. That will not change.

   b) **If the merger goes through and there are no net neutrality regulations in place, would you agree to binding merger conditions forbidding you from favoring your own programming on your own Internet video websites for five years?**

We would not agree to such a condition. We do not believe there is any need for regulatory intervention with respect to a website's choice of content or its dealings with content, application, or service providers.

One of the reasons that online video is growing at such fantastic rates is because anyone can make content available online without having to go through a middleman, like a network that aggregates programming, or an MVPD that aggregates networks. A content provider doesn't necessarily need Comcast to make video content available to consumers, and a consumer doesn't necessarily need Comcast to access the content he or she wishes to view. In such a competitive and dynamic environment, large and small content providers alike can reach an ever-widening audience and we don't think the government needs to dictate what online video content Comcast, Netflix, Apple, Hulu or any other aggregator might make available, or regulate how they deal with unaffiliated suppliers of content. That said, I would continue to emphasize that Comcast's goal is to keep expanding the content that is available online, without regard for whether that content is affiliated with Comcast, because we want to be the provider of choice in making the content that consumers want available anytime, anywhere.

Comcast's online websites currently account for less than one-half of one percent of all online video views. NBCU's websites also account for less than one percent of online video views. Even Hulu – which NBCU does not control (see response to Question 1 above) – has only four

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percent of online video views. Content providers face few barriers to entry online – anyone can upload content to the Internet and make it available to anyone who wants to go there. In such a marketplace, which is highly fragmented and changing rapidly, there is no need for regulation, and no need for a merger condition, that governs the relationships between content producers and website operators.

c) Would you agree that these merger conditions would also bind any future incarnations of your companies resulting from future mergers, acquisitions or corporate restructuring?

While we perceive no need for the merger conditions you have described, we would agree that any conditions that are attached to approval of this deal will be binding on our successors.

d) If the FCC does not or cannot make net neutrality regulations, would you support legislation that extends program carriage rules to the Internet?

No. We do not think that such legislation is necessary. The program carriage rules were written when DBS companies like DirecTV and Dish Network had zero subscribers (they now have over 30 million, and are the second and third largest multichannel video providers in the United States), when Bell companies were statutorily forbidden to provide cable services (AT&T and Verizon are now doing so with considerable success), when the average cable system carried only 2-3 dozen channels (we now carry hundreds, and the Internet's capacity is almost limitless), and when a significant majority of national cable programming networks were owned in whole or in part by cable operators (that number has now plummeted from 57 percent at the time Congress enacted program carriage rules to below 15 percent today).

We think a bipartisan Congress and President Clinton got it right in the Telecommunications Act of 1996, which established a national policy "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." That policy has served us well. It led directly to the investment of hundreds of billions of dollars of private risk capital in Internet facilities, content, applications, and services. It enabled companies like Comcast to bring consumers residential broadband that is literally hundreds of times faster than the Internet of 1996 – and to offer that service to 99.5 percent of the homes we pass. We are now deploying next-generation broadband Internet technology that will support the applications and services of tomorrow. Applying monopoly-era regulations to this competitive and dynamic marketplace would be unnecessary and counterproductive, diminishing the entrepreneurship and creativity that are needed to ensure that America's Internet continues to progress.

As we said in our Comment in the FCC's "open Internet" proceeding, "Comcast shares the Commission's goal of preserving and encouraging the vibrant, dynamic nature of the open Internet, and applauds the Commission for its stated commitment to a fair, fact-based, data-driven process to explore how that openness can best be preserved." Comcast was one of the very first companies to deliver the promise of broadband to American homes. Ever since we first started offering our High-Speed Internet service in 1996, we have operated it in a manner consistent with the openness embodied by the four principles of the *Internet Policy Statement*,

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and the express exception for reasonable network management. Our commitment to doing so in the future is unwavering.

e) If the FCC does not or cannot make net neutrality regulations, would you urge any trade group to which you belong to support legislation that extends program carriage rules to the Internet?

No. See answers above.

3. PREFERENTIAL TREATMENT FOR CHANNELS. In 2009, Steve Burke, the Chief Operating Officer of Comcast Corporation and the President of Comcast Cable, acknowledged under oath that Comcast treats channels it owns as "siblings," giving them less scrutiny and more time to pitch themselves to the cable distributor.

If a Comcast-NBCU merger is successful, the resulting company will own many more channels than Comcast does today. If Comcast already gives preferential treatment to its own channels, what would prevent a Comcast-NBCU joint venture from giving preferential treatment to the many additional channels it will own? (Please exclude FCC program carriage rules from your answer)

The testimony by Comcast's COO Steve Burke in a program carriage dispute with NFL Network has been taken out of context and mischaracterized. As Mr. Burke recently explained under oath, the quoted comment was simply an observation that Comcast's cable group and Comcast's programming group currently share physical proximity: they work in the same office building, they share common company facilities, they know each other, and they can readily arrange to meet with one another. But Mr. Burke's testimony went on to explain that Comcast's cable and programming groups operate as distinct businesses and that Comcast Cable makes program carriage decisions based on the merits of each network and its potential value to Comcast Cable and its subscribers, *regardless of affiliation.*

Importantly, as the FCC's Enforcement Bureau has recognized, nothing in the program carriage rules require that "the relationship between a vertically integrated MVPD and its programming affiliate must necessarily be 'at arms length.'" Nonetheless, for sound business reasons, Comcast does not discriminate against unaffiliated networks when making carriage decisions. Those decisions are guided entirely by legitimate business considerations, and Comcast has every business incentive to carry unaffiliated services that are valued by its subscribers and to ensure that carriage decisions regarding affiliated programmers are good for Comcast Cable. That's why Comcast already provides broad distribution to NBCU's channels, even though they are currently unaffiliated with Comcast.

Comcast does not give preferential treatment to its affiliated channels. Allegations to the contrary were rejected by the FCC's Enforcement Bureau in two cases. In the one case that progressed to the point of a decision by the FCC's Chief Administrative Law Judge, the judge ruled that Comcast's accuser had "failed completely" to prove its charges of discrimination. Comcast carries vast numbers of unaffiliated channels, and even post-transaction six out of seven channels that Comcast carries will be unaffiliated. Incidentally, affiliation is no guarantee of continued carriage; two national Comcast-affiliated networks have been shuttered

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in recent years because they did not offer what Comcast, other MVPDs, and their customers wanted.

4. **WORKERS' RIGHTS. While NBC has been a fairly union-friendly employer, Comcast has aggressively tried to keep unions out of the workplace. In St. Paul, Minnesota, for example, workers with AT&T Broadband organized a union under the Communication Workers of America. But when Comcast purchased AT&T Broadband in 2002, Comcast spent two years delaying contract negotiations. Eventually, the frustrated workers agreed to decertify the union.**

   I want to make sure that a merger wouldn't put the collective bargaining rights of both Comcast and NBC workers in danger. What will Comcast pledge to do to protect the rights of its workers, as well as those currently employed by NBC?

   Comcast is a pro-employee company and has been for over 45 years. We respect the right of employees to choose whether to be represented by a union. Comcast does not delay bargaining to encourage decertification of unions. When our employees choose to be represented by a union, we negotiate in good faith.

   It is true that the overwhelming majority of our employees have generally chosen to work in a union-free environment, as is their right. But in our locations that are represented by a union, Comcast bargains in good faith to reach a fair labor contract and enjoys solid relationships. While union represented employees represent a small percentage of the workforce in Comcast's cable operations, union representation is higher within our programming units (13.1%) – almost double the U.S. average percentage of private sector union workers (7.2%).

   All of Comcast's employees enjoy the protection of U.S. labor laws. Employees have freely voted whether to be organized as a union, using secret ballots, and some employees chose not to unionize. Comcast honors their decision, as it respects the decisions made by other employees in other locations, whether they have chosen organized representation through a union or not.

   With respect to the employees of NBCU, Comcast has committed to honor all of NBCU's collective bargaining agreements, and Comcast does not anticipate that any fundamental changes will be made to the manner in which NBCU conducts labor relations. In fact, senior representatives of the companies have begun to correspond and meet with representatives of guilds and unions in the businesses that would be directly affected by the transaction.

   Comcast understands from decades of experience that healthy communications, information, and entertainment businesses rely on trained, talented, and motivated employees. Our cable, Internet, and digital voice businesses employ and depend on tens of thousands of workers who install advanced services in customers' homes, answer trouble calls, split fiber nodes, improve Internet safety, and on and on. Comcast also understands that successful broadcast and cable programming and successful movies are built from the labors of reporters, actors, writers, camera operators, stagehands and workers of many other skills and guilds. We value our present, and our future, employees.

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No one can deny that Americans enjoy a greater abundance and diversity of quality programming than ever before. In many ways, news and entertainment have never been better. Yet newspapers are closing by the hundreds, and many other businesses have lost revenues and jobs as online developments outrun sustainable business models. Comcast embraces – and empowers – the new online world, and as discussed above intends by this transaction to further accelerate the anytime, anywhere future. But Comcast is also working hard to sustain and improve the models that provide gainful employment for the workers who bring us the news, information, and entertainment we love.

5. **TERRESTRIAL LOOPHOLE. In January, the FCC tightened the "terrestrial loophole," which allowed cable companies to withhold certain programming, especially regional sports programming, from its competitors. Comcast has opposed closing this loophole.**

   a) **Will you promise not to appeal the FCC's order through litigation in court?**

   Yes. We have decided not to appeal that order. We reserve the right to defend ourselves if any complaints should be filed.

   It is important to put this is context. First, the terrestrial exemption in the program access rules reflects a conscious decision by Congress in 1992 to apply the program access rules only to satellite-delivered programming. Congress believed, and it turns out to have been correct, that not applying program access rules to terrestrially delivered programming would promote the development of local and regional programming. Second, across Comcast's 39-state footprint, there is only a single Comcast-affiliated network, Comcast SportsNet Philadelphia ("CSN-Philadelphia") in a single market, that Comcast chooses not to license to all competing MVPDs. (Even CSN-Philadelphia is licensed to Verizon and other competitors to which we are not required to license it, and I have testified publicly that we would license this *regional* network to the two others if DirecTV were to relinquish its *exclusive* access to the *national* NFL Sunday Ticket.) Both the FCC and the D.C. Circuit have examined this situation and definitively ruled that Comcast's decisions as to this network were not unfair and were entirely lawful.

   b) **Will you promise not to appeal the FCC's order within the FCC?**

   Yes.

   c) **Will you urge any trade group to which you belong not to appeal the order, either through litigation in court or within the FCC?**

   We will not advocate that any such trade group appeal the order, but we will not seek to prevent a trade group or other members thereof from doing so.

6. **PROGRAM ACCESS RULES. In the Senate Judiciary Committee's subcommittee hearing on the Comcast/NBC Universal merger on February 4, 2010, you suggested that, given this potential merger, you would be comfortable with an extension of the program access rules, and noted that you "do not find those rules a burden because our behavior has never been inconsistent with that."**

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Given those statements, do you agree to withdraw Comcast from the litigation in Cablevision Systems v. FCC, a case currently in front of the D.C. Circuit Court of Appeals in which Comcast and Cablevision are appealing the extension of program access rules?

The court has now ruled in this case, we lost, and we will not appeal that decision. Consequently, we believe that this issue has been put to rest..

We continue to believe that the FCC's decision in 2007 to perpetuate a rule that Congress had scheduled to sunset in 2002 was arbitrary and capricious, and unsupported by the record. We continue to believe that it is unfair to prohibit cable companies from entering into exclusive contracts that better enable them to compete with satellite companies who have exclusive content like NFL Sunday Ticket. Nonetheless, as we have repeatedly said, whatever the court decided on these rules, we remain prepared to discuss with the FCC having them continue to apply to Comcast as part of the NBCU transaction if appropriate.

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U.S. Senate Committee on the Judiciary,
Subcommittee on Antitrust, Competition Policy, and Consumer Rights
Hearing on "The Comcast/NBC Universal Merger: What Does the Future Hold for Competition and Consumers?"

March 15, 2010

Responses to questions for the record submitted by Senator Orrin Hatch:

1. **Much of the debate surrounding this merger is likely going to center on whether the current FCC regulations – particularly those relating to program access and carriage – are sufficient to protect competition in a post-merger environment. Under the FCC's program access regulations, a vertically integrated video content distributor – like Comcast – is prohibited from demanding discriminatory rates and terms from its competitors when it licenses its own content.**

   Some have argued that, once it owns NBC Universal's content, Comcast could simply raise the price it charges itself for the same content, thereby raising the cost for its competitors without running afoul of the FCC regulations. Under such a scenario, Comcast would be paying nominally higher prices, but any related losses would be internalized. Its competitors, on the other hand, would see their costs increase significantly and, as a result, we'd likely see more costs passed on to customers. What's to stop Comcast from taking this approach? And, as a follow-up, is Comcast willing to accept conditions on the merger to address program access concerns – including possible arbitration requirements and agreements not to pull programming in the middle of a dispute?

Competition is – and will remain – intense among cable programming networks and multichannel video programming networks ("MVPDs"). Competition does – and will continue to – act as a restraint against unfair practices in the distribution and programming business segments. The new NBCU will continue to have strong incentives to reach as broad an audience as possible. To do that, NBCU will need to secure the best possible distribution not only from Comcast, but also from other MVPDs, which together serve over 75 percent of MVPD households. If NBCU charges excessive prices for its programming, it will risk losing distribution and that, in turn, will translate quickly into revenue losses as affiliate fees and advertising revenue both decline. So the realities of a competitive marketplace provide strong protection against the concerns that you identify; the costs of a foreclosure strategy would outweigh any conceivable benefit. As Professor Richard Epstein of the University of Chicago has written, speaking specifically about the Comcast-NBCU joint venture, "why would either company wish to make its network weaker than it need be, by entering into actions of exclusion that hurt itself as much as any outsider?"

Nonetheless, the FCC's program access regulations remain available as a backstop. The program access rules that currently apply to the Comcast cable networks will now apply to NBCU's cable networks as well, providing a regulatory backstop to prevent unfair practices and discrimination by distributors who are affiliated with programmers. Comcast always has abided by these program access rules and never has been found to have violated them.

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Given the protections provided first and foremost by the imperatives of the competitive marketplace, and additionally those that are already supplied by existing rules, we see no need for yet another layer of protection. We did make a voluntarily commitment to accept the application of program access rules to the high-definition feeds of any network whose standard definition feed is subject to the rules; we stand by that, and we have expressed a willingness to discuss with the FCC making the program access rules binding upon us even if they are overturned in court. Beyond this, it would premature to speculate about potential further conditions.

2. **One of the more prominent concerns critics have expressed about this merger is that it has the potential to stifle the burgeoning market for video content distributed on the Internet. Sure enough, NBC Universal is one of the biggest players on this market, distributing its content on more and more Internet outlets. There is of course Hulu, which is a property at stake in this merger. NBC also posts much of its content on its own website. In addition, consumers can access NBC Universal content via subscription or download services like Netflix or iTunes.**

   In each of these outlets, while consumers cannot always access NBC Universal's content for free, they can access it regardless of whether they subscribe to an MVPD service. This seems, in some respects, to conflict with Comcast's business model, which appears to tie Internet access to content to cable subscriptions, as we see in the TV Everywhere proposals. Are these two approaches in conflict? By that I mean, currently NBC Universal is pursuing a route that seeks to put its content in front of the broadest possible audience, regardless of the distribution outlet or platform. It would seem, at least on the surface, that Comcast, as a distributor, would have an incentive, at least some of the time, to limit the number of outlets where its content is available. How can these approaches be reconciled when the companies are under common ownership, particularly with regard to Internet distribution?

The proposed joint venture will not in any way limit competition in the fragmented and dynamic marketplace for online video content. We have always been a driving force to bring more, not less, content to consumers across platforms, and that is one of our primary goals in pursuing this joint venture.

The premises of this question are not entirely correct. NBCU is not one of the biggest players in online video. Comcast and NBCU do not have conflicting approaches to online availability of content; both favor widespread availability of content online, but believe that should be done through sustainable business models that ensure continued production of high-quality content. Content carried on NBCU's national cable networks is *not* generally available to consumers who do not subscribe to MVPD service.

First, Comcast and NBCU are relatively small players both as providers and distributors of online video content. Online video distribution sites owned by Comcast (e.g., Fancast) account for less than one-half of one percent of online video views, and sites owned by NBCU account for less than one percent of online video views. Hulu, in which NBCU owns a minority interest,

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only has four percent of online video views. Even if NBCU's partial interest in Hulu were entirely in the control of the combined company (which it clearly will not be), the combined company's share of online video views would only account for approximately five percent. The combined company will therefore have no market power, either as a provider or distributor of online video content, and no ability to limit competition in this dynamic marketplace. The competitive dynamics of this nascent business will be determined by the interplay of many, many actors on the Internet, including Google (which accounts for 55 percent of all online video views), Apple, Netflix, Blockbuster, Amazon, Yahoo, Wal-Mart, and many others.

Second, Comcast's and NBCU's approaches to distributing content over the Internet are not in conflict. Both Comcast and NBCU have strong interests in making content available over the Internet in ways that allow programmers to recoup the significant costs of creating that content. Both companies – and others in this arena – are actively experimenting with a wide variety of business models to deliver video to consumers over the Internet. Comcast's Fancast Xfinity TV alone currently combines several different models: (1) advertising-supported: long-form and short-form videos available to Comcast subscribers and non-subscribers alike for free; (2) authentication: long-form and short-form videos available to Comcast Cable subscribers at no additional charge, with the content available to a particular subscriber being based on the content available to that subscriber as a result of his video subscription; (3) transactional: DVDs and VOD available for purchase at the Fancast store.

Concerns over whether online advertising revenues can support the creative infrastructure needed to produce premium video content have made producers of premium video content (NBCU included) reluctant to make available online the content for which MVPDs currently pay cable networks tens of billions of dollars per year. As a result, most professional video content now available at online advertising-supported sites is either broadcast programming content (which is already available at no additional charge to consumers with an over-the-air antenna) or library content. While NBCU makes some of its content – particularly shows from the NBC broadcast network – available online through advertising-supported sites, and certain episodes of certain shows can be purchased individually via iTunes, the vast majority of NBCU's (and other programmers') cable network and film content still is distributed only to consumers who have MVPD subscriptions and is distributed online to those customers only to a limited degree (primarily through the vehicle of TV Everywhere initiatives like Comcast's Fancast Xfinity TV).

Comcast has long made certain video content available over the Internet on an advertising-supported basis to subscribers and non-subscribers alike, through Fancast's free online service since its launch in 2008. Fancast has partnered with Hulu since Hulu launched. Forty percent of Fancast's views are Hulu views, and Fancast contributes three percent of Hulu's video views. Fancast's online video business is (and Hulu's will be) largely incremental and complementary to Comcast's cable business. Many consumers who view television programs online do so to catch-up on missed episodes or to discover and to sample new fare. According to a December 2009 Nielsen report, television viewing remained at a seasonal all-time high (with an average television viewer watching more than 140 hours of television per month), even as online video viewing grew (with the average online video viewer now watching three-and-a-half hours of online video per month.)

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We also do not view Hulu as "a property at stake in this merger." This transaction will not change NBCU's participation in Hulu in any way. Although NBCU was a founding partner in Hulu, Hulu is a joint venture in which NBCU currently holds approximately a 32 percent, non-controlling, non-management interest. NBCU's governance rights are limited, and this will not change as a result of the proposed transaction. Comcast has no intention of changing NBCU's relationship with Hulu or NBCU's decision to provide certain content to Hulu. This does not mean that Hulu itself will not change during the period that this transaction is under government review. Other owners of Hulu have publicly expressed concern that Hulu's current business model is not working and should be changed. Just last week, we saw Viacom and Hulu part ways, with Viacom taking down popular Comedy Central content like *The Daily Show with Jon Stewart* and *The Colbert Report* from Hulu because the parties could not reach a mutually satisfactory agreement. While Comcast cannot and will not seek to influence those Hulu discussions, we understand the difficulties that Hulu faces and the challenges of devising new ways to increase consumers' access to content while maintaining the economics that allow the content to be produced in the first place. Comcast and NBCU both have incentives to experiment and develop pro-consumer models that do this, and we believe the joint venture will enable us to do so with greater success and speed.

3. **We've heard testimony from competitors and advocates who believe that this merger will give Comcast greater incentive to protect its own programming from competition from independent programmers. As part of this agreement, your company has pledged to add two new "independent" networks to its distribution every year for three years. My question is, first, how do you define "independent?" Would, for example, a Time Warner network be considered independent now that they no longer own any distribution outlets? In addition, how does [this commitment] differ from Comcast's current practices?**

We have defined "independent" in our public interest statement to mean networks that are both (a) not currently carried by Comcast, and (b) unaffiliated with Comcast, NBCU, or any of the top 15 owners of networks (as measured by revenues). To use your example, any networks owned by Time Warner Inc., along with Viacom, Disney, News Corp., Hearst, Discovery, Liberty, and CBS, among others, will not be considered independent for purposes of fulfilling this commitment.

Our commitment to add two independent programmers every year for three years is unprecedented. We proposed this commitment because we see a window of opportunity for new channel launches as we complete our company-wide digital migration of our expanded basic tier of service to digital, allowing us to reclaim analog bandwidth for even more HD channels, more and better VOD, and faster Internet speeds. While Comcast currently carries hundreds of unaffiliated channels – six out of every seven channels carried by Comcast will remain unaffiliated with Comcast after the transaction – we think this concrete commitment to add even more independent networks as our analog bandwidth is reclaimed and capacity expands ought to provide an additional measure of comfort for those concerned about the continued growth of programming diversity.

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Even in the absence of a commitment, we have in the past launched independent channels and will continue to do so. We have been pleased to see the supportive letters sent to the Senate Commerce Committee by several independent programmers: Outdoor Channel, Ovation TV, and Reelzchannel. Stanley Hubbard, CEO of Reelzchannel, for instance, said that they "could not be more appreciative of the support we have received from Comcast for the launch and development of our independent cable network," that they "believe that this relationship will remain strong in the future" and that they "do not believe that the NBCU/Comcast merger will in any way affect that relationship or commitment to success of our independent network." The CEO of Ovation, Charles Segars, said that "Comcast has a strong record of launching viable, independent channels" and that "Comcast has been responsive to those channels with . . . a compelling value proposition that includes fair and competitive rates." A copy of each letter is attached.

Our interest in working with independent programmers extends beyond linear channels. Comcast On Demand has worked successfully with independent programmers to obtain content for its On Demand platform. For example, Comcast's On Demand lineup gives consumers access to content from IFC, Tribeca Enterprises, Concert TV, Havoc, Here Networks, RHI Entertainment, and Shalom TV, among others.

4. **Over the last several years, at least at a national level, we've seen an increase in competition in the video distribution market. There's been an expansion in the services offered by satellite companies and, more recently, telecommunications icons like AT&T and Verizon have entered the video market with no small measure of success. In fact, in your statements both here and to the FCC, you've noted that Comcast has actually lost subscribers due to what at least ostensibly appears to be robust competition. In addition, we've seen numerous technological innovations with regard to video distribution.**

   From the antitrust perspective, there is an assumption that competition is good for consumers. Yet, despite claims and appearances that the video distribution market is competitive, prices for cable services have continually gone up, sometimes dramatically. If what you claim is true – that this market is continually becoming more competitive – why haven't we seen a steady decline in prices? And, with these concerns in mind, shouldn't we be at least somewhat skeptical of claims that this merger will benefit consumers in the long run?

Competition is good for consumers, and the video distribution marketplace is very competitive. Comcast competes against DirecTV and Dish nationally in every market in which we provide service. In many of those markets, we also face competition from telephone companies like AT&T and Verizon, as well as overbuilders. And these competitors are fierce. In about 15 years, DirecTV and Dish have become the second and third largest MVPDs, respectively. And Verizon and AT&T are now both top ten MVPDs and continue to grow every quarter.

Along the way, Comcast – like its rivals – has continued to increase the value proposition for customers. Prices may have increased, but quality and choice have increased far more.

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Abundance and diversity of programming have never been greater, and cable is a better value proposition than ever.

There is little doubt that consumers are getting more for their money than they did in the past. Indeed, at a little over $2 a day, cable is about the price of a morning cup of coffee. On a monthly basis, standard cable is less expensive than taking a family of four to the movies once and a fraction of the price of taking the family to a single sporting event. The average cable household viewing time is 310.5 hours per month; compare that to one three-hour ballgame or a few hours at the movies. When adjusted for inflation, the "price per viewing hour" of cable service has decreased 26 percent over the last 10 years. Plus, the quality of the programs we deliver has increased, as has the versatility of the service (e.g., video-on-demand, which offers thousands of choices at no additional charge).

In addition, many of our customers take advantage of promotional or multi-product discounts. We offer High-Speed Internet and digital voice services in addition to video, and consumers who buy two- or three-product packages enjoy significant savings as compared to the prices for the services when purchased separately. Other customers receive promotional price discounts, e.g., when they first sign up for service or when they agree to a service-level upgrade. The growing use of such discounts is often omitted from cable price surveys, which skews the results.

Times are tough for many Americans, and we are highly focused on controlling costs for the benefit of our customers. Like all of our competitors, however, we must adjust prices to account for our increased costs of doing business. It's a fact of life – separate and apart from the proposed transaction – that programming costs have risen and will likely continue to rise. Notably, many of our competitors, including AT&T, Verizon, and DirecTV, have increased their prices by as much or more than Comcast, reflecting the continuing costs pressures of the business.

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43445 Business Park Drive, Ste. 103 • Temecula, CA 92590 800-770-5750 • 951-699-6991 • Fax 951-699-6313

March 10, 2010

Jay D. Rockefeller, IV
Chairman
Committee on Commerce, Science, and Transportation
United States Senate
Dirksen Senate Office Building 508
Washington, DC 20510

Kay Bailey Hutchison
Ranking Member
Committee on Commerce, Science, and Transportation
United States Senate
Dirksen Senate Office Building 508
Washington, DC 20510

Dear Chairman Rockefeller and Ranking Member Hutchison:

I am writing as the President and Chief Executive Officer of Outdoor Channel, an independent cable network focused on hunting, fishing, and outdoor adventure. We appreciate the opportunity to share our perspective on the pending merger between Comcast and NBC Universal – and to tell you why we believe that Comcast has been a good partner – and why the dynamics of the video business, in our opinion, will encourage Comcast to continue to be a good partner following its merger.

First, to give you some perspective on what it means to be an independent content provider in today's cable landscape, and some perspective on the audience we uniquely serve, let me provide you with some background on Outdoor Channel. Our network is the quintessential independent programmer. We were originally founded in 1994 by a family of outdoor enthusiasts as a programming service for other enthusiasts. In the last 16 years, we have grown into a profitable, financially stable publicly traded company (NASDAQ: OUTD) with annual revenue in excess of $75 million.

Outdoor Channel features quality programming designed to educate and entertain outdoor enthusiasts of all skill levels. We promote the traditional outdoor activities that are a vital part of our national heritage including fishing, hunting, shooting sports and other outdoor adventures. Our programs are designed to appeal to enthusiasts of all ages with a focus on activities that the entire family can enjoy in the great outdoors. Outdoor Channel promotes the spirit of conservation in all of our programs, emphasizing responsible hunting, fishing and habitat maintenance. We also broadcast programs that highlight conservation and preservation initiatives, helping outdoor enthusiasts understand the importance of maintaining and improving our lands. According to Nielsen Media Research, we serve approximately 36 million cable, satellite and telco subscribers in both rural and urban communities around the country.

It is important to emphasize that the key to our success as an independent network is that we have continued to invest heavily in our business. Our ongoing investments in compelling programming that includes the best and brightest celebrity talent, innovative formats like High Definition (HD) and Video on Demand (VOD) and building a robust digital presence has made our growth possible and enabled us to maintain our leadership position. We have also heavily invested in branding, marketing and research to support our sales and marketing efforts.

Against that background, let me turn to Outdoor Channel's relationship with Comcast. Comcast has been an important partner for us, and our relationship has been mutually beneficial. Given my experience in the cable television industry, I can attest that with Comcast, our carriage negotiations, back office functions and day to day dealings have always been reasonable and forthright.

Outdoor Channel relies on cable distributors like Comcast to provide household delivery in two ways. First, we look for Comcast to carry our network in the greatest number of cable systems possible. Comcast evaluates the fit for each network on a market specific basis and is under no obligation to carry Outdoor Channel in every market it serves. With that carriage flexibility in mind, we are pleased to be carried in most of Comcast's markets around the country. In the markets where Outdoor Channel is available on Comcast's channel line-up, Outdoor Channel reaches approximately 30% of the total potential subscribers.

Second, Outdoor Channel provides Comcast the latitude to package Outdoor Channel in ways that best serve their markets and business objectives. Over the past two years, in recognition of Outdoor Channel's broad appeal and program quality improvements, Comcast has repackaged our network to more highly penetrated packages that reach substantially greater numbers of potential viewers.

Comcast, like other distributors, has seen the value of Outdoor Channel increase over time. They have recognized that our network is more than a concept – it's a proven, sustainable entity. As we've grown our business, we've proven that we are filling a critical content void in the market, and we have staying power. Considering Outdoor Channel's growing base of viewers, high-quality programming and innovative formats like HD, Comcast has continued to give us additional opportunities to bring our network to new markets.

We were particularly pleased to see the interest we were receiving for upgraded packaging at the local system level supported at Comcast's corporate office where these decisions are ultimately approved. We have invested in staffing a professional field sales force and we were gratified to see the benefit of this investment, coupled with our commitment to best in class programming, paying dividends in the form of increased subscriber growth. We are encouraged that continued investment in first-rate content, advanced technology such as HD, and innovative marketing partnerships will continue to be recognized with additional growth opportunities for our networks throughout Comcast's systems.

Additionally, Outdoor Channel looks toward distributors like Comcast to be strong marketing partners. Each year, we run two network consumer promotions: *Spring Fever* and *Gear Up & Go*. The purpose of these sweepstakes-based promotions is to enhance our brand's awareness and increase viewership and consumer engagement. During these promotions, we partner with cable affiliates, asking them to run promotional television spots on their systems to increase sweepstakes enrollment and programming tune-in. Historically, Comcast systems have participated heavily in these promotions. For the 2009 *Gear Up & Go* promotion, Comcast systems representing over 4 million subscriber households participated. These Comcast systems ran promotional television spots valued in excess of $1.5 million which in turn helps us to increase viewing which drives our advertising sales business.

In line with our belief in the compelling logic of thoughtful, sustainable independent programming, we have taken note of the "Commitments" Comcast and NBCU have made in their testimony to legislators as guarantees of their post merger intentions. We are especially encouraged by Commitment #13 – "Carriage for Independent Programmers." We applaud the concept behind that commitment of adding new independently owned and operated channels to Comcast's digital lineup. At the same time, as one of the few true independents operating today, we frankly would like to see that commitment modified to include granting broader distribution to proven independents whose programming capabilities and financial stability are already established.

In closing, I would like to draw the Chairman's attention to another aspect of our relationship with Comcast that we believe speaks to a larger sense of that company's progressive attitude toward programmers and to its role as a supporter of the social responsibility initiatives that are dear to us and our viewers. Outdoor Channel participates in dozens of community initiatives each year. Together with our local distribution partners in markets across the country, we organize events to highlight and benefit conservation-related causes and mobilize outdoor enthusiasts to make a positive impact on their communities.

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Comcast has become a major partner for us in local markets as we develop, organize and participate in community campaigns in their systems' territories. One recent example was in Chattanooga, Tennessee where Outdoor Channel, Comcast Chattanooga and the Chattanooga Chapter of Safari Club International (SCI), teamed up with the Chattanooga Community Kitchen for the area's first annual "Sportsmen Against Hunger" event. This event was held this past October when local outdoor enthusiasts joined together to serve meals to the hungry. Together, we fed more than 300 people with donated food from local area residents. We can cite dozens of other similar local community examples, including our sponsorship with Comcast for the Eastern Sports & Outdoor Show, which attracted more than 800,000 outdoor enthusiasts and provided a significant economic boost for the host city of Harrisburg, Pennsylvania as well as the thousands of retailers associated with the event.

With our long history working with Comcast, we have no doubts about its commitment to serving the public interest and working with independent programmers like Outdoor Channel. We've negotiated with Comcast for carriage in the past and expect that under this combined company, our carriage relationship will remain intact and unobstructed, and in no way impact any potential future negotiations. We expect the same as it relates to our community service initiatives and only hope that under a merged entity there will be additional new opportunities to develop and distribute Outdoor Channel content on Comcast Systems.

Sincerely,

Roger L. Werner
President & Chief Executive Officer
Outdoor Channel

cc: Senator John F. Kerry, Chairman, Subcommittee on Communications and Technology
Senator John Ensign, Ranking Member, Subcommittee on Communications and Technology

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ovation

March 9, 2010

The Honorable John D. Rockefeller IV
531 Hart Senate Office Building
Washington, DC 20510

The Honorable Kay Bailey Hutchison
284 Russell Senate Office Building
Washington, DC 20410

Dear Senators Rockefeller and Hutchison,

At the heart of American democracy is our commitment to free speech and expression. Therefore it is vital to our freedom that Americans enjoy unrestricted access to that same free speech and expression.

Since 1996, Ovation TV, a privately funded, independent cable television network, has dedicated itself to providing viewers the best in creative expression through arts and culture programming. Ovation is one of a kind. No other national network offers viewers this type of content day after day. And having provided over $5 million in cash and in-kind support over the past three years, Ovation is also a key partner of America's cultural institutions and arts education initiatives in cities and towns nationwide.

Since acquiring and re-launching Ovation in 2007, the network has grown from 5 million to 38 million homes. Much of this success is in part due to our outstanding business relationship with Comcast Cable. Comcast has become an outstanding distributor of our unique programming, adding over 3 million homes to our distribution base. Most importantly, they have become a key partner in numerous local arts education initiatives; including assistance in providing access to free museum visits and building awareness of cultural events.

While critics are fast to point out that these 3 million homes represent a small portion of the Comcast foot print, the relationship with the "new" Ovation is a young one. As we continue to deliver on our promise of providing a unique Arts service to their customers, we believe Comcast will continue to roll us out and make us available in all of their digital homes. We also believe that a NBCU/Comcast merger will not affect that rollout.

It is has been our experience that Comcast pays competitive rates to independent programmers. Those rates enable us and other programmers to invest in even greater programming for their viewers and more marketing to reach them, all the while creating lasting jobs in a variety of communities. We are hopeful that an NBCU/Comcast merger will not affect the rates that Comcast pays to us nor to any other independent programmers.

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OVATION

Comcast has a strong record of launching viable, independent channels. Viable is the key term here. Not everyone with an idea for a channel deserves carriage nor can Comcast be expected to accept every idea that comes through their door. As in the case of Ovation, Comcast has been responsive to those channels with solid plans to meet the interests of viewers not currently being served in the marketplace, the right team with proven expertise, solid financial backing and a compelling value proposition that includes fair and competitive rates.

Comcast has also stated they will continue to create more opportunities for viable, independent programmers. They have committed, upon completing their digital migration companywide in 2011, to add two new independently owned and operated channels to their line up each year for the next three years under customary terms and conditions.

Comcast has recognized Ovation's many attributes, including its service in the community, and has provided us with growing distribution on their platform at competitive rates. We enjoy a relationship that has required good faith negotiations and we are confident that relationship will continue to grow stronger after the merger.

The issues facing independent programmers like Ovation relative to large distributors can be summarized in two words, carriage and rates. In our experience, Comcast has been a fair partner in both of these areas. Thank you for your commitment to supporting independent programmers and ensuring that our voices be heard.

Sincerely,

Charles Segars
Chief Executive Officer
Ovation

CC: The Honorable John Kerry
The Honorable John Ensign

66290.031

March 10, 2010

5650 University Boulevard SE
Albuquerque, NM 87106
T 505-212-8800
F 505-212-8801
www.reelzchannel.com

Honorable Jay D. Rockefeller, IV
Chairman
Committee on Commerce,
Science & Transportation
United States Senate
Dirksen Senate Office Building 508
Washington, D. C. 20510

Honorable Kay Bailey Hutchison
Ranking Member
Committee on Commerce,
Science & Transportation
United States Senate
Dirksen Senate Office Building 508
Washington, D. C. 20510

Re: TESTIMONY OF STANLEY E. HUBBARD BEFORE THE COMMERCE COMMITTEE OF THE UNITED STATES SENATE

Dear Chairman Rockefeller and Ranking Member Hutchison:

I appreciate this opportunity to share my perspective on the impact Comcast has had on independent cable and satellite networks attempting to gain acceptance and distribution in an increasingly crowded and competitive environment. Quite simply, without Comcast's support, REELZCHANNEL would probably never have been launched and would certainly not be approaching its fourth anniversary and the critical 50 million subscriber mark.

REELZCHANNEL is an independent cable and satellite network that is all about movies, the way Food Network, for example, is all about food. In fact, our tagline is TV ABOUT MOVIES® Hubbard Broadcasting, REELZCHANNEL's parent company, developed the channel's concept starting in 2000, refining the underlying idea, business premise and focus for more than a year before introducing the channel concept to the distribution marketplace, which includes cable and satellite.

By way of background, Hubbard pioneered the Direct Broadcasting Satellite (DBS) industry in 1994, when it introduced the Digital Satellite System, in cooperation with DIRECTV, through its subsidiary U.S. Satellite Broadcasting (USSB). With USSB, we were a distributor of movie-driven services such as HBO and Showtime, and experienced first hand our subscribers' love affair with movies and the need for a service that would help viewers learn about and find more movies (in all windows of release) that would match their interests.

Our business strategy with REELZCHANNEL was simple: we knew it was a difficult environment for new channels – especially independent channels not associated with large programming companies that have the ability to leverage their existing channels and business relationships into new channel launches of their own. We felt that, unlike other independents that had launched and failed over the years, it was important to get as many distribution agreements completed

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as possible PRIOR to committing to the massive expenditures required to launch and operate a national television network.

To that end, in the summer of 2001, we first reached out to Comcast, then a recent and former competitor to our USSB, for an initial meeting with their top programming executives who welcomed us to their Philadelphia headquarters within weeks of our request. At that initial meeting, to a person, they were respectful of us as individuals and, in fact, enthusiastic about our ideas for REELZCHANNEL. They were also clear that since this was a first meeting it would take some time for us to prove our viability and to get to the point of entering into an actual distribution agreement, especially since we weren't launched yet and didn't yet have a target date for launch. But they did make specific suggestions on how to keep the process in forward motion: First, they encouraged us to present our ideas to some of their key people at systems and divisions in the field so that those folks could feed back their thoughts and ideas to the corporate programming department; and second, they asked us to keep them informed as we got closer to establishing an actual launch date, as well as our status in getting agreements done with other distributors around the country.

We followed their advice, kept them informed of our progress toward launch, and did our diligence in the field. Over a period of 24 months we visited all of their key systems and divisions, and without exception we were met with helpful, interested people who encouraged us to press for a distribution agreement at the corporate level. Further, the Comcast people in the field provided detailed feedback to their corporate programming department about REELZCHANNEL.

In 2004, Comcast programming executives orally agreed to enter into a distribution agreement with REELZCHANNEL and, over the following months, both sides negotiated in good faith, and executed a final agreement in September of 2005. Our agreement with Comcast was completed more than a year in advance of our actual launch, and proved to be a critical milestone for REELZCHANNEL because it demonstrated to the rest of the industry that Comcast was behind us and had vetted us as being viable. It is important to note that, as is the usual case, no specific commitments were made by Comcast in terms of distribution of our channel. Instead, we were granted what is known as a "hunting license," essentially a "right" for us to approach their systems one by one, and, if those systems were truly interested, they could go ahead and launch us pending the approval of the division and corporate office that oversaw them.

The Comcast agreement was also very important to the Hubbard Broadcasting board of directors in deciding whether to authorize the new business investment needed to launch REELZCHANNEL. Our financial model required distribution from both cable and satellite in order to be successful and an early distribution agreement with Comcast added significantly to our board's confidence in our ability to secure mass cable distribution as an important part of our business imperatives.

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Comcast has continued to play an important and straightforward role in REELZCHANNEL's development. The Comcast system in Minneapolis/Saint Paul became the first major metropolitan cable system to launch REELZCHANNEL coincidental with our launch in September, 2006. Today almost five million Comcast subscribers receive REELZCHANNEL as part of their subscription, including those located in large cities such as Chicago, Detroit, Boston, Atlanta, Houston and Miami, to name a few. We continue to work with Comcast's division and system management and are hopeful that in the next 12 to 24 months we will launch our service in systems in Seattle, Portland, Denver, Washington, D. C., and the San Francisco Bay area, among others. To date, in every instance of a local system wanting to launch REELZCHANNEL, Comcast corporate programming executives have approved the launch request.

Comcast continues to support the independent REELZCHANNEL by adding us to more and more of their systems, even though the demands on bandwidth for both cable and satellite have continued to increase substantially since our initial meeting in 2001. The increasing demands on bandwidth are due to the rapid evolution of HDTV, high speed internet services, telephony, expanded business services, the broadcast digital transition and more channels being introduced by large programming companies with the ability to leverage even the largest operators into launch commitments for their new channels. Comcast officials have always been clear on the realities of the changing environment and also clear on how we need to sharpen and shape our vision for our network so that REELZCHANNEL could become an even more compelling proposition. Accordingly, today, we are engaged in discussions with Comcast on a number of fronts. At their urging we have developed video-on-demand content for Comcast, and other distributors, that ties into and promotes our brand. They are also working with us on a 2010 roll-out of a high definition version of REELZCHANNEL and Comcast systems are enthusiastic participants in our big summer consumer promotion: The Guaranteed Movie Recommendation.

In summary, we could not be more appreciative of the advice and support we have received from Comcast for the launch and development of our independent cable network, REELZCHANNEL. We have found the people at Comcast to be universally supportive of REELZCHANNEL ever since our initial conversations almost 9 years ago. Comcast personnel at the corporate headquarters and in the field across the nation are consistently accessible, openly communicative to us and organized in a way that provides guidance, creative suggestions and committed follow-up to help our business grow with them. We truly feel there is a commitment to our growth and economic well-being that is built on a sense of overall fairness and continuing mutual respect.

The strength of our relationship is demonstrated by the steady stream of Comcast systems which continue to launch REELZCHANNEL. We believe that this relationship will remain strong in the future and we do not believe that the

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NBCU/Comcast merger will in any way affect that relationship or commitment to success of our independent network, REELZCHANNEL.

Thank you for the opportunity to provide these insights. If you have any other questions, please contact me directly.

Yours most respectfully,

Stanley E. Hubbard
President & CEO

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U.S. Senate Committee on the Judiciary,
Subcommittee on Antitrust, Competition Policy, and Consumer Rights
Hearing on "The Comcast/NBC Universal Merger: What Does the Future Hold for Competition and Consumers?"

March 15, 2010

Responses to questions for the record submitted by Senator Amy Klobuchar:

1. **The price of expanded basic cable service has gone up faster than the rate of inflation since 1995. Some industry observers have claimed that the pairing of the nation's largest cable company with one of the leading television broadcasters would raise prices even more for viewers.**

   (a) What assurances can you give that this merger will not result in higher fees for customers?

This transaction should not affect cable pricing to consumers. Competition is – and will remain – intense among programmers and multichannel video programming distributors ("MVPDs"). Comcast will have continuing incentives to offer the most compelling, innovative consumer experience possible, increase consumer choice, expand the amount, quality and diversity of programming available, and expand multiplatform options. Nothing about the transaction will increase Comcast's incentive or ability to increase prices to consumers. There is no increase in Comcast's size as a distributor and no increase in our ability to raise rates in the very competitive video distributor market. In just the past two years, cable companies have lost 1.6 million customers while our competitors have gained over 7.6 million new subscribers. Last quarter, Comcast alone lost 200,000 subscribers. We have every incentive to remain price competitive in video distribution.

There is little doubt that consumers are getting more for their money than they did in the past. Indeed, at a little over $2 a day, cable is about the price of a morning cup of coffee. On a monthly basis, standard cable is less expensive than taking a family of four to the movies once and a fraction of the price of taking the family to a single sporting event. The average cable household viewing time is 310.5 hours per month; compare that to one three-hour ballgame or a few hours at the movies. When adjusted for inflation, the "price per viewing hour" of cable service has decreased 26 percent over the last 10 years. Plus, the quality of the programs we deliver has increased, as has the versatility of the service (e.g., video-on-demand, which offers thousands of choices at no additional charge).

In addition, many of our customers take advantage of promotional or multi-product discounts. We offer High-Speed Internet and digital voice services in addition to video, and consumers who buy two- or three-product packages enjoy significant savings as compared to the prices for the services when purchased separately. Other customers receive promotional price discounts, e.g., when they first sign up for service or when they agree to a service-level upgrade. The growing use of such discounts is often omitted from cable price surveys, which skews the results.

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Times are tough, and we are highly focused on controlling costs and improving value for the benefit of our customers. Like all of our competitors, however, we must adjust prices to account for our increased costs of doing business. Separate and apart from the proposed transaction, it is unfortunate that programming costs have risen. It is important to note that other leading MVPD competitors have increased their prices by as much or more than Comcast, though this competition has worked to constrain the relative size of the price increases and to improve consumer value.

(b) What assurances can you give me that this merger will not limit viewers' access to content in the cable marketplace?

Our goal is to expand consumers' choices, not to limit them. As a combined company, we will have every incentive – both as a network owner and a distributor – to maximize access to content. As we said in our public interest statement, the proposed transaction, which links NBCU's content with Comcast's multiple distribution platforms, will give the combined entity greater incentive and ability to deliver more content choices to consumers sooner, and across more platforms, than either company could do alone.

The imperatives of the competitive marketplace provide strong assurances that viewers will continue to have access to all of the content they have come to expect. The new NBCU will continue to have strong incentives to reach as broad an audience as possible. To do that, NBCU will need to secure the widest possible distribution not only from Comcast, but also from other MVPDs, which together serve over 75 percent of MVPD households. If NBCU charges excessive prices for its programming, it will risk losing distribution and that, in turn, will translate quickly into revenue losses as affiliate fees and advertising revenue both decline. As a result, these marketplace imperatives will ensure that content is distributed as widely as possible; the costs of a foreclosure strategy would outweigh any conceivable benefit to limiting distribution. As Professor Richard Epstein of the University of Chicago has written, speaking specifically about the Comcast-NBCU joint venture, "why would either company wish to make its network weaker than it need be, by entering into actions of exclusion that hurt itself as much as any outsider?"

Nonetheless, the FCC's program access regulations remain available as a backstop. The program access rules that currently apply to Comcast's cable networks will now apply to NBCU's cable networks as well, providing a regulatory backstop to prevent unfair practices and discrimination by distributors who are affiliated with programmers. Comcast has always abided by these rules, and has never been found to have violated them.

2. What is the current state of the Internet video market? How will the proposed merger impact competition in this market?

The marketplace for online video is highly fragmented, highly dynamic, and intensely competitive. It is highly fragmented because there are many players in the marketplace. The dominant leader in online viewing (by far) is Google (through YouTube and other sites it has built or acquired), with nearly 55 percent of online video views. This puts Google well ahead of Microsoft, Viacom, and Hulu (all of which have low- or mid-single-digit percentages of online

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video views) and even farther ahead of Comcast's Fancast (currently well below one percent of online video views). There are countless other sites that provide robust competition and near-infinite consumer choice.

The marketplace is highly dynamic because both new and established players are constantly deploying new technologies and experimenting with new and innovative business models. The marketplace is intensely competitive because consumers have an almost unimaginable array of places to go on the Internet to access online video. Barriers to entry are low; new websites, business models, and technologies are introduced all the time. The combination of Comcast's and NBCU's Internet properties poses no threat to this abundant, aggressive, and growing competition.

We believe that the proposed transaction will give the new NBCU an opportunity to become a better competitor in the online video marketplace by combining compelling content with state-of-the-art distribution platforms. With respect to NBCU's movie and television production content and other NBCU content, Comcast and the new venture will be in a better position to expand the convenient availability of all genres of television and movie content across multiple platforms on an accelerated basis through a workable and replicable business model, to the benefit of consumers. Our ability and incentive to innovate and bring new and better services to consumers will make the online marketplace more competitive.

3. If approved by the Department of Justice and the Federal Communications Commission, how will this merger transform the market for Multi-Channel Video Programming Distributors (MVPD)?

We don't believe the proposed transaction will fundamentally transform the MVPD market, but we do believe it will foster further innovation in an already competitive and dynamic marketplace. Comcast currently competes against DirecTV and Dish in every market in which we provide service. In many of those markets, we also face competition from telephone companies like AT&T and Verizon, as well as overbuilders. And these competitors are fierce. In about 15 years, DirecTV and Dish have become the second and third largest MVPDs, respectively. And Verizon and AT&T are now both top-ten MVPDs and continue to grow every quarter. As the U.S. Court of Appeals for the D.C. Circuit recently found, no MVPD has "bottleneck" control over video programming. Along the way, cable has become a better value proposition than ever before, and Comcast has continued to increase this trend. Abundance and diversity of programming have never been greater.

By linking NBCU with Comcast, a company that is focused on and committed to investing in the media and communications industry, the joint venture will create new opportunities to better serve consumers. Through the joint venture, NBCU and Comcast will each be stronger, more effective players in both the video programming and video distribution marketplaces than they would be alone. By becoming better competitors, the new NBCU will spur other content producers and distributors to invest and innovate. This is good for competition, which is good for consumers.

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U.S. Senate Committee on the Judiciary,
Subcommittee on Antitrust, Competition Policy, and Consumer Rights
Hearing on "The Comcast/NBC Universal Merger: What Does the Future Hold for Competition and Consumers?"

March 15, 2010

Responses to questions for the record submitted by Senator Herb Kohl:

1. **Is there any way this merger will limit rate increases that consumers see in their cable TV bills, or even lead to rate decreases? If you believe this merger will hold down cable rates, please identify how with specificity. If you do not believe this merger will hold down cable rates, please explain why not.**

This transaction should not affect cable prices for consumers one way or the other, but it should enable us to continue to improve the value of the services we provide.

Competition is – and will remain – intense among both cable programming networks and multichannel video programming distributors ("MVPDs"). Comcast will have continuing incentives to offer the most compelling, innovative consumer experience possible, increase consumer choice, expand the amount, quality, and diversity of programming available, and expand multiplatform options, while competing head-to-head in all of our markets with two nationwide satellite MVPDs (DirecTV and Dish Network), and in a growing number of markets with phone companies offering MVPD services (AT&T, Verizon, and many others) and "overbuilders" (RCN, WOW, SureWest, and many others).

Along the way, Comcast – like its rivals – has continued to increase the value proposition for customers. Prices may have increased, but quality and choice have increased far more. Abundance and diversity of programming have never been greater, and cable is a better value proposition than ever.

There is little doubt that consumers are getting more for their money than they did in the past. Indeed, at a little over $2 a day, cable is about the price of a morning cup of coffee. On a monthly basis, standard cable is less expensive than taking a family of four to the movies once and a fraction of the price of taking the family to a single sporting event. The average cable household viewing time is 310.5 hours per month; compare that to one three-hour ballgame or a few hours at the movies. When adjusted for inflation, the "price per viewing hour" of cable service has decreased 26 percent over the last 10 years. Plus, the quality of the programs we deliver has increased, as has the versatility of the service (e.g., video-on-demand, which offers thousands of choices at no additional charge).

In addition, many of our customers take advantage of promotional or multi-product discounts. We offer High-Speed Internet and digital voice services in addition to video, and consumers who buy two- or three-product packages enjoy significant savings as compared to the prices for the services when purchased separately. Other customers receive promotional price discounts, e.g., when they first sign up for service or when they agree to a service-level upgrade. The growing use of such discounts is often omitted from cable price surveys, which skews the results.

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Nothing about the transaction will increase Comcast Cable's incentive or ability to increase prices to consumers. There is no increase in Comcast's size as a cable distributor and nothing that would influence how we price services to consumers in the very competitive video distribution marketplace. We have every incentive to remain price-competitive in video distribution. In just the past two years, cable companies have lost 1.6 million customers while our competitors have gained over 7.6 million new subscribers.

Times are tough, and we are highly focused on controlling costs and improving value for the benefit of our customers. Like all of our competitors, however, we must adjust prices to account for our increased costs of doing business. Separate and apart from the proposed transaction, it is unfortunate that programming costs have risen. It is important to note that other leading MVPD competitors have increased their prices by as much or more than Comcast, though this competition has worked to constrain the relative size of the price increases and to improve consumer value.

2. **We've often heard the argument that programming cost increases are mainly responsible for cable rate increases, and that consumers pay less today on a per-channel basis. If this is true, why not offer consumers the option of choosing fewer channels at a lower price, rather than making them buy large packages at higher prices which include channels they don't watch? I understand that the cable industry objects to "a la carte" pricing, but what's wrong with [offering] consumers more choices in programming?**

We offer a wide variety of choices to our customers so that they can choose the right amount of programming at the right price for them. We offer an economical Basic Cable service, a low-price Family Tier, an array of digital programming packages including Digital Economy, Digital Starter, Digital Preferred, and Digital Premier, and an array of specialty tiers as well as premium channels offered individually. In Washington, D.C., for example, Comcast offers 14 different packages, starting at $15 per month. Further savings are available via promotions and two- and three-product bundles. At any given time, about half of our customers are purchasing a package of services from us or are on a promotion. They are not paying the "rate card" price. Claims about cable price increases generally are based on what a consumer *might* pay for cable on a stand-alone basis at the "rate card" price without factoring in the discounts utilized by many consumers. The claims thus overstate cable prices.

A multitude of factors go into our decisions regarding the packaging and pricing of the services we offer, including the competition we face, and we feel that our offerings strike the appropriate balance by offering both high-value and high-quality service.

Like virtually every other supplier of programming, large or small, Comcast believes that retail a la carte would hurt networks and consumers. The programming packages that we and our competitors assemble for our customers have played an enormous role in enabling the number and variety of programming services to grow and providing the abundance, diversity, quality, and value that consumers enjoy today. If operators were required to offer channels on an a la carte basis, distribution of those networks would decrease, forcing programmers to increase rates

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to offset the smaller number of subscribers taking the channels. Consumers would end up worse off.

One of the most popular writers on economics is James Surowiecki at *The New Yorker*. He looked at the a la carte issue recently, and concluded: "An à-la-carte system would inject huge uncertainty into the cable business,... and many niche and diverse cable networks wouldn't get enough subscribers to survive."

3. **NBC currently owns 32% of the Internet web site Hulu, in partnership with NewsCorporation and Disney. Hulu is a growing site that delivers a great variety of TV content over the Internet for free, including broadcast TV content of NBC, ABC and Fox, and also the content of cable networks. In this sense, Hulu competes with traditional cable systems with respect to this content – consumers need not to subscribe to cable in order to receive this content. Hulu also directly compete[s] with Comcast's "Fancast" website.**

   What will Comcast's acquisition of NBC mean for Hulu? Will Comcast direct NBC to exclude its broadcast or cable network programming from Hulu? Will Comcast seek to have Hulu charge for its content?

This transaction does not change NBCU's participation in Hulu in any way. We have no intention of changing NBCU's relationship with Hulu or NBCU's decision to provide certain content to Hulu.

Although NBCU was a founding partner in Hulu, Hulu is a joint venture in which NBCU currently holds approximately a 32 percent, non-controlling, non-management interest. News Corporation, Disney, and Providence Equity also own interests in Hulu, which has an independent management team. NBCU's governance rights are limited, and this will not change as a result of the proposed transaction. Hulu's future will be determined by all of its partners, not just NBCU.

We think Hulu is great. We've been a partner with Hulu through Fancast's free online service since Hulu launched. Forty percent of the views on Fancast are of Hulu content, and we contribute three percent of Hulu's video viewers through Fancast. Comcast is a supportive partner to Hulu, and we intend to be a driving force to bring *more*, not less, content to the Web and across platforms.

Comcast will remain a company heavily invested in the distribution side of the business, and we have invested billions in bringing the fastest Internet speeds to our customers. We have every incentive to ensure that our high-speed Internet customers have the best online experience, which includes having access to the best content.

That does not guarantee, however, that all NBCU shows (or anyone else's, for that matter) will be available on the Internet, or that the "new NBCU" programming that appears on the Internet will be available solely on an advertising-supported basis. Economic models for online video are still in an early stage of evolution. All content producers and aggregators are still experimenting

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to determine the best ways to support the enormous costs of creating high-quality video programming. Viacom's recent decision to no longer distribute *The Daily Show with Jon Stewart*, *The Colbert Report*, and other Comedy Central television shows through Hulu is evidence that programmers are indeed experimenting with different online distribution models and the online video market is rapidly evolving.

Internet video is in its infancy. Everyone is searching for a business model that works. Hulu's ad-supported model represents an initial effort, but reports indicate that the business has not been profitable and the partners are already considering changes. The experience of the newspaper industry strongly suggests that relying on advertising alone as a way to fund the online availability of expensive content may not always prove to be a sustainable business model.

4. **Last year, Comcast and Time Warner Inc. announced their "TV Everywhere" initiative. Under TV Everywhere, cable subscribers will be able to access video content for free wherever they have access to the Internet – on their computers, on their smart phones, while travelling, or anywhere else. While this obviously has the prospects for considerable benefits to consumers, it also raises serious concerns.**

   (a) **One concern is whether this will become the <u>exclusive</u> way programmers will be required to distribute their content over the Internet. This could stifle the Internet as an independent competitor to cable, and require consumers have a cable subscription in order to access TV programming on the Internet. Some have raised concerns that Comcast wields tremendous leverage over programmers who rely significantly on subscriber fees. Using this leverage, they argue, Comcast could obtain exclusivity. Will Comcast insist on such exclusivity from programmers?**

Content owners are experimenting with a wide variety of online video distribution models, including ad-supported, authentication, pay-per-view, and subscription. This experimentation and innovation are key. Comcast, as an online video distributor, does not require programmers to distribute their content over the Internet in an "exclusive" way. Content owners choose for themselves the various ways that they want to distribute their content online. Comcast's Fancast Xfinity TV alone currently combines several different models: (1) advertising-supported: long-form and short-form videos available to Comcast subscribers and non-subscribers alike for free; (2) authentication: long-form and short-form videos available to Comcast Cable subscribers at no additional charge, with the content available to a particular subscriber being based on the content available to that subscriber as a result of his video subscription; (3) transactional: DVDs and VOD available for purchase at the Fancast store.

Our idea when we signed on to the TV Everywhere principles developed by Jeff Bewkes at Time Warner, Inc. was to create innovative services that expand choice, giving customers online access to movies and TV shows that have never been available online before. It is important to note that one of the core principles of TV Everywhere is that it is not limited to any one MVPD or programmer – cable, satellite, or telco video distributors are free to enter into similar agreements with any programmers. We do not think that the TV Everywhere authentication model will be the only way to distribute cable programming online. And we believe that the experimentation will certainly continue.

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(b) In Comcast's FCC filing for this merger you state a programming vendor will be free "to license its content to the online platforms of other MVPDs." But you say nothing about programming vendors being free to license their content to Internet distributors. Was this omission intentional? Will you commit to expanding this to mean programming vendors are free to license their content to Internet companies, whether or not they are also MVPDs?

In negotiating agreements with programming vendors, Comcast does not seek to prevent them from licensing their content to Internet companies that are not MVPDs. Consistent with timing "windows" commonly used by the industry, Comcast does seek terms limiting the extent to which certain full episodes of cable shows are distributed on the Internet *free of charge* at the same time, or shortly after, the shows are telecast on the cable networks for which we and our customers pay substantial license fees. These terms are premised on Comcast's belief that it is neither fair nor reasonable to expect a cable customer to pay to watch a network's shows via cable, when the network also makes those shows available to everyone without such a charge at the same time online. This approach helps to maintain the economics that enable the production of high-quality programming – and provide gainful employment for thousands of actors, writers, stage-hands, set and costume designers, etc.

(c) Another concern with TV Everywhere is that Comcast will require a Comcast Internet subscription, as well as a cable TV subscription, in order for a consumer to access TV Everywhere. Will Comcast allow its video customers who do not buy internet service from Comcast to access TV Everywhere?

Yes. One of the TV Everywhere principles that Comcast and Time Warner Inc. announced last June is that "[v]ideo subscribers can access this content using any broadband connection." Following the national beta launch of Fancast Xfinity TV in December 2009, Comcast is working this year to provide its cable customers with the ability to access Fancast Xfinity TV content using the network of any Internet service provider. We are also working to facilitate authenticated access to a particular content owner's content from that owner's website (such as HBO's online service: HBOgo.com).

(d) Would you support expanding the program access rules to ensure fair and non-discriminatory rates to MVPD providers who wish to put Comcast or NBC content on their Internet platforms?

We do not think it is necessary – or advisable – to apply program access rules to the content available on the Internet. Competition in the online video marketplace is fierce as content providers fight for online viewers. Content owners have a strong incentive to distribute their content as widely as possible. Competition requires that content owners and distributors alike act in a pro-competitive manner to provide the best services possible to consumers. We do not believe that a regulatory backstop is needed in this instance.

The history and circumstances of the program access rules indicate that extending them as the question suggests would not be appropriate. The program access rules were written for a

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different time and for different circumstances. These rules were enacted in 1992, when cable faced very little competition, DBS had not yet launched, telephone companies were statutorily prohibited from providing cable services, and a significant majority of national cable programming networks were owned in whole or in part by cable operators. DBS has now achieved enormous marketplace success, and telephone companies are strong competitors in the video marketplace. And the percentage of national cable networks that are vertically integrated with cable operators has plummeted from 57 percent at the time Congress enacted the rules to below 15 percent today. As you may be aware, Congress even scheduled the exclusivity prohibition in the program access rules to sunset in 2002, envisioning – correctly – that competition would obviate the need for these rules.

There is no reason to expand the scope of rules created in an era where cable companies held a monopoly with highly vertically-integrated content into today's marketplace. This is the most competitive, fragmented, and dynamic video marketplace ever, and its success is due in significant part to the wise decision by Congress and President Clinton to establish a national policy "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2).

(e) Will Comcast offer an internet-only subscription to TV Everywhere so that consumers do not have to subscribe to cable service in order to gain access to this programming? If not, why not?

Comcast has no present intention to offer an Internet-only subscription to Fancast Xfinity TV. Our business objective is to provide our cable subscribers with greater value by obtaining for them the rights to watch programming from their favorite cable networks online for no additional charge. One reason we are excited about Fancast Xfinity TV is that we think it strikes the right balance between giving consumers what they want – anytime, anywhere access to compelling video content – and supporting the economic viability of high-quality programming, which relies heavily on the tens of billions of dollars that cable networks currently receive from cable and satellite distributors. Content owners are justifiably interested in ensuring that whatever business model they adopt for online distribution of video assures them that there will be a sufficient revenue stream to continue producing the content that consumers what to see. The marketplace is evolving rapidly, of course, and it is unclear at this time which business models will be successful, so it is impossible to say what kinds of services will be available in the future.

5. The FCC's program access rules contain what is known as the "terrestrial loophole." This means that programming a cable company owns that is delivered via wires on the ground does <u>not</u> have to be made available to its competitors. Comcast has made use of this loophole to deny its regional sports network in Philadelphia to its satellite TV competitors.

In addition to your commitment to voluntarily accept the application of the program access rules to the high-definition feeds of any network whose standard definition feed is subject to the program access rules, would you commit to a condition to approval of

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this merger that Comcast will not use the terrestrial loophole in the future to deny programming it owns to competitors? If not, why not?

We do not think that additional regulations or conditions concerning terrestrial delivery are needed. As an initial matter, all of NBCU's cable programming is satellite-delivered and, therefore, will become subject to the program access rules upon acquisition by Comcast. Independent of those rules, of course, there are powerful business incentives to license NBCU's content broadly. Comcast serves fewer than 25 percent of MVPD households, and NBCU's networks would be hurt much more than would competing MVPDs by withholding this content from the MVPDs who serve more than 75 percent of MVPD households. Disney/ABC, Time Warner, Viacom, and many other network owners license their programming broadly, with no government compulsion to do so, and NBCU will continue to do the same.

When Congress decided that it needed to regulate program access, it consciously applied the rules only to certain *satellite-delivered* programming. Terrestrially-delivered programming was not covered because Congress wanted to retain incentives for the development of new local and regional programming, which is precisely what has occurred.

There have been predictions for many years that cable-affiliated networks would migrate to terrestrial delivery to avoid being subject to program access rules, but this never occurred, and the vast majority of cable-affiliated networks are available to all MVPDs. Across Comcast's 39-state footprint, there is only one Comcast-affiliated network, in a single market, that Comcast chooses not to license to all competing MVPDs, and that is our RSN in our hometown of Philadelphia. We chose long ago not to license it to two distributors, and the FCC and the D.C. Circuit both previously have ruled that our decision to do so was entirely lawful – and specifically that it was not an "unfair practice." It is also notable that competing MVPDs have exclusive programming agreements that prevent us from distributing content that that we would otherwise like to distribute; DirecTV's exclusive contract for the *national* NFL Sunday Ticket is a prime example.

The FCC recently adopted an order that purports to allow program access complaints to be brought against terrestrially-delivered networks. We do not plan to appeal that order but reserve the right to defend ourselves fully if any complaints are filed against us.

The most important thing to remember about our decision to not license CSN-Philadelphia to the DBS providers is that we made that decision over a decade ago, and it had absolutely nothing to do with the current proposed transaction.

6. Will this merger make it more difficult for independent programmers [to] get carried on Comcast because now Comcast will acquire 30 new cable channels from NBC?

This merger will not affect the ability of independent programmers to gain carriage on Comcast's cable systems. Comcast faces the competitive imperative to provide its customers with attractive and desirable programming, and Comcast does so irrespective of affiliation. We have been pleased to see the supportive letters sent to the Senate Commerce Committee by several independent programmers: Outdoor Channel, Ovation TV, and Reelzchannel. As Roger

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Werner, CEO of Outdoor Channel, wrote, "With our long history working with Comcast, we have no doubts about its commitment to serving the public interest and working with independent programmers." A copy of each letter is attached.

Comcast is not acquiring control of 30 new cable channels from NBC. NBCU owns 11 cable networks: Bravo, Chiller, CNBC, CNBC World, MSNBC, mun2, Oxygen Media, Sleuth, Syfy, Universal HD, and USA Network. NBCU also owns minority, non-controlling interests in another dozen or so channels that are deemed "attributable" under the FCC's aggressive attribution rules (under which even a five percent interest is generally deemed attributable). Comcast already accords most of these networks broad distribution, and whether these networks are deemed "attributable" under the FCC's attribution rules will not affect opportunities for other networks to occupy slots on Comcast's channel line-ups. Importantly, even after the NBCU acquisition, and even when one treats all "attributable" networks as affiliated, six out of seven channels carried by Comcast will still be unaffiliated. This includes an enormous array of channels, some of which are owned by large (but unaffiliated) content companies and some of which are relatively new channels owned by entities with no other programming interests.

Comcast has voluntarily committed that it will add at least two independent channels to its systems every year for three years in an effort to reaffirm its commitment to giving attractive independently-owned and -operated cable channels an opportunity to thrive. This is an unprecedented commitment that will further promote diversity and competition.

7. Comcast has committed to add two independent programmers a year for three years. With respect to this commitment –

(a) Does a programmer from a large media company not affiliated with a cable company (for example, Viacom or Disney) qualify as "independent"?

No. For purposes of our commitment, we have defined "independent" to mean networks that are both (a) not currently carried by Comcast, and (b) unaffiliated with Comcast, NBCU, or any of the top 15 owners of networks (as measured by revenues). To use your examples, any networks owned by Viacom and Disney, along with News Corp., Time Warner Inc., Hearst, Discovery, Liberty, and CBS, among others, will not be considered independent for purposes of fulfilling this commitment. Our goal is to provide assurances of opportunities to truly independent network providers with good programming and business models.

(b) Where on your channel lineup will the independent channel be shown – on the widely viewed expanded basic tier, or on a digital tier which the consumer must pay extra money to receive?

No decision yet has been made about where in the channel lineup the not-yet-chosen networks will be carried. We have said that they will be carried on customary terms and conditions, and new networks are not usually launched on the most highly-penetrated tiers. It should be noted that even the expanded basic tier will soon be digital-only; indeed, it is our migration of channels from analog to digital-only delivery that is enabling us to expand the number of HD channels we carry, to increase VOD choices, to increase Internet speeds, and to launch new channels. We

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also need to be mindful of the effect of adding new channels to the most widely penetrated tiers on the cost of those tiers to consumers.

(c) Why is this commitment limited to three years? Do you expect the problem of independent programmers gaining carriage on cable systems to be resolved after 3 years?

Independent programmers currently are widely carried. At last count, out of 565 national programming networks, 481 are unaffiliated with any cable operator. We think independent programmers have been very successful at gaining carriage, and we see neither a present nor future problem there. As we said earlier, six out of every seven channels carried by Comcast post transaction will be unaffiliated with Comcast. Our commitment to add two independent programmers every year for three years is unprecedented. We proposed a condition of that duration because we see a window of opportunity for new channel launches as we complete our company-wide digital migration, and because we do not wish to unnecessarily limit our ability in the future to use of cable bandwidth to satisfy our customers' demands. In the rapidly changing video marketplace, three years is a long time; we think it is an appropriate length of time for this commitment.

8. In Comcast's FCC filing, you say that Comcast has "no ability or incentive to deny carriage to independent programmers." Yet, recently, you have been in several carriage disputes with independent programmers from the NFL to the Tennis Channel. Aren't these evidence that Comcast does have the incentive and ability to deny carriage?

Comcast has a strong record of launching independent channels, including, in recent years, VeneMovies, The Africa Channel, WAPA America, HDNet, Gospel Music Channel, TeleFormula, qubo, ION Life, Ovation, RFD-TV, WFN, Reelzchannel, The Outdoor Channel, SiTV, Bloomberg, Sportsman, Hallmark, Hallmark Movie Channel, Altitude, YES, NESN, and Jewelry TV, among others.

The existence of a dispute does not provide a reasonable basis for making any assumptions about which party was in the right. We carry hundreds of networks. Only four networks have ever brought program carriage complaints against us in nearly 20 years, and none of those complaints has been determined to have been meritorious. No court or agency has ever found that Comcast engaged in unlawful or anticompetitive discrimination against independent programmers. If these cases are indicative of anything, it is of the dangers of creating a climate that is hospitable to regulatory gamesmanship.

In the case brought by WealthTV, an administrative law judge found that the complainant had "failed completely" to prove its allegations, that its evidence was "unreliable," and that its witnesses were "not credible." He also specifically found that Comcast's decision not to carry the network was based on "nondiscriminatory business reasons." In the MASN case, the parties settled their dispute privately after the FCC's Enforcement Bureau recommended that the complaint against Comcast be denied. In the NFL case, the parties settled their dispute before the Enforcement Bureau opined or the administrative law judge ruled. In the Tennis Channel

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case, Comcast has only recently filed its Answer, pointing out (among other things) that it carries the Tennis Channel in accordance with a contract that the Tennis Channel voluntarily entered into and proudly promoted; that Comcast carries the Tennis Channel in the same manner that multiple other MVPDs do; that the Tennis Channel itself has recognized that placing its network on a sports tier is a "cost/business" decision, not a function of affiliation; and that carrying the Tennis Channel on a more broadly penetrated tier would have caused a sharp increase in Comcast's costs of carrying the network.

9. In its filing with the FCC, Comcast argues that there is "an existing, comprehensive regulatory scheme to deter and constrain unreasonable, affiliation-based discrimination" against independent programmers. This is a reference to the FCC's program carriage rules. Given the history of problems with enforcement of the program carriage rules, how much can we really rely on these rules to protect independent programmers?

We are unaware of any basis for the suggestion that there have been problems with the enforcement of the program carriage rules, and, if there are problems with the rules, that should only be addressed in an industry-wide proceeding. That a small handful of independent programmers have filed complaints and been unable to prove their cases is evidence not of enforcement problems but of cases that lacked substantive merit. The fact that Comcast has launched so many independent channels over the years (see our response to Question 8 for a sampling) demonstrates why there have been so few complaints.

It has been Comcast's experience that competition in the video marketplace requires us to supply the attractive, compelling programming that our customers demand. Competition, not the FCC's rules, is the principal driver of our carriage decisions; we need to provide the programming our customers want, or we will risk losing customers to competing MVPDs that do so. As we have said many times, after the transaction, six out of every seven channels will remain independent of and unaffiliated with Comcast. With or without the program carriage rules, Comcast does not and will not discriminate on the basis of affiliation.

10. Last April Comcast Cable's President, Steve Burke, testified before the FCC that Comcast treats its own programming services like "siblings." Your critics claim this testimony implies that Comcast provides preferential treatment to your own programming services in deciding whether to carry them on Comcast. After the costly acquisition of NBC with its wealth of programming, shouldn't we expect that Comcast will afford these new programming "siblings" preferential treatment in deciding whether to carry them?

The testimony by Comcast's COO Steve Burke in a program carriage dispute with NFL Network has been taken out of context and mischaracterized. As Mr. Burke recently explained under oath, the quoted comment was simply an observation that Comcast's cable group and Comcast's programming group currently share physical proximity: they work in the same office building, they share common company facilities, they know each other, and they can readily arrange to meet with one another. But Mr. Burke's testimony went on to explain that Comcast's cable and programming groups operate as distinct businesses and that Comcast Cable makes program

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carriage decisions based on the merits of each network and its potential value to Comcast Cable and its subscribers, *regardless of affiliation.*

Importantly, as the FCC's Enforcement Bureau has recognized, nothing in the program carriage rules require that "the relationship between a vertically integrated MVPD and its programming affiliate must necessarily be 'at arms length.'" Nonetheless, for sound business reasons, Comcast does not discriminate against unaffiliated networks when making carriage decisions. Those decisions are guided entirely by legitimate business considerations, and Comcast has every business incentive to carry unaffiliated services that are valued by its subscribers and to ensure that carriage decisions regarding affiliated programmers are good for Comcast Cable.

Comcast does not give preferential treatment to its affiliated channels. Allegations to the contrary were rejected by the FCC's Enforcement Bureau in two cases. In the one case that progressed to the point of a decision by the FCC's Chief Administrative Law Judge, the judge ruled that Comcast's accuser had "failed completely" to prove its charges of discrimination. Comcast carries vast numbers of unaffiliated channels, and even post-transaction six out of seven channels that Comcast carries will be unaffiliated. Incidentally, affiliation is no guarantee of continued carriage; two Comcast-affiliated networks have been shuttered in recent years because they did not offer what Comcast, other MVPDs, and their customers wanted.

11. Since you believe this deal makes so much sense for you at Comcast and for NBC, should we expect other cable and satellite companies to seek content partners like NBC, and shouldn't we expect therefore that this deal will set off a wave of media mergers?

That seems unlikely. It should be noted that this transaction runs in the opposite direction of industry trends, with the recent separations of Time Warner, Inc. and Time Warner Cable and News Corp and DirecTV. Comcast and NBCU are trying to put together a successful vertical partnership of compelling content and state-of-the-art distribution platforms. We are excited about the potential for the new NBCU to create and deliver more content to consumers in a greater variety of ways, and we are working very hard to make this potential a reality. Our transaction should be reviewed on its own merits. We simply are not in a position to anticipate what other companies will do. And the key question presented here is does *this* transaction, on its own merit, warrant government approval? Any future transaction by other parties should also be evaluated on its own merit, based on the state of the market at the time. It is worth noting, though, that this transaction is *not* the sort of horizontal combination that has been at the core of concerns about localism and diversity. Moreover, the parties have made specific commitments to create more local and diverse content, in keeping with the FCC's primary policy goals.

12. We have recently heard concerns from cable operators about retransmission consent negotiations for local broadcast stations. Now that Comcast will own a broadcast station, we again have the problem of Comcast paying itself and having the ability to effectively deny other MVPDs retransmission consent of its owned and operated affiliates. Would Comcast be willing to commit at a minimum to a condition included in the NewsCorp DirecTV Order which required an arbitration process, including an obligation to continue airing the station while negotiations are taking place?

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Congress already has enacted legislation to require that broadcasters and MVPDs negotiate in good faith over retransmission consent, and the FCC has amplified that requirement in longstanding rules. Nonetheless, in connection with the transaction, Comcast has committed to "voluntarily extend the key components of the FCC's program access rules to negotiations with MVPDs for retransmission rights to the signals of NBC and Telemundo O&O stations." Under this commitment, Comcast will be prohibited in retransmission consent negotiations from unduly or improperly influencing the NBC and Telemundo O&O stations' decisions about the price or other terms and conditions on which the stations make their programming available to unaffiliated MVPDs. In addition, the "burden shifting" approach to proof of discriminatory pricing in the program access rules will be applied to complaints regarding retransmission consent negotiations involving the NBC and Telemundo O&O stations. And the "shot clock" applied to program access adjudications would apply to retransmission consent disputes involving the NBC and Telemundo O&O stations. We think this voluntary and unprecedented commitment is more than sufficient to address any transaction-specific concerns.

The retransmission consent process can be contentious at times, but neither Comcast nor NBCU has had any retransmission consent negotiation escalate to the point where MVPD customers were deprived of the primary signal of any local broadcast station for any period of time. There will continue to be pressure to change the way retransmission consent works, especially as the model is changing, but we think that is an industry-wide issue and should be addressed, if at all, in industry-wide proceedings.

13. In your FCC filing, you made a commitment to provide NBC video-on-demand (VOD) to customers at "no additional charge." It also says that "NBC now provides the shows to Comcast for no additional charge, and Comcast now provides them to its customers at no additional charge." As the owner of NBC content, will you offer these same NBC VOD rights for free to competing MVPDs after the merger? If not, would this give Comcast an undue competitive advantage?

Comcast received VOD rights for certain NBC shows as part of a larger transaction for NBCU content that predates this transaction. We understand that NBCU has also granted similar VOD rights to other MVPDs like Cox and Charter. NBCU will remain free to enter into similar deals with other MVPDs. While we cannot say specifically how these rights will be licensed in the future, in a competitive and rapidly changing marketplace, the new NBCU will have strong competitive incentives to make its content widely available to MVPDs and their customers, including on VOD platforms.

14. We've heard concerns from small cable companies that large programmers that also own broadcast TV stations use the retransmission consent process to insist that small cable companies take large bundles of cable channels in order to obtain needed broadcast stations. They complain that this practice takes away bandwidth that small cable companies could otherwise use for broadband services and denies consumers' programming choices.

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What is your response? Will this merger make this problem even worse, as now NBC owned stations can insist on bundles of NBC cable networks and also Comcast owned cable networks?

My understanding is that NBCU currently is willing to license its networks individually but also, consistent with common practices in this industry and many others, offers discounts to distributors who agree to carry multiple networks (or to expand distribution of the networks they carry). Rather than causing any consumer harms, this practice makes programming more affordable and helps programmers launch and distribute new programming services, including niche services.

I do not foresee that the proposed transaction will cause any change in NBCU's current practices. The transaction will not increase NBCU's incentive or ability to force MVPDs to carry networks they do not want.

The concerns to which you allude are ones that certain cable operators have expressed for many years with regard to many program network owners, not just NBCU or Comcast. These concerns clearly are not transaction-specific. The FCC is currently considering them in a pending industry-wide rulemaking proceeding, and we believe that is the appropriate place to address them in order to ensure fairness and consistency in policy.

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43445 Business Park Drive, Ste. 103 • Temecula, CA 92590 800-770-5750 • 951-699-6991 • Fax 951-699-6313

March 10, 2010

Jay D. Rockefeller, IV
Chairman
Committee on Commerce, Science, and Transportation
United States Senate
Dirksen Senate Office Building 508
Washington, DC 20510

Kay Bailey Hutchison
Ranking Member
Committee on Commerce, Science, and Transportation
United States Senate
Dirksen Senate Office Building 508
Washington, DC 20510

Dear Chairman Rockefeller and Ranking Member Hutchison:

I am writing as the President and Chief Executive Officer of Outdoor Channel, an independent cable network focused on hunting, fishing, and outdoor adventure. We appreciate the opportunity to share our perspective on the pending merger between Comcast and NBC Universal – and to tell you why we believe that Comcast has been a good partner – and why the dynamics of the video business, in our opinion, will encourage Comcast to continue to be a good partner following its merger.

First, to give you some perspective on what it means to be an independent content provider in today's cable landscape, and some perspective on the audience we uniquely serve, let me provide you with some background on Outdoor Channel. Our network is the quintessential independent programmer. We were originally founded in 1994 by a family of outdoor enthusiasts as a programming service for other enthusiasts. In the last 16 years, we have grown into a profitable, financially stable publicly traded company (NASDAQ: OUTD) with annual revenue in excess of $75 million.

Outdoor Channel features quality programming designed to educate and entertain outdoor enthusiasts of all skill levels. We promote the traditional outdoor activities that are a vital part of our national heritage including fishing, hunting, shooting sports and other outdoor adventures. Our programs are designed to appeal to enthusiasts of all ages with a focus on activities that the entire family can enjoy in the great outdoors. Outdoor Channel promotes the spirit of conservation in all of our programs, emphasizing responsible hunting, fishing and habitat maintenance. We also broadcast programs that highlight conservation and preservation initiatives, helping outdoor enthusiasts understand the importance of maintaining and improving our lands. According to Nielsen Media Research, we serve approximately 36 million cable, satellite and telco subscribers in both rural and urban communities around the country.

It is important to emphasize that the key to our success as an independent network is that we have continued to invest heavily in our business. Our ongoing investments in compelling programming that includes the best and brightest celebrity talent, innovative formats like High Definition (HD) and Video on Demand (VOD) and building a robust digital presence has made our growth possible and enabled us to maintain our leadership position. We have also heavily invested in branding, marketing and research to support our sales and marketing efforts.

Against that background, let me turn to Outdoor Channel's relationship with Comcast. Comcast has been an important partner for us, and our relationship has been mutually beneficial. Given my experience in the cable television industry, I can attest that with Comcast, our carriage negotiations, back office functions and day to day dealings have always been reasonable and forthright.

Outdoor Channel relies on cable distributors like Comcast to provide household delivery in two ways. First, we look for Comcast to carry our network in the greatest number of cable systems possible. Comcast evaluates the fit for each network on a market specific basis and is under no obligation to carry Outdoor Channel in every market it serves. With that carriage flexibility in mind, we are pleased to be carried in most of Comcast's markets around the country. In the markets where Outdoor Channel is available on Comcast's channel line-up, Outdoor Channel reaches approximately 30% of the total potential subscribers.

Second, Outdoor Channel provides Comcast the latitude to package Outdoor Channel in ways that best serve their markets and business objectives. Over the past two years, in recognition of Outdoor Channel's broad appeal and program quality improvements, Comcast has repackaged our network to more highly penetrated packages that reach substantially greater numbers of potential viewers.

Comcast, like other distributors, has seen the value of Outdoor Channel increase over time. They have recognized that our network is more than a concept – it's a proven, sustainable entity. As we've grown our business, we've proven that we are filling a critical content void in the market, and we have staying power. Considering Outdoor Channel's growing base of viewers, high-quality programming and innovative formats like HD, Comcast has continued to give us additional opportunities to bring our network to new markets.

We were particularly pleased to see the interest we were receiving for upgraded packaging at the local system level supported at Comcast's corporate office where these decisions are ultimately approved. We have invested in staffing a professional field sales force and we were gratified to see the benefit of this investment, coupled with our commitment to best in class programming, paying dividends in the form of increased subscriber growth. We are encouraged that continued investment in first-rate content, advanced technology such as HD, and innovative marketing partnerships will continue to be recognized with additional growth opportunities for our networks throughout Comcast's systems.

Additionally, Outdoor Channel looks toward distributors like Comcast to be strong marketing partners. Each year, we run two network consumer promotions: *Spring Fever* and *Gear Up & Go*. The purpose of these sweepstakes-based promotions is to enhance our brand's awareness and increase viewership and consumer engagement. During these promotions, we partner with cable affiliates, asking them to run promotional television spots on their systems to increase sweepstakes enrollment and programming tune-in. Historically, Comcast systems have participated heavily in these promotions. For the 2009 *Gear Up & Go* promotion, Comcast systems representing over 4 million subscriber households participated. These Comcast systems ran promotional television spots valued in excess of $1.5 million which in turn helps us to increase viewing which drives our advertising sales business.

In line with our belief in the compelling logic of thoughtful, sustainable independent programming, we have taken note of the "Commitments" Comcast and NBCU have made in their testimony to legislators as guarantees of their post merger intentions. We are especially encouraged by Commitment #13 – "Carriage for Independent Programmers." We applaud the concept behind that commitment of adding new independently owned and operated channels to Comcast's digital lineup. At the same time, as one of the few true independents operating today, we frankly would like to see that commitment modified to include granting broader distribution to proven independents whose programming capabilities and financial stability are already established.

In closing, I would like to draw the Chairman's attention to another aspect of our relationship with Comcast that we believe speaks to a larger sense of that company's progressive attitude toward programmers and to its role as a supporter of the social responsibility initiatives that are dear to us and our viewers. Outdoor Channel participates in dozens of community initiatives each year. Together with our local distribution partners in markets across the country, we organize events to highlight and benefit conservation-related causes and mobilize outdoor enthusiasts to make a positive impact on their communities.

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Comcast has become a major partner for us in local markets as we develop, organize and participate in community campaigns in their systems' territories. One recent example was in Chattanooga, Tennessee where Outdoor Channel, Comcast Chattanooga and the Chattanooga Chapter of Safari Club International (SCI), teamed up with the Chattanooga Community Kitchen for the area's first annual "Sportsmen Against Hunger" event. This event was held this past October when local outdoor enthusiasts joined together to serve meals to the hungry. Together, we fed more than 300 people with donated food from local area residents. We can cite dozens of other similar local community examples, including our sponsorship with Comcast for the Eastern Sports & Outdoor Show, which attracted more than 800,000 outdoor enthusiasts and provided a significant economic boost for the host city of Harrisburg, Pennsylvania as well as the thousands of retailers associated with the event.

With our long history working with Comcast, we have no doubts about its commitment to serving the public interest and working with independent programmers like Outdoor Channel. We've negotiated with Comcast for carriage in the past and expect that under this combined company, our carriage relationship will remain intact and unobstructed, and in no way impact any potential future negotiations. We expect the same as it relates to our community service initiatives and only hope that under a merged entity there will be additional new opportunities to develop and distribute Outdoor Channel content on Comcast Systems.

Sincerely,

Roger L. Werner
President & Chief Executive Officer
Outdoor Channel

cc: Senator John F. Kerry, Chairman, Subcommittee on Communications and Technology
Senator John Ensign, Ranking Member, Subcommittee on Communications and Technology

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ovation

March 9, 2010

The Honorable John D. Rockefeller IV
531 Hart Senate Office Building
Washington, DC 20510

The Honorable Kay Bailey Hutchison
284 Russell Senate Office Building
Washington, DC 20410

Dear Senators Rockefeller and Hutchison,

At the heart of American democracy is our commitment to free speech and expression. Therefore it is vital to our freedom that Americans enjoy unrestricted access to that same free speech and expression.

Since 1996, Ovation TV, a privately funded, independent cable television network, has dedicated itself to providing viewers the best in creative expression through arts and culture programming. Ovation is one of a kind. No other national network offers viewers this type of content day after day. And having provided over $5 million in cash and in-kind support over the past three years, Ovation is also a key partner of America's cultural institutions and arts education initiatives in cities and towns nationwide.

Since acquiring and re-launching Ovation in 2007, the network has grown from 5 million to 38 million homes. Much of this success is in part due to our outstanding business relationship with Comcast Cable. Comcast has become an outstanding distributor of our unique programming, adding over 3 million homes to our distribution base. Most importantly, they have become a key partner in numerous local arts education initiatives; including assistance in providing access to free museum visits and building awareness of cultural events.

While critics are fast to point out that these 3 million homes represent a small portion of the Comcast foot print, the relationship with the "new" Ovation is a young one. As we continue to deliver on our promise of providing a unique Arts service to their customers, we believe Comcast will continue to roll us out and make us available in all of their digital homes. We also believe that a NBCU/Comcast merger will not affect that rollout.

It is has been our experience that Comcast pays competitive rates to independent programmers. Those rates enable us and other programmers to invest in even greater programming for their viewers and more marketing to reach them, all the while creating lasting jobs in a variety of communities. We are hopeful that an NBCU/Comcast merger will not affect the rates that Comcast pays to us nor to any other independent programmers.

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OVATION

Comcast has a strong record of launching viable, independent channels. Viable is the key term here. Not everyone with an idea for a channel deserves carriage nor can Comcast be expected to accept every idea that comes through their door. As in the case of Ovation, Comcast has been responsive to those channels with solid plans to meet the interests of viewers not currently being served in the marketplace, the right team with proven expertise, solid financial backing and a compelling value proposition that includes fair and competitive rates.

Comcast has also stated they will continue to create more opportunities for viable, independent programmers. They have committed, upon completing their digital migration companywide in 2011, to add two new independently owned and operated channels to their line up each year for the next three years under customary terms and conditions.

Comcast has recognized Ovation's many attributes, including its service in the community, and has provided us with growing distribution on their platform at competitive rates. We enjoy a relationship that has required good faith negotiations and we are confident that relationship will continue to grow stronger after the merger.

The issues facing independent programmers like Ovation relative to large distributors can be summarized in two words, carriage and rates. In our experience, Comcast has been a fair partner in both of these areas. Thank you for your commitment to supporting independent programmers and ensuring that our voices be heard.

Sincerely,

Charles Segars
Chief Executive Officer
Ovation

CC: The Honorable John Kerry
The Honorable John Ensign

66290.056

March 10, 2010

5650 University Boulevard SE
Albuquerque, NM 87106
T 505-212-8800
F 505-212-8801
www.reelzchannel.com

Honorable Jay D. Rockefeller, IV
Chairman
Committee on Commerce,
Science & Transportation
United States Senate
Dirksen Senate Office Building 508
Washington, D. C. 20510

Honorable Kay Bailey Hutchison
Ranking Member
Committee on Commerce,
Science & Transportation
United States Senate
Dirksen Senate Office Building 508
Washington, D. C. 20510

Re: TESTIMONY OF STANLEY E. HUBBARD BEFORE THE COMMERCE COMMITTEE OF THE UNITED STATES SENATE

Dear Chairman Rockefeller and Ranking Member Hutchison:

I appreciate this opportunity to share my perspective on the impact Comcast has had on independent cable and satellite networks attempting to gain acceptance and distribution in an increasingly crowded and competitive environment. Quite simply, without Comcast's support, REELZCHANNEL would probably never have been launched and would certainly not be approaching its fourth anniversary and the critical 50 million subscriber mark.

REELZCHANNEL is an independent cable and satellite network that is all about movies, the way Food Network, for example, is all about food. In fact, our tagline is TV ABOUT MOVIES® Hubbard Broadcasting, REELZCHANNEL's parent company, developed the channel's concept starting in 2000, refining the underlying idea, business premise and focus for more than a year before introducing the channel concept to the distribution marketplace, which includes cable and satellite.

By way of background, Hubbard pioneered the Direct Broadcasting Satellite (DBS) industry in 1994, when it introduced the Digital Satellite System, in cooperation with DIRECTV, through its subsidiary U.S. Satellite Broadcasting (USSB). With USSB, we were a distributor of movie-driven services such as HBO and Showtime, and experienced first hand our subscribers' love affair with movies and the need for a service that would help viewers learn about and find more movies (in all windows of release) that would match their interests.

Our business strategy with REELZCHANNEL was simple: we knew it was a difficult environment for new channels – especially independent channels not associated with large programming companies that have the ability to leverage their existing channels and business relationships into new channel launches of their own. We felt that, unlike other independents that had launched and failed over the years, it was important to get as many distribution agreements completed

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as possible PRIOR to committing to the massive expenditures required to launch and operate a national television network.

To that end, in the summer of 2001, we first reached out to Comcast, then a recent and former competitor to our USSB, for an initial meeting with their top programming executives who welcomed us to their Philadelphia headquarters within weeks of our request. At that initial meeting, to a person, they were respectful of us as individuals and, in fact, enthusiastic about our ideas for REELZCHANNEL. They were also clear that since this was a first meeting it would take some time for us to prove our viability and to get to the point of entering into an actual distribution agreement, especially since we weren't launched yet and didn't yet have a target date for launch. But they did make specific suggestions on how to keep the process in forward motion: First, they encouraged us to present our ideas to some of their key people at systems and divisions in the field so that those folks could feed back their thoughts and ideas to the corporate programming department; and second, they asked us to keep them informed as we got closer to establishing an actual launch date, as well as our status in getting agreements done with other distributors around the country.

We followed their advice, kept them informed of our progress toward launch, and did our diligence in the field. Over a period of 24 months we visited all of their key systems and divisions, and without exception we were met with helpful, interested people who encouraged us to press for a distribution agreement at the corporate level. Further, the Comcast people in the field provided detailed feedback to their corporate programming department about REELZCHANNEL.

In 2004, Comcast programming executives orally agreed to enter into a distribution agreement with REELZCHANNEL and, over the following months, both sides negotiated in good faith, and executed a final agreement in September of 2005. Our agreement with Comcast was completed more than a year in advance of our actual launch, and proved to be a critical milestone for REELZCHANNEL because it demonstrated to the rest of the industry that Comcast was behind us and had vetted us as being viable. It is important to note that, as is the usual case, no specific commitments were made by Comcast in terms of distribution of our channel. Instead, we were granted what is known as a "hunting license," essentially a "right" for us to approach their systems one by one, and, if those systems were truly interested, they could go ahead and launch us pending the approval of the division and corporate office that oversaw them.

The Comcast agreement was also very important to the Hubbard Broadcasting board of directors in deciding whether to authorize the new business investment needed to launch REELZCHANNEL. Our financial model required distribution from both cable and satellite in order to be successful and an early distribution agreement with Comcast added significantly to our board's confidence in our ability to secure mass cable distribution as an important part of our business imperatives.

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Comcast has continued to play an important and straightforward role in REELZCHANNEL's development. The Comcast system in Minneapolis/Saint Paul became the first major metropolitan cable system to launch REELZCHANNEL coincidental with our launch in September, 2006. Today almost five million Comcast subscribers receive REELZCHANNEL as part of their subscription, including those located in large cities such as Chicago, Detroit, Boston, Atlanta, Houston and Miami, to name a few. We continue to work with Comcast's division and system management and are hopeful that in the next 12 to 24 months we will launch our service in systems in Seattle, Portland, Denver, Washington, D. C., and the San Francisco Bay area, among others. To date, in every instance of a local system wanting to launch REELZCHANNEL, Comcast corporate programming executives have approved the launch request.

Comcast continues to support the independent REELZCHANNEL by adding us to more and more of their systems, even though the demands on bandwidth for both cable and satellite have continued to increase substantially since our initial meeting in 2001. The increasing demands on bandwidth are due to the rapid evolution of HDTV, high speed internet services, telephony, expanded business services, the broadcast digital transition and more channels being introduced by large programming companies with the ability to leverage even the largest operators into launch commitments for their new channels. Comcast officials have always been clear on the realities of the changing environment and also clear on how we need to sharpen and shape our vision for our network so that REELZCHANNEL could become an even more compelling proposition. Accordingly, today, we are engaged in discussions with Comcast on a number of fronts. At their urging we have developed video-on-demand content for Comcast, and other distributors, that ties into and promotes our brand. They are also working with us on a 2010 roll-out of a high definition version of REELZCHANNEL and Comcast systems are enthusiastic participants in our big summer consumer promotion: The Guaranteed Movie Recommendation.

In summary, we could not be more appreciative of the advice and support we have received from Comcast for the launch and development of our independent cable network, REELZCHANNEL. We have found the people at Comcast to be universally supportive of REELZCHANNEL ever since our initial conversations almost 9 years ago. Comcast personnel at the corporate headquarters and in the field across the nation are consistently accessible, openly communicative to us and organized in a way that provides guidance, creative suggestions and committed follow-up to help our business grow with them. We truly feel there is a commitment to our growth and economic well-being that is built on a sense of overall fairness and continuing mutual respect.

The strength of our relationship is demonstrated by the steady stream of Comcast systems which continue to launch REELZCHANNEL. We believe that this relationship will remain strong in the future and we do not believe that the

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NBCU/Comcast merger will in any way affect that relationship or commitment to success of our independent network, REELZCHANNEL.

Thank you for the opportunity to provide these insights. If you have any other questions, please contact me directly.

Yours most respectfully,

Stanley E. Hubbard
President & CEO

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U.S. Senate Committee on the Judiciary,
Subcommittee on Antitrust, Competition Policy, and Consumer Rights
Hearing on "The Comcast/NBC Universal Merger: What Does the Future Hold for Competition and Consumers?"

March 15, 2010

Responses to questions for the record submitted by Senator Charles E. Schumer

The proposed joint venture between Comcast and NBC represents a dramatic change in the cable and Internet markets. I appreciate the many assurances you have offered to protect consumers and competition in the marketplace, and I am gratified that this merger will not result in job reductions. I do, however, have a few remaining questions about this proposed endeavor.

1. **Given the size and influence of both NBC and Comcast, how can we be assured that competition in the cable programming and distribution markets will be preserved or even improved? What about in the emerging market for Internet video?**

Competition is, and will remain, intense in the three markets you mention.

Competition is – and will remain – intense among cable programming networks. NBCU's cable networks, while valuable, represent a small fraction of the total market for video content. The new NBCU will be ranked fourth in total national cable network revenues among major media companies (the same ranking NBCU now has), owning 16 national cable networks. At last count, there were 565 national programming networks. The new NBCU will continue to have strong incentives to reach as broad an audience as possible and to secure the widest possible distribution, not only from Comcast, but also from the other MVPDs, which together serve over 75 percent of MVPD households. If NBCU charges excessive prices for its programming, it will risk losing distribution and that, in turn, will translate quickly into revenue losses as both affiliate fees and advertising revenue decline. As a result, these marketplace realities will ensure that content is distributed as widely as possible; the costs of a foreclosure strategy would outweigh any conceivable benefit to limiting distribution.

Competition is – and will remain – intense among multichannel video programming distributors as well. As the FCC has found, in every community, virtually every consumer can choose from a minimum of three MVPDs, and in many cases a fourth or fifth MVPD is available or will be soon. And these competitors are fierce. In about 15 years, DirecTV and Dish have become the second and third largest MVPDs, respectively. And Verizon and AT&T are now both top ten MVPDs and continue to grow every quarter. After the transaction, Comcast will continue to have a strong incentive to offer the most compelling, innovative consumer experience possible; increase consumer,

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choice; increase the amount, quality and diversity of programming available; and expand multiplatform options.

Competition is – and will remain – intense among providers of online video. Only one company, Google, controls a significant share of online video views – 55 percent of all online video views. Both Comcast and NBCU are relatively small players both as providers and distributors of online video content and will remain so after the transaction. The proposed joint venture will account for only about 12 percent of total national cable network revenues, and its share of video content that can be distributed over the Internet will be still lower. Online video distribution sites owned by Comcast account for less than one-half of one percent of online video views, and sites owned by NBCU account for less than one percent of online video views. Hulu, in which NBCU owns a minority interest, only accounts for four percent of online video views. Even if NBCU's partial interest in Hulu were thought to be entirely in the control of the combined company (which it will not be), the combined company's share of online video viewing would only be approximately five percent of online video views. The combined company will therefore have no market power, either as a provider or distributor of online video content, and no ability to limit competition in this dynamic marketplace. Online video is still very much a nascent marketplace. Everyone, content producers and distributors alike, is looking for a business model that works. The competitive dynamics of this emerging business will be determined by the interplay of many, many actors on the Internet, including Google, Apple, Netflix, Blockbuster, Amazon, Yahoo, and many others. Barriers to entry are low, and new competitors and business models are emerging all the time.

Comcast and NBCU hope that, through this transaction, we will be able to bring new investment and innovation in all of these areas. As we become more innovative players in video programming and distribution, we will spur other content producers and distributors to invest and innovate as well. This is good for competition and good for consumers.

2. You have offered a number of voluntary steps you will take to protect the public interest. Given that these steps are in fact voluntary, can consumers rely on the protections you propose continuing?

This joint venture has the potential to bring myriad public interest benefits to consumers: it will enhance the *diversity* of programming by expanding the amount, quality, variety, and availability of content; it will provide increased *localism* through more and better local programming; it will foster *competition* by better serving consumers and spurring other players to follow suit; and it will accelerate *innovation* by combining compelling content with state-of-the-art distribution platforms. Both companies are working tirelessly to make these benefits a reality.

We have also proposed to enhance these benefits by offering an unprecedented array of public interest commitments. Consumers can rely on these commitments because in our public interest statement, we proposed that they be included in any Commission Order

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approving the transaction and become binding on the parties upon completion of the transaction.

As I noted in my testimony, Comcast has a history of promising consumer benefits associated with its acquisitions and delivering on those promises. I assure you that we will do so again in our joint venture with NBCU.

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U.S. Senate Committee on the Judiciary,
Subcommittee on Antitrust, Competition Policy, and Consumer Rights
Hearing on "The Comcast/NBC Universal Merger: What Does the Future Hold for Competition and Consumers?"

March 15, 2010

Responses to questions for the record submitted by Senator Arlen Specter

1. **Some confusion seemed to arise at the hearing regarding Comcast's position on the FCC's program access rules and on the FCC's program carriage rules. Please set forth Comcast's position.**

I welcome the opportunity to clarify our position.

Let me begin by drawing the distinction between the concepts of "program access" and "program carriage." Both are FCC rules resulting from provisions in the Cable Television Consumer Protection and Competition Act of 1992. Essentially, the *program access* rules govern the process by which a satellite-delivered network that is affiliated with a cable operator *sells* its programming to competing multichannel video programming distributors ("MVPDs"). The *program carriage* rules, on the other hand, govern the process by which a cable operator *buys* programming from unaffiliated programmers.

Program access rules, which can be found in Section 628 of the Communications Act of 1934, generally require that cable operators afford competing MVPDs non-discriminatory access to satellite-delivered cable-affiliated programming. Specifically, the rules include: (1) a prohibition against exclusive contracts between cable-affiliated programming networks and any cable operator (a provision which Congress set to sunset in 2002, but which the FCC has extended); (2) a prohibition against cable operators unreasonably influencing (or attempting to influence) whether an affiliated networks sells (or on what terms it sells) its programming to an unaffiliated MVPD; and (3) a prohibition against unreasonable discrimination in the prices, terms, and conditions of carriage arrangements with unaffiliated MVPDs.

By contrast, the program carriage rules, which can be found in Section 616 of the Communications Act of 1934, generally require that MVPDs act fairly in selecting the programming they assemble in packages for sale to consumers. The program carriage rules provide that: (1) MVPDs may not require an equity interest in a programmer as a condition of carriage; (2) MVPDs may not coerce unaffiliated programmers to provide (or punish unaffiliated programmers for not providing) exclusive rights as a condition of carriage; and (3) MVPDs may not unreasonably restrain the ability of unaffiliated programmers to compete fairly by discriminating on the basis of affiliation in the selection, terms, or conditions for carriage.

Comcast conducts its business in full accordance with these rules. As the owner (or partial owner) of various national and regional networks, in a marketplace with hundreds of national networks and scores of regional networks, and in which consumers in any given geographical area can obtain multichannel video services from three, four, or sometimes five strong

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competitors, Comcast has strong incentives to secure widespread distribution for its programming, including through distribution on MVPDs that compete directly with Comcast Cable. If DirecTV, Dish Network, phone companies and others across the country do not distribute the networks we own, we cannot maximize the revenue necessary to produce high-quality programming that consumers will want to watch. As an MVPD competing directly with DirecTV, Dish Network, Verizon, AT&T, and various other companies, Comcast Cable has powerful incentives to make available to its customers the programming they want, the vast majority of which necessarily comes from unaffiliated sources. In a competitive marketplace, we need to offer our customers attractive packages of programming at attractive prices, and this inevitably requires that we carry scores of unaffiliated networks. If DirecTV and Dish Network – and Verizon and AT&T – are offering networks that our customers want but we refuse to carry, we will lose valuable customers to them. That's why the vast majority of the networks we carry are unaffiliated and, even post-transaction, approximately six of every seven channels we carry will be unaffiliated. Thus, intense competition provides a powerful discipline against anticompetitive behavior in both the buying and the selling of programming.

Comcast has not challenged the validity of either the program access or program carriage rules; we have challenged only the extension of the exclusivity ban for reasons I describe below. To be sure, because of the dramatic increases in competition – in programming and in distribution – that have occurred since 1992, the need for program access and program carriage regulations has been dramatically reduced, if not eliminated altogether. Nonetheless, the rules remain available as a backstop, and parties who believe they have been treated unfairly have available to them a complaint process at the FCC through which claims of violations can be adjudicated. Though certain parties have alleged at various times that Comcast has violated the program access and program carriage rules, Comcast has never been found in violation of any of these regulations.

Comcast has asserted, and properly so, that any FCC program access or program carriage rulemakings and adjudications must be conducted in accordance with law, and with due regard for the constitutional interests that are at stake. Contrary to the claims of some parties, Comcast has not asserted that the program carriage or program access rules are unconstitutional. While we haven't mounted a constitutional challenge to the validity of the program access or program carriage statute or rules, we have invoked constitutional considerations as factors that need to be considered in making and applying rules under both program access and program carriage.

The Supreme Court determined long ago that cable operators are entitled to First Amendment protections. "There can be no disagreement on an initial premise: *Cable programmers and cable operators* engage in and transmit speech, and they *are entitled to the protection of the speech and press provisions of the First Amendment. . . . [T]he rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation,* whatever its validity in the cases elaborating it, *does not apply in the context of cable regulation.*" *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 636-37 (1994) (emphasis added). Rules that tell us what video programming we must carry or must sell inevitably implicate our First Amendment rights. We have reminded the FCC and the courts that they must take the First Amendment into account when they make, review, or apply program access and program carriage rules, especially when FCC fact-finders are making content-specific findings about the relative quality of, or similarities between, programming networks. That is not a "challenge" to the rules on "Constitutional

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grounds." It is simply a reminder that there is a First Amendment, and that it applies to cable operators.

We were recently criticized for invoking a constitutional argument in a program carriage complaint proceeding, but we stand by the position that we took. We did *not* challenge the validity of the program carriage rules. We did *not* argue that the program carriage statute was constitutionally invalid. We *did* say that congressional intent, FCC precedent, marketplace developments, and constitutional considerations all dictate that the FCC construe the program carriage rules narrowly and "exercise extreme caution before interfering with any carriage decision, including the specific tier on which a network is carried by an MVPD, the price that will be paid, and the other terms and conditions of carriage."

Our main point was that the FCC needed to think long and hard about substituting its judgment for that of a cable operator regarding whether a particular network should be carried, how much the cable operator should pay for the network, where it should be tiered, etc. We reminded the FCC of the vast changes that had occurred in the marketplace since 1992 and that the Supreme Court had recognized that cable operators are entitled to First Amendment protections of speech and of the press. These are not arguments against the program carriage rules and are not an attempt to prevent a complainant from bringing and trying to prove its case. All we were saying was that, in the unlikely event that a violation were proven, the FCC in fashioning a remedy would need to account for the fact that cable operators have full First Amendment protections of speech and of the press. And just as a newspaper or even a broadcaster cannot lawfully be ordered to publish an article or air a show that it doesn't want to, the FCC in a program carriage order would need to formulate a remedy for any adjudicated violation that takes account of constitutional constraints.

Bear in mind that claims about program carriage violations have historically been quite rare. The best explanation for the recent spate of cases is regulatory gamesmanship. Despite all kinds of reckless allegations by a small handful of networks, not one complaint has been ruled to be meritorious. In the cases that went the furthest, WealthTV's four complaints against four separate cable companies, the FCC's Chief Administrative Law Judge ruled that each of the defendants acted reasonably and that their accuser had "failed completely" to prove a violation of the rules. He specifically found that the evidence presented by the accuser was "unreliable" and that the accuser's witnesses were "not credible."

Finally, some have questioned why Comcast appealed a program access rulemaking order. That appeal involved an FCC decision, issued in 2007, to extend for an additional five years the ban on exclusive contracts between vertically integrated programmers and cable operators – the one portion of the program access rules that Congress had slated to sunset in 2002. On appeal, Cablevision and Comcast argued that the FCC applied an incorrect standard governing the circumstances under which the FCC may prevent the exclusivity rule from sunsetting automatically; and that the FCC was required to let the rule sunset, or at least narrow it. Comcast was motivated in large part by the inequity of applying an anti-exclusivity rule to cable, while our satellite competitors are able to use exclusive programming contracts against us. Contrary to the claims of some outside parties, Comcast did not challenge all of the features of the program

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access rules in this litigation nor assert that the exclusivity ban, or any other portion of the program access rules, is unconstitutional.

We believe in the position that we took before the court, and we hoped the court would agree with us that competition has obviated the need for this rule. Nonetheless, on February 4, I testified that we are willing to discuss with the FCC making the program access rules binding on us in connection with approval of the transaction, even if the D.C. Circuit overturned the FCC's extension of the exclusivity prohibition.

In any event, on March 12, the D.C. Circuit upheld the FCC's order in a 2-1 vote. This decision, which we will not appeal, would appear to put this issue to rest.

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U.S. Senate Committee on the Judiciary,
Subcommittee on Antitrust, Competition Policy, and Consumer Rights
Hearing on "The Comcast/NBC Universal Merger: What Does the Future Hold for Competition and Consumers?"

February 4, 2010

Questions for the record submitted by Senator Russell D. Feingold:

1 A. Mr. Zucker and Mr. Roberts, I see that nowhere in your statements do you mention lower cable rates as a consumer benefit of your merger, so at least you are not trying to sell us that bill of goods. But I'd like to know what you think the merger's impact will be on cable rates. Specifically, will you add a commitment #18 to your public interest commitments that would tie the increase in cable rates to inflation and will you also lock in the rates you charge for content either for cable network carriage or through retransmission consent?

B. Ms. Abdoulah, Mr. Cooper and Mr. Schwartzman: From your written statements you clearly have concerns about the merger. What harm do you foresee for consumers and especially the impact on subscription television rates?

The proposed acquisition poses danger to the diversity of program choices in video programming that will be available to video subscribers and on the Internet.

Ever since rate regulation was repealed in 1996, cable rates have consistently been far in excess of inflation. A Comcast/NBCU combination would likely accelerate this trend in a number of ways. For example, at the February 4 hearing and elsewhere, Mr. Roberts has indicated that Comcast will increase retransmission consent rates paid to broadcasters. Because typical contractual arrangements include "most favored nations" clauses, this will increase rates for all cable operators, not just Comcast. These fees will inevitably be passed on to cable customers.

2. A. Mr. Zucker and Mr. Roberts, I'm interested in how your two firms currently negotiate with other television providers to gain carriage of either cable networks or through retransmission consent for the NBC local stations. Specifically I wanted to know whether the price was the same for a larger cable operator like Time Warner or Charter and for a very small cable company that may cover just a single town or part of a couple of rural counties as is common in parts of Wisconsin. Are the rates currently different? Would you be willing to commit to charging the same rate for the same content as part of the merger?

B. Ms. Abdoulah, Mr. Cooper and Mr. Schwartzman: Typically how much disparity between the prices paid by small and large cable systems for similar content from a cable network or through retransmission consent? Would the increased market power

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of a combined NBC/Comcast make this situation worse or otherwise encourage consolidation among the smaller cable systems?

I do not have access to data necessary to answer with specificity about the size of the disparity between prices paid by large and small cable systems for similar content. More generally, however, I can state that the acquisition of NBCU's broadcast and cable networks will allow Comcast to extract higher prices by bundling these offerings when made available to smaller operators.

3. A. Mr. Zucker and Mr. Roberts, it is common practice now to require a television distributor like a rival cable company to carry several less popular cable channels in order to get a cable channel that they and consumers really want. Would you be willing to stop this practice and agree to offer fair rates for individual channels?

B. Ms. Abdoulah, Mr. Cooper and Mr. Schwartzman: There have been proposals in the past to allow television subscribers to choose which channels they wish to receive "a la carte" instead of the typical bundles. Would this option for both subscription television systems from content providers and for consumers from the systems be a benefit for competition and/or help keep cable rates from increasing at as high a rate? What potential negative effects could providing a la carte options have?

I do not have an opinion at this time with respect to merger specific pros and cons of "a la carte" pricing.

4. A. Mr. Zucker and Mr. Roberts, I noticed that in some of your public interest commitments you only agree to protections for a limited number of years or tied to FCC rules being in force. If these provisions are in the public interest and help prevent competitive harm, why aren't these indefinite commitments or permanent firewalls instead?

B. Ms. Abdoulah, Mr. Cooper and Mr. Schwartzman: Are there any combination of public interest commitments that NBC/Comcast could agree to that would eliminate your concerns about the merger such that you would no suggest that the DOJ block the merger? If so, should these commitments be indefinite? Do you have any concern if such commitments are for only a short time frame?

While various commitments could ameliorate some of the deleterious effects of the proposed Comcast/NBCU transaction, I do not believe that any combination of such promises would be sufficient to justify approval of the deal. First, as your question suggests, such promises might be of limited duration. Second, the cost, delay and uncertainty of bringing complaints to the Department of Justice, the FCC or to a court renders such commitments unenforceable, especially for consumers and smaller or start-up competitors. Third, no matter how carefully crafted these arrangements may be, the dynamic nature of the technologies employed means

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that there will be loopholes. That is how, for example, Comcast's Philadelphia-based regional sports networks escaped coverage when the FCC approved Comcast's acquisition of Adelphia cable.

5. A. Mr. Zucker and Mr. Roberts: I have seen some concern expressed that the stake of the new company in Hulu could somehow be leveraged to Hulu's advantage or against other competitors in this emerging market. Would you consider divesting your internet television interests and staying out of this segment of the industry to alleviate these concerns? If not, what protections will you put in place to make sure the relationship doesn't stifle innovation?

   B. Ms. Abdoulah, Mr. Cooper and Mr. Schwartzman: If the merger were approved, what divestment should be required? Can divestment alleviate your concerns about competition?

As I have indicated, I do not believe that mere divestment of certain internet program interests would be sufficient to alleviate my concerns about the proposed transaction. Nor would divestment address the ability to withhold programming from Internet distribution, or tie it into Comcast's Xfinity "authentication" scheme. I can state, however, that spinoff of the current NBCU interest in Hulu certainly would not be sufficient to assure a competitive environment in the Internet space; at the very least, a divestment requirement would have to extend to all present and future NBCU program ownership rights relating to Internet distribuition.

6. A. Mr. Roberts: Comcast has been widely criticized for what many see as violations of net neutrality. Many have suggested that Comcast leveraged its control of the broadband infrastructure to limit another company that competed with your video entertainment offerings. This seems to suggest a willingness to leverage vertical relationships and makes me doubly concerned about the proposed merger. Can you explain this situation?

B. Ms. Abdoulah, Mr. Cooper and Mr. Schwartzman: Please provide any thoughts you have on this issue.

The FCC found that Comcast blocked all "peer to peer" file transfers employing a particular protocol without regard to the fact that the files being transferred contained lawful content. It found that Comcast initially misrepresented its practices and cited pretextual justifications that were not borne out by the facts. Almost three years after the circumstances which gave rise to this controversy, litigation over this matter remains unresolved.

In addition to the fact that Comcast's blocking of potentially competitive content was self-serving, I would observe that this episode demonstrates the shortcomings of attempting to address otherwise impermissible ownership arrangements through structural and behavioral conditions. The cost and delay associated with enforcing such conditions make them ineffective and thus justify outright rejection of the proposed transaction.

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Senator Orrin Hatch
Questions for the Record
"The Comcast/NBC Universal Merger:
What Does the Future Hold for Competition and Consumers?"
Hearing before the Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights
February 4, 2010

For Mr. Schwartzman

1. Comcast and NBC Universal have characterized this merger as being predominantly vertical, with very little significant horizontal overlap between the two companies. You two seem to disagree, particularly with regard to local and regional video markets. Specifically, you both argue that Comcast and NBC Universal compete in a number of markets where NBC owns local affiliate stations and Comcast is dominant cable provider. My question is whether the local broadcast affiliates and cable providers actually compete in the same market. This is an important question as the level of horizontal overlap between the two companies, in many respects, will dictate the level of scrutiny the merger receives.

   Under our antitrust laws, the key determination in defining a product market is interchangeability. So, in this case, it seems that the question should ultimately be whether cable services and broadcast services are interchangeable for either consumers or advertisers. In other words, we should be asking, if cable prices go up in any of these markets, will consumers switch to over-the-air broadcast networks for their video programming? That proposition seems questionable to me. Is that, in fact, the case? Are Comcast and NBC Universal significant competitors in this sense?

Your question is based on the premise that viewers are broadcasters' customers. Actually, advertisers are the customers; viewers are the product which is sold to advertisers. Local cable systems and local TV stations directly – and vociferously – compete for advertisers by competing for viewers. Indeed, the cable television industry has created an organization called the Cable Advertising Bureau ("CAB") to make the case that cable is an effective competitor with local TV. I respectfully refer you to CAB's website at http://www.thecab.tv to see how the cable industry positions itself vis a vis local TV. In particular, I point to a presentation entitled "Why Ad-Supported Local Cable?" which is located at
http://www.thecab.tv/downloads/whycable/Local_Cable_Rationale.pdf
The presentation contains numerous charts and tables to support its assertion (at page 17) that "Only Wired Cable is a Local Broadcast Replacement."

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Senator Kohl's Follow-Up Questions for Hearing On

"The Comcast/NBC Universal Merger: What Does the Future Hold for Competition and Consumers?"

For Andrew Schwartzman

1. Many are now concerned about what the Comcast/NBC Universal merger means for the future of free over the air TV. Do we have reason to worry that Comcast will, in the future, move the best new programming ideas to NBC cable networks? Won't Comcast have an incentive to do this as it charges other cable systems to carry these networks on a per subscriber basis? Should we be worried about the future of free over-the-air programming on NBC after this merger?

In the near future, it is likely that federal policy will attempt to recapture portions of the spectrum presently allocated to broadcast TV. To the extent that Comcast would be better equipped to transition from over-the-air transmission, it may be receptive to such entreaties.

2. One bright spot for competition has been the development of the Internet as an alternative for consumers to view video content. Because of the rapid deployment of high speed internet connections, millions of consumer now access TV programming from web sites such as Hulu or Apple TV without paying the cable or satellite companies anything. Some consumers have even "cut the cord" and rely solely on the Internet to watch programming.

However, we have recently heard from some programmers who allege that cable TV companies are demanding that the programmer refuse to make its programming available over the internet as a condition getting carried on cable TV. This applies to archives of old programming in addition to current content. And these programmers contend that they are in no position but to accede to such a condition in order to reach the tens of millions of cable subscribers.

(a) Do you believe cable TV companies have the market power to demand that programmers keep their content off the Internet? If so, will this merger make the situation worse?

Cable TV companies unquestionably have the market power to restrict Internet distribution of video content through various contractual arrangements. While I am not in a position to forsee whether this power will be sufficient to keep content off the Internet or merely delay and otherwise limit such distribution, it is quite clear that acquisition of the NBCU broadcast and cable programming will enhance Comcast's ability to restrict Internet distribution.

(b) Can you think of any remedies to address this situation? Do we need program access rules for the internet?

As I explained in my written testimony, existing program access rules have been ineffective. Mere extension of those rules to the Internet will not solve the problem because enforcement is slow, cumbersome and ineffective, and does not provide for interim relief. While I do not believe that any remedies will be sufficient to resolve these problems, any conditions which

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were adopted would have to be far more stringent than existing rules. Because the central problem is that the Internet distribution of video content competes with cable's core business, a better (but still insufficent) approach would be to require divestiture of all Internet programming rights into a separately owned and controlled entity.

3. NBC currently owns 32% of the Internet web site Hulu, in partnership with NewsCorporation and Disney. Hulu is a growing site that delivers a great variety of TV content over the Internet for free, including broadcast TV content of NBC, ABC and Fox, and also the content of cable networks. In this sense, Hulu competes with traditional cable systems with respect to this content – consumers need not to subscribe to cable in order to receive this content. Hulu also directly compete with Comcast's "Fancast" website.

(a) Do you have any concerns about the future of Hulu after Comcast succeeds to NBC's interest?

As I indicated in my written testimony, I fear that Comcast may wish to withdraw from Hulu and withhold NBC and Universal content.

(b) Would these concerns be resolved if Comcast agreed to divest NBC's interest in Hulu after the merger? Wouldn't it remain a problem that NBC could still withhold its content from Hulu even after such a divestiture?

No, these concerns would not be resolved precisely because NBC and Universal could withhold, delay or otherwise restrict availability of their content on Hulu.

4. Last year, Comcast and Time Warner Inc. announced their "TV Everywhere" initiative. Under TV Everywhere, cable subscribers will be able to access video content for free wherever they have access to the Internet -- on their computers, on their smart phones, while travelling, or anywhere else. While this obviously has the prospects for considerable benefits to consumers, it also raises serious concerns.

One concern is whether this will become the exclusive way programmers will be required to distribute their content over the Internet. Some are concerned that this could stifle the internet as an independent competitor to cable, and require consumers have a cable subscription in order to access video programming on the Internet. Do you believe the TV Everywhere platform could be used to stifle video competition on the Internet in this manner?

Yes, as I stated in my testimony, the TV Everywhere platform is likely to stifile video competition in a number of ways. Comcast can condition cable carriage on programmers' agreement not to make content available, or immediately available, on the Internet. It can also withhold or otherwise restrict NBC and Universal content for the Internet. TV Everywhere also extends the cable industry's historic refusal to compete geographically; there is no technologial reason why Comcast couldn't offer its video programming to Time Warner Cable customers and vice versa.

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5. What is your view of the impact of this merger on the ability of independent programmers to get carried on Comcast? And what is your view of Comcast's commitment to add two independent programmers for 3 years?

Because Comcast will have more cable channels to bundle in offering them to other MVPD's, the effect of the merger will be to make fewer channels available for carriage of independent programmers' content. Comcast's commitment to add two independent programmers per year to some (but not all) of its platforms means very little, since it contains no promises with respect to tiering and to contractual limitations such as requirments to delay or withold such programming from Internet distribution.

6. In its filing with the FCC, Comcast argues that there is "an existing, comprehensive regulatory scheme to deter and constrain unreasonable, affiliation-based discrimination" against independent programmers. This is a reference to the FCC's program carriage rules. What is your view of the effectiveness of the FCC's program carriage rules? Has an independent programmer ever won a final judgment to enforce the program carriage rules against a cable operator?

As I indicated in my written testimony, enforcement of existing program carriage rules is ineffective, and I am unaware of any program carriage complaint having been granted by the FCC.

7. Are we likely to see a new wave of media mergers after this deal? And should we be concerned about that?

History suggests that approval of the Comcast/NBCU merger will lead to more mergers. Each successive merger is more problematic.

8. Should the Justice Department and FCC decide to approve the Comcast/NBC Universal deal, what conditions would you recommend these agencies to impose?

As I stated in my testimony, I do not believe that any combination of conditions would justify approval of the proposed transition.

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QUESTIONS FOR THE RECORD ADDRESSED TO MR. ZUCKER

FROM MEMBERS OF THE SENATE JUDICIARY COMMITTEE

FROM THE HEARING ENTITLED "THE COMCAST/NBC UNIVERSAL MERGER: WHAT DOES THE FUTURE HOLD FOR COMPETITION AND CONSUMERS?" HELD FEBRUARY 4, 2010

Senator Herb Kohl

1. Since you believe this deal makes so much sense for you at NBC Universal and for Comcast, should we expect other cable and satellite companies to seek content partners like NBC Universal, and shouldn't we expect therefore that this deal will set off a wave of media mergers?

The media market we face is highly competitive and it is also undergoing tremendous change. Consumers are choosing not just between broadcast and cable television, but also increasingly look to the Internet, XBox, iPhone, Playstation and so many other new platforms and technologies for their entertainment and media choices. In this incredibly dynamic market, every company is experimenting in search of a sustainable business model that meets consumer demands for high quality content where and when they want it. I cannot predict what others will do but seriously doubt that any one approach will be selected and therefore do not believe that there will be a wave of media mergers triggered by the proposed transaction. In any case, future transactions should be evaluated on their merits, based on the state of the market at the time. Different industry players have adopted and likely will pursue a variety of business plans, including separating content from distribution. For example, Time Warner has elected to separate its content and distribution businesses. But we believe that the proposed transaction will allow us to better serve our customers. I am looking forward to the investment and innovation that Comcast will bring to NBCU as together we strive to meet the changing demands of the market and our customers. Entertainment is one of the United States' top exports and the country will be best served if policy makers permit the industry to adapt to the change we face and find successful ways to meet demand.

2. (a) Has NBC Universal exercised its influence as a 32% owner of Hulu to direct Hulu to block Hulu content from being viewed on television sets using the Boxee application?

Neither NBC Universal nor any other owner is empowered to direct Hulu to take any action with respect to Boxee under Hulu's governance structure. Hulu is managed by its own executive team and ultimately by its board of directors, on which NBC holds 3 out of 11 voting seats, as well as by the terms of its LLC agreement, which limits the ability of any shareholder to direct the policies of Hulu. That being said, NBC Universal has from time to time advocated that Hulu take appropriate and lawful actions to protect its carefully crafted site design and its chosen distribution and advertising model from being

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undermined by unauthorized free-riders who might seek to cherry-pick the valuable content provided by Hulu and pull it without permission into their own proprietary digital environments to build their own businesses. In this regard, it is worth noting that Hulu has also entered into distribution agreements with many, many highly trafficked Internet portals and websites such as MSN, Yahoo, and Amazon who agree to respect and work with Hulu's site design and business model.

(b) *At the hearing in the House Subcommittee on Communications, Technology & the Internet, you were asked about NBC's involvement in Hulu's action to block Boxee and you responded, "This was a decision made by the Hulu management...what Boxee was doing was illegally taking the content that was on Hulu without any business deal."*

Boxee has responded by insisting they were legally linking to Hulu.

How do you respond to Boxee's claim? For consumers who use Boxee to access the Internet, will you commit to permit them to access Hulu, just as you do for users of Microsoft Internet Explorer and Mozilla Firefox?

For its own part, subject of course to the views of its three Hulu co-owners and Hulu's management, NBC Universal supports Hulu's policy of allowing access to Hulu by users of true Internet browsers such as Microsoft Internet Explorer and Mozilla Firefox. However, Boxee's attempt to portray itself as a "browser" in the same category as Internet Explorer and Firefox is disingenuous and misleading. Nor is Boxee a search engine or website that is simply "linking" to Hulu content as the question suggests. Rather, Boxee has created a specialized software application for viewing video that by deliberate design interferes with the intended operation of Hulu.com in at least the following ways:

- Boxee's current default mode when it loads a Hulu video is to display only the top half of the Hulu webpage – sometimes called "above-the fold" -- as a static image. As a result, Hulu videos viewed through Boxee's default mode do not present the tune-in information, copyright notices, recommended video lists or user comments that appear on Hulu.com below the area of the video player, and a user cannot scroll down to access that content. Nor can a user scroll down to access the optional closed captioning, which is activated through a button on the Hulu site situated below the area that Boxee displays statically.

- Boxee disables viewers of Hulu video from accessing interactive functionality built into Hulu.com that provides added value both to Hulu viewers and advertisers. As a result, users viewing Hulu video through the Boxee application **cannot** do any of the following:

    - make the choice that Hulu offers, by agreement with certain advertisers, between viewing long-form ads at the beginning of a program, or viewing interstitial ads at multiple points within the program;

- click through the ads that appear in the video stream, which would enable the user to pause the video and visit the websites of Hulu advertisers;
- click through the banner ads above the player due to the static nature of the image Boxee loads, as discussed above;
- use Hulu's voting functionality to express their personal opinions about the programming and advertising on Hulu.

- Boxee enables its users to zoom in on the Hulu video player and occupy the full screen, but it is not the same user experience as when a Hulu viewer selects full-screen mode while using an ordinary browser. Boxee superimposes its *own* user interface and video controls over Hulu's, and Hulu's overlay branding logo is not displayed. The same disabling of interactive functionality occurs with respect to the ads in the video stream.

The Boxee effect is thus essentially akin to watching Hulu video through an impermeable glass window controlled by Boxee, which disables the user from using the site as Hulu has designed it and as its Terms of Service require. The negative commercial implications of Boxee's deliberate interference with Hulu's site design -- particularly its obstruction of the click-through advertising functionality -- should be obvious to anyone who understands how ad-supported business on the Internet is conducted.

Operators such as Boxee present a serious impediment to the hope that Hulu and services like it can successfully provide Internet video viewers with a robust, ad-supported online video option. If such a model is to have long-term sustainability, the legal rules and commercial norms must require operators such as Boxee to obtain appropriate permission before building a business upon content that they bore none of the expense to create and that is owned and lawfully distributed by others.

3. Isn't it true that in some of your local advertising markets Comcast is a major or even the most significant competitor for local ad dollars? For example, in a 2006 filing before the FCC, NBC claimed that cable's local advertising dollars exceeded the total advertising dollars at NBC local stations, and actually were greater than the number one ranked station in both Philadelphia and San Francisco. Doesn't this merger combine two entities with large shares of many local markets? Won't this merger lead to a significant loss of competition for local advertising in these markets?

There is a highly competitive market for local advertising revenues in each of the areas in which NBCU has an owned and operated NBC station and Comcast has a significant cable presence. They are Chicago, Hartford, Miami, the San Francisco Bay Area, Washington, DC, and Philadelphia. That will be unchanged after the joint venture is effective.

There are three reasons for this. *First*, broadcast stations and cable systems are not considered to be close substitutes. Instead, cable systems offer "hyper-local" services, targeted to particular geographical regions within a particular Designated Market Area ("DMA"). Broadcast stations, by contrast, offer the ability to reach all television households in a DMA. Thus, as the Antitrust Division has alleged, a significant number of advertisers do not view cable television advertising to be a meaningful substitute for broadcast television spot advertising. See Complaint filed by the Antitrust Division in United States v. Raycom Media Inc. (2008).

Second, even advertisers who do regard cable and broadcast advertising as substitutes would continue to enjoy a broad number of alternatives post-transaction. These include, first and foremost, advertising on other broadcast stations serving the area, such as the ABC, CBS and Fox affiliates as well as the CW, My Network and others. All these compete for advertising revenues with each other and with other alternatives available for advertisers to choose from, including radio, the Internet, newspapers and billboards.

Finally, even if an artificial market were constructed consisting only of broadcast stations and MVPDs in a particular DMA, advertisers would still have plenty of competitive choices and that was the point being made in the 2006 filing – the availability of multiple options for advertisers in these markets. In each of these areas, there are at least seven non-NBCU broadcast stations and several competing MVPDs. The bottom line: Comcast and NBCU will only be able to make ad sales if they offer competitive pricing.

Senator Orrin Hatch

1. I think it's safe to conclude that NBC Universal, like any other company, wants to maximize its profits. As with all content companies, it has a built-in incentive to maximize the fees it receives from distributors in return for the right to disseminate its content. Now, unfortunately, this doesn't always lead to lower prices for consumers, but that is the unfortunate reality of the marketplace.

My question to you is whether you believe that this merger serves that motive. Will this deal make NBC Universal's content more valuable to distributors or give NBC Universal, or whatever the new company ends up being called, more leverage in the licensing and distribution negotiations? If not, why is this deal good for NBC Universal? If so, how will that affect consumer prices in the video market?

We operate in an intensely competitive marketplace. For example, NBCU along with the other four largest media companies in the United States, now each only accounts for between 5 and 10 percent of all television viewing. A multitude of smaller competitors actually account for approximately half of all television viewing. The NBCU national cable channel business is ranked fourth today and after the transaction (with the addition of Comcast's cable channels) will still be ranked fourth by total revenue among owners of national cable networks. At the same time, consumers are choosing not just between broadcast and cable television, but also increasingly look to the Internet, XBox, iPhone, Playstation and so many other new platforms and technologies for their media choices. As Comcast can describe, the distribution market is also very competitive. Our competitive posture will not change after this deal.

In such a competitive market place, I believe companies must work hard to meet an increasingly demanding consumer who is asking for high quality content delivered where they want it, how they want it and when they want it. We believe this deal is good for NBCU and for consumers because it will bring Comcast's innovative knowledge of the industry along with its commitment to invest in NBCU so that we can better meet the demands of our customers. Particularly at a time when broadcast is under pressure, I am excited about the prospects for free, over-the-air broadcast in a way I have not been for a while.

Senator Charles Schumer

The proposed joint venture between Comcast and NBC represents a dramatic change in the cable and Internet markets. I appreciate the many assurances you have offered to protect consumers and competition in the marketplace, and I am gratified that this merger will not result in job reductions. I do, however, have a few remaining questions about this proposed endeavor.

1) Given the size and influence of both NBC and Comcast, how can we be assured that competition in the cable programming and distribution markets will be preserved or even improved? What about in the emerging market for Internet video?

We operate in an intensely competitive marketplace. For example, NBCU along with the other four largest media companies in the United States, now each only account for between 5 and 10 percent of all television viewing. A multitude of smaller competitors actually account for approximately half of all television viewing. We are fourth today in total revenue from national cable networks and we will remain fourth after this transaction. As Comcast can describe, the cable distribution market is also very competitive, and this deal would not increase the size of its cable distribution business.

With respect to the market for online video, this marketplace is in its infancy -- but competition is healthy and very robust. For example, NBCU's share of online video is just 0.7% (measured by videos viewed). When we combine with Comcast, which has a 0.3% share of online video, we will have not much more than 1% of online viewing. Hulu (in which we are co-investors with three other partners) has just 4.0% of online video. By way of comparison, Google sites represent over 50% of online viewing. Even these measures of competition, however, miss the true nature of this highly dynamic and rapidly changing industry. Consumers increasingly look to the XBox, iPhone, Playstation and so many other new platforms and technologies for their entertainment and media choices. I don't believe anyone can predict how the entertainment and media industry will develop but I feel confident it will continue to be fiercely competitive. And I am excited that this transaction will position the new NBCU to better meet the demands of our customers thanks to the innovation and knowledge Comcast brings to the deal as well as its commitment to invest in NBCU.

2) You have offered a number of voluntary steps you will take to protect the public interest. Given that these steps are in fact voluntary, can consumers rely on the protections you propose continuing?

Consumers can safely rely on the voluntary public interest commitments that Comcast and NBCU have proposed as part of this transaction. Comcast and NBCU have proposed that these commitments be included in any FCC order approving the transaction -- which would make them binding on the parties and enforceable by the FCC.

Senator Al Franken

1) INTERNET VIDEO
The Internet is the future of the media business, and what happens to online programming will help determine the future of show business. Currently, NBC's shows are freely available to Internet viewers on websites such as Hulu.

a) If this merger goes through, will you guarantee that the company won't remove NBC's or Comcast's current shows from the Internet?

NBCU is proud to be a pioneer in providing high-quality news, sports and entertainment programming to viewers over the Internet. Through NBC.com and other NBC Universal websites, fans have been given easy access to a wealth of information and video material for their favorite entertainment programs on an ad-supported basis. Viewers interested in news can watch popular full-length news shows like Nightly News with Brian Williams or Meet the Press through MSNBC.MSN.com, also on an ad-supported basis. The sites even contain a tool that allows viewers to embed portions of these shows into their own blogs or websites. Similarly, sports fans have access through NBCSports.MSNBC.com to abundant information and video content on an ad-supported basis. Extraordinary access to Olympic material was provided on-line at NBCOlympics.com in a hybrid form, with large amounts being available on an ad-supported basis, and some material being included in the cable subscription package.

NBCU is also proud to be a founding partner of the website Hulu.com. We noted that the naysayers who confidently predicted that "old media" companies would fail miserably on the Internet have lavished Hulu with praise for its wealth of content and ease of use.

Today, NBCU programming is available over the Internet in a variety of ways – including ad-supported, subscription-based, and downloadable for a per program fee to view or to own. NBCU will continue to experiment with different business models for different programming to respond to consumer and market demands.

In a business that has seen changes that were unimaginable just a few years ago, and with the only certainty being that more rapid and vast changes are in store, it would be irresponsible to guarantee that anything will forever remain static. That said, however, we emphasize what was said repeatedly in the testimony: NBC Universal remains committed to providing viewers with the ability to access the programs that they want, when and where they want, under a sustainable business model that provides a reasonable return on investment. And specifically, NBC Universal has no plans to remove the kind of shows currently offered over the Internet on an ad-supported basis – generally, programs that have previously been on over-the-air broadcast television.

b) Can you also guarantee that the merged company won't provide them only to the company's cable subscribers?

We are strong supporters of the "TV Everywhere" concept. We believe that consumers who pay for subscription television services, such as those offered by cable, satellite or similar MVPD services, want to be able to access online the programming they subscribed to and have paid for through their MVPD services. TV Everywhere would give them this valuable bonus option at no additional cost.

As noted above, we will work with MVPDs to offer NBCU cable programming to subscribers, and NBCU has no plans to remove the kind of shows that we currently provide over the Internet on an ad-supported basis – generally, programs that have previously been on broadcast television.

c) If this merger goes through, will you guarantee that the company will place any future shows it owns on the Internet?

As set forth in the answer to 1(a) above, NBC Universal currently has a number of different business models for Internet exhibition of different types of programming. NBCU plans to continue to seek the widest possible distribution of its content on the internet under a sustainable business model that provides reasonable return on investment. NBCU has no plans to remove the kind of shows currently offered over the Internet on an ad-supported basis – generally, programs that have previously been exhibited on ad-supported broadcast television.

d) Can you also guarantee that the merged company won't provide them only to the company's cable subscribers?

Please see answer to 1(b), above.

2) NET NEUTRALITY

Comcast and NBC Universal have argued that FCC program carriage rules will make sure that the company can't favor its own programming—but no such rules exist for Internet video. To make matters worse, a Comcast case currently in front of the D.C. Circuit Court of Appeals could prevent the FCC from being able to make such Internet regulations in the future.

a) Do you promise not to discriminate against other companies' programming on the Internet, even if the FCC never promulgates net neutrality regulations?

Question 2(a) is more appropriately answered by Comcast, which has provided an answer to this question to the Committee.

b) If the merger goes through and there are no net neutrality regulations in place, would you agree to binding merger conditions forbidding you from favoring your own programming on your own Internet video websites for five years?

c) Would you agree that these merger conditions would also bind any future incarnations of your companies resulting from future mergers, acquisitions or corporate restructuring?

d) If the FCC does not or cannot make net neutrality regulations, would you support legislation that extends program carriage rules to the Internet?

e) If the FCC does not or cannot make net neutrality regulations, would you urge any trade group to which you belong to support legislation that extends program carriage rules to the Internet?

First, I would note that the online video marketplace is in its infancy -- but competition is healthy and very robust. For example, NBCU' s share of online video is just 0.7% (measured by videos viewed). When we combine with Comcast, which has a 0.3% share of online viewing, we will have not much more than 1% of online viewing. Hulu (in which we are co-investors with three other partners) has just 4.0% of online video. By way of comparison, Google sites represent over 50% of online viewing.

NBCU offers programming on our own web site, NBC.com. Consumers expect that they will have access to NBCU content on this site and come to it for that reason. By definition, then, NBC.com favors NBCU content and imposing a merger condition that would prohibit that would make no sense. If consumers want CBS content, for example, they are able to go to the CBS web site, CBS.com. Given the nature of this very dynamic and competitive marketplace, it is also difficult to see why there is a need for a merger condition to forbid any future incarnation of the company from favoring our own programming on NBC.com for five years. It is not clear to me what problem it would address, and such a condition or rule would not serve consumers. If NBC.com had to also offer programming from every other content provider who sought to put their content on NBC.com, I think it might cause NBC to refrain from hosting the site in the first place. For the same reasons, I also am not ready to suggest that there is a need for legislation in this area.

3) TERRESTRIAL LOOPHOLE

In January, the FCC tightened the "terrestrial loophole," which allowed cable companies to withhold certain programming, especially regional sports programming, from its competitors. Comcast has opposed closing this loophole.

a) If this merger goes through, will you promise not to appeal the FCC's order through litigation in court?

b) If this merger goes through, will you promise not to appeal the FCC's order within the FCC?

c) If this merger goes through, will you urge any trade group to which you belong not to appeal the order, either through litigation in court or within the FCC?

Questions 3(a) through 3(c) are more appropriately answered by Comcast, which has provided answers to these questions to the Committee.

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Senator Russell Feingold

1. Mr. Zucker and Mr. Roberts, I see that nowhere in your statements do you mention lower cable rates as a consumer benefit of your merger, so at least you are not trying to sell us that bill of goods. But I'd like to know what you think the merger's impact will be on cable rates. Specifically, will you add a commitment #18 to your public interest commitments that would tie the increase in cable rates to inflation and will you also lock in the rates you charge for content either for cable network carriage or through retransmission consent?

We operate in an intensely competitive marketplace. For example, NBCU along with the other four largest media companies in the United States, now only account for between 5 and 10 percent each of all television viewing. A multitude of smaller competitors actually account for approximately half of all television viewing. The new NBCU national cable network business will be ranked fourth by total revenue among owners of national cable networks. At the same time consumers are choosing not just between broadcast and cable television, but also increasingly look to the Internet, XBox, iPhone, Playstation and so many other new platforms and technologies for their entertainment and media choices. In this unpredictable and dynamic marketplace, price competition is robust and the market sets rates for content - both for cable network carriage and for retransmission consent. In addition, industry players compete intensely for customers in many ways in addition to price, including on the quality of the content as well as the method, time and place of delivery of that content. Moreover, at a time when broadcast is under great pressure (note the recent announcement of ABC that it is downsizing its news and other programming staff), it will be important for the broadcast industry to identify additional revenue streams. One of the benefits of this merger is that Comcast will bring a balanced view to retransmission consent negotiations as the industry looks for ways to sustain itself. Finally, I would note that once the transaction is finalized, MVPD purchasers of NBCU content will, for the first time, have the benefit and protections of the program access rules.

2. *Mr. Zucker and Mr. Roberts, I'm interested in how your two firms currently negotiate with other television providers to gain carriage of either cable networks or through retransmission consent for the NBC local stations. Specifically I wanted to know whether the price was the same for a larger cable operator like Time Warner or Charter and for a very small cable company that may cover just a single town or part of a couple of rural counties as is common in parts of Wisconsin. Are the rates currently different? Would you be willing to commit to charging the same rate for the same content as part of the merger?*

The rates charged to MVPDs by NBCU for its programming networks are determined by the market based on the interplay of a number of factors. The penetration level for each network is a key negotiating point in our carriage agreements with MVPDs, because all of our linear networks are advertiser-supported and ad rates are based on potential viewers (i.e., number of subscribers) rather than actual viewing. Broader carriage of the networks therefore results in increased advertising revenues, which in turn helps to keep

down per-subscriber costs. Although we would prefer to have each of our networks distributed to the largest possible audience, which generally means the most widely subscribed tier on a cable system, we are not always able to achieve this in our negotiations with MVPDs. As a result, some of our networks are carried on the most widely subscribed tiers, while others are not, and others are not carried at all. We may offer discounts to MVPDs who agree to carry multiple networks in order to gain broader distribution of our networks, and we sometimes offer other incentives to MVPDs, such as marketing support, to encourage them to carry our new and less penetrated networks. All of these factors play a role in the vigorous back-and-forth negotiations between NBCU and the distributors of its programming networks.

Smaller cable operators can take advantage of economies of scale and receive volume discounts by contracting for carriage of NBCU's programming networks under the agreements we have in place with the National Cable Television Cooperative ("NCTC"), a not-for-profit programming and hardware purchasing cooperative serving more than 1,100 cable operators throughout the United States, as well as with other buying cooperatives. Through joint purchasing and negotiation, NCTC functions like a multiple system cable operator in the negotiation and administration of master affiliation agreements on behalf of its member companies, which allows NCTC to negotiate competitive pricing and pass on the cost savings to its members. NCTC member companies operate more than half of the franchised cable systems in the United States and serve more than 12 million subscribers. Under its Agreement with NBCU, NCTC's members can elect to sign on to the agreement and adhere to its terms, or they can choose to negotiate with NBCU directly. A member who signs on to the NBCU agreement must continue to carry the networks it was distributing at the time of signing, and will be subject to the NCTC-negotiated terms and conditions applicable only to those networks and any other NBCU Networks covered by the agreement which it chooses to distribute during the term.

3. *Mr. Zucker and Mr. Roberts, it is common practice now to require a television distributor like a rival cable company to carry several less popular cable channels in order to get a cable channel that they and consumers really want. Would you be willing to stop this practice and agree to offer fair rates for individual channels?*

NBC does not engage in any such practice. NBC already offers fair market rates for individual channels as described in response to Question No. 2 above and does not compel MVPDs to take unwanted channels. A study conducted in early 2008 showed that almost 50 percent of small cable operators take only one of NBCU's cable networks, and an additional 35 percent take only two of these networks.

4. *Mr. Zucker and Mr. Roberts, I noticed that in some of your public interest commitments you only agree to protections for a limited number of years or tied to FCC rules being in force. If these provisions are in the public interest and help prevent competitive harm, why aren't these indefinite commitments or permanent firewalls instead?*

This question is more appropriately answered by Mr. Roberts, who has provided an answer to the Committee.

5. *Mr. Zucker and Mr. Roberts: I have seen some concern expressed that the stake of the new company in Hulu could somehow be leveraged to Hulu's advantage or against other competitors in this emerging market. Would you consider divesting your Internet television interests and staying out of this segment of the industry to alleviate these concerns? If not, what protections will you put in place to make sure the relationship doesn't stifle innovation?*

This question is more appropriately answered by Mr. Roberts, who has provided an answer to the Committee.

SUBMISSIONS FOR THE RECORD

TESTIMONY OF COLLEEN ABDOULAH
PRESIDENT AND CHIEF EXECUTIVE OFFICER, WOW!
BOARD MEMBER, AMERICAN CABLE ASSOCIATION

BEFORE THE SENATE SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY AND CONSUMER RIGHTS

THE COMCAST/NBC UNIVERSAL MERGER: WHAT DOES THE FUTURE HOLD FOR COMPETITION AND CONSUMERS?

FEBRUARY 4, 2010

Chairman Kohl, Ranking Member Hatch, and Members of the Subcommittee, thank you for inviting me to appear today to testify on the proposed combination of Comcast and NBC Universal. My name is Colleen Abdoulah, President and CEO of WOW!, a terrestrial-based competitive provider of cable television and other broadband-related services operating in Illinois, Indiana, Michigan and Ohio.[1] In those markets, we face some of the most intense competition in the United States, going toe-to-toe with multiple providers of video, Internet, and voice service.

Customers appreciate having a choice of communications providers, and when they choose WOW!, it is because we offer great value at a fair price. Our true differentiation is the customer experience we provide, from the products we offer, to how we sell, install, and service them. It is for that reason that I am especially proud that *Consumer Reports* just ranked WOW! as the "Number 1" provider of video, Internet, and voice services in the United States, outperforming AT&T, Comcast, and satellite providers. In addition, in 2009, we were ranked highest by J.D. Power and Associates for overall customer satisfaction among television, Internet, and residential phone providers in the North Central Region. WOW! has received 10 of these awards in the past five years. These awards are not serendipitous. Since our inception, WOW! has been dedicated to caring for and respecting our customers, and it is heartening that in turn our customers appreciate what we do for them.

In our Chicago and Detroit markets, covering approximately 1 million households, as a multi-channel video distributor (MVPD), WOW! competes directly with Comcast's cable systems. It also competes with both Comcast and NBC's television stations in the local advertising market and now with their Internet distribution platforms. Equally as important, especially in the context of the proposed combination, WOW! is a major consumer of content from Comcast and NBC Universal. The Federal Communications Commission (FCC) classifies some of this content as "must have" programming, and we know that other content is much in-demand by our customers. In reviewing this proposed combination, it is not critical that content be "non-replicable" or "must have" – only that the content be sufficiently desirable to enable the entity owning or controlling it to possess market power as a result. Moreover, once an entity has

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[1] WOW! began operations in March 2000 in the Denver market, and in 2001 it acquired Ameritech's extensive competitive cable television systems in the Midwest. Today, it serves approximately 465,000 customers.

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"market power content," it can, and many do today, leverage it in a number of ways, many of which are discussed in this testimony. For instance, television network owners with market power today, bundle their low-value content with higher-value networks, which in essence compels WOW! to carry non-consumer requested programming. In sum, WOW! has a major vested interest in the federal government's review of the proposed combination to ensure that it neither harm consumers nor a vibrant competitive marketplace.

I am also here on behalf of the American Cable Association (ACA), which represents approximately 900 smaller MVPDs that operate in every state. Just like WOW!, many of these providers compete as described above with Comcast and NBC Universal, and all of them are consumers of content from these two entities. So, harms caused by the proposed combination will be felt across the country.

In addressing the proposed combination of Comcast and NBC Universal, I am going to focus on three critical points:

- First, this is an unprecedented deal, which, if consummated, would substantially increase the market power of Comcast, threatening consumers and competition in the traditional and the rapidly evolving Internet content and distribution arenas. In fact, Comcast and NBC Universal have already admitted that the deal raises competitive concerns and have proffered a series of voluntary, albeit completely inadequate, commitments to address these concerns.[2]

  Contrary to the claims of Comcast and NBC Universal, the proposed combination is not a mere vertical integration of Comcast's distribution assets with NBC Universal's programming assets.[3] Rather, the deal greatly increases horizontal concentration by effectively combining key content assets from the two firms, as well as important distribution assets. This increased market power can then be employed vertically by the combined entity to threaten competing video distributors.

- Second, in fashioning relief to address the anticompetitive harms caused by the proposed combination, we need to learn from and correct the many inadequacies in remedies imposed or accepted by agencies to settle other

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[2] While on their face the Comcast-NBC Universal "commitments" may superficially reflect access to programming (broadcasting and otherwise) concessions, in reality they provide neither material certitude of program access nor assurance of a level playing field with regard to terms and conditions for access. For example, using the same methodology for resolution of discriminatory pricing and terms in future Comcast-NBC Universal retransmission agreements as exists under the FCC's Program Access Rules (which are slated to expire in 2012) is a remedy without a solution given the time and cost of seeking a resolution and discontinuance of program access during the pendency of a complaint.

[3] The vertical integration issues raised by the proposed combination, of course, raise anticompetitive concerns that the FCC and Department of Justice must address.

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combinations. Comcast has proven itself particularly adept at weakening or even rendering meaningless any such relief.

- Third, because of the substantial and far-reaching problems posed by the deal, the federal agencies need to proceed deliberately in their review with an eye toward imposing meaningful relief that will remedy the many harms that would be caused by the potential combination. This is especially the case because Comcast and NBC Universal are seeking to combine assets in an attempt to obtain greater market power not only in today's traditional multi-channel video market, but also in the next-generation "over-the-top" Internet video market.

I. The Proposed Combination is Unprecedented and Will Greatly Enhance Comcast's Market Power

I have been in the cable industry for more than 25 years and have tremendous respect for Comcast and Brian Roberts and for NBC Universal and Jeffrey Zucker and their employees. Over the past decade, these gentlemen and their two firms have amassed a series of impressive assets. Comcast is by far the leader in cable distribution and controls extensive content, including its highly potent regional sports networks (RSNs) and its new video-on-demand offering. It also has developed a TV Everywhere type of service called Fancast XFINITY, tying its cable customers to video services provided on the Internet through its broadband access network. NBC Universal also controls key content distribution assets – both its traditional owned-and-operated stations and the Internet-provided Hulu platform – and an impressive array of content through its movie studio, broadcast network and its many cable channels.

As I indicated at the outset of my testimony, WOW! competes directly with Comcast and NBC Universal, and we have more than held our own against these companies despite having fewer customers and resources. WOW! has no problem with robust competition. However, when your competitor also is a major vendor, supplying video content essential or important for any competitive provider to access, problems constantly arise. Over the years, WOW!, like most of us in the cable industry, has wrestled with each of these two firms individually to obtain content, and there is little doubt they have used their market power in these negotiations to extract additional value and obtain an advantage in the distribution market.

What concerns me and I believe should concern the FCC, Department of Justice, and you about this proposed combination is that the problems WOW! sees in the current market are surely going to be exacerbated when the two firms come together. Those problems harm the consumer and the overall marketplace in many ways, including by abnormally inflating prices, reducing distributors' ability to tailor program offerings to consumer interests, and ultimately limiting broadband services as distributors are forced to expend bandwidth for services consumers do not want.

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A. Current (Pre-Combination) Problems Faced by WOW! and Smaller MVPDs in Accessing Content

To understand the harms that will occur post-combination, it is first essential to understand the anticompetitive acts that occur in the industry today. Because I am forbidden by confidentiality clauses in agreements with Comcast and NBC Universal from disclosing specific terms and conditions, I will describe for the Subcommittee general and frequent problems that MVPDs have encountered and currently face when negotiating content deals.[4] These should provide you with a more complete understanding of why today's system is not as consumer-centric as it could and should be and why, after this combination, consumers and non-vertically integrated competitive providers such as WOW! will be even more disadvantaged. Anticompetitive behavior such as the following regularly occur:

1. After entering into a distribution deal with a competitive MVPD, a RSN affiliated with a competing incumbent cable operator went back into the local professional sports rights marketplace and outbid an existing rights holder, a local broadcast station, for a package of professional sports games. Then, despite having an existing agreement, the RSN demanded a significant surcharge from the competitive MVPD in exchange for the rights to add these new games to the existing package. To add to the harm, the broadcast outlet that lost the product dramatically increased its demands for retransmission consent fees to compensate, in part, for the loss of revenue associated with the games. The competitive MVPD was faced with a poor choice: try to compete in the marketplace without key sports product, or pay twice, in effect, for the same set of games.

2. In negotiations for retransmission agreements, major owned-and-operated television network stations have conditioned any agreement with MVPDs upon carriage of infrequently-viewed networks because it drives their advertising revenues. As a result, the MVPDs were unable to carry networks with greater viewership or niche networks requested by their subscribers, and, because these "extra" networks used valuable bandwidth, the MVPDs were constrained in dedicating increased bandwidth for broadband services.

3. A MVPD attempted to negotiate a carriage agreement with a network that is partially owned by a large content provider. The network refused to grant the MVPD carriage rights for advanced platform content it was thinking about deploying -- HD, VOD, and online. However, the network reserved the right to provide this advanced content on an exclusive basis, or simply at more favorable terms, to larger competing providers operating in the same markets. This would have the effect of making the MVPD's product offerings less competitive with these larger providers, thus limiting consumers traditional and online choices.

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[4] Confidentiality clauses are important to preserve the integrity of the negotiation process and relations between firms. However, government entities are entitled to receive agreements despite these clauses if they issue a subpoena or make a similar demand. WOW! and ACA members intend to cooperate fully with the FCC and the Department of Justice as they review the proposed combination and will respond promptly to all demands for information.

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4. Content providers with market power are increasingly demanding "take it or leave it" "rate resets" during contract renewal negotiations, enabling them to automatically pass-through increased content costs. Consumers are harmed by the pass-through of some of these inflated costs; the competing MVPD is harmed when it must absorb the remaining costs, thereby diminishing the resources needed to offer content from smaller providers as well as implement advanced services.

5. Content providers with significant market power sometimes demand a higher penetration of distribution for their video services from smaller operators than they do from larger distributors. If even a relatively small number of new or existing video subscribers choose the lower-cost "broadcast basic" tier, the penetration of the higher-cost "expanded basic" tier could fall below the required penetration floor. The only remedy in that case would be to migrate the cable network(s) in question to the Limited Basic tier of service, forcing additional programming cost on those subscribers who may least be able to afford it -- and, in the process, causing the entry-level video offering to become less competitive from a retail pricing perspective than that offered by large competitors who may not have equivalent penetration requirements.

6. A MVPD has most recently experienced problems with initiating its own version of Comcast's Fancast XFINITY TV service because it has been unable to obtain content from Comcast and other content providers with whom Comcast has struck deals. This despite the fact that Comcast claims the content used in its online service is non-exclusive. This highlights the fact that mere promises of non-exclusivity offer very little. An entity can obtain a de facto exclusive by slow-rolling negotiations or by offering the product at unreasonable rates, terms, and conditions. In the end, consumers lose as the face more limited options.

B. Harms to Competition Arising from the Proposed Comcast- NBC Universal Combination

With the proposed combination, the issue is whether post-combination Comcast is able to use the newly aggregated assets and market power to engage in substantially enhanced anticompetitive activities, including by raising prices significantly, withholding or discriminating in providing access, mandating uneconomic tiering or minimum penetration requirements, or forcing unreasonable tying or bundling arrangements. The readily proven response is that of course it does given the assets that the combined entity will control post-combination and given the current anticompetitive behavior of the two firms.

While couched in terms of synergies and growth opportunities, at its heart, the Comcast-NBC Universal deal is principally driven by the aim to lock-up a wider array of key content (a horizontal combination) and use that enhanced power vertically to reduce or eliminate competition, in either traditional or Internet-based markets. Let me elaborate.

In a series of rulings over the past five years – one just the other day -- the FCC has determined that sports programming was "non-replicable" or "must have." In other words, a

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video distributor such as WOW! or other ACA members could not succeed if it could not give customers access to such programming. The Commission has reached a similar conclusion for television network programming, which combines the value of prime-time content with extensive sports content. A main driver of the proposed combination is to "lever" these two "must have" and currently competing content anchors and squeeze unaffiliated downstream multi-channel video providers to extract appreciably higher fees.[5] In the post-combination world Comcast will have so much power that it can create its own economic reality and make one plus one equal five. This makes every distributor in the United States quake as they will be forced to pay more for the content so essential to their businesses. Further, it means that American consumers will pay more as well. This is the antithesis of a pro-competitive deal.

Two examples will help make this point clearly. In Chicago today, WOW! carries 19 networks from Comcast and NBC Universal, including both Comcast's regional sports network and NBC's owned-and-operated television station. We negotiate separately with the two firms, and, although it is quite limited because each firm leverages its existing "market power content" to the maximum extent, we have some limited maneuverability regarding the rates, terms and conditions for carriage. Post-combination, even this very limited flexibility evaporates, and we will face a "take-it or leave-it" deal – which, because it contains much increased "market power content," we must take.

An ongoing battle between Comcast and competing video distributors in California provides more specificity on how Comcast can extract added value when it controls two separate "must have" networks. Historically, Comcast's regional sports network in the Bay Area carried all local sports teams, and competing video distributors were able to acquire this content, albeit at very high prices. Then, just a short time ago, Comcast removed two of the local teams' games from the Bay Area network and placed them on a separate regional sports network in Sacramento, which was not previously carried by the other providers. The competing distributors thus were forced to either pay for two networks – although the amount of content from in-market sports teams did not increase and the price for the Bay Area network did not decrease -- or deprive their users of much-in-demand content. This is just one of the many strategies Comcast can employ and expand upon if this proposed combination is approved.

This enhanced market power, of course, poses the major concern for providers, like WOW!, that rely on access to key content – such as Comcast's Chicago RSN and NBC's "O&O" station in Chicago -- and that are competing directly with Comcast's Chicago cable systems. Numerous studies, including from U.S. General Accountability Office, have demonstrated that competitors like WOW! provide real competition to incumbent cable providers and tangible benefits for consumers. As I discussed at the outset, WOW! has received an unprecedented

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[5] In their application to transfer control filed last week with the FCC, Comcast-NBC Universal contend there is not an issue with regard to RSNs arising from the proposed combination. However, they only arrive at this contention by artificially pigeon-holing RSNs into their own submarket. In this testimony, WOW! has provided one example of how RSNs and local television networks compete directly, which demonstrates the fallacy of Comcast-NBC Universal's market definition, and other distributors and WOW! can provide additional evidence supporting a conclusion that a more expansive market definition is justified.

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number of awards for providing an exceptional service experience compared to incumbent providers. However, if WOW! is forced to either forgo access to content or pay supra-competitive prices or face anticompetitive terms and conditions for it, all of this is placed in jeopardy.

Moreover, WOW! is not the only competing video distributor in an extremely vulnerable position. DirecTV, Dish, Verizon's FiOS, and AT&T U-Verse are all in Comcast's cross-hairs. In fact, with the advent of Internet-delivered video content, the hundreds of ACA members who currently do not compete with Comcast's cable systems become new targets. Comcast will be able to present them with the simple proposition: if you want your customers to have access to our content, you will now pay supra-competitive prices both to acquire Comcast-NBC Universal's "must have" content for traditional cable customers and to allow your customers to access this content as an Internet-delivered service. Heads, Comcast wins; Tails, Competition and Consumers lose.

Finally, if WOW! must pay the combined Comcast-NBC Universal supra-competitive prices for content or must accept anticompetitive terms and conditions, such as unreasonable tying, tiering, or penetration requirements, it will have little choice but to either raise prices for its customers far above what would occur in competitive markets or limit the content it acquires from other suppliers, including smaller, independent providers. Moreover, WOW! can envision that the combined entity will make demands much greater than today and that are so onerous that we will have to continue to shrink the bandwidth we would dedicate for advanced services and broadband offerings. This runs directly counter to the federal government's vision of expanding and enhancing next-generation Internet access services for all users.

II. Traditional Behavioral Remedies are Insufficient to Remedy the Harms that Arise from the Proposed Combination

In fashioning relief to address the harms that would arise if Comcast and NBC Universal were permitted to combine, it is important to review the history of the Congressionally mandated program access requirements and merger-related conditions and understand they are so flawed as to provide ineffective relief. The program access statute, passed as part of the 1992 cable legislation, sought to address the market power that large cable operators had acquired and which they used frequently to squeeze programmers not affiliated with them and to refuse to sell (or otherwise discriminate in the sale of) affiliated programming product to competing distributors. The FCC promptly implemented the statute by adopting rules, but it became quickly apparent that there were so many loopholes in the rules that incumbent cable operators and their affiliated programmers could readily avoid them. For example, program access remedies contain an enormous loophole that permits entities to justify discriminatory practices by claiming they are based on volume-rated cost differentials, although there is scant evidence of any cost-based rationale. Another loophole permits programming vendors to artificially establish a high market rate, which its affiliated distributor "kicks-back" to the vendor. As for the program access complaint process, there is no prohibition on programmers requiring the distributor to remove the network upon expiration of an agreement while a program access complaint is pending. Further, the costs and time associated with pursuing a complaint are so prohibitive that they are beyond the reach of most small operators.

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The FCC sought to tighten these loopholes in subsequent mergers between content providers and distributors, for instance, by permitting complainants to use third-party arbitration or collectively bargain for rights. But, here again, programmers affiliated with larger cable operators quickly found how to beat the system. WOW! considered using the arbitration process imposed on Comcast in the Adelphia decision but determined the cost of the process was likely to exceed $1 million, take one year or longer, and require key personnel to take large amounts of time from their regular jobs. In other words, the costs of using arbitration were going to be close enough to the extra price Comcast was going to charge us in the first place. Instead, we had no choice but to "eat" an enormous rate increase to carry Comcast's RSN. In effect, the program access process has essentially given us a right without a remedy. It would be a grave error to buy into the contention of Comcast and NBC Universal that these processes constitute a legitimate backstop for anticompetitive harms arising from the deal.

WOW! and the ACA are committed to addressing problems with behavioral relief and devising enhanced measures. For instance, among the many remedies we are considering proposing to the FCC and the Department of Justice that would be necessary to address the potential harms are the following:

- **Non-Discriminatory Rates and Terms**. All Comcast-NBC Universal content (whether broadcast, satellite, terrestrial or online) would be available on a non-discriminatory basis, with rates based on a Most Favored Nation or other benchmark.

- **Prohibitions on Content Tying, Bundling and Similar Practices.** Comcast-NBC Universal would be prevented from tying and bundling its services, from requiring carriage of content on a particular tier or level of service, and from penetration or buy-through requirements that disadvantage one provider compared to another.

- **Program Access Arbitration Reforms**. To resolve any program access complaints, unaffiliated MVPDs should be permitted to elect third party review and, thereafter, binding arbitration in connection with the reasonableness of program access and retransmission consent terms and condition (including those between Comcast and NBC Universal). While the third party review or arbitration is pending, unaffiliated MVPDs would be permitted to continue to carry the programming under the terms and conditions of the existing or expired agreement.

Even with potentially enhanced behavioral remedies, given that the harms from the proposed combination of Comcast-NBC Universal are so severe, the FCC and Department of Justice must seriously consider structural relief, including divestitures of assets that are the cause of the harms. The great value of structural relief is that it creates the proper, pro-competitive market dynamic and minimizes any regulatory gaming that can occur. WOW! and the ACA were most heartened to see the Department of Justice rely on structural relief (a divestiture) in the recently negotiated Ticketmaster consent decree.

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III. Because of the Substantial and Far-reaching Problems Posed by the Deal, the Federal Communications Commission and the Department of Justice Should Proceed Deliberately

The proposed combination of Comcast and NBC Universal would bring together the leading content distributor and a major content provider with a major television network distributor which creates and controls effectively essential content. As a consequence, the proposed combination raises critical concerns about the anticompetitive effects on a variety of markets and consumers throughout the country. In my testimony, I have briefly discussed harms from increased horizontal concentration of content, enhanced vertical integration of content and distribution, and further horizontal concentration in distribution markets. I also have raised concerns about the harms that would result with the efforts of Comcast and NBC Universal to extend their market power from the traditional communications markets to the Internet. I know that other interested parties, including consumer groups, have raised concerns which include: higher prices for consumers, particularly those in rural areas, fewer programming choices, increased difficulty by unaffiliated content providers to obtain equitable distribution agreements less competition in local advertising markets, and lost jobs. In light of the magnitude of the proposed combination and its potential to drastically alter the competitive landscape in traditional and new content and distribution markets, the federal agencies need to proceed deliberately to gather, understand, and analyze all relevant data. WOW! and the ACA ask that they be permitted to do their jobs correctly.

IV. Conclusion

The proposed combination of Comcast and NBC Universal places federal decision-makers at a crossroads: will the agencies have sufficient foresight to adopt the necessary robust relief that will enable them to get ahead of anticompetitive problems caused by the proposed combination, or will they proceed cautiously waiting first to see if prices rise, jobs are lost, and firms go under? If the FCC and Department of Justice ignore or treat lightly the potential harms or provide inadequate relief, the already disturbing trend of big content and distribution mergers will only accelerate, all riding on the precedent of this deal. As a result, consumer hopes for greater choice will be dashed. On the other hand, if the federal agencies address the grave potential harms with robust relief as described above, incumbent entrepreneurs will expand their businesses and new ones will rush into the market – all to the benefit of American consumers. The consequences of these choices make this proposed combination a "big deal." WOW! and the ACA look forward to working with the Congress and the agencies as the review proceeds and as the agencies fashion relief to address anticompetitive harms.

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TESTIMONY OF

LARRY COHEN
PRESIDENT
COMMUNICATIONS WORKERS OF AMERICA

Competition in the Media and Entertainment Distribution Market

Before the
U.S. House of Representatives
Committee on the Judiciary

February 25, 2010

Good Morning, Mr. Chairman and Members of the Committee. Thank you for the opportunity to appear before you today. I am Larry Cohen, President of the Communications Workers of America. CWA represents more than 700,000 workers in communications, media, airlines, manufacturing, and the public sector. Specifically, we represent workers at both Comcast and NBC-Universal and can provide a unique perspective on the impact that this proposed merger would have on them and the industry.

The purpose of this hearing is to explore the potential anticompetitive impact of Comcast Corporation's proposed acquisition of NBC Universal. My testimony will focus on three areas: 1) the impact of the Comcast-NBC combination on jobs and the potential erosion of labor standards; 2) the anticompetitive behavior that currently pervades the video distribution and content markets and how that behavior will be exacerbated by this merger; and 3) the potential harms that such a transaction would pose to the emerging Internet video marketplace. At bottom, the public must be protected from the significant harms created by a combination of such unprecedented scale.

I. Impact on Workers

The proposed Comcast acquisition of NBC poses considerable harm to workers. It likely will result in the loss of good jobs, the erosion of employee rights, and undermine living standards in the communications and media industries.

The new venture will be financially weaker the day after the merger. As part of the transaction, NBC debt will increase by approximately $8 billion. As a result, the new entity will be under intense pressure to cut costs and jobs. This is an all too familiar pattern in the media sector. Media companies over-leverage to pay for a merger, and then cut jobs to improve their balance sheets, only to discover that they do not have enough staff to produce quality news and entertainment programming. This in turn leads to a vicious cycle of declining audience share, less revenue, and even more cost-cutting. Absent firm commitments from Comcast and NBC to maintain current employment levels, there is no reason to believe that the Comcast/NBC joint venture will not follow this pattern. With official unemployment now at 10 percent, this is a time

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to evaluate all corporate transactions through a screen that assesses the impact on jobs. We should not support a corporate deal that would eliminate good jobs.

The communications and media sectors historically have been a source of good jobs for American workers, the result of more than 70 years of collective bargaining. But a Comcast acquisition of NBC would reverse this progress and undermine employment standards for workers in these sectors.

Comcast has adopted a low-road labor policy, one based on the violation of workers' rights. Comcast has a sordid track record of aggressive action to eliminate worker organization at companies that it has acquired.

In 2002, Comcast acquired AT&T Broadband. At the time, CWA represented about 5,000 cable employees there. After the transaction was announced, I met with Comcast executives and they made a commitment to me that they would respect their employees' right to a union voice on the job. Let me tell you what a Comcast commitment means. Soon after Comcast took control of AT&T Broadband, a senior vice president in Oregon announced: "We're going to wage war to decertify the CWA." And that is precisely what Comcast did in multiple locations.

Most of the organized units that Comcast acquired were in the process of negotiating a first contract. Comcast delayed bargaining for years, denied workers wage and benefit improvements provided to non-union employees, and supported decertification elections. Comcast refused to reach agreement on a first contract in 16 of the organized units that it acquired from AT&T.[1]

Comcast has fired and retaliated against workers that try to form a union. Before a union election, Comcast instructs its supervisors to ride along with technicians on the job, to meet

[1] American Rights at Work, *No Bargain: Comcast and the Future of Workers' Rights in Telecommunications,"* 2004 (available at http://www.americanrightsatwork.org/publications/general/no-bargain-comcast-and-the-future-of-workers-rights-in-telecommunication.html).

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repeatedly with workers one on one, and to hold mandatory meetings to convey its anti-union message.

CWA today represents Comcast employees in the Pittsburgh area. Comcast workers were forced to go through four union elections there in five years – three of them decertification attempts orchestrated by the company – before they finally won their union voice. Getting a first contract required overcoming further Comcast delaying tactics. Finally, Comcast has recognized that the workers there want a union voice and has negotiated a contract with CWA.

CWA represents Comcast employees in the San Francisco Bay and Detroit metropolitan areas. In both locations, Comcast has shifted about half the work to non-union lower-wage contractors, reducing secure jobs in areas hard-hit by unemployment.

Through these tactics, Comcast has managed to limit union representation to a small percentage of its workforce. Telecommunications has been a source of good jobs in this country, largely a result of more than 70 years of collective bargaining. The telecommunications industry has provided good jobs for women and minorities, with the result, as one economist wrote, that this industry is one of the few that has overcome market-based pay discrimination.[2] But Comcast – which competes directly with unionized telecom companies for voice, video, and broadband service – drags down the industry wage and benefit standards.

In contrast, NBC-Universal has a 70-year history of collective bargaining with multiple unions. To be sure, negotiations often deal with contentious issues, and the National Association of Broadcast Employees and Technicians (NABET) sector of CWA is currently in difficult negotiations with NBC-Universal on a contract covering technicians at the NBC network and stations in Washington, D.C., New York, Chicago, and Los Angeles. The contract expired 11 months ago. We are hopeful that we can resolve the issues that currently divide us. Although

[2] Vicky Lovell, Heidi Hartmann, Jessica Koski, *Making the Right Call: Jobs and Diversity in the Communications and Media Sector*, Washington, D.C.: Institute for Women's Policy Research, 2006 (available at http://www.iwpr.org/pdf/C364.pdf).

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these are challenging negotiations, the bottom line is that NBC workers have a collective voice through their union – a right that Comcast has aggressively denied to their employees.

With the merger, an aggressively anti-union Comcast would be in control of labor relations, and an employer that has taken the low-road employment strategy will expand its ability to put downward pressure on living standards throughout the communications and media sectors.

Furthermore, the Comcast acquisition of NBC-Universal from General Electric represents a giant step backward on corporate governance practices. General Electric uses a one-share one-vote rule in shareholder voting. In contrast, Comcast has two classes of stock that gives super-majority voting rights to its CEO, Brian Roberts. Although Mr. Roberts owns only 1.23 percent of Comcast shares, he has 33 percent voting power. The Corporate Library, an independent shareholder research organization, has given Comcast an "F" on corporate governance practices. Comcast's undemocratic corporate governance structure mirrors its anti-democratic labor-management relations as well as its domination of the media marketplace.[3]

II. Anticompetitive Harms to Today's Video Marketplace

The proposed combination of Comcast, the nation's largest video service distributor, and NBC Universal, a leading video content producer, would create a vertically integrated entity with market power to increase cable rates, block competition in the video marketplace, and reduce jobs.

There is already too little competition in the video marketplace, as evidenced by the ever increasing rates that consumers pay year after year. The FCC estimates that from 1995 to 2008, the price of expanded basic service grew at three times the rate of inflation -- from $22.35 to $49.65, an increase of 122.1 percent, compared with an increase in the Consumer Price Index of 38.4 percent over the same period. (*See* chart, attached).[4] This merger would provide

[3] The Corporate Library, Comcast Corporate Governance Report, Feb. 23, 2010.

[4] *In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, Report on Cable Industry Prices, MM Docket No. 92-266 ¶ 2, Chart 1 (2009).

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Comcast/NBC with added incentive and ability to engage in anti-competitive practices that would raise cable rates for consumers.

Today, competing video distributors are often forced to purchase large bundles of channels that they and their customers do not want. Following the merger, Comcast will have more premium content and will have the ability to bundle its less desirable cable channels with must-have NBC programming to secure higher rates and more favorable placement of its programming. This forced bundling will raise other video providers' costs, and those added costs translate into higher cable rates for consumers.

This is particularly problematic for small rural operators and new video competitors with a smaller subscriber base. Because Comcast and NBC give bulk discounts, they charge themselves less than they charge small and rural carriers on a per subscriber basis, raising the costs for cable subscription for customers of rural operators and new video entrants.

Today, some companies are trying to compete with incumbent cable operators, investing significant resources to build out their networks and enter the video marketplace. This merger would provide Comcast/NBC with the incentive and ability to block or limit that competition, and block or limit the investment and jobs that accompany those efforts.

As competitors' costs increase, those companies trying to compete will invest less in building out their networks and hire fewer people. As a result of this proposed merger, Comcast/NBCU will have the market power to stifle competitive entry by new video operators. As a result, there will be fewer companies competing to provide traditional cable video services, fewer choices and higher prices for consumers, and lost jobs from these potential competitors.

In the past, Comcast has used its ownership of sports programming in an anti-competitive way. For example, Comcast has prevented DirecTV and Dish Network from accessing its SportsNet Philadelphia channel, which carries the games of Major League Baseball's Phillies, the NBA's Sixers and the NHL's Flyers. (Comcast has a controlling interest in the Sixers and Flyers.) By withholding the games of the three Philadelphia professional sports teams from its rivals, Comcast has had a powerful marketing advantage against satellite TV competitors.

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Comcast has faced numerous FCC complaints from programmers for discrimination and anti-competitive behavior. The NFL Network, the Tennis Channel, MASN, a regional sports network, and Wealth TV, an emerging HD programmer, have filed formal FCC complaints against Comcast. These complaints allege that Comcast carried its own programming on favorable terms while refusing to carry independent programming on equal terms – or to carry such programming at all. Should regulators approve the Comcast-NBCU merger, Comcast will have more affiliated content and even more of an incentive to favor its own programming in its carriage decisions.

This may result in Comcast refusing to carry competitors' programming, paying them less for carriage, or placing them on a program tier with fewer viewers. After acquiring NBC programming, Comcast will have even greater incentives to favor its own array of programming, shutting out the independent voices of other programmers, leaving consumers with less quality, choice and diversity in programming. In fact, Comcast Cable's President and COO Steve Burke made remarks during the NFL's program carriage complaint with the FCC that Comcast treats affiliate networks "like siblings as opposed to strangers."

Meanwhile, bringing a carriage access complaint to the FCC is not a meaningful remedy. The complaint process currently lacks any concrete deadlines for FCC action, with many complaints languishing at the Commission for years.

Today, Comcast's regional and local programming networks compete with NBC's owned and operated stations for news and entertainment programming. A merged Comcast/NBCU would have the incentive to merge these operations, reducing quality, diversity, competition, and employment in video programming. Already, NBC has pioneered local news sharing agreements that in effect merge NBC's local news gathering with those of its broadcast competitors. Under these arrangements, NBC and its former competitors jointly determine news assignments and crew assignments, replacing what were once competing news operations with shared news gathering. In New York City, for example, six stations owned by four different owners (including NBC's owned and operated station and its Telemundo station) cooperate in a local news sharing venture.

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This merger also threatens to eliminate a current competitor for local advertising. Contrary to Comcast/NBC claims today, Comcast is a major and sometimes even the most significant competitor for local ad dollars in some local advertising markets. In 2006, NBC made this very argument to the Federal Communications Commission. NBC stated that cable's local advertising dollars exceeded the total advertising dollars at NBC local stations, and actually were greater than advertising revenues at the number one ranked station in several markets, including Philadelphia (greater than the ABC station by $26 million) and San Francisco (greater than the Fox station by $70 million).[5] Comcast's local ad share has grown since then. In addition, an independent broadcaster will not be able to offer the volume discounts and package deals for advertising across dozens of channels that the merged entity will be able to do.

This translates into less revenue for competing broadcasters to produce local news and to hire workers. As a result, broadcasters will no doubt be forced to scale back local news production, with negative impact on diversity, competition, and adequate staffing that drive quality news.

In terms of local market share, Comcast's ad penetration is analogous to NBC trying to merge with the number one ranked station in the market, a practice prohibited by the FCC under its dual network rule. That rule permits common ownership of multiple broadcast networks but prohibits a merger of the "top four" networks, i.e., ABC, CBS, Fox, and NBC.

III. Anticompetitive Harms in Emerging Online Video Market

Another area of concern posed by the Comcast-NBC Universal merger is in the developing online video marketplace. New entrants are beginning to offer a number of video streaming services on the Internet and "over the top" services that bring Internet video directly to the television. This premium content that is available online increases the value of broadband subscription to consumers. Thus, the availability and ease of accessing video online is an important means to encourage the deployment and adoption of broadband. And as broadband

[5] NBC Media Ownership Comments, FCC 06-121 (Oct. 2006).

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adoption increases, some users are able to choose to "cut the cable cord," canceling their cable subscription and relying on the Internet for television. In fact, the FCC recently concluded that internet video and video devices are an important part of developing a National Broadband Plan.[6]

The Comcast-NBC merger has the potential to bring this to a halt by limiting the ability of over-the-top service providers to provide video. A combined Comcast/NBC could limit consumers' online access to NBC content altogether or charge consumers higher prices to access that content unless they already subscribe to cable services. This is the TV Everywhere model that Comcast and NBC have already begun to deploy, bundling content with cable subscription, thereby forcing internet customers to buy cable packages in order to see content online from NBC.

TV Everywhere is an initiative being pursued by a number of cable companies, but led by Comcast. Under the TV Everywhere model, Comcast video subscribers have access to video content online for free, just as they do today. Online consumers, however, are forced to pay higher rates or restricted from accessing the content at all. For example, that is what is happening with some Olympic coverage from NBC today. In the biggest TV Everywhere trial, NBC restricts access to live streaming and full replay of Olympic events to consumers who can "authenticate" that they are paying cable subscribers.

TV Everywhere creates a mechanism for programmers and content providers to have a "walled garden" of online video content, only available to those who pay their monthly cable subscriptions. In doing so, TV Everywhere denies independent video distributors access to must-have programming, and creates a barrier to entry in the video distribution market for Internet-only video distributors. This extension and protection of the cable business model effectively "cablizes" the Internet as we know it today, thus diminishing innovation, depressing investment in broadband and ultimately eliminating jobs.

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[6] *Comment Sought on Video Device Innovation*, NBP Public Notice #27, GN Docket Nos. 09-47, 09-51, 09-137; CS Docket No. 97-80 (Dec. 21, 2009).

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In the end, consumers lose out. TV Everywhere would protect the cable business model by imposing its subscription pricing structure on the Internet. Where customers have traditionally accessed content for free, they would now be forced to pay. Where the internet use to be a source of expanding consumer choice and diversity of programming content, it would be used to protect the current cable incumbents.

A merged Comcast/NBC would have the ability to force this business model on other distributors through their ownership of NBC's content. Today, NBC owns a 30 percent interest in a website called Hulu.com that offers free, advertising-supported streaming video of broadcast and cable television shows and movies. In acquiring NBC, Comcast would secure a substantial interest in Hulu.com, which is the second leading online video provider. As a result, Comcast would play a critical role in the public's ability to continue accessing the Internet's growing video services.

All of the actions I have just described restrict the Internet from developing into a platform for competitive video alternatives. These actions in essence protect the cable-channel business platform at the expense of new video entrants, thereby devaluing the broadband investment of competitive companies. The end result is that companies will invest less in broadband deployment, put less fiber in the ground and hire fewer people.

IV. Conclusion

The Comcast/NBC merger's potential to limit growth, investment and jobs is not in the public interest. Given its anticompetitive and anti-consumer effects, federal regulators cannot pass this merger without carefully considering the significant impact the merging companies will have on video competition, choice and jobs. Moreover, federal regulators cannot rely on the voluntary public interest commitments offered by Comcast and NBC Universal alone. The voluntary commitments are: 1) insufficient to address adequately the very real competitive harms; and 2) in many cases, rest on pending actions before federal regulators. As a result, prior to addressing this merger, CWA believes that both the DOJ and the FCC should complete many of the actions that will address some of these issues from a broader industry-wide perspective.

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Federal regulators would then have the ability to craft any additional, specific merger conditions that are necessary to further address the potential harms caused by this combination.

Again, I want to thank the Committee for giving me the opportunity to testify today and for Chairman Conyer's leadership on this issue. I look forward to answering any questions that the Members of the Committee may have.

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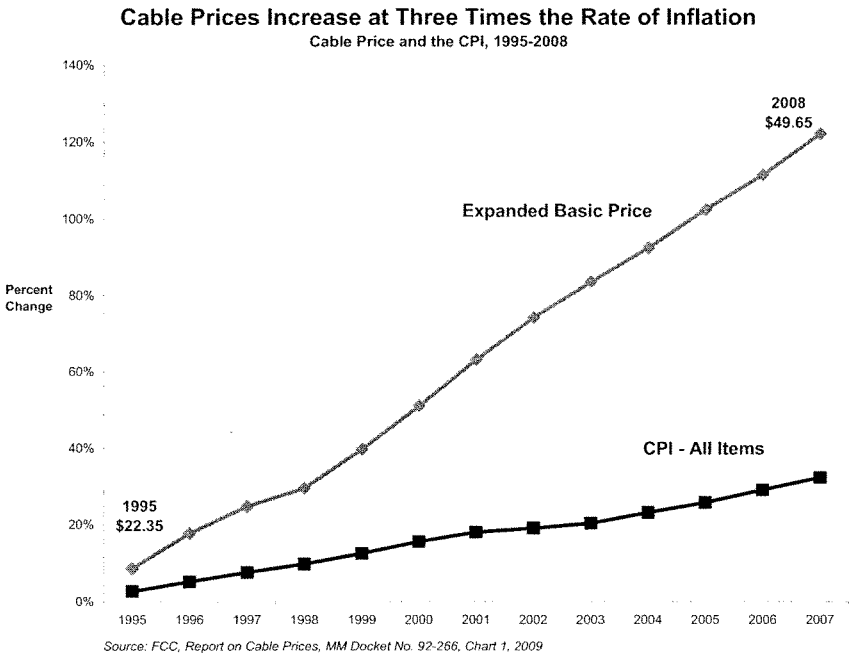
ATTACHMENT



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CITATIONS OF ONLINE REPORTS

[1] American Rights at Work, *No Bargain: Comcast and the Future of Workers' Rights in Telecommunications,"* 2004 (available at http://www.americanrightsatwork.org/publications/general/no-bargain-comcast-and-the-future-of-workers-rights-in-telecommunication.html)

[2] Vicky Lovell, Heidi Hartmann, Jessica Koski, *Making the Right Call: Jobs and Diversity in the Communications and Media Sector*, Washington, D.C.: Institute for Women's Policy Research, 2006 (available at http://www.iwpr.org/pdf/C364.pdf)

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February 4, 2010

Hearing of the Subcommittee on Antitrust, Competition Policy and Consumer Rights: *"The Comcast/NBC Universal Merger: What Does the Future Hold for Competition and Consumers?"*

Statement of Senator Cornyn

Thank you, Mr. Chairman, for calling today's hearing. This subcommittee provides an important forum for public discussion of the competitive implications of mergers. And I want to thank each of the witnesses for taking the time to participate in today's hearing and bringing their respective perspectives to bear.

The law gives primary responsibility for merger review to the Antitrust Division of the Department of Justice and the Federal Trade Commission. These agencies are given this important responsibility because they have significant investigative resources and expertise in antitrust law and economics.

The DoJ's Antitrust Division will be reviewing this particular merger. Many are looking to the Division's handling of this merger as an early test of the Obama Administration's Antitrust policy. I hope that the Antitrust Division will live up to its history of analyzing mergers expeditiously and according to neutral and publicly available legal and economic principles.

Specifically, I want to urge the Antitrust Division to resolve this matter quickly and in accordance with the principles stated in the DoJ/FTC merger guidelines.

First, it is always important for the Antitrust Division to complete its review of mergers as expeditiously as its resources and its obligation to professionalism and thoroughness allow. When a merger waits in extended legal limbo, companies, their assets, their employees, and consumers are harmed.

There can be a tendency in the public sector to forget that, in the private sector, time is of the essence. Each day that a company's future ownership structure remains in doubt, it becomes

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harder for that company to attract investors, invest in new products, or hire new employees. So I want to urge the fine attorneys and economists in the Antitrust Division to be mindful that time is of the essence in this—and every—merger.

Second, I think it is important that this merger is evaluated according to the neutral and publicly available merger guidelines. I know that the DoJ and FTC are in the process of revising the horizontal merger guidelines. I hope that the guidelines continue to be grounded in sound economic principles. To the extent that any new concepts are being discussed as part of the revision process, I think that fairness requires that this merger be evaluated according to the guidelines as they existed at the time of the merger.

Certainty and predictability are cornerstones of the rule of law. We write law down so that people can order their affairs, secure in the knowledge that government will intervene only according to predetermined, objective, and predictable rules. Predictability and the rule of law make civilization and economic development possible.

The creation of the Merger Guidelines was an important step in bringing predictability to antitrust law, and ensuring that economics, not politics, govern competition policy. As Deputy Attorney General Varney has said, "The Guidelines serve the important purpose of providing broad transparency to businesses and the antitrust bar as to how the Agencies approach merger review. Particularly in times of economic uncertainty, providing clear guidance to businesses about enforcement intentions is 'good government' that benefits us all."

I agree, and that is why I believe that it is important that this merger be analyzed according to the Guidelines that were publicly available when the merger was agreed to.

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Testimony of

Dr. Mark Cooper
Director of Research
Consumer Federation of America

on behalf of

Consumer Federation of America
Free Press
Consumers Union

before the

Senate Judiciary Committee
Subcommittee on Antitrust, Competition Policy and Consumer Rights

Regarding

"The Comcast/NBC Universal Merger: What Does the Future Hold for Competition and Consumers?"

February 4, 2010

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Mr. Chairman and Members of the Committee,

My name is Dr. Mark Cooper. I am the Director of Research at the Consumer Federation of America. I appear before you today on behalf of the Consumer Federation of America, Free Press and Consumers Union. We appreciate the opportunity to share our views of a merger that is unique in the history of the video market and will go a long way toward determining whether or not the future of video viewing in America is more competitive and consumer-friendly than the past.

The merger of Comcast and the National Broadcasting Company (NBC) is a hugely complex undertaking, unlike any other in the history of the video marketplace. Allowing the largest cable operator in history to acquire one of the nation's premier video content producers will radically alter the structure of the video marketplace and result in higher prices and fewer choices for consumers. The merging parties are already among the dominant players in the current video market. This merger will give them the incentive and ability to not only preserve and exploit the worst aspects of the current market, but to extend them to the future market.

Comcast has sought to downplay the impact of the merger by claiming that it is a small player in comparison to the vast video universe in which it exists. It has also glossed-over the fact that this merger involves the elimination of actual head-to-head competition. Finally, it has argued that existing protections and public interest promises will prevent any harms that might result from the merger. All three claims are wrong.

Neither Comcast's regurgitation of market shares and counts of outlets and products, nor its public interest commitments begin to address the fundamental public policy questions and competitive issues at stake in this merger. Nor can the merger of these companies be viewed separately from the products they sell. NBC and Comcast do not sell widgets. They sell news and information and access to the primary platforms American use to receive this news and information. Control over production and distribution of information has critical implications for society and democracy. As a consequence, the merger of these two media giants reaches far beyond the economic size of the merging parties to the very content consumers receive, and how they are permitted to access it.

Finally, if the size and scope of this merger is not sufficient to give you pause, the past actions of the acquiring party should. Comcast has raised cable rates for consumers every year, and is among the lowest ranked companies in terms of customer service. Comcast is the frequent subject of program access complaints of competing video providers, as well as of discriminatory carriage complaints by independent programmers. Finally, Comcast is on record lying to a federal agency regarding whether they blocked Internet users' access to a competing a video application for anti-competitive purposes. These past practices do not bode well for future competition if Comcast is allowed to acquire NBC. Further, Comcast's lack of candor in past proceedings cast doubt on the prudence of relying on Comcast's voluntary public interest commitments as a means of addressing the anti-consumer impacts of this merger.

The goal of mega-mergers such as this is to cut costs and increase revenues. The most direct path to those outcomes are firing workers and raising prices. Cutting jobs is hardly a laudable

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goal in the current environment, but the primary "synergy" that mergers produce is the ability to reduce employment by sharing resources between the commonly-held companies. To expect the opposite to happen here based on the evidence-free assertions of Comcast would be foolhardy. Simply put, this merger is about higher prices, fewer choices, and lost jobs.

The Biggest Gets Bigger (and Stronger)

Comcast is the nation's largest cable operator, largest broadband service provider and one of the leading providers of regional cable sports and news networks. NBC is one of only four major national broadcast networks, the third largest major owner of local TV stations in terms of audience reach, an icon of local and national news production and the owner of one of a handful of major movies studios.

As large as Comcast is nationally, it is even more important as a local provider of video services. Comcast is a huge entity in specific product markets. It is the dominant multi-channel video programming distributor (MVPD) in those areas where it holds a cable franchise, accounting, on average for over half of the MVPD market. It is the dominant broadband access provider in the areas where it has a cable franchise, accounting for over half of that market. This dominance of local market distribution platforms is the source of its market power. The merger will eliminate competing distribution platforms in some of its markets and will give Comcast control over strategic assets to preserve and expand its market power in all of its markets.

Broadcasters and cable operators are producers of goods and services that compete head-to-head, including local news, sports, and advertising. In addition, NBC and Comcast are also suppliers of content and distribution platforms, which are goods and services that complement one another. In both roles there is a clear competitive rivalry between them. For example, in providing complementary services, broadcasters and cable operators argue about the price, channel location and carriage of content. The merger will eliminate this natural rivalry between two of the most important players in the multi-channel video space, a space in which there are only a handful of large players.

These anticompetitive effects of the merger are primarily what antitrust practice refers to as horizontal effects. They are likely to reduce competition in specific local markets – head-to-head competition in local video markets, head-to-head competition for programming viewers, head-to-head competition for distributions platforms. The merger will raise barriers to entry even higher through denial and manipulation of access to programming and the need to engage in two-stage entry. The merger will increase the likelihood of the exercise of existing market power within specific markets, and will increase the incentive and ability to raise prices or profits.

The fact that some of the leverage is brought to bear because of the link to complementary products (i.e. is vertical in antitrust terms), should not obscure the reality that the ultimate effects are on horizontal competition in both the distribution and programming markets. The merger would dramatically increase the incentive and ability of Comcast to raise prices, discriminate in carriage, foreclose and block competitive entry and force bundles on other cable systems. The merger enhances the ability of Comcast to preserve its position as the dominant local MVPD,

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reinforce its ability to exercise market power in specific cable or programming markets and extend its business model to the Internet.

We raise these concerns about the merger based on eight specific anti-competitive effects that the merger will have on the video market. The attached exhibit presents the list of distribution and content assets owned in whole or in part by these two companies. The exhibit makes it crystal clear that they do compete head-to-head across a number of product and geographic markets and the assets represent an arsenal of complements that would be powerful ammunition to use as leverage against existing competitors and new entrants.

Higher Prices, Fewer Choices, Less Competition

(1) This Merger will reduce choice and competition in local markets. The merging parties currently compete head-to-head as distributors of video content, in local markets. Because broadcasters own TV stations, they compete with cable in local markets for audiences and advertisers -- especially in the production and distribution of local news, and local and political advertising. This merger eliminates this head-to-head competition in 11 major markets where NBC owns broadcast stations and Comcast operates a cable franchise. These 11 markets account for nearly a quarter of U.S. TV households.

This merger also eliminates a competitor for local and political advertising. In fact, in 2006 NBC told the Federal Communications Commission that local cable operators present the single biggest threat to broadcasters in terms of securing local and political advertising.[1] Now that NBC is looking to merge with Comcast, the potential elimination of this local competition has been conveniently ignored. But federal authorities cannot and should not ignore the fact that a merger between Comcast and NBC is likely to cause a significant decline in competition in local advertising markets and excessive domination by the merged company. Not only will advertisers lose an important option, but the merger will be to the detriment of other local broadcasters - particularly smaller, independent ones - who are already facing ad revenue declines in an economic downturn. A stand-alone broadcaster will not be able to offer package deals and volume discounts for advertising across multiple channels the way that Comcast/NBC will be able to do post-merger. That means other local broadcasters will have less money to produce local news and hire staff. To compete, rival broadcasters will have two options: fire staff and reduce production of local news and information; or consolidate in order to compensate for market share lost to the new media mammoth.

(2) This merger removes an independent outlet and an independent source of news and information. These two companies compete in the video programming market, where Comcast's regional sports and news production compete with NBC's local news and sports production. By acquiring NBC, Comcast's incentive to develop new programming would be reduced. Instead of continuing to compete to win audience, it just buys NBC's viewers. Where two important entities were producing programming, there will now be one.

[1] NBC Media Ownership Comments, FCC Docket 06-121 (filed Oct. 2006).

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(3) The merger will eliminate competition between Comcast and NBC in cyberspace. NBC content is available online in a variety of forms and on different websites and services. Most prominently, of course, NBC is a stakeholder in Hulu -- an online video distribution portal that draws millions of viewers. Comcast has put resources into developing its own online video site - "Fancast" - where consumers can find content owned by the cable operator. The merger eliminates this nascent, head-to-head competition.

Moreover, Comcast is the driving force behind the new "TV Everywhere" initiative. This collusive venture -- which we believe merits its own antitrust investigation—would tie online video distribution of cable content to a cable subscription and pressure content providers to restrict or refrain from online distribution outside of the portal. This is a disaster for video competition. The proposed merger strengthens Comcast's hand in this scheme by increasing their market power in both traditional and online video distribution. Comcast is clearly attempting to control the distribution of the video content it makes available on the web by restricting sales exclusively to Comcast cable customers. It does not sell that content to non-Comcast customers. By contrast, NBC has exactly the opposite philosophy -- or at least it did. Through Hulu, NBC is competing for both Comcast and non-Comcast customers by selling video online that is not tied to cable. NBC also has incentives to make its programming available in as many points of sale as possible. Merger with Comcast will put an end that pro-competitive practice.

(4) The merger will provide Comcast with greater means to deny rivals access to Comcast controlled programming. Comcast already has incentive to undermine competing cable and satellite TV distributors by denying them access to critical, non-substitutable programming, or by extracting higher prices from competitors to induce subscribers to switch to Comcast. Post-merger it will have a great deal more content to use as an anticompetitive tool. Comcast has engaged in these anticompetitive acts in the past and by becoming a major programmer it will have a much larger tool to wield against potential competitors. Moreover, Comcast has opposed, and is currently challenging in court, the few rules in place that would prevent it from withholding its programming from competing services.

(5) The merger will provide greater incentive for Comcast to discriminate against competing independent programmers. Comcast already has a strong incentive to, and significant track record of, favoring its own programming over the content produced by others with preferential carriage deals. Post-merger it will have a lot more content to favor. The current regulatory structure does not appear sufficient to remedy the existing problem and cannot be expected to address the resulting post-merger threat to independent programmers. The econometric analysis of program carriage indicates there is a great deal of discrimination occurring already. The fact that the FCC is continually trying to catch up with complaints of program carriage discrimination is testimony to the existence of the problem and the inability of the existing rules to correct it.

(6) The merger will stimulate a domino effect of concentration between distributors and programmers. The new combination will create a major asymmetry in the current cartel model in the cable industry. It brings together a large cable provider with a huge stable of must-have programming *and* the largest wireline broadband platform in America. Very likely, this will trigger more mergers and acquisitions because it changes the dynamics of the market. But there will be no positive competitive outcomes resulting from this change.

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This merger signals that the old, anticompetitive game is still on—but with a twist. Like all other cable operators, Comcast has never entered the service territory of a competing multi-channel video program provider, allowing everyone to preserve market power and relentlessly raise prices. But Comcast's expanded assets and especially its new leverage over the online video market will give it a substantial edge against its direct competitors in its service territory. The likely effect of the merger will be for other cable distribution and broadband companies to muscle up with their own content holdings to try and offset Comcast's huge advantage. In other words, there is only one way to deal with a vertically integrated giant that has must-have content and control over two distribution platforms -- you have to vertically integrate yourself. This merger would send a signal to the industry that the decades old game of mutual forbearance from competition will be repeated but at the next level of vertical integration that spills over into the online market. Watch for AT&T and Verizon to be next in line for major content acquisitions. When that happens, it will be extremely difficult for any company that is merely a programmer or merely a distributor to get into the market. Barriers to entry to challenge vertically integrated incumbents will be nearly unassailable. The only option may be a two-stage entry into both markets at the same time -- which is an errand reserved only for the brave and the foolish.

(7) By undermining competition this merger will result in higher prices for consumers. Comcast already raises its rates every year for its cable subscribers, and prices are likely to rise further after the merger. By weakening competition, Comcast's market power over price is strengthened, but there are also direct ways the merger will push the price to consumers up. Comcast will have the opportunity and incentive to charge its competitors more for NBC programs and force competitors to pay for less desirable Comcast cable channels in order to get NBC programming -- those added costs will mean bigger bills for cable subscribers. Furthermore, the lack of competitive pressure that has failed to produce any appreciable downward pressure on cable rates since 1983, will not discipline Comcast from raising its own rates.

(8) This merger will result in higher prices for consumers through the leveraging of "retransmission rights." Through its takeover of local NBC broadcast stations, Comcast will also gain special "retransmission consent rights," which allow stations to negotiate fees for cable carriage of broadcast signals. These rights will enable Comcast to leverage control over must-have local programming and larger bundles of cable channels to charge competing cable, telco and satellite TV providers more money for content. Additionally, once Comcast acquires a broadcaster, it will have the means and incentive to raise retransmission rights payments for NBC-owned stations. This will be reinforced by two factors. First, as the owner of NBC, Comcast profits from the retransmission payments it receives and does not lose from the retransmission payments it makes, which are passed through to consumers. Second, Comcast can charge competitors more for local NBC programming, and will be able to exploit asymmetric information. Cable operators do not publish what they pay for retransmission; broadcasters do not publish what they get. Because of Comcast's superior bargaining power, it will ask for more and pay less.

A Comcast/NBC Merger Should Not Be Allowed To Proceed

The merger has so many anti-competitive, anti-consumer, and anti-social effects that it cannot be fixed. Comcast's claim that FCC oversight will protect the public is absurd. The challenges that

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this merger poses to the future of video competition cannot be ignored, or brushed aside by reliance on FCC rules that have yet to remedy current problems and, thus, are ill-equipped to attend to the increased anticompetitive means and incentives that will result from Comcast's acquisition of NBC. The FCC rules have failed to break the stranglehold of cable to-date; there is no reason to believe they will be better able to tame the video giant that will result from this merger.

Further, any suggestion that the public interest commitments Comcast has made will solve these problems is misguided. Temporary band-aids cannot cure long-term structural injuries. Comcast's promises lack substance and accountability. More importantly, the commitments do not begin to address the anticompetitive effects of the merger. Many of Comcast's commitments amount to little more that a promise to obey the law. Where they go beyond current law, they largely fall within the company's existing business plans. Anything beyond that is meager at best, and in no way substitutes for the localism and diversity that a vigorously competitive industry would produce.

Over the past quarter century there have been a few moments when a technology comes along that holds the possibility of breaking the chokehold that cable has on the multi-channel video programming market, but on each occasion policy mistakes were made that allowed the cable industry to strangle competition. This is the first big policy moment for determining whether the Internet will function as an alternative platform to compete with cable. If policymakers allow this merger to go forward, the prospects for a more competition-friendly, consumer-friendly multi-channel video marketplace will be dealt a severe setback.

I urge policymakers to think long and hard before they allow a merger that gives the parties incentives to harm competition and consumers, while increasing their ability to act on those incentives. This hearing should be the opening round in what must be a long and rigorous inquiry into a huge complex merger of immense importance to the American people. It should be the first step in a review process that concludes the merger is not in the public interest and should not be allowed to close.

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CITIES WHERE THE MERGING MEDIA GIANTS HAVE HEAD TO HEAD COMPETITION AND COMPLEMENTARY ASSETS

NBCU		COMCAST
DISTRIBUTION		**DISTRIBUTION**
• **National Footprint**		• **National Footprint**
27 Stations in 24 cities in 19 states		39 Cable Systems reaching 39 states
• **Local Footprint**		• **Local Footprint**
NBC Station		
WNBC		
New York →	New York	
KNBC		
Los Angeles		
WMAQ		
Chicago →	Chicago	
WCAU		
Philadelphia →	Philadelphia	
KNTV		
San Jose/San Francisco →	San Francisco	
KXAS		
Dallas/Fort Worth		
WRC		
Washington →	Washington	
WTVJ		
Miami →	Miami	
KNSD		
San Diego		
WVIT		
Hartford →	Hartford	
WNCN		
Raleigh		
WCMH		
Columbus		
WVTM		
Birmingham		
WJAR		
Providence →	Providence	
Telemundo Stations:		
KVEA/KWHY		
Los Angeles		
WNJU		
New York →	New York	
WSCV		
Miami		
KTMD		
Houston →	Houston	
WSNS		
Chicago →	Chicago	
KXTX		
Dallas/Fort Worth		
KVDA		
San Antonio		
KSTS		
San Jose/San Francisco →	San Francisco	
KDRX		
Phoenix		
KNSO		
Fresno →	Fresno	
KMAS		
	Denver	
Denver →		
WNEU	Boston	
Boston/Merrimack →		
KHRR		
Tucson		
WKAQ		
Puerto Rico		

New Bedford
Springfield
Pittsburgh
Wilkes Barre
Baltimore
Richmond
Jacksonville
Orlando
West Palm Beach
Fort Myers
Tampa
Atlanta
Knoxville
Nashville
Chattanooga
Memphis
Peoria
Detroit
Grand Rapids
Indianapolis
Peoria
Champaign
Minneapolis/St. Paul
Albuquerque
Colorado Springs
Salt Lake City
Portland
Seattle
Sacramento

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IVilalge.com
Scifi.com
Telemundo.com
Bravotv.com
Triotv.com
Nbcolympics.com
Shopnbc.com
Partial
Hulu (a joint venture with News Corp.)
Aetv.com
Biorgraphy.com
History channel.com
Military.history.com
Thehiostorychannelclub.com
Historytravel.com
Newsvine.com

PROGRAMMING
- **Cable Network Properties**

Bravo
CNBC
MSNBC
NBC Sports
Oxygen
SyFy Channel
USA Network
Weather Channel
Chiller
Sleuth
Universal HD

- **Broadcasting**

NBC Television Network
NBC Sports & Olympics

OTHER CONTENT PROPERTIES
Universal Media Studios
Universal Cable Productions
Universal Pictures
Focus Features
Universal Studios Home Video

COMCAST

INTERNET
Comcast.com
Fancast
Fandango
thePLATFORM
Plaxo
(TV Everywhere)

PROGRAMMING
- **Cable Network Properties**

Golf Channel
Style Network
Versus
E! Entertainment Television, Inc.
G4 Media, Inc.
FearNet

- **Local Sports Media Properties**

Comcast SportsNet Bay Area
Comcast SportsNet California
Comcast SportsNet Chicago
Comcast SportsNet Mid-Atlantic
Comcast SportsNet New England
Comcast SportsNet Northwest
Comcast SportsNet Philadelphia
Mountain West Sports Network

OTHER CONTENT PROPERTIES
MGM Pictures (partial ownership)
United Artists Corporation (partial ownership)

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February 4, 2010

Hon. Herb Kohl, Chairman
U.S. Senate Subcommittee on Antitrust,
Competition Policy, and Consumer Rights
308 Hart Senate Office Building
Washington, D.C. 20510

Hon. Orrin Hatch, Ranking Member
U.S. Senate Subcommittee on Antitrust,
Competition Policy, and Consumer Rights
104 Hart Senate Office Building
Washington, D.C. 20510

Re: Comcast and NBC Universal Merger

Dear Chairman Kohl and Ranking Member Hatch:

DISH Network would like to thank you for holding a hearing that examines the impact of the proposed $30 billion merger between Comcast and NBC Universal. Merging together the largest cable company, a massive broadband infrastructure, and a content conglomerate should cause alarm. It will result in a giant with brute strength capable of crippling competition and causing injury to consumers.

Going down this perilous road endangers competition in the video distribution marketplace. But that's not all. Broadband will be as important to our lives in the future as electricity is today. Education, healthcare, energy management, home security and countless other applications are moving to the Internet. Such a behemoth will touch almost every aspect of our lives.

The stakes are too high to allow a Comcast-NBCU merger to proceed as the applicants propose. Once a merger is complete, there is no "second chance" to get it right. If the government allows this merger to proceed, it must be only after meaningful, tough conditions are firmly in place.

Tough Conditions

Comcast's proposed merger conditions provide no real comfort. Indeed, Comcast failed to include even a single network neutrality principle in its list of proposed conditions. Comcast should not be permitted to squeeze out the competition by consolidating its market power across industries. Direct Broadcast Satellite providers, for example, offer stand-alone video service. Thus, their subscribers must obtain broadband connections from companies like Comcast. Video distribution companies are increasingly combining traditional video services with Internet-delivered video on demand ("VOD") that can be delivered to consumers via broadband. The

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public good requires an open and non-discriminatory broadband pipe to ensure that vibrant competition remains in the video marketplace and that consumer choice does not suffer.

Given this incestuous relationship, the potential for anti-consumer, discriminatory behavior in a Comcast-NBCU merger abounds. Incredibly, Comcast believes that it was appropriate for it to covertly block certain Bit-Torrent use over its network with no notice to consumers. That conduct is but a small sample of what Comcast is capable of doing in the future. For example, Comcast could price its bundled services in such a way that stand-alone providers could not compete. Likewise, Comcast would have the incentive to prioritize its own NBC content or service offerings, like VOD or Fancast XFINITY TV, over VOD services sent through Comcast's "pipe" to a DISH Network subscriber. To protect against this type of harm, Comcast, at a minimum, should be required:

- **To refrain from discriminating against any competitive services when content is delivered over its broadband network;**
- **To provide broadband at wholesale rates to other service providers that want to offer a competitive bundle of services; and**
- **To offer to consumers a stand-alone, low-cost broadband service with robust bandwidth.**

In addition to broadband-related conditions, protections are needed to ensure that Comcast will no longer be able to combine content and distribution in a way that stymies competition. One need look no farther than the city of Philadelphia where Comcast is headquartered to see that when it owns the local sports team, arena, sports network, and cable system, it will go to remarkable lengths to deny its competitors, like DISH Network, access to "must have" programming. Therefore, instead of the symbolic gestures proposed by Comcast, the merged company should, at minimum, be:

- **Prevented from evading program access rules by delivering affiliated content (including broadcast channels) to consumers through alternative means such as IP networks;**
- **Required to submit to mandatory "baseball-style" arbitration with interim carriage if negotiations over affiliated content break down, so that consumers can continue to watch their favorite shows; and**
- **Required to offer all affiliated content to its competitors on a stand-alone basis, and not be allowed to tie any of its programming together.**

DISH Network is the third largest pay-TV provider in the U.S., and arguably the last major independent distributor unaffiliated with any flagship content providers. DISH Network has experienced first-hand Comcast's tactics for thwarting competition through denying competitors must-have programming. Comcast should not be permitted to combine its current power in the traditional video and residential broadband markets with NBC-Universal's content, and leverage

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that position into the emerging broadband video and applications markets. If the door is left open for mischief, consumers, competition, and the vibrancy of American media will suffer.

Very Truly Yours,

s/R. Stanton Dodge

R. Stanton Dodge
Executive Vice President & General Counsel

Statement of

The Honorable Russ Feingold

United States Senator
Wisconsin
February 4, 2010

Statement of Senator Russell D. Feingold
U.S. Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy, and Consumer Rights
Hearing on "The Comcast/NBC Universal Merger: What Does the Future Hold for Competition and Consumers?"
February 4, 2010

Mr. Chairman, thank you very much for holding this hearing. The proposal to combine NBC Universal and Comcast clearly has both vertical and horizontal competition concerns. In addition to the content produced by the NBC broadcast network, both NBC Universal and Comcast have a significant number of profitable cable networks on both sides of the ledger including USA, Bravo, E!, and regional sports channels. The dangers of this horizontal consolidation are significantly compounded by the vertical combination of content and distribution that the joint written statement of Comcast and NBC Universal not only admits but touts.

While Mr. Zucker and Mr. Roberts believe that this vertical integration is not a problem, I have been concerned with these types of vertical alliances of behemoths both in media and elsewhere for some time. They often seem to be harmful, unsuccessful, or both. For example, the vertical combination of Clear Channel's radio stations, concert venues and promotion was unfair to musical artists, small business competitors and, ultimately, concert goers and radio listeners. But even with this ability to leverage dominance in one part of the industry, that union was not successful, and the concert venue and promotion side of the business was spun off as Live Nation. In retrospect, I think you would be hard pressed to find anyone who thought the vertical alliance had been beneficial to consumers, but many believe, as I do, that the alliance was harmful and contributed to a decline in the quality, local content and popularity of traditional radio.

Similarly, I had strong reservations about the vertical merger of Live Nation with Ticketmaster and despite the series of conditions required by the Justice Department, I remain concerned about the long-term competitive environment in concerts and ticketing.

Perhaps more on-point to the current merger proposal, I think it is telling that 10 years after their highly touted merger, Time Warner, AOL and Time Warner Cable are now three separate entities.

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The potential for NBC Universal-Comcast merger to be unsuccessful would not really be our concern if the downside were limited to the companies involved. But Mr. Schwartzman, Mr. Cooper and a number of other observers have suggested several ways that the merger will be harmful either to consumers, smaller competitors, or both. These include serious concerns about harm to innovation, as Comcast has not been the strongest supporter of net neutrality principles. In addition, the combined company's vertical interest in the internet television site Hulu could unfairly tip the scales in that nascent segment of the industry.

But I am going to focus on what my constituents really want—cable rates that don't increase by double digits every year. During the past two years in Wisconsin, basic cable rates have increased by 21% and expanded basic rates have gone up by 11%. This is all the more galling since consumers had been promised lower rates from state franchise deregulation. It reminds me of the disparity between promises and results from the deregulation of the 1996 Telecom Act. It seems to me that proponents of this merger ought to answer some very pointed questions about the effect of the merger on consumers.

Thank you, Mr. Chairman.

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The Free State Foundation

A Free Market Think Tank For Maryland...Because Ideas Matter

Perspectives from FSF Scholars
February 12, 2010
Vol. 5, No. 4

The Comcast and NBCU Merger: The Upside Down Analysis of Dr. Mark Cooper

by

Richard A. Epstein*

I have just had the opportunity to read the statement that Dr. Mark Cooper, the Director of Research for the Consumer Federation of America, has prepared in opposition to the proposed combination of Comcast and NBC Universal. Normally the detached analysis has to wait to see the affirmative case for a merger to bless it. But in this stance, Dr. Cooper has achieved a rare feat. The evidence that he presents against this proposed merger suffices to explain emphatically why it ought to be approved.

As a matter of basic theory, any merger evaluation should depend on an accurate appraisal of its relative costs and benefits. Under the traditional analysis of a merger, the pro side consists of the efficiency gains that are obtained from the integration of the facilities of the two firms. The negative side, in turn, consists of the increase in market concentration to the extent that it allows the new firm to raise its prices above the competitive level. As a matter of basic theory, this risk may materialize in horizontal mergers, but rarely will appear in vertical ones, which involve the integration of two facilities or services at different levels in the chain of production.

Dr. Cooper's analysis does not engage in this elementary form of analysis. The words "efficiency" and "benefit" do not appear anywhere in the analysis, so that the implicit baseline for his dubious judgment is that any cost of the merger is in and of itself to require its rejection by the applicable public authorities.

The Free State Foundation
P.O. Box 60680, Potomac, MD 20859
info@freestatefoundation.org
www.freestatefoundation.org

This omission is curious beyond belief. The first question to ask about this merger is whether it should be treated as horizontal or vertical. To be sure, there are some horizontal components to the merger, which could be met by a partial divestiture in some local markets if the concentration levels are thought to move too high. But the vast bulk of this transaction lies on the vertical side of the line, which involve the linkage of a transmission company — Comcast — with a content company—NBC Universal.

Dr. Cooper acknowledges this point when he notes the "complementary" nature of the assets of the two firms. To most people in the field, the merger of two complements in effect is one of the reasons why vertical mergers are viewed generally with favor why horizontal mergers are not. Thus in patent pools, for example, the antitrust law encourages the pooling of complements, because of the way in which such pooling lowers transaction costs and eliminates some of the substantial social losses associated with the "double marginalization" problem, which produces substantial resources when two successive links in the chain of production that enjoy some monopoly power interact with each other.

Dr. Cooper has the rare skill to turn an economic virtue into a social vice. He writes that the two companies have in their respective roles of distributor and content provider, "a competitive rivalry. For example, in providing complementary services, broadcasters and cable operators argue about the price, channel location and carriage of content." Argue? What his odd choice of words shows us is that he has no explanation as to why the reduction in transaction costs should count as a social loss, when in fact it allows the provision of more services at lower prices. The gains from vertical integration are treated as though they create a social loss, which is even more mysterious because he does not bother to establish that either firm has any level of monopoly power to begin with.

He then fortifies this analysis with one kind of alarmist prediction that makes sense only to those who are convinced that both companies will commit hari-kari after their linking up their fortunes. Thus he thinks that Comcast will carry only NBC content, which NBC will in turn only supply to Comcast. But why would either company wish to make its network weaker than it need be, by entering into actions of exclusion that hurt itself as much as any outsider? If the purchase of outside content allows Comcast to satisfy its customers' tastes, it will go for it. If selling content to other service providers allows NBC to gain more revenues, all the better. Both points are especially true for Comcast which does not have nationwide penetration in the cable market.

These antitrust arguments are then dead losers. Nor are they improved by the other ad hoc diversionary arguments that are just beside the point. For antitrust purposes, what possible difference could it make that Mr. Cooper claims Comcast has raised its rates every year? If it can do so without the merger, why think that the merger will make matters worse? And why harp on the point that Comcast has blocked Internet access to a competitive supplier of video material? If Comcast violated a law or regulation, then that "conduct" offense should be punished. But it is irrational to think that any particular past sin has some outsized role to play in the assessment of a proposed forward-looking merger.

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It is even worse to claim that letting go workers after merger should count against the merger, when the entire purpose of antitrust law is to allow firms to produce more with less. Perhaps some workers will be let go. Or perhaps some additional services will be provided. But until letting go workers becomes some kind of public offense, the point is a mindless diversion unless the antitrust law become a back-handed way to introduce civil service requirements through the back door.

So the question remains why anyone should think that the identification of these efficiency gains should count as an objection to this merger? Dr. Cooper's magic bullet on this point is that we are not dealing with two companies that "sell widgets." We are dealing with companies that are dealing with speech and public discourse.

True enough, but the last thing that any analyst should do is botch the antitrust analysis in any field that is as important as speech. Instead, the question is to ask why this combination might affect the market in speech. Here two points are relevant. The first is that the political speech market has never been healthier, because the coming of age of the web introduces more political content and lower cost of access than ever before. Entertainers may experience serious grief with the web because they are trying to sell content that is easily pirated. But political commentators are intent upon giving away content for free in the hope that every reader will forward a particular story to his or her entire list. *Puhleeze forward*!!

NBC surely must be hit hard in the content department like every other established news service. It may not be a failing company, but it is surely one that is buffeted by the winds of change. If it thinks that this alliance will stop the bleeding, it should be given the running room to make the business judgment that might salvage or expand its operations.

The situation is in reality exactly the opposite of what Dr. Cooper's topsy-turvy analysis predicts. Efficiency is even more important when first amendment issues are at stake than when they are not. He is not able to perform a minor intellectual miracle of having an upside down antitrust analysis saved by topsy-turvy First Amendment analysis. His errors don't cancel each other out. They cumulate.

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* Richard A. Epstein is the James Parker Hall Distinguished Service Professor of Law, The University of Chicago, The Peter and Kirsten Bedford Senior Fellow, The Hoover Institution, and a visiting professor at New York University Law School. He is also a Distinguished Adjunct Senior Scholar at the Free State Foundation and a member of FSF's Board of Academic Advisors.

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Perspectives from FSF Scholars
March 15, 2010
Vol. 5, No. 6

The Dogmatic Posture of a Consumer Advocate: A Second Response to Mark Cooper

by

Richard A. Epstein*

In a previous Perspectives published by the Free State Foundation, I took to task the shoddy reasoning in Dr. Mark Cooper's statement in opposition to the Comcast-NBC Universal merger. In that piece, I explained that nothing he had said in opposition to that merger gave the slightest reason to think that the linkage of these two firms would cause any systematic harm to the overall telecommunications and entertainment industry, to its video segment, or to the larger economy as a whole. The explicit test I used in making that judgment was social welfare, which is equal to the sum of consumer and producer surplus generated by the transaction.

In recent testimony submitted to the United States Senate Commerce Committee, Dr. Cooper has responded to my comments as part of his ongoing opposition to the proposed merger on behalf of the Consumer Federation of America, the Consumers Union and Free Press. His criticisms are both general and specific. He first attacks the general approach to antitrust law of the Chicago School, of which I am a proud part. He then goes into some particulars of this transaction in order to support his own conclusion. Let me take his general points first and then turn to the particulars of this merger.

Efficiency and Restraint. Mr. Cooper (who has no visible qualifications in antitrust law) believes that the Chicago School represents an unflinching ideological commitment to the position that mergers produce efficiencies, even as they generate

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serious horizontal and vertical restrictions which are harmful to consumer welfare. He accuses me, and others like me, of harboring deep "ideological" commitments that stand in the way of clear analysis. He pays no attention at all to his own ideological blinders.

In launching this indiscriminate broadside, he is surely right that I did not speak about the specific efficiencies of this particular merger, as my purpose was to point out the economic weaknesses in his own arguments, none of which he responds to in detail. He makes similar mistakes in this recent testimony. Any sound economic theory shows that Dr. Cooper is surely wrong in denying, without any empirical evidence of his own, the existence of economic efficiencies unless they can be demonstrated in concrete economic fashion.

To see why, assume that under the proper definitions of the geographical and product market, there are some restrictive effects to many mergers, perhaps even to this one. The question is what does this indicate about the potential economic gains to these transactions. Here there are three possibilities. The first is that the merger would be so clunky that it would introduce extra layers of bureaucracy that disrupt sensible patterns of production. The second is that there are no organizational changes of note so that the efficiency remains the same. The third is that there are efficiencies that come from the merger which are evident to the insiders, even if they are not easily identifiable to outsiders like Mr. Cooper who know nothing about the internal operations of the new firm or its component parts.

The question is which of these three possibilities is the most likely to occur when the merger takes place. We can easily dismiss the first of them in virtually all cases, because any merger that created a firm with known inefficiencies would be surely less competitive than the two firms that it replaced. It is highly doubtful that the contraction of the industry, moreover, would allow it to regain through the exercise of market power the profits that it lost from its poor operations. The far more likely outcome is that other firms in the industry — for no one suggests that this merger would result in a 100 percent market control over any industry — would be able to take advantage of the high cost structure of a newly beached whale. Or that new entrants would help finish the job. It does not take empirical evidence to reach this conclusion. It only takes a rudimentary appreciation of basic economic theory. High-cost mergers are not planned in advance, even though they do arise in practice when business calculations go awry.

The second possibility — that all things should be expected to stay the same — can be dismissed with equal confidence. With respect to its internal operations, the merger of two large organizations will surely present some difficulties in the integration of different cultures, a point which is not likely to be lost on the parties to the merger. But at the same time, the decision to go forward with the synergy suggests that it would be wholly irrational to abandon any effort to eliminate duplication, streamline supply chains, combine research and advertisement facilities, engage in cross promotions, and open up new joint ventures that neither party could undertake itself. It follows therefore that the conventional model that evaluates mergers by asking about a trade-off between its efficiency properties and its restrictive implications is the correct trade-off.

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It is not just a Chicago School artifact. It is also the standard view within the economic profession, which accordingly concentrates on this third possibility, ignoring all others. It is therefore intellectually irresponsible for Mr. Cooper to insist that the Chicago School just "waves a magic efficiency wand. . ." As should be evident, this derisive sentence could only be written by someone who has not tried to understand what the Chicago approach is about from the inside.

False Analogies. Being totally devoid of all theory, Mr. Cooper then seeks to bolster his general denunciations of my previous Perspectives piece by citing at great length a number of studies that have pointed out the flaws of a "free market" approach to financial regulation. But what he fails to do is to connect up that an analysis of market failure in other markets to the instant transaction. Thus in footnote 20, he makes the correct point that the great mistake of financial deregulation in the first decade of this century was its uncritical acceptance of a view (championed by Robert Rubin and Lawrence Summers, as well as Alan Greenspan) that counterparty scrutiny eliminated all need for government regulation of these transactions.

That criticism is in fact correct, and its most persuasive explanation comes from the sound application of the banking principles of the Chicago School. One problem with financial markets is that they dealt in newly created instruments that had a higher variability in value than traditional analysis suggested. Accordingly, the stress tests that are normally used to evaluate the soundness of financial arrangements understand the volatility of the financial deals, and hence the risk of widespread bankruptcy. Given the close interconnections between the parties and the rapid velocity of financial transactions, the counterparties bear only part of the overall social loss, which in turn suggests that their joint precautions will be insufficient to withstand the beating that they will take in times of stress. The result is that some form of regulation may well make sense. One sensible first step is retaining some overall reserve requirements.

It also bears mention that the financial markets were distorted by multiple *government* policies whose combined effect aggravated the risks of these voluntary transactions. First, the underlying mortgage securities were often mispriced, in part because of the active role that Fannie Mae and Freddie Mac played as a buyer and guarantor of these instruments. Second, the cheap money policies of the Federal Reserve resulted in a run-up in prices of the complementary goods, the real estate. Third, all players operating in these markets counted on an implicit federal guarantee that they would be bailed out from any economic failure, which in turn induced them to take high-risk, heads-I-win-tails-you-lose gambles, which ended in disaster. Fourth, imposing mark-to-market rules created the real risk of downward cascades that spread risk far further than should have been the case.

It has been said that free market advocates are supposed to believe in the privatization of gains and the socialization of losses. Nothing could be further from the truth. It is the height of government irresponsibility to create incentive structures that operate in this fashion. Whatever guarantees are given should be for a price that reflects the underlying risk, and, like ordinary private guarantees, contain explicit covenants on how banks and other financial institutions should operate in order to control against these risks. The intellectual blindness of Mr. Cooper in understanding the difference

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between financial and entertainment markets condemns his work to the lower levels of Dante's inferno.

Mr. Cooper shows a similar want of understanding about the ill-fated mergers under the Telecommunications Act of 1996. This statute was ballyhooed as introducing competition into the telecommunication industry, but it did nothing of the sort. Telecommunications is a network industry in which classical "wheat farm" textbook competitive solutions are not possible. The proponents of the 1996 Act oversold its supposed competitive effects because they ignored the simple fact that even after the statute was put into place the FCC and the state commissions had to figure out how to forge the appropriate integration of services of multiple carriers. Rejecting the old AT&T model of an end-to-end monopoly subject to regulation on matters of rates and access does not decide what should be put in its place.

The great disaster under the Telecommunications Act was again a *government* failure in the design of that new system. The 1996 Act allowed for either interconnection or for the purchase of "unbundled network elements" as the mode of integration. The FCC pushed the second approach at the expense of the first. In so doing it mispriced all the elements which led to excessive subsidization of new entrants and a litigation nightmare that lasted for about a decade. Many of the mergers that took place were driven by the desire to settle the unending litigation under the 1996 Act and to correct the bad guess of Judge Harold Greene that telecommunications was best organized with AT&T as a long lines carrier and the Regional Bell Companies as local exchange carriers to be treated as regulated local monopolists. Had the bill been passed five years later, it would have been clear that the so-called "last mile" monopoly of the incumbents had largely been overtaken by technology, and the Act would have assumed, hopefully, a very different form. But however these complications play out, it is again blinding economic ignorance to confuse the proposed Comcast-NBCU merger with the unfortunate escapades of the 1990s. The technology in telecommunications has so advanced that the prospect of single firm monopoly has been blunted by the multiple pathways into the home and office.

The Comcast NBC Universal Merger in Context. Mr. Cooper's fundamental misperceptions about how markets work leads him to make counterproductive proposals for the evaluation of this merger. Desirous of some - any - grand vision of how the telecommunications and entertainment industry should look, he bravely insists that the government ought to undertake "complete industry-wide proceedings" to resolve all underlying problems and to determine the proper institutional structure for the video industry insofar as it relates to both content and carriage. This recommendation is subject two fatal flaws. The first is that it presupposes that anyone could conduct a study on this fast-moving and complex industry that could be completed before some new technological or business model innovation rendered it obsolete. Yet that result would be ideal for Mr. Cooper because in the interim he could stymie this merger on procedural grounds without presenting any persuasive evidence that the merger is anticompetitive.

On this score, he surely disagreed with the glowing appraisal of the merger offered by Comcast and NBC-Universal. But he should find it more difficult to disagree

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with the assessment of the Congressional Research Service's February 2, 2010 report, authored by Charles B. Goldfarb, "The Proposed Comcast-NBC Universal Combination: How It Might Affect the Video Market," which is the antithesis of Mr. Cooper's jeremiad about this merger. Mr. Goldfarb's account of the video industry notes that there is "so much uncertainty" associated with the future development of the video market as to render it impossible to make any sound predictions of the industry's direction. More concretely, he properly tends to downplay the risks of vertical exclusion that Mr. Cooper trumpets in his report. Thus the CRS acknowledges that in "some unique circumstances" a distributor might be willing to pay a huge premium to foreclose distribution of certain content through other channels. But, in practice, this result is likely to be most uncommon, and if it does occur some narrow conduct rule that is directed to this risk of foreclosure is surely a far better way to deal with this problem than the total nullification of the merger. As a matter of general theory, Mr. Cooper shows no awareness of the critical role that tailoring limited remedies can play in an intelligent antitrust policy.

It should come as no surprise that the deep conceptual confusions in Mr. Cooper's recent presentation sheds no light on the empirical evidence that surrounds this merger. In his extended remarks he chides me for a fact-free presentation in my earlier paper. That criticism is largely beside the point because my purpose there was to discredit his own attack on the merger, not to mount a first-line defense of the transaction. His most recent broadside against the merger, however, does purport to be comprehensive. Yet it offers no detailed analysis, by name, of any particular geographical or product market that might induce someone to reject the merger. That omission is inexcusable in his case because his response wholly ignores the detailed presentation Comcast and NBC Universal have offered the FCC for their merger, which does mention a large number of competitors who compete in different ways for various segments of the video market. These major players include video rental operations like Wal-Mart, Blockbuster, Hollywood Video and Net Flix. It includes over-the-air satellite firms like EchoStar and DirecTV and online companies like Amazon, BlinkX, Clicker.com, Veoh, and the like, many of which I have never heard of. And of course there are content standbys like Walt Disney and Time Warner to contend with, plus many small players in this space.

It would be presumptuous of any academic to speak about the movements that are likely to take place in this industry. The principle of comparative advantage counsels against that foolhardy undertaking. But it is critical to note the clear implications of the constant level of new entry and new innovation throughout this sector. All of these devices are imperfect substitutes for each other, just as Skype is an imperfect substitute for cell phones, which in turn are an imperfect substitute for land lines and so on. What is clear, however, is that technological innovation always expands the boundaries of the relevant market, which thereby undercuts any claim of market dominance or monopolization by any player, big or small. Mr. Cooper offers vague speculation of unambiguous movements in price and quality without a shred of evidence as to how these trends will play out over the life of this proposed merger or any other.

It may well be that this merger will crater like the Time Warner/AOL deal. But that is not an antitrust concern, but a sober reminder that bigger is not always better, and that

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even sophisticated business parties can make mistakes in gauging the gains from trade and the future direction of markets. But it is precisely because all mergers face economic pressures of self-correction that we should regulate them with a light hand. The cumbersome Soviet-style review process that Mr. Cooper advocates does no good for the consumers who he purports to represent. It only shows how far out of touch he is with the basics of antitrust theory as they relate to the particulars of the telecommunication market.

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* Richard A. Epstein is the James Parker Hall Distinguished Service Professor of Law, The University of Chicago, The Peter and Kirsten Bedford Senior Fellow, The Hoover Institution, and a visiting professor at New York University Law School. He is also a Distinguished Adjunct Senior Scholar at the Free State Foundation and a member of FSF's Board of Academic Advisors.

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Senator Kohl

Today we examine the merger between Comcast and NBC Universal. The combination of NBC's content holdings with Comcast's distribution power would create a media powerhouse of unmatched size and scope which, if approved, will have far reaching consequences for competition and consumers.

Comcast is the nation's largest and most powerful cable TV company – with 24 million pay TV subscribers and the dominant share of customers in the markets it serves. It now seeks to acquire NBC-Universal, which includes the family of NBC broadcasting and cable networks, 25 local NBC and Telemundo stations in some of the nation's largest cities, and the Universal Pictures Movie Studios. NBC has some of the most popular programs on television – from the Olympics, to NFL football, to NBC news programming, to entertainment programs ranging from the Tonight Show to the Office, to give just a few examples. We are witnessing the creation of a media conglomerate which is likely to greatly impact both what consumers pay for cable TV and the ability of other pay TV companies to compete fairly in the market.

The highly concentrated nature of the cable TV industry, and the limited choices available to consumers, have long concerned this Subcommittee. Rather than compete with each other, large incumbent cable companies have divided the country into regional clusters in which their market share of pay TV viewers reach as much as 70% or higher. Consumers suffer from annual cable rate increases running for the last decade about triple the rate of inflation. While recent years have seen the emergence of satellite and phone company competitors, these competitors face considerable obstacles, including difficulties obtaining programming owned by the cable giants and steep price increases when they are able to obtain that programming. Now, because of NBC's must-have programming, many fear this merger has the potential to make these obstacles even worse.

There are four principal areas of concern raised by this merger. First, will this deal create the possibility that Comcast will deny "must have" NBC programming to its rival pay TV services, or unreasonably raise the price of this programming? Second, will Comcast move NBC programming now enjoyed by millions of Americans on free broadcast TV to pay cable TV? Third, will this deal make it significantly more difficult for independent programmers to have Comcast carry their new cable networks?

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And fourth, we must pay particular attention to the effects of this merger on a new and promising form of competition – video programming on the Internet. The widespread deployment of broadband internet in millions of consumers' homes has led to a growing phenomenon of "cord cutting" – consumers dropping their pay TV subscriptions and watching full length television programming via high speed internet connections. But we have recently heard concerns from programmers that cable TV companies are demanding restrictions on their ability to show their programming on the Internet. We must be vigilant to ensure that the market strength created by this merger does not give the combined company the ability to stifle this new innovative form of competition over the Internet. Moreover, NBC owns a significant share in Hulu, one of the largest providers of video content on the Internet, and there are real concerns regarding its future and its ability to access NBC content after the merger.

So the role of the antitrust regulators at the Justice Department and the FCC will be vital to preserving competition. Should these agencies decide to allow this merger, we believe it is essential they insist on strong conditions to protect consumers. Comcast has already pledged to adhere to a number of commitments with respect to this merger. We appreciate that effort, however those commitments are only a starting point to determine what conditions will be necessary to protect consumers. And it is essential that you, Mr. Roberts and Mr. Zucker, explain to us and the American public how the creation of this media conglomerate will serve the interests of the American people, not just the interests of your companies. I now turn to Senator Hatch for his opening statement.

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Statement Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
Hearing On "The Comcast/NBC Universal Merger: What Does The Future Hold For Competition And Consumers?"
February 4, 2010

Today, the Antitrust Subcommittee examines the competitive impact of Comcast's proposed acquisition of NBC Universal. This acquisition would combine the Nation's largest cable company with one of the leading television and film content owners, and has significant implications for the media industry. I thank Senator Kohl and Senator Hatch for holding this important hearing.

Over the years, the media industry has consistently found innovative ways to provide viewers with an enhanced television experience. Comcast and NBC Universal have both invested significantly in products and technology that provide consumers with more choices of higher quality content. Innovations are driven by the competition that exists in both the cable and satellite provider market, and the television programming market. We must ensure that these markets remain competitive for the benefit of consumers.

The lines between cable providers and television programmers are becoming increasingly blurred, and we have witnessed over the past decade a tremendous development in the way video content is made available to consumers. We watch movies, television programs, and other video content today not only on our television sets, but also on our computers, phones, and other mobile devices. Both Comcast and NBC Universal have been at the forefront of the innovations that have benefited consumers. The issue for the Department of Justice (DOJ) in reviewing this merger is whether Comcast's acquisition of NBC Universal will ultimately reduce the incentives for innovation, decrease competition, and raise prices for consumers.

The antitrust laws, which are rooted in fundamentals of competition and price, are also flexible enough to govern this complex area. Still, the exact boundaries of the markets at issue are difficult to define. With technology and modes of distributing media content developing every day, it is important that the Justice Department, which has the resources and necessary expertise, take the time to conduct a thorough review. I am confident that the Department will do just that.

When the new administration took office over a year ago, it promised a more vigilant enforcement of the antitrust laws. Its actions have matched its words. In the fall, I chaired a Committee hearing in Vermont at which Christine Varney, the Assistant Attorney General in charge of the Antitrust Division, promised to take a close look at competition issues in the dairy industry. Subsequently, the Department of Justice began workshops around the country to analyze these competition issues, and, two weeks ago, DOJ challenged the acquisition of two dairy bottling plants by the country's largest dairy distributor. I am confident that the Department's vigorous enforcement in these areas will benefit farmers in Vermont and across the Nation.

I look forward to hearing from our distinguished panel of witnesses today.

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OPASTCO

ORGANIZATION
FOR THE PROMOTION
AND ADVANCEMENT
OF SMALL
TELECOMMUNICATIONS
COMPANIES

February 3, 2010

The Honorable Herb Kohl
Chairman
Subcommittee on Antitrust,
Competition Policy & Consumer Rights
308 Hart
Washington, D.C. 20510

The Honorable Orrin Hatch
Ranking Member
Subcommittee on Antitrust,
Competition Policy & Consumer Rights
104 Hart
Washington, D.C. 20510

Dear Chairman Kohl and Ranking Member Hatch:

The Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) has grave concerns about Comcast's proposed acquisition of NBC-Universal. We are concerned that this merger will lead to reduced availability of video content for small, independent video and broadband service providers.

OPASTCO represents more than 500 small, independently owned, local communications companies and cooperatives in 47 states, and collectively serve more than five million customers. OPASTCO members provide wireline and wireless telecommunications, cable and broadband Internet service.

We are concerned that a combined Comcast/ NBC will charge too much for its video content, block or restrict the ability of our members to provide programming to consumers, or prioritize the delivery of its own content to the detriment of consumers. As broadband and video access and penetration are increasingly intertwined, the proposed merger has implications for broadband services, in addition to video competition. OPASTCO requests that you keep in mind consumers in rural parts of our country that rely on local video and broadband service providers for their news, sports and other entertainment needs.

Thank you for your attention to this matter.

Sincerely,

John N. Rose
President

2020 K Street, NW
7th Floor
Washington, DC 20006
202 659 5990
Fax 202 659 4619
http://www.opastco.org

JOINT WRITTEN STATEMENT BY

BRIAN L. ROBERTS
CHAIRMAN AND CHIEF EXECUTIVE OFFICER
COMCAST CORPORATION

AND

JEFF ZUCKER
PRESIDENT AND CHIEF EXECUTIVE OFFICER
NBC UNIVERSAL

TO THE
SENATE JUDICIARY COMMITTEE
SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY, AND CONSUMER RIGHTS

February 4, 2010

Mr. Chairman, and Members of the Subcommittee, we are pleased to appear before you today to discuss Comcast Corporation's ("Comcast") planned joint venture with General Electric Company ("GE"), under which Comcast will acquire a majority interest in and management of NBC Universal ("NBCU"). As you know, the proposed transaction will combine in a new joint venture the broadcast, cable programming, movie studio, theme park, and online content businesses of NBCU with the cable programming and certain online content businesses of Comcast. This content-focused joint venture will retain the NBCU name.

The new NBCU will benefit consumers and will encourage much-needed investment and innovation in the important media sector. How will it benefit consumers? First, the new venture will lead to increased investment in NBCU by putting these important content assets under the control of a company that is focused exclusively on the communication and entertainment industry. This will foster enhanced investment in both content development and delivery, enabling NBCU to become a more competitive and innovative player in the turbulent and ever changing media world. Investment and innovation will also preserve and create sustainable media and technology jobs. Second, the transaction will promote the innovation, content, and delivery that consumers want and demand. The parties have made significant commitments in the areas of local news and information programming, enhanced programming for diverse audiences, and more quality educational and other content for children and families. And finally, Comcast's commitment to sustain and invest in the NBC broadcast network will promote the quality news, sports, and local programming that have made this network great over the last 50 years. We discuss these specific and verifiable public interest commitments later in this statement, and a summary is attached.

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The new NBCU will advance key policy goals of Congress: diversity, localism, innovation, and competition. With Comcast's demonstrated commitment to investment and innovation in communications, entertainment, and information, the new NBCU will be able to increase the quantity, quality, diversity, and local focus of its content, and accelerate the arrival of the multiplatform, "anytime, anywhere" future of video programming that Americans want. Given the intensely competitive markets in which Comcast and NBCU operate, as well as existing law and regulations, this essentially vertical transaction will benefit consumers and spur competition, and will not present any potential harm in any marketplace.

NBCU, currently majority-owned and controlled by GE, is an American icon – a media, entertainment, and communications company with a storied past and a promising future. At the heart of NBCU's content production is the National Broadcasting Company ("NBC"), the nation's first television broadcast network and home of one of the crown jewels of NBCU, NBC News. NBCU also has two highly regarded cable news networks, CNBC and MSNBC. In addition, NBCU owns Telemundo, the nation's second largest Spanish-language broadcast network, with substantial Spanish-language production facilities located in the United States. NBCU's other assets include 26 local broadcast stations (10 NBC owned-and-operated stations ("O&Os"), 15 Telemundo O&Os, and one independent Spanish-language station), numerous national cable programming networks, a motion picture studio with a library of several thousand films, a TV production studio with a library of television series, and an international theme park business.

Comcast, a leading provider of cable television, high-speed Internet, digital voice, and other communications services to millions of customers, is a pioneer in enabling consumers to watch what they want, when they want, where they want, and on the devices they want. Comcast is primarily a distributor, offering its customers multiple delivery platforms for content and services. Although Comcast owns and produces some cable programming channels and online content, Comcast owns relatively few national cable networks, none of which is among the 30 most highly rated, and, even including its local and regional networks, Comcast accounts for a tiny percentage of the content industry. The majority of these content businesses will be contributed to the joint venture. The distribution side of Comcast (referred to as "Comcast Cable") is not being contributed to the new NBCU and will remain under Comcast's ownership and control.

The proposed transaction is primarily a *vertical* combination of NBCU's content with Comcast's multiple distribution platforms. Antitrust law, competition experts, and the FCC have long recognized that vertical combinations can produce significant benefits. Experts and the FCC also have found that vertical combinations with limited horizontal issues generally do not threaten competition.

The transaction takes place against the backdrop of a communications and entertainment marketplace that is highly dynamic and competitive, and becoming more so every day. NBCU – today and post-transaction – faces competition from a large and

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growing roster of content providers. There are literally hundreds of national television networks and scores of regional networks. These networks compete not only with each other but also with countless other video choices – both for consumers' attention and for distribution on various video platforms. In addition, content producers increasingly have alternative outlets available to distribute their works, free from any purported "gatekeeping" networks or distributors. In this universe of content producers, with competitors such as Disney/ABC, Time Warner, Viacom, and News Corp., the new NBCU will have the incentive and financial resources to give consumers the high-quality programming they want and no incentive – or ability – to restrict competition or otherwise harm the public interest.

Competition is fierce among distributors as well. Consumers in every geographic area have multiple choices of multichannel video programming distributors ("MVPDs") and can obtain video content from many non-MVPDs as well. In addition to the local cable operator, consumers can choose from two MVPDs offering direct broadcast satellite ("DBS") service: DirecTV and Dish Network, which are now the second and third largest MVPDs in America, respectively. Verizon and AT&T, along with other wireline overbuilders, are strong, credible competitors, offering a fourth MVPD choice to tens of millions of American households and a fifth choice to some. Indeed, as competition among MVPDs has grown, Comcast's nationwide share of MVPD subscribers has steadily decreased (it is now less than 25 percent, a share that the FCC has repeatedly said is insufficient to allow an MVPD to engage in anticompetitive conduct). Moreover, current market dynamics are more telling than static measures of market shares; over the past two years, Comcast lost 1.2 million net video subscribers while its competitors continued to add subscribers. (DirecTV, Dish Network, AT&T, and Verizon have added 7.6 million net video customers over the same time period.)

Consumers can also access high-quality video content from myriad other sources. Some households continue to receive their video through over-the-air broadcast signals, which have improved in quality and increased in quantity as a result of the broadcast digital television transition. Millions of households purchase or rent digital video discs ("DVDs") from one of thousands of national, regional, or local retail outlets, including Walmart, Blockbuster, and Hollywood Video, as well as Netflix, MovieCrazy, Café DVD, and others who provide DVDs by mail. High-quality video content also is increasingly available from a rapidly growing number of online sources that include Amazon, Apple TV, Blinkx, Blip.tv, Boxee, Clicker.com, Crackle, Eclectus, Hulu, iReel, iTunes, Netflix, Sezmi, SlashControl, Sling, Veoh, Vevo, Vimeo, VUDU, Vuze, Xbox, YouTube – and many more. These sites offer previously unimaginable quantities of professionally-produced content and user-generated content that can be accessed from a variety of devices, including computers, Internet-equipped televisions, videogame boxes, Blu-ray DVD players, and mobile devices. In addition, there is a huge supply of user-generated video content, including professional and quasi-professional content. YouTube, for example, which is by far the leader in the nascent online video distribution business, currently receives and stores virtually an entire day's worth of video content for its viewers *every minute*. And there are no significant barriers to entry to online video

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distribution. Thus, consumers have a staggering variety of sources of video content beyond Comcast and its rival MVPDs.

The combination of NBCU and Comcast's content assets under the new NBCU – coupled with management of the new NBCU by Comcast, an experienced, committed distribution innovator – will enable the creation of new pathways for delivery of content to consumers on a wide range of screens and platforms. The companies' limited shares in all relevant markets, fierce competition at all levels of the distribution chain, and ease of entry for cable and online programming ensure that the risk of competitive harm is insignificant. Moreover, the FCC's rules governing program access, program carriage, and retransmission consent provide further safeguards for consumers as do the additional public interest commitments made by the companies to the FCC.

At the same time, the transaction's public interest benefits – particularly for the public interest goals of diversity, localism, competition, and innovation – are substantial. Through expanded access to outlets, increased investment in outlets, and lower costs, the new venture will be able to increase the amount, quality, variety, and availability of content more than either company could on its own, thus promoting *diversity*. This includes content of specific interest to minority groups, children and families, women, and other key audience segments. The new venture will also be able to provide more and better local programming, including local news and information programming, thereby advancing *localism*. NBCU and Comcast will be more innovative and effective players in video programming and distribution, spurring other content producers and distributors to improve their own services, thus enhancing *competition*. Marrying NBCU's programming assets with Comcast's multiple distribution platforms will make it easier for the combined entity to experiment with new business models that will better serve consumers, thus promoting *innovation*.

In addition, Comcast and NBCU have publicly affirmed their continuing commitment to free, over-the-air broadcasting. Despite a challenging business and technological environment, the proposed transaction has significant potential to invigorate NBCU's broadcasting business and expand the important public interest benefits it provides to consumers across this country. NBC, Telemundo, their local O&Os, and their local broadcast affiliates will benefit by having the full support of Comcast, a company that is focused entirely on entertainment, information, and communications and that has strong incentives – and the ability – to invest in and grow the broadcast businesses it is acquiring, in partnership with the local affiliates.

Moreover, combining Comcast's expertise in multiplatform content distribution with NBCU's extensive content creation capabilities and video libraries will not only result in the creation of more and better programming – it will also encourage investment and innovation that will accelerate the arrival of the multiplatform, "anytime, anywhere" future of video programming that Americans want. This is because the proposed transaction will remove negotiation friction that currently inhibits the ability of Comcast to implement its pro-consumer vision of multiplatform access to quality video programming. Post-transaction, Comcast will have access to more content that it can

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make available on more outlets, including the new NBCU's national and regional networks and Comcast's cable systems, video-on-demand ("VOD") platform, and online platform. This increase in the value of services offered to consumers by the new company will stimulate competitors – including non-affiliated networks, non-affiliated MVPDs, and the numerous other participants in the video marketplace – to improve what they offer to consumers.

The past is prologue: Comcast sought for years to develop the VOD business, but it could not convince studio distributors – who were reluctant to permit their movies to be distributed on an emerging, unproven platform – to provide compelling content for VOD. This caution, though understandable in light of marketplace uncertainty, slowed the growth of an innovative and extremely consumer-friendly service. Comcast finally was able to overcome the contractual wrangling and other industry resistance to an innovative business model when it joined with Sony to acquire an ownership interest in Metro-Goldwyn-Mayer ("MGM"). This allowed Comcast to "break the ice" and obtain access to hundreds of studio movies that Comcast could offer for free on VOD. Thanks to Comcast's extensive efforts to foster the growth of this new technology, VOD has gone on to become extremely popular. Comcast customers have now used Comcast's VOD service more than 14 billion times. By championing the growth of VOD, Comcast has been able to benefit not only its customers but also program producers, and it has stimulated other MVPDs to embrace the VOD model.

The formation of the new NBCU will remove negotiation impediments by providing Comcast with control of a rich program library and extensive production capabilities that Comcast can use to develop novel video products and services that will be offered to consumers across an array of distribution platforms. There is every reason to believe that the transaction proposed here will create a pro-consumer impetus for making major motion pictures available sooner for in-home, on-demand viewing and for sustainable online video distribution – which, as the FCC has observed, will help to drive broadband adoption, another key congressional goal.

As noted above, the risk of competitive harm in this transaction is insignificant. Viewed from every angle, the transaction is pro-competitive:

First, combining Comcast's and NBCU's programming assets will give rise to no cognizable competitive harm. Comcast's national cable programming networks account for only about three percent of total national cable network advertising and affiliate revenues. While NBCU owns a larger number of networks, those assets account for only about nine percent of overall national cable network advertising and affiliate revenues. In total, the new NBCU will account for only about 12 percent of overall national cable network advertising and affiliate revenues. The new NBCU will rank as the fourth largest owner of national cable networks, behind Disney/ABC, Time Warner, and Viacom – which is the same rank that NBCU has today. Because both the cable programming market and the broader video programming market will remain highly competitive, the proposed transaction will not reduce competition or diversity, nor will it lead to higher programming prices to MVPDs or consumers, or higher advertising prices.

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Even after the transaction, approximately six out of every seven channels carried by Comcast Cable will be unaffiliated with Comcast or the new NBCU.

Second, Comcast's management and ownership interests in NBCU's broadcast properties raise no regulatory or competitive concern. While Comcast will own both cable systems and a stake in NBC owned and operated broadcast stations in a small number of Designated Market Areas ("DMAs"), the FCC's rules do not prohibit such cross-ownership, nor is there any policy rationale to disallow such relationships. The prior cross-ownership prohibitions have been repealed by actions of Congress, the courts, and the FCC. The case for any new prohibition, or any transaction-specific restriction, on cable/broadcast cross-ownership is even weaker today, given the increasingly competitive market for the distribution of video programming and robust competition in local advertising. And, importantly, each of the major DMAs in question has a significant number of media outlets, with at least seven non-NBCU broadcast stations in each DMA as well as other media outlets, including radio. Thus, numerous diverse voices and a vibrantly competitive local advertising environment will remain following the combination of NBCU's broadcast stations and Comcast cable systems in each of the overlap DMAs.

Third, the combination of Comcast's and NBCU's Internet properties similarly poses no threat to competition. There is abundant and growing competition for online video content. Although Comcast operates a video site, called Fancast, and NBCU holds a 32 percent, non-controlling interest in Hulu, a site that provides access to certain online video content, the leader in online viewing (by far) is Google (through YouTube and other sites it has built or acquired), with nearly 55 percent of online video viewing. This puts Google well ahead of Microsoft, Viacom, and Hulu (all of which are in low- or mid-single digits) and even farther ahead of Fancast (currently well below one percent). There are countless other sites that provide robust competition and near-infinite consumer choice. Even if one restricts the analysis to "professional" online video content, the combined entity will still have a small share and face many competitors. On the Internet, content providers essentially control their own destinies since there are many third-party portals as well as self-distribution options. Entry is easy. Thus, the transaction will not harm the marketplace for online video.

Finally, a vertical combination cannot have anticompetitive effects unless the combined company has substantial market power in the upstream (programming) or downstream (distribution) market, and such circumstances do not exist here. As noted, the video programming, video distribution, and Internet businesses are fiercely competitive, and the proposed transaction does not reduce that competition. The recent history of technology demonstrates that distribution platforms are multiplying, diversifying, and increasingly rivalrous. Wired services have been challenged by both satellite and terrestrial wireless services. Cable has brought voice competition to the telephone companies; the telephone companies have added to the video competition that cable already faced; and both cable and phone companies are racing to deploy and improve broadband Internet. Static descriptions of markets have repeatedly failed to capture advances in distribution technologies. In this highly dynamic and increasingly competitive environment, speculative claims about theoretical problems arising from any

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particular combination should be subject to searching and skeptical scrutiny, given the accelerating power of technology to disrupt, continuously, all existing market structures.

In any event, there is a comprehensive regulatory structure already in place, comprising the FCC's program access, program carriage, and retransmission consent rules, as well as an established body of antitrust law that provides further safeguards against any conceivable vertical harms that might be presented by this transaction.

Although the competitive marketplace and regulatory safeguards protect against the risk of anticompetitive conduct, the companies have offered an unprecedented set of commitments to provide assurances that competition will remain vibrant. Moreover, the companies have offered concrete and verifiable commitments to ensure certain pro-consumer benefits of the transaction. In addition to the commitment to continue to provide free, over-the-air broadcasting, mentioned previously, the companies have committed that following the transaction, the NBC O&O broadcast stations will maintain the same amount of local news and information programming they currently provide, and will produce an additional 1,000 hours per year of local news and information programming for various platforms. The combined entity will maintain NBCU's tradition of independent news and public affairs programming and its commitment to promoting a diversity of viewpoints, maintaining the journalistic integrity and independence of NBCU's news operations.

Comcast will commit voluntarily to extend the key components of the FCC's program access rules to negotiations with MVPDs for retransmission rights to the signals of NBC and Telemundo O&O broadcast stations for as long as the FCC's current program access rules remain in place. Of particular note, Comcast will be prohibited in retransmission consent negotiations from unduly or improperly influencing the NBC and Telemundo stations' decisions about whether to sell their programming, or the terms and conditions of sale, to other distributors. It would also adopt the "burden-shifting" approach to proof of discriminatory pricing. And the companies would accept the five-month "shot clock" that the Commission applies to program access adjudications.

The companies also have committed that Comcast will use its On Demand and On Demand Online platforms to increase programming choices available to children and families, as well as to audiences for Spanish-language programming. Within three years of closing the transaction, Comcast has committed to add 1,500 additional programming choices appealing to children and families and 300 additional programming choices from Telemundo and mun2 to its VOD platforms. Comcast also will continue to provide free or at no additional charge the same number of VOD choices that it now provides free or at no additional charge, and will make available within three years of closing an additional 5,000 VOD choices over the course of a month that are available free or at no additional charge.

As Comcast makes rapid advances in video delivery technologies, more channel capacity will become available. So Comcast will commit that, once it has completed its digital migration company-wide (anticipated to be no later than 2011), it will add two new independently-owned and -operated channels to its digital line-up each year for the

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next three years on customary terms and conditions. Independent programmers would be defined as networks that (1) are not currently carried by Comcast Cable, and (2) are unaffiliated with Comcast, NBCU, or any of the top 15 owners of cable networks, as measured by revenues. With respect to public, educational, and governmental ("PEG") channels, Comcast has affirmatively committed not to migrate PEG channels to digital delivery on any Comcast cable system until the system has converted to all-digital distribution, or until a community otherwise agrees to digital PEG channels, whichever comes first.

We have proposed that these commitments be included in any FCC order approving the transaction and become binding on the parties upon completion of the transaction. A summary of the companies' commitments is attached to this statement.

In the end, the proposed transaction simply transfers ownership and control of NBCU from GE, a company with a very diverse portfolio of interests, to Comcast, a company with an exclusive focus on, and a commitment to investing its resources in, its communications, entertainment, and information assets. This transfer of control, along with the contribution of Comcast's complementary content assets, will enable the new NBCU to better serve consumers. The new NBCU will advance key public policy goals: diversity, localism, competition, and innovation. Competition, which is already pervasive in every one of the businesses in which the new NBCU – and Comcast Cable – will operate, provides abundant assurance that consumer welfare will be not only safeguarded but increased. Comcast and NBCU will succeed by competing vigorously and fairly.

We intend to use the combined assets to accelerate and improve the range of choices that American consumers enjoy for entertainment, information, and communications. We would welcome your support.

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COMCAST/NBCU TRANSACTION
PUBLIC INTEREST COMMITMENTS

Comcast, GE, and NBC Universal take seriously their responsibilities as corporate citizens and share a commitment to operating the proposed venture in a way that serves the pubic interest. To demonstrate their commitment to consumers and to other media partners, the parties have made a set of specific, written commitments as part of their public interest filing with the Federal Communications Commission. Comcast, GE, and NBCU are committed to expanding consumer choice, ensuring the future of over-the-air broadcasting, enhancing programming opportunities, ensuring that today's highly competitive marketplace remains so, and maintaining journalistic independence for NBC's news properties. The parties' commitment to these principles will ensure that consumers are the ultimate beneficiaries of the proposed Comcast/NBCU transaction.

Applicants' Voluntary Public Interest Commitments

Local Programming

Commitment #1. The combined entity remains committed to continuing to provide free over-the-air television through its O&O broadcast stations and through local broadcast affiliates across the nation. As Comcast negotiates and renews agreements with its broadcast affiliates, Comcast will continue its cooperative dialogue with its affiliates toward a business model to sustain free over-the-air service that can be workable in the evolving economic and technological environment.

Commitment #2. Comcast intends to preserve and enrich the output of local news, local public affairs and other public interest programming on NBC O&O stations. Through the use of Comcast's On Demand and On Demand Online platforms, time slots on cable channels, and use of certain windows on the O&O schedules, Comcast believes it can expand the availability of all types of local and public interest programming.

- For three years following the closing of the transaction, NBC's O&O stations will maintain the same amount of local news and information programming that they currently provide.

- NBC's O&O stations collectively will produce an additional 1,000 hours a year of local news and information programming. This additional local content will be made available to consumers using a combination of distribution platforms.

Children's Programming

Commitment #3. Comcast will use its On Demand and On Demand Online platforms and a portion of the NBC O&Os' digital broadcast spectrum to speak to kids. Comcast intends to develop additional opportunities to feature children's content on all available platforms.

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- Comcast will add 500 VOD programming choices appealing to children and families to its central VOD storage facilities within 12 months of closing and will add an additional 1,000 such VOD choices (for a total of 1,500 additional VOD choices) within three years of closing. (The majority of Comcast's cable systems will be connected to Comcast's central VOD storage facilities within 12 months of closing and substantially all will be connected within three years of closing.) Comcast will also make these additional choices available online to authenticated subscribers to the extent that Comcast has the requisite online rights.

- For three years following closing, each of NBC's O&O stations will provide one additional hour per week of children's educational and informational programming utilizing one of the station's multicast channels.

Commitment #4. Comcast reaffirms its commitment to provide clear and understandable on-screen TV Ratings information for all covered programming across all networks (broadcast and cable) of the combined company, and to apply the cable industry's best-practice standards for providing on-screen ratings information in terms of size, frequency and duration.

- NBCU will triple the time that program ratings remain on the air after each commercial break (from 5 seconds to 15 seconds).

- NBCU will make program ratings information more visible to viewers by using a larger format.

Commitment #5. In an effort to constantly improve the tools and information available for parents, Comcast will expand its growing partnership with Common Sense Media ("CSM"), a highly respected organization offering enhanced information to help guide family viewing decisions. Comcast will work to creatively incorporate CSM information it its emerging On Demand and On Demand Online platforms and other advanced platforms, and will look for more opportunities for CSM to work with NBCU.

- Comcast currently gives CSM content prominent placement on its VOD menus. Comcast and the new NBCU will work with CSM to carry across their distribution platforms more extensive programming information and parental tools as they are developed by CSM. Comcast and NBCU will explore cooperative efforts to develop digital literacy and media education programs that will provide parents, teachers, and children with the tools and information to help them become smart, safe, and responsible users of broadband.

- Upon closing and pursuant to a plan to be developed with CSM, Comcast will devote millions of dollars in media distribution resources to support public awareness efforts over the next two years to further CSM's digital literacy campaign. The NBCU transaction will create the opportunity for CSM and Comcast to work with NBCU's broadcast networks, local broadcast stations, and cable networks to provide a targeted and effective public education campaign on

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digital literacy, targeting underserved areas, those with high concentrations of low-income residents and communities of color, as well as target Latino communities with specifically tailored Spanish-language materials.

Programming for Diverse Audiences

Commitment #6. Comcast intends to expand the availability of over-the-air programming to the Hispanic community utilizing a portion of the digital broadcast spectrum of Telemundo's O&Os (as well as offering it to Telemundo affiliates) to enhance the current programming of Telemundo and mun2.

- Within 12 months of closing the transaction, Telemundo will launch a new Spanish language channel using programming from Telemundo's library that has had limited exposure, to be broadcast by each of the Telemundo O&O stations on one of their multicast channels. The Telemundo network also will make this new channel available to its affiliated broadcast stations on reasonable commercial terms.

Commitment #7. Comcast will use its On Demand and On Demand Online platforms to feature Telemundo programming.

Commitment #8. Comcast intends to continue expanding the availability of mun2 on the Comcast Cable, On Demand, and On Demand Online platforms.

- Comcast will increase the number of VOD choices from Telemundo and mun2 available on its central VOD storage facilities from approximately 35 today, first to 100 choices within 12 months of closing and then to a total of 300 additional choices within three years of closing. Comcast will also make these additional choices available online to its subscribers to the extent that it has the requisite online rights.

Expanded Video On Demand Offerings At No Additional Charge

Commitment #9. Comcast currently provides approximately 15,000 VOD programming choices free or at no additional charge over the course of a month. Comcast commits that it will continue to provide at least that number of VOD choices free or at no additional charge. In addition, within three years of closing the proposed transaction, Comcast will make available over the course of a month an additional 5,000 VOD choices via its central VOD storage facilities for free or at no additional charge.

Commitment #10. NBCU broadcast content of the kind previously made available at a per-episode charge on Comcast's On Demand service and currently made available at no additional charge to the consumer will continue to be made available at no additional charge for the three-year period after closing.

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Public, Educational, and Governmental ("PEG") Channels

Commitment #11. With respect to PEG channels, Comcast will not migrate PEG channels to digital delivery on any Comcast cable system until the system has converted to all-digital distribution (i.e. until all analog channels have been eliminated), or until a community otherwise agrees to digital PEG channels, whichever comes first.

Commitment #12. To enhance localism and strengthen educational and governmental access programming, Comcast will also develop a platform to host PEG content On Demand and On Demand Online within three years of closing.

- Comcast will select five locations in its service area to test various approaches to placing PEG content on VOD and online. Comcast will select these locations to ensure geographic, economic and ethnic diversity, with a mix of rural and urban communities, and will consult with community leaders to determine which programming – public, educational and/or governmental – would most benefit local residents by being placed on VOD and online.

- Comcast will file annual reports to inform the Commission of progress on the trial and implementation of this initiative.

Carriage for Independent Programmers

Commitment #13. As Comcast makes rapid advances in video delivery technologies, more channel capacity will become available. So Comcast will commit that, once it has completed its digital migration company-wide (anticipated to be no later than 2011), it will add two new independently-owned and -operated channels to its digital line-up each year for the next three years on customary terms and conditions.

- New channels are channels not currently carried on any Comcast Cable system.

- Independent programmers are entities that are not affiliated with Comcast, NBCU, or any of the top 15 owners of cable networks (measured by revenue).

Expanded Application of the Program Access Rule Protections

Commitment #14. Comcast will commit to voluntarily accept the application of program access rules to the high definition (HD) feeds of any network whose standard definition (SD) feed is subject to the program access rules for as long as the Commission's current program access rules remain in place.

Commitment #15. Comcast will commit to voluntarily extend the key components of the FCC's program access rules to negotiations with MVPDs for retransmission rights to

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the signals of NBC and Telemundo O&O stations for as long as the Commission's current program access rules remain in place.

- Comcast will be prohibited in retransmission consent negotiations from unduly or improperly influencing the NBC and Telemundo O&O stations' decisions about the price or other terms and conditions on which the stations make their programming available to unaffiliated MVPDs.

- The "burden shifting" approach to proof of discriminatory pricing in the program access rules will be applied to complaints regarding retransmission consent negotiations involving the NBC and Telemundo O&O stations.

- The five-month "shot clock" applied to program access adjudications would apply to retransmission consent negotiations involving the NBC and Telemundo O&O stations.

Journalistic Independence

Commitment #16. The combined entity will continue the policy of journalistic independence with respect to the news programming organizations of all NBCU networks and stations, and will extend these policies to the potential influence of each of the owners. To ensure such independence, the combined entity will continue in effect the position and authority of the NBC News ombudsman to address any issues that may arise.

Labor-Management Relations

Commitment # 17. Comcast respects NBCU's existing labor-management relationships and expects them to continue following the closing of the transaction. Comcast plans to honor all of NBCU's collective bargaining agreements.

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Testimony of
Andrew Jay Schwartzman
President and CEO
Media Access Project

To the
Subcommittee on Antitrust Competition
Policy and Consumer Rights
Senate Judiciary Committee

February 4, 2010

1625 K STREET, NW - SUITE 1000 WASHINGTON, DC 20006 PHONE: (202) 232-4300 FACSIMILE: (202) 466-7656
HTTP://WWW.MEDIAACCESS.ORG

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I believe that Comcast should not be allowed to acquire NBC Universal.

As I said when the Comcast/NBCU transaction was announced, this is the most important media merger since Lucy met Desi. Comcast seeks to combine its huge cable and internet footprint, reaching about 30 % of the nation's homes, with NBCU's gigantic content assets. NBCU has 26 TV stations in the country's largest markets, the NBC network, several of the highest rated cable TV networks and the Universal film library.

WHY THIS IS SUCH AN IMPORTANT TRANSACTION

At the outset, I want to stress that my opposition to the Comcast/NBCU merger is not based on animus. Brian Roberts is not evil; to the contrary, he is a public spirited, ethical businessman. Even though I have problems with his labor/management practices and his corporate governance structure, I recognize that he is motivated by business considerations and not some sort of design to undermine American democracy.

But the consequences of this deal nonetheless could have precisely that effect.

Concentration of control in the mass media poses unique questions for policymakers and regulators. Unlike any other line of business, media properties raise important questions which go to the very nature of democratic self-governance. Our viewpoints and perspectives on political and social issues are the outgrowth of what we hear and watch. Indeed, it has been clear for some 60 years that antitrust principles overlap with First Amendment doctrine. The seminal case in this regard is *United States v. Associated Press,* where the Supreme Court applied the Sherman Act to newspapers.

Writing for the majority in *Associated Press*, Justice Black held that the First Amendment provided powerful support for applying the Sherman Act because it "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public...." Justice Frankfurter emphasized in his concurring opinion that the case was about a commodity more important than peanuts or potatoes, that it was about who we are as a nation. "A free press," he said, "is indispensable to the workings of our democratic society." For that reason, he wrote, "the incidence of restraints upon the promotion of truth through denial of access to the basis for understanding calls into play considerations very different form comparable restraints in a cooperative enterprise having merely a commercial aspect." *Id.*

A notable example of how this concept has been applied in practice can be found in Judge Greene's treatment of the AT&T consent decree. In imposing restrictions on what was then described as "electronic publishing," he held that both competitive and First Amendment considerations separately supported his action.

Judge Greene made clear that application of these objectives is not delimited to Title III of the Communications Act. "Certainly," he said, "the Court does not here sit to decide on the allocation of broadcast licenses. Yet, like the FCC, it is called upon to make a judgment with respect to the public interest and, like the FCC, it must make that decision with respect to a regulated industry and a regulated company." Thus, he said, it was necessary for him to "take into account the decree's effect on other public policies, such as the First Amendment principle of diversity in

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dissemination of information to the American public. Consideration of this policy is especially appropriate because, as the Supreme Court has recognized, with respect to promoting diversity in sources of information, the values underlying the First Amendment coincide with the policy of the antitrust laws." *Id.*

Time precludes extensive discussion, so today I will emphasize just three of the many anti-competitive ways in which Comcast could leverage ownership of NBC content assets to extend its reach in distribution of video programming and Internet services. My focus on national issues does not mean that I am unconcerned about the impact of Comcast's plans on the communities where it will own both TV stations and cable systems. Rather, it means that I know that my friend Mark Cooper is going to address this question extensively in his remarks, with which I wish to associate myself.

A COMCAST/NBCU COMBINATION WILL HARM INDEPENDENT PROGRAMMERS AND THE PUBLIC

First, I want to address how approval of this merger would increase Comcast's power to squeeze out independent programmers with diverse editorial perspectives.

There are scores of cable networks which have been unable to obtain carriage on Comcast and other cable systems. I'm here, and they are not, because some of these companies have told me that they are afraid of retaliation. Indeed, over the last several years numerous programmers such as NFL Network, WealthTV and the Tennis Channel have unsuccessfully pursued carriage complaints at the FCC. In each case, they argued that Comcast favored its own channels while refusing to carry independent programming on workable terms, if at all. Acquisition of NBC's stable of cable networks will greatly exacerbate the imbalance of power.

If Comcast is permitted to purchase the NBC TV stations and its highly viewed cable networks, Comcast will be able to bundle its programming when it seeks carriage deals with other multichannel video programming distributors ("MVPDs") such as telephone and satellite companies. This enables Comcast to obtain distribution for new and secondary channels which otherwise would never receive such treatment. Each time a Comcast channel is forced into the program menu, there is one less slot for independently owned programming.

The problem is even greater with respect to carriage on Comcast's own cable systems. The existing legal framework already gives Comcast every incentive to favor its own programming over independently produced cable channels. This can include refusal to carry competitors, paying them far less for carriage or placing them on a lesser watched program tier.

After the acquisition, Comcast will have even more cable networks to favor in deciding what to carry on its cable platform. Because it will create incentives for Comcast to make programming decisions based on self-serving financial factors rather than program quality, approval of the merger would mean that the public will get inferior programming. Discrimination of this kind also generates higher prices for all Americans, not just Comcast customers. Since Comcast will be paying itself for program carriage, it can set a higher wholesale price for its programming, so that competing MVPDs will also have to pay higher prices. This, of course, will be passed on to their customers.

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There ought to be a law against such abuse. In fact, there is. Section 616 of the Communications Act prohibits cable companies from demanding an equity interest in a programmer or exclusivity rights as a condition for carriage. It also prohibits cable companies from discriminating in favor of their own programming.

Comcast understandably, but unpersuasively, argues that existing laws and regulations sufficiently protect independent programmers and the public. However, in its presentation to the FCC and, I assume, this Subcommittee, Comcast neglects to mention that it has argued that enforcement of Section 616 is unconstitutional, and presumably would renew that claim were Section 616 to be invoked against it in the future.

The rules surely pass constitutional muster. However, they have not worked. The cost of litigating these cases has proven to be prohibitive, and the FCC has adopted almost insuperable legal hurdles for complainants to overcome. Since Section 616 was enacted in 1992, only a handful of complaints have made it past the threshold level. There is no time limit for FCC action, and complaints and appeals often have been stalled at the FCC for months and years. Even when there is FCC action, the reward for success is a lengthy and expensive legal trial with the legal deck stacked in favor of the cable companies.

A case in point is the difference in treatment between the MLB Network and the NFL Network. For more than a decade, the National Football League's NFL Network has fought for carriage on widely viewed cable tiers at fair prices. It has been unable to reach agreements with a number of major cable operators. By contrast, Versus, a competing but far less viewed sports channel owned by Comcast, has been placed on a basic tier. Finally, the NFL filed a Section 616 complaint against Comcast, alleging that Comcast would not place the NFL Network on the same tier that Comcast placed its own sports networks and that it had conditioned its willingness to carry the NFL Network upon receipt of a financial interest in NFL programming. After considerable delay, the FCC finally directed that a hearing be held. Eventually, a year after its complaint was filed, the delay and cost of the hearing forced the NFL to accept a settlement which provided inferior channel placement at a price far below what the NFL had sought. Even the NFL, with its vast resources, couldn't crack the Comcast stranglehold without lawsuits, FCC proceedings, and years of uncertainty before it reached a negotiated settlement which was less than what it wanted.

Major League Baseball learned from the NFL's experience, and took a different tack. When it created the MLB Network it did what the NFL has refused to do, and offered significant ownership interests to the major cable operators, including Comcast. Not surprisingly, from the moment of its launch, the MLB Network has been carried on the basic cable tier.

Plainly, existing law does not provide adequate protection for independent programmers. Acquisition of the NBCU program networks will only make things worse.

THE PROPOSED MERGER WILL HURT OTHER DISTRIBUTORS AND THE PUBLIC

Combining NBC and Universal content with Comcast's cable and Internet distribution systems will also give the merged company vastly increased power over content distribution markets. Depending on the circumstance, Comcast could choose to withhold its programming or force it upon

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competitors at inflated prices. This in turn will increase cable bills and deprive customers of access to programming from diverse sources.

There are countless ways in which Comcast could exercise such leverage. For example, it can condition the sale of important "must have" programming, including that of the NBC and Telemundo TV stations, upon acceptance of undesired, secondary channels which would never receive carriage in a competitive market. Or it could withhold or delay access to the Universal film library from competing MVPDs, or demand vastly inflated licensing fees.

Retransmission consent for NBC Network and Telemundo programming poses an especially important problem. Without Comcast's permission, competing MVPDs would be unable to offer this essential programming. As the recent Fox/Time Warner Cable dispute demonstrated, even the most powerful satellite or cable companies cannot last for a day without major TV network programming. Post-merger, Comcast could decide to pay itself twice the fair value for NBC and Telemundo programming and then turn around and exact the same inflated price from its competitors, who would be forced to pass on the overcharges to their customers. Or, Comcast could tie the carriage of this programming to the carriage, at favorable channel locations, of the least desirable of its cable channels, also at inflated prices.

As with the program carriage problem discussed above, Comcast would assure you that existing law is sufficient to protect against harm. It will point out that the "program access" provision in Section 628 of the Communications Act requires vertically integrated cable operators to share their programming with competitors without discrimination in prices, terms or conditions of sale. Moreover, the Commission has recently closed, in part, the so-called "terrestrial loophole" that has permitted Comcast and other cable companies withhold regional programming, such as the Comcast Sports Network in Philadelphia. Comcast will also cite to regulations issued under Section 325 of the Communications Act, which requires broadcasters to engage in "good faith negotiation" for "retransmission consent."

I doubt that Comcast will also volunteer that it has gone to court to challenge the FCC's basic legal authority to continue enforcing the program access rules.

That aside, there are many reasons why existing law is insufficient to protect Comcast's competitors and their customers. First, even if Comcast doesn't upset them in court, the program access rules expire in two years, and there is no assurance that they will be extended. In any event, the program access regime does not preclude bundling, which is one of the principal anti-competitive mechanisms Comcast is likely to employ. Although Section 628 prohibits discrimination against competitors, this simply means that as long as Comcast overcharges itself, it can overcharge everyone else. In addition, the program access provision does not apply to a large proportion of the content that Comcast is acquiring, such as feature films and other video on demand content. Moreover, Section 628 is a right without a remedy; the FCC's complaint process is so onerous and time consuming that I am unaware of a single program access complaint which has ever been granted. And, no less importantly, the negotiation process is one-sided. There is no "standstill" requirement, so that when a carriage agreement expires, all of the power is in the hands of the programmer.

Retransmission consent rules are even less reliable as a tool for video competitors. The

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statutory mandate for "good faith" negotiation does not prohibit price or packaging discrimination; it simply requires a commercially feasible offer. NBC already requires MVPDs to accept bundles of cable programming in order to get the NBC and Telemundo programming; addition of the Comcast distribution magnifies the leverage by several orders of magnitude. The FCC's complaint process offers no effective remedies other than a finding that one party has acted badly. There is no time limit for FCC action, and as with program access, there is no "standstill" provision to maintain some level of parity during negotiations.

HOW COULD THIS HAPPEN?

One could fairly ask how Congress could have created a system which would permit a single company to operate cable systems, cable TV networks and a stable of owned-and operated TV stations, much less a major TV network? The answer is that Congress never contemplated such a combination. When the program access and retransmission consent provisions were enacted in 1992, the law already prohibited common ownership of a cable system and a local TV station. The local cable/television cross-ownership rule was eliminated a few years ago by judicial action, not legislation. There is very little doubt that Congress would have included much stronger protections if it ever thought that such cross-ownership would ever be permitted.

COMCAST'S ACQUISITION OF NBCU WOULD JEOPARDIZE DEVELOPMENT OF A FREE AND OPEN INTERNET

Internet technology offers the prospect of creating vibrant and highly competitive markets for video programming. Members of the public can, or will soon be able to, receive high-definition video via the Internet. Comcast has already taken steps to kill off such competition, and acquisition of NBC's content will greatly enhance that campaign.

Comcast has strong reason to keep its customers from migrating to existing and potential Internet-delivered video competitors. Control of NBCU branded content as well as its one-third interest in Hulu would give Comcast a powerful mechanism to retain its video services revenue stream by strangling potential Internet-based competition before it can even get off the ground.

It would be reasonable to expect that the public's reaction to the diminished choice and increased prices resulting from a Comcast/NBC merger would be to seek alternative ways to obtain video content. Indeed, a brave few have decided to "cut the cord" by cancelling their cable TV service and relying on the increasing amount of content available over the Internet. It is becoming ever easier to connect digital TV sets directly to the Internet and employ services like iTunes, Boxee, Roku, and Hulu while relying on free over-the-air television for news and other local programming. Existing online-only video distributors such as Netflix are growing rapidly. There is no technological or business model reason why there won't soon be Internet-delivered "virtual cable" services with a menu offering the popular "linear programming," including the major cable TV networks. Indeed, earlier this week, the *Wall Street Journal* reported that a company called Move Networks plans to offer just such a service.

This is an existential threat to the cable industry. Its answer is "TV Everywhere." Comcast's version, which goes under the unwieldy name of "Fancast XFinity," offers the superficially attractive opportunity for its video and Internet customers to view video over the Internet without extra charge.

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The catch, which is a very big catch indeed, is that you must keep your cable TV subscription.

XFinity represents an attempt to kill off potential competition while preserving the cable TV revenue stream indefinitely. XFinity is available only in Comcast regions, as it and other cable operators have continued their longstanding tacit agreement of never competing with each other on price or services. And, while we are told that satellite and telco competitors will soon be allowed to offer Comcast's content, the same opportunity will not be offered to any new online-only TV distributors. Nor is it clear that this content will be made available under the same terms and conditions. By design, XFinity cuts off the flow of programming to disruptive new entrants.

The XFinity offering also threatens existing independent programmers. Comcast has conditioned cable TV carriage on contractual provisions which prevent programmers from selling their content to competing online distributors at least temporarily and, perhaps, permanently.

Last month, MAP joined with Free Press and other public interest groups in issuing a white paper which set forth in detail how the cable industry has colluded to create the"TV Everywhere" model. As the report says,

> Stripped of slick marketing, TV Everywhere consists of agreements among competitors to divide markets, raise prices, exclude new competitors and tie products.

Comcast's acquisition of NBCU's programming vastly increases its leverage to force XFinity upon its customers and to stifle new competitors. All of the program carriage and program access problems that video competitors currently face will be replicated in the Internet space, but there are no similar legal protections. Of particular note in this regard is the fact that NBC has a major ownership interest in Hulu, the leading Internet video service. If it is in Comcast's interest, it can cripple Hulu by withdrawing NBC content from Hulu. Alternatively, Comcast may choose to make the NBC content exclusive to Hulu and withhold it from new Internet-delivered video competitors.

Comcast's control of the vast Universal film library would be another important building block in the effort to stifle new Internet competitors. Comcast can withhold these products from Internet competitors or delay their availability while offering them exclusively on XFinity. For example, it could target DishTV, which competes in the video market. Dish has an Internet delivered video service called Dish Online. By denying Universal's film library to Dish Online, Comcast could drive video customers to itself. If Dish were uncooperative, Comcast could also deny XFinity to Dish in Comcast markets.

Finally, while I hope that the FCC quickly moves to adopt "Network Neutrality" rules to prohibit discrimination in delivery of broadband services, I must point out that, in the absence of such provisions, Comcast can degrade or otherwise discriminate against competitors seeking to deliver Internet video program services to Comcast's Internet customers.

CONCLUSION

Comcast's proposed acquisition of NBCU is profoundly anti-competitive and will adversely affect the marketplace of ideas as well. I hope the Subcommittee members will join Media Access Project in urging the FCC and the Department of Justice to block it.

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