S. HRG. 111–949

CONSUMERS, COMPETITION, AND CONSOLIDATION IN THE VIDEO AND BROADBAND MARKET

HEARING

BEFORE THE

SUBCOMMITTEE ON COMMUNICATIONS, TECHNOLOGY, AND THE INTERNET

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION
UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

MARCH 11, 2010

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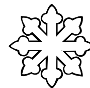

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ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

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CONSUMERS, COMPETITION, AND CONSOLIDATION IN THE VIDEO AND BROADBAND MARKET

THURSDAY, MARCH 11, 2010

U.S. SENATE,
SUBCOMMITTEE ON COMMUNICATIONS, TECHNOLOGY, AND THE INTERNET,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:02 a.m. in room SR–253, Russell Senate Office Building, Hon. John D. Rockefeller IV, presiding.

OPENING STATEMENT OF HON. JOHN D. ROCKEFELLER IV, U.S. SENATOR FROM WEST VIRGINIA

The CHAIRMAN. Good morning. This hearing will come to order. And we welcome all. I notice there are a few people in the room.

We are here today to discuss consumers—They are the good guys, right? The people we try to protect—and competition and consolidation in the video and broadband markets. These are services that are vital to our democracy, in fact. What kind of content do they get? How much do they have to pay for it? Can they get it in all cases?

They shape the way we communicate. They shape the way we share news and information. They shape the way we entertain ourselves or dumb down ourselves, whichever you look at it, and the way we spend our free time.

When consolidation occurs in these markets, we need to pay attention, therefore. We need to pay attention. When companies swell to include both content and distribution, we need to pay attention because it is vitally important that when we have mergers in these markets, consumers cannot be left with lesser programming and higher rates.

So, today, we are going to talk about these issues. This hearing is an opportunity to have a serious discussion about consumers, how consolidation affects their lives directly and what we can do to make sure that they are absolutely protected.

We begin our first panel with authorities from the Federal Communications Commission and the Department of Justice, two top-of-the-line people in our country, much less the Federal Government.

We know they take their jobs seriously. So we respect that while the Comcast-NBC merger as a concept is pending, they are limited

to what they can discuss, and that is only the process rather than the substance of the merger. Otherwise—I am not a lawyer, but they would be doing something bad.

But we look to frame our discussion, which we will continue with the private sector witnesses on our second panel. And I need to apologize because we are doing the FAA bill on the floor, and Byron Dorgan, who is a committee member, is managing it for an hour. Then I have to go down at 11 o'clock. So I apologize for that.

So I thank you all very much, and we shall get started.

Senator Hutchison is not here. So I will call upon Senator Inouye.

STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII

Senator INOUYE. Thank you very much.

There is no question that a proposed merger between Comcast, the Nation's largest video programming distributor, which also happens to be the Nation's largest residential broadband provider, and NBC Universal, the fourth-largest media and entertainment company, deserves our scrutiny, vigorous scrutiny.

However, size alone should not be the basis for approving or disapproving mergers. If that is the standard, then many previously approved mergers should have been denied. The key factor is how the merger will impact the quality and affordability of services available to consumers and whether the merger will be in the public interest.

Today's hearing will hopefully provide the members of this committee with a better understanding of the impacts of this proposal based upon the facts. Further, the merits of the proposed joint venture should not be judged based on extraneous issues, such as personality or parties.

I have known Mr. Brian Roberts and his father, Ralph Roberts, the founder of Comcast, for many years. And both of the men are of unquestionable integrity, and under their leadership and guidance, I have no doubt that Comcast will live up to the commitments it made as part of the proposed joint venture with NBC Universal.

The question before us is whether, even with the commitments that have been made, this is a good deal for consumers. There have been significant changes in the communications and entertainment marketplace. It is in this context that the proposed merger must be evaluated with the public interest at heart. The changing marketplace should also serve as the basis for reviewing policies that may need updating due to developments.

For example, as one of the authors of the 1992 statute that established retransmission consent, I believe the time is ripe for the Federal Communications Commission to exercise its oversight responsibilities on matters of this nature that impact consumers and the general well-being of the Nation.

While I believe the FCC has the necessary authority to resolve retransmission consent disputes, I will be interested to hear from the Chairman whether there are any additional tools that would be helpful in the FCC's oversight efforts. So I look forward to working

with my colleagues on the Committee and the FCC on these important issues. And I thank you very much, Mr. Chairman.

And I, too, will have to leave early. And I have a couple of questions for the FCC, if you will submit them for me?

The CHAIRMAN. Of course.

Senator INOUYE. Thank you, Mr. Chairman.

The CHAIRMAN. The Honorable Kay Bailey Hutchison with the great State of Texas.

STATEMENT OF HON. KAY BAILEY HUTCHISON, U.S. SENATOR FROM TEXAS

Senator HUTCHISON. Well, thank you very much, Mr. Chairman.

Welcome to our distinguished FCC panel. And I am pleased that we are holding this hearing.

We are going to have to grapple with evolving technology and the convergence between traditionally distinct businesses like telecommunications and video program distribution. We want to look at this type of consolidation's impact on consumers and competitors, but we also want to make sure that policy determinations about this deal do not impact innovation and investment in this rapidly moving area.

In my judgment, the FCC's review of this transaction should be limited to the transfer of the relevant licenses between the parties and whether that is consistent with the public interest. Merger reviews at the Commission have not always stayed as narrow as I believe they should.

Frequently, parties have used merger review proceedings as a proxy policymaking forum to pursue conditions that reach well beyond the merger itself. In a number of cases, previous FCCs have imposed some of these conditions.

While I hope that the current Commission will thoughtfully conduct its public interest analysis, I also hope they avoid imposing conditions that will require a significant ongoing involvement of the Government in monitoring and policing the market.

In that context, Mr. Chairman, I would like to note that we have seen some recent disputes between programmers, broadcasters, and cable providers about the terms for retransmission of signals on cable systems, mainly in the sports arena, and that has led some to suggest that we need more Government involvement in these marketplace negotiations, such as through FCC-managed arbitration.

Again, I think Congress and the regulators need to tread very carefully and make sure that the policies we discuss take account of the evolving nature of the marketplace, the competition between providers, and the growing number of choices consumers have to access content. What we do not want to do is intervene in private market negotiations in a way that disrupts what is going on in the marketplace or leads to advantages for one stakeholder or technology.

With respect to the Comcast-NBC transaction, Mr. Chairman, I do have a number of questions, particularly how a combined entity would deal with independently-owned broadcast stations. In a number of cases, non-NBC owned stations will have to negotiate the terms for retransmission of their broadcast signal with the very

same company that provides its programming. How Comcast will deal with those stations from a transparency perspective is important for us to understand how this transaction could impact one segment of the industry.

Texas has 14 Telemundo stations, 3 of which Comcast will own and operate. We also have 21 NBC stations, 1 of which will be owned and operated by Comcast. Consumers in Texas want to know how programming and availability of all these stations will be impacted, but they particularly want to know whether Comcast will continue to invest in and develop programming for the stations, and that NBC and Telemundo will remain available as free over-the-air stations.

Now I understand that the Chairman of Comcast has made commitments in this area, which I think are very positive. Preserving free over-the-air stations is an essential component of this transaction, in my opinion.

Transparency will be important in this area, but it will also be critical to assessing how Comcast will deal with competitors who want access to NBC programming, as well as affiliated programming developed by Comcast, such as its sports programming.

I have heard from a number of smaller cable systems representing primarily rural areas of my state. Although bundling or "tying" arrangements are prohibited, there are concerns that the combined company may wish, through pricing arrangements, to strongly encourage the smaller systems to accept multiple streams of programming. I will be interested in hearing Mr. Roberts's thoughts on how Comcast will address those concerns.

I am also interested to hear how he and other witnesses view the 16 voluntary commitments that Comcast has made, some of which I have heard personally, and whether those conditions adequately ensure transparency and availability of content to consumers and competitors.

So, Mr. Chairman, thank you for holding this hearing. Thank you for appearing. I think it is important that we look at all of this, and I just hope that we don't overdo it, but that we do just the right amount of regulatory and Congressional action.

Thank you very much.

[The prepared statement of Senator Hutchison follows:]

PREPARED STATEMENT OF HON. KAY BAILEY HUTCHISON, U.S. SENATOR FROM TEXAS

Mr. Chairman, thank you for holding this hearing today. The pending transaction between Comcast Corporation and NBC Universal is a significant development in the programming and video distribution markets.

The scale of the transaction, the changing technology landscape, will make it challenging to Members of Congress and regulators to fully understand and appreciate all of the implications of this deal.

We will need to grapple with evolving technology and convergence between traditionally distinct businesses like telecommunications and video program distribution, and appreciate that there are shifting business models and evolving demands by consumers for choices in content and ways to access that content.

Viewing this deal in context, and working to make sure that it satisfies the public interest, will require us to challenge some of the assumptions and regulatory models of the past and to look forward.

That type of forward-looking analysis is not a common occurrence in Washington, but I believe it is essential as we discuss this deal and the future marketplace. We want to make sure the deal does not pose dangers to consumers and competitors,

but we also want to make sure that policy determinations about this deal do not impact innovation and investment in this rapidly moving area.

In my judgment, the Federal Communications Commission's review of this transaction should be limited to the transfer of the relevant licenses between the parties and whether that is consistent with the public interest. Merger reviews at the Commission have not always stayed as narrow as they should, however.

Frequently, parties have used merger review proceedings as a proxy policy-making forum to pursue conditions that reach well beyond the merger itself. In a number of cases, previous FCC's have imposed some of those conditions.

While I hope that the current Commission will thoughtfully conduct its public interest analysis, I also hope that they avoid imposing conditions that will require a significant ongoing involvement of the government in monitoring and policing the market.

In that context Mr. Chairman, I would like to note that we have seen some recent disputes between programmers, broadcasters, and cable providers about the terms for retransmission of signals on cable systems. That has led some to suggest that we need more government involvement in these marketplace negotiations such as through FCC managed arbitration.

Again, I think Congress and the regulators need to tread very carefully and make sure that the policies we discuss take account of the evolving nature of the marketplace, the competition between providers, and the growing number of choices consumers have to access content. What we do not want to do is intervene in private market negotiations in a way that disrupts what's going on in the marketplace or leads to advantages for one stakeholder or technology.

With respect to the Comcast/NBC deal, Mr. Chairman, I do have a number of questions, particularly how a combined entity would deal with independently owned broadcast stations. In a number of cases, non-NBC owned stations will have to negotiate the terms for retransmission of their broadcast signal with the very same company that provides its programming.

How Comcast will deal with those stations, from a transparency perspective is important for us to understand how this transaction could impact one segment of the industry.

Texas has 14 Telemundo stations, three of which Comcast will own and operate. We also have 21 NBC stations, one of which (Dallas/Fort Worth) will be owned and operated by Comcast. Consumers in Texas want to know how programming and availability of all of these stations will be impacted, but they particularly want to know whether Comcast will continue to invest and develop programming for the stations, and that NBC and Telemundo will remain available as free over-the-air stations.

Transparency will be important in this area, but it will also be critical to assessing how Comcast will deal with competitors who want access to NBC programming, as well as affiliated programming developed by Comcast such as its sports programming.

I have heard from a number of smaller cable systems representing primarily rural areas of my state. Although bundling or "tying" arrangements are prohibited, there are concerns that the combined company may wish, through pricing arrangements, to strongly encourage the smaller systems to accept multiple streams of programming. I am interested to hear Mr. Roberts' thoughts on how Comcast will address those concerns and the thoughts of our other witnesses.

I am also interested to hear how Mr. Roberts and our other witnesses view the 16 voluntary commitments Comcast has made to date, and whether those conditions adequately ensure transparency and the availability of content to consumers and competitors.

Mr. Chairman, I want to thank you again for having this hearing. I look forward to hearing from our witnesses.

The CHAIRMAN. Thank you, Senator Hutchison.

Senator Hutchison, like myself, has to go do the FAA thing, but that is not for a while. Senator Dorgan will be taking my place for a while, and he is also going to chair the second panel, which I won't be able to because I will be on the floor. And so, you can give your statement then, or you can give it now.

STATEMENT OF HON. BYRON L. DORGAN, U.S. SENATOR FROM NORTH DAKOTA

Senator DORGAN. Mr. Chairman, I will go to the floor when we start the FAA reauthorization discussion over there. Then I will come back and be happy to chair for the second panel. I will be glad to make a statement at that point in time if you want to go to the witnesses now.

The CHAIRMAN. I thank you very much.

So, as I said, we really have two of the most important people in Government and two of the smartest people in Government and anywhere, and I really mean that. This is a perfect first panel. And Julius Genachowski, of course, is head of this little agency called the Federal Communications Commission, and Christine Varney does antitrust at a very high level for the Department of Justice.

So, Mr. Genachowski, we turn to you, sir.

STATEMENT OF HON. JULIUS GENACHOWSKI, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION

Chairman GENACHOWSKI. Thank you, Mr. Chairman and members of the Committee.

Thank you for the opportunity to address the role of the FCC in reviewing proposed mergers in the communications industry, including the contemplated transaction involving Comcast and NBC.

The Commission approaches these matters mindful that maintaining a vibrant, innovative, consumer-friendly, and competitive communications sector is essential for our economy, our society, and our democracy. Communications policy affects the lives of all Americans and is becoming ever more important. Communications represents a major sector of our economy and plays a vital role in addressing many of the challenges our Nation faces.

Congress has set the basic framework for our review of mergers and transactions. Sections 214 and 310 of the Communications Act require that before FCC licenses or authorizations may be transferred from one holder to another, the FCC must find affirmatively that the transfer is in the public interest. This is a statutory requirement to protect and promote the interests of all Americans.

In exercising our statutory responsibilities in the context of reviewing transactions, the Commission is focused on several important and interrelated principles. These include protecting and advancing the interests of consumers, as well as those of children and families; ensuring effective competition; promoting innovation; and encouraging investment in the broad and rapid deployment of broadband and other advanced services throughout the United States.

Specifically with respect to television programming, the Commission's goals include a vibrant and healthy marketplace, guided by the well-settled Communications Act values of competition, diversity, localism, and a deep respect for the First Amendment. In the review of any particular transaction, some of these considerations may be more centrally at issue than others. Additional factors, such as spectrum, universal service, or foreign ownership, or national security may also be important in specific cases.

The law further requires that the Commission analyze these issues through an open process. The Administrative Procedures Act

provides for a record-based agency review, with a full opportunity for all interested persons to file their facts and arguments and, ultimately, a decision supported by the evidence.

In my written comments, I describe in more detail the Commission process, including our coordination with our colleagues at the Department of Justice. The Commission's review of communications transactions fills a unique role that complements the important role played by the Department of Justice.

Of course, the FCC's review of transactions must be thorough, efficient, timely, and transparent. It must have the appearance as well as the reality of objectivity, fairness, and reliance on the best available data and analysis. In the past, some have expressed some concerns about FCC reviews of transactions. I am committed to working with my fellow Commissioners to ensure that the agency's review meets the highest standards of openness, transparency, rigor, and fairness, that it minimize costs and delay while fully protecting the public interest.

In general, the FCC begins its transaction review process once a complete and compliant transfer application has been received from the parties. At that point, we ask for public comment.

In the Comcast-NBC proceeding, the companies filed an initial application in late January, and at the request of the parties, the Commission awaited the filing of a supplemental economic report, which we received last Friday. The Commission now will soon issue a notice that begins the public comment period.

To promote a thorough and efficient process, a dedicated team at the FCC has already begun work on staff-level review of the proposed transaction. Reflecting the scope of the transaction, the team members come from a number of the agency's bureaus and offices and bring to bear years of expertise.

I have directed the team to learn from experience—to examine past similar transactions and see, with the benefits of hindsight, what the FCC did right and where the agency could have done better. Our staff has also begun the process of consultation and cooperation with our colleagues at the Justice Department.

As you indicated, Mr. Chairman, the legal requirements of record-based decisionmaking prevent me from commenting in any way on the merits of pending transactions, including the Comcast-NBC transaction. Our decisions on mergers are made only after we compile and review a full record. The FCC will, of course, thoroughly consider all of the important issues that have been raised or will be raised in the context of the transaction.

As the Committee is aware, the communications and media landscape is rapidly evolving. New media and new communications technologies are an increasingly important part of the landscape, even as millions of Americans continue to rely on traditional forms of media and communications. The landscape today is very different from 5 and 10 years ago and will be very different 5 and 10 years from now.

While the changing landscape must, of course, inform the FCC's decisionmaking, certain core values remain constant. Robust and healthy competition is essential to producing consumer benefits, better services and lower prices. An important part of our responsibility at the Commission is to ensure that communications industry

transactions do not enable firms to frustrate innovations or raise prices ultimately paid by consumers.

We must ensure that American consumers enjoy all the benefits of competition and choice, in a vibrant and diverse communications and media landscape that upholds vital First Amendment values.

Finally, investment, innovation, and employment are key objectives, as is the rapid and widespread deployment of advanced communications services. These and other traditional goals and values will inform our review of transactions.

Thank you for the opportunity to appear before you today. And of course, I would be happy to address any questions.

[The prepared statement of Chairman Genachowski follows:]

PREPARED STATEMENT OF HON. JULIUS GENACHOWSKI, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION

Mr. Chairman and members of the Committee, thank you for this opportunity to address the role of the Federal Communications Commission in reviewing proposed mergers in the communications industry, including the contemplated transaction involving Comcast and NBC Universal.

The Commission approaches these matters mindful that maintaining a vibrant, innovative, consumer-friendly, and competitive communications sector is essential for our economy, our society, and our democracy. Communications policy affects the lives of all Americans—and is becoming ever more important. Communications represents a major sector of our economy and plays a vital role in addressing many of the challenges our Nation faces.

Congress has set the basic framework for our review of mergers and transactions in the communications industry. Sections 214 and 310 of the Communications Act require that before FCC licenses or authorizations may be transferred from one holder to another, the FCC must find affirmatively that the transfer is in the public interest. This is a statutory requirement to protect and promote the interests of all Americans.

In exercising our statutory responsibilities in the context of reviewing transactions, the Commission is focused on several important and interrelated principles. These include protecting and advancing the interests of consumers, as well as those of children, and families; ensuring effective competition; promoting innovation; and encouraging investment and the broad and rapid deployment of broadband and other advanced communications services throughout the United States. Specifically with respect to television programming, the Commission's goals include a vibrant and healthy marketplace, guided by the well-settled Communications Act values of competition, diversity, localism, and a deep respect for the First Amendment.

In the review of any particular transaction, some of these considerations may be more centrally at issue than others. Additional factors, such as spectrum, universal service, or foreign ownership and national security, may also be important in specific cases.

The law further requires that the Commission analyze these issues through an open process. The Administrative Procedure Act provides for a record-based agency review, with a full opportunity for interested persons to file their facts and arguments, and a decision supported by the evidence. The Commission's staff reviews and analyzes the record, issues information requests when appropriate for additional necessary data, meets with the applicants, opponents, and others to understand and discuss positions on all sides, and reaches out to affected parties to obtain various perspectives on the proposed transaction. The staff then prepares a draft order addressing the record and reaching tentative conclusions. Ultimately the five-member Commission votes on whether to approve the transfer, with or without specific conditions, or to reject it. Our decision can be challenged in court, like any other administrative order.

Consistently over many years, the FCC and the Federal antitrust agencies reviewing particular transactions have worked out procedures that allow the agencies to cooperate, taking advantage of the respective expertise of their staffs. This cooperation includes sharing information and analysis; identifying issues; avoiding conflict regarding any necessary remedies; and making the review process as efficient as possible for all concerned. At the same time, each reviewing agency must make its own decisions, under its own governing statutes and standards.

The FCC's public interest standard and procedures are different from the ones the Department of Justice applies when it reviews transactions. Unlike the FCC's review standard, the Department of Justice determines whether the transaction may "substantially lessen competition" under the antitrust laws and, when appropriate, fashions antitrust remedies. The Department of Justice's investigations are not focused on issuance of an administrative order, but instead primarily on whether or not to challenge the transaction in court. The Hart-Scott-Rodino Act, which is its governing statute, requires strict confidentiality concerning the investigative process, allowing public disclosure only under limited circumstances.

In terms of remedies, in the Communications Act, Congress granted the FCC flexibility to address potential harms and reinforce promised benefits by using tailored remedies requiring or prohibiting particular conduct. Accordingly, the Commission's review of communications transactions fills a unique role that complements the role played by the Department of Justice.

Especially given its unique function, the FCC's review of communications industry transactions must be thorough, efficient, timely, and transparent. It must have the appearance as well as the reality of objectivity, fairness, and reliance on the best available data and analysis. In the past, some have expressed concerns about whether FCC review of some transactions has taken longer than the circumstances warranted. Some have also questioned in particular cases whether the Commission's processes were sufficiently open and reflected a sufficiently thorough analysis of the relevant data and issues. I am committed to working with my fellow Commissioners to ensure that the agency's review procedures meet the highest standards of openness, transparency, rigor, and fairness, and minimize costs and delay while fully protecting the public interest.

In general, the FCC begins its transaction-review process once a complete and compliant transfer application has been received from the parties. At that point, we ask for public comment.

In the Comcast/NBC Universal proceeding, for example, the companies filed an initial Application and Public Interest Statement on January 28, 2010. At the request of the applicants, the Commission awaited the filing of a supplemental economic report, which we received last Friday, March 5. The Commission will soon issue a notice that begins the public comment period and informs interested persons how they can address the applicants' submissions and participate in the FCC proceeding.

To promote a thorough and efficient process, a dedicated team has already begun work on staff-level review of the proposed transaction. Reflecting the scope of the transaction, the team members come from a number of the agency's bureaus and offices and bring to bear years of expertise. I have directed the team to learn from experience—to examine past similar transactions and see, with the benefit of hindsight, what the FCC did right, and where the agency could have done better. Our staff has also begun the process of consultation and cooperation with our colleagues at the Department of Justice.

The legal requirements of record-based decision-making prevent me from commenting in any way on the merits of pending transactions, including the Comcast/NBC Universal transaction. Our decisions on mergers are made only after we compile and review a full record. The FCC will of course thoroughly consider all of the important issues that have been raised or will be raised in the context of the transaction.

As the Committee is aware, the communications and media landscape is rapidly evolving. New media and new communications technologies are an increasingly important part of the landscape, even as millions of Americans continue to rely on traditional forms of media and communications. The landscape today is very different from 5 and 10 years ago, and will be very different 5 and 10 years from now.

While the changing landscape must of course inform the FCC's decision-making, certain core values remain constant. Robust and healthy competition is essential to producing consumer benefits—better services, and lower prices. An important part of our responsibility at the Commission is to ensure that communications industry transactions do not enable firms to frustrate innovation or raise prices ultimately paid by consumers. We must ensure that American consumers continue to enjoy all the benefits of competition and choice, in a vibrant and diverse communications and media environment that upholds vital First Amendment values.

Investment, innovation, and employment are key objectives, as is the rapid and widespread deployment of advanced communications services. These and other traditional goals and values will inform our review of transactions.

Thank you for the opportunity to appear before you today. I look forward to working with the Committee, and I would be happy to address any questions the Committee may have.

The CHAIRMAN. Thank you, sir.
Ms. Varney?

STATEMENT OF HON. CHRISTINE A. VARNEY, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE

Ms. VARNEY. Good morning, Mr. Chairman and members of the Committee. I am delighted to be here today to talk with you and Chairman Genachowski about how the Justice Department analyzes mergers.

Our Nation's antitrust laws play a vitally important role in ensuring U.S. markets remain vibrant and competitive. Marketplace competition benefits American businesses and consumers by assuring that the market provides price competition and product innovations that increase our standard of living. I take seriously the need for vigorous review of transactions and judicious enforcement of the antitrust laws.

Over the course of many years and many investigations, the Antitrust Division has developed significant expertise in both the telecommunications and media industries. Both industries have seen dramatic technological innovation that has brought incredible benefits to our society. We look forward to bringing our expertise to the review of the proposed transaction between Comcast and NBC. We also look forward to working closely with the Federal Communications Commission during both our agencies' reviews of the transaction.

Although the Justice Department and the FCC have different missions—ours is to protect competition while the FCC's is to promote the public interest—we share similar concerns and intend to collaborate effectively.

I am precluded, as is the Chairman, from discussing the specifics of the proposed Comcast-NBC transaction because the matter is currently under investigation, and our authorizing statutes prohibit discussion of pending matters. I hope, however, that a review of some of the Antitrust Division's work over the past year will provide useful insight to you regarding our approach to antitrust enforcement.

As the Assistant Attorney General for antitrust, I have sought to take a measured and responsible approach to enforcement, using well-established antitrust principles, evaluating each matter carefully, thoroughly, and in light of the particular facts of the transaction. Some matters involving large, significant companies have proceeded unchallenged because they were unlikely to result in anticompetitive harm.

As Senator Inouye pointed out, size cannot be the determining factor in an antitrust evaluation. For instance, the Justice Department did not challenge either the combination of Oracle and Sun or the collaboration between Microsoft and Yahoo!.

Some proposed mergers have been approved under conditions designed to protect competition. For instance, the combination of Ticketmaster and Live Nation, as well as that of Bemis and Rio Tinto, proceeded only after we obtained decrees resolving our competitive concerns.

In Ticketmaster, for instance, we required divestiture of ticketing assets, licensing of ticketing software, and prohibited retaliation and anticompetitive bundling.

We have also been ready to litigate when we need to. For instance, we are currently challenging a transaction involving Dean Foods, the Nation's largest dairy processor, because we believe the transaction harms competition and will inflate milk prices.

Additionally, just this week, the parties to a proposed transaction involving the two largest health insurers in Lansing, Michigan, announced they were abandoning their merger after being informed by me that we intended to sue to stop their transaction because it would have harmed competition for health insurance.

The Justice Department also uses its expertise to advocate on behalf of competition and consumers. For instance, we recently provided the FCC with a detailed market analysis of broadband competition as part of the Commission's ongoing preparation of a national broadband plan. We provide similar analyses to other agencies and policymakers, sharing our industry expertise and understanding of market dynamics in transportation, agriculture, finance, and many other sectors.

In my prepared statement, I describe in some detail the procedural framework that governs the Justice Department's review of transactions such as Comcast and NBC. One point in that discussion worth emphasizing is that the Justice Department's review is confidential.

Customers and industry participants with views about the transaction must know that the law places significant meaningful restrictions on our ability to disseminate information provided to us during our merger investigations. However, with appropriate waivers from the parties, we may share confidential information with the Commission.

In the course of our review of the proposed Comcast-NBC merger, we will also use our analytical skills and tools to determine the competitive effects of the transaction. We will work closely with the Federal Communications Commission to ensure consistency in the Government's review of the transaction, to protect competition, and promote consumer welfare in a vibrant telecommunications and media market.

Mr. Chairman, this concludes my remarks, and I look forward to your questions.

[The prepared statement of Ms. Varney follows:]

PREPARED STATEMENT OF HON. CHRISTINE A. VARNEY,
ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE

Good morning Mr. Chairman and members of the Committee. I am pleased to present this statement addressing how the Justice Department analyzes mergers in the telecommunications industry, a vitally important part of our economy.

Mergers can allow businesses to grow in ways that help consumers. They can combine complementary assets and enable firms to get new and better products to consumers more quickly and more cheaply.

On the other hand, mergers can harm consumers by, for example, eliminating competition that would have resulted in lower prices or product innovation. Those potential consumer harms have been a central concern of the Justice Department since the Sherman Act's enactment.

Since its passage in 1976, the Justice Department has reviewed mergers within the framework of the Hart-Scott-Rodino Antitrust Improvements Act. Under that

statute, parties to proposed transactions over a certain size must provide to us information regarding their businesses before consummating their transaction. If a transaction falls outside the statute's reporting thresholds, the Justice Department can still investigate under its Civil Investigative Demand authority, which allows us to review both pending and consummated transactions.

Although our review of the vast majority of transactions subject to the Hart-Scott-Rodino Act's pre-merger filing requirement is accomplished within 30 days of the parties' initial filing, some transactions require a closer look for us to make an informed judgment about their likely competitive effects. In those instances, we issue what is called a second request, which is essentially a request for a more complete set of party documents and data. Until they comply with the second request and provide us time to review their materials, parties are not allowed to consummate their proposed deal.

During the period of time when the parties are complying with a second request, we typically conduct interviews with customers and competitors, and often request documents and data from industry participants. Working together, the Antitrust Division's economists and lawyers examine the transaction's likely competitive effects based on the facts as they present themselves.

An important point worth emphasizing is that the Justice Department's review during this second request phase is confidential. Under the law, even the fact that a company has filed a notification cannot be disclosed. Customers and industry participants with views about a transaction should know that the law places significant, meaningful restrictions on our ability to disseminate information provided to us during our merger investigations. I noted at the outset of this testimony that we cannot discuss the details of an active investigation. Indeed, absent an explicit waiver, we are even restricted in our ability to share confidential information with the Federal Communications Commission, which, as I will describe below, also reviews transactions in the telecommunications field.

Turning back to the second request, we try to minimize costs and delay, recognizing that second requests can not only impose significant burdens on merging parties but also harm consumers by delaying a transaction, thus denying them the benefits of procompetitive mergers. At the same time, however, we often need to conduct a thorough inquiry to assess adequately how a proposed transaction will affect the consumers we are charged with protecting. That may necessitate a particularly detailed review in instances involving significant transactions that have the potential to transform markets because there is typically no going back once that transformation occurs.

For those transactions requiring a second request, it often takes the parties several months to comply with our requests. At the end of our review, if we believe that the transaction is likely to violate the antitrust laws, the Department must file a lawsuit asking a court to enjoin the parties from completing their transaction. Courts adjudicate our merger challenges under the well-established standards of the Clayton Act, which is not specific to the telecommunications industry and prohibits transactions that result in a substantial lessening of competition.

After learning that the Department intends to file suit to block a deal, parties frequently will seek to negotiate a settlement that will remedy the competitive harms of the transaction while simultaneously allowing the procompetitive aspects of the merger to go forward. Indeed, it has been the case for many years that the majority of the transactions challenged by the Justice Department have resulted in negotiated settlements. Accordingly, our investigations are conducted not only with an eye toward litigating, but also in light of the reality that we often obtain a solution that protects competition without resort to a contested litigation. Thus, the contours of any potential consent decree can be the subjects of our confidential discussions with industry participants during our investigation.

In the telecommunications field, we conduct our merger reviews alongside the Federal Communications Commission. The FCC has jurisdiction to review transactions involving the transfer of FCC licenses, and it has the power to impose conditions on those transfers. Unlike the Justice Department's inquiry, which is conducted under the antitrust laws and thus focuses on competition, the FCC's review is typically conducted under the Communications Act of 1934 and that statute's mandate to protect the public interest. Unlike the Antitrust Division, which must persuade a court to enjoin a transaction, the FCC may condition license transfers under its own authority.

Under the public-interest standard, the FCC focuses not only on competition concerns but also other considerations, including universal service, spectrum allocation, diversity of news and content, technological standards, and national security. Even though the standards are different, the Justice Department and the FCC often focus on similar issues and review similar facts, and both agencies seek to cooperate dur-

ing their investigations. That cooperation allows us to share expertise about market structure and industry trends, and also to make sure that any necessary remedies are consistent.

In terms of process, the Justice Department and FCC coordinate during investigations to minimize the parties' costs. For instance, merging parties typically grant waivers that permit the FCC and Antitrust Division to coordinate document productions, thereby minimizing party burdens. Another procedural point worth mentioning is that, unlike the typical merger reviewed by the Justice Department, where the parties are free to close their transaction 30 days after substantially complying with a second request, merging parties in the telecommunications field may be required to wait for the FCC to affirmatively approve the transfer of a license before closing, thus displacing, at least as a practical matter, the time constraints normally imposed by the Hart-Scott-Rodino Act. In all cases, however, we do our best to review transactions closely and, at the same time, not delay the closing of procompetitive transactions unnecessarily.

A review of the Antitrust Division's general work over the past year will, I hope, provide useful insight into our priorities and approach to antitrust enforcement.

In short, antitrust enforcement helps keep markets competitive, protecting consumers and spurring innovation. In the merger context, this approach means ensuring that we either go to court to block those mergers that will substantially reduce competition or negotiate a settlement agreement that simultaneously enables the procompetitive aspects of a deal to go forward yet also prevents mergers from having anticompetitive effects on consumers. Our review of likely competitive effects considers both vertical and horizontal issues, and we publicly set forth our enforcement standards in a number of ways, including competitive impact statements, litigation pleadings, closing statements, and other policy documents. When we investigate the unilateral conduct of a firm with market power or the coordinated conduct of firms, this approach means ensuring that firms do not engage in behavior that harms consumers and competition. In the criminal context, this approach means working to detect cartels and prosecuting the firms and individuals who fix prices.

As Assistant Attorney General for Antitrust, I have sought to take a measured approach to enforcement using sound antitrust principles, evaluating each matter carefully, thoroughly, and in light of its particular facts. Some matters involving large, significant companies have proceeded unchallenged because they were unlikely to result in anticompetitive harm. For instance, the Justice Department did not challenge either the combination of Oracle and Sun or the collaboration between Microsoft and Yahoo!.

Some proposed mergers have been altered through settlement agreements designed to ensure that competition would be preserved. For instance, the combination of Ticketmaster and Live Nation, as well as that of Bemis and Rio Tinto, proceeded only after we obtained decrees resolving our competitive concerns. Some aspects of our Ticketmaster decree are worth pointing out. The proposed settlement requires Ticketmaster to license its ticketing software and divest ticketing assets to two different companies, allowing both to compete head-to-head with Ticketmaster in the provision of primary ticketing services. In addition, the proposed consent decree also subjects Ticketmaster to court-ordered behavioral restrictions including, among other things, provisions that preclude Ticketmaster from retaliating against any venue that chooses to use another company's ticketing services or another company's promotional services. As we explained in our competitive impact statement accompanying the proposed settlement, our conclusion that Live Nation was a "disruptive entrant" that was positioned potentially to challenge Ticketmaster's dominance in ticketing constituted the core of our competitive concerns regarding the merger and triggered our judgment that a strong remedy was necessary. By enabling the entry and repositioning of other competitors, the Division concluded that the agreed-upon remedies preserved the competition that would have existed but for the merger.

We are ready to litigate when we need to. We are currently challenging a transaction involving Dean Foods, the Nation's largest dairy processor, in the United States District Court for the Eastern District of Wisconsin. We are seeking a court order requiring Dean to divest the milk processing plants it acquired from a close competitor in Wisconsin on the ground that the merger will increase the price of both the fluid milk bought in the grocery stores and other similar retail outlets and the school milk drunk by students in Wisconsin and the Upper Peninsula of Michigan.

In addition to our work involving mergers, the other aspects of our civil-enforcement program are active. For instance, in a series of court filings and court appearances, the Justice Department articulated a number of concerns about the business arrangements negotiated, through the construct of a proposed class-action settlement, between Google and the Nation's largest book publishers. In the same vein,

we have articulated to the United States Court of Appeals for the Second Circuit our competitive concerns about so-called reverse payments in the pharmaceutical arena, whereby firms agree to delay the entry of generic-drug competition through settlement of a patent dispute. Finally, we recently announced a proposed settlement resolving our concerns about anticompetitive conduct that thwarted regulatory incentives to lower electricity prices in New York City.

On the criminal side, our cartel enforcement is very active. Our ongoing investigation of price fixing in the liquid-crystal-display and cathode-ray-tube industries continues to result in plea agreements and significant criminal fines and jail time. In October, a jury also returned the first indictment in our ongoing investigation of anticompetitive conduct in the municipal bond industry.

The Justice Department has also taken an active role advocating on behalf of competition and consumers. For instance, in coordination with the National Telecommunications and Information Administration, we recently provided to the Federal Communications Commission a submission addressing broadband competition as part of the FCC's ongoing preparation of a national broadband plan as requested by the Congress. That submission was part of a broader effort to share our industry expertise and understanding of how competitive behavior affects consumers.

Finally, I would like to conclude by mentioning a policy that has been of particular importance to me. Within the confines of our confidentiality obligations, the Antitrust Division seeks to be as transparent as possible regarding our enforcement intentions. I have made this point a policy priority, particularly in the international arena, because the burgeoning of antitrust enforcement around the world has the potential to harm U.S. business interests in those places where enforcement intentions are unclear. Transparency is good for business, and it is also good for consumers. Among other virtues, transparency enables businesses to better predict enforcement actions. From my prior work in private practice and service on corporate boards of directors, I know firsthand that predictability is of crucial importance to the business community.

To sum up, with the Division's excellent career staff and my very experienced Front Office team, the Antitrust Division is proceeding in the direction that I outlined in my first public remarks as Assistant Attorney General: "vigorous antitrust enforcement in this challenging era." In reviewing proposed transactions, we use our analytical skills and tools to determine the appropriate competitive analysis. In reviewing proposed mergers in the telecommunications industry, we work closely with the Federal Communications Commission to ensure that any antitrust remedy is synchronized with their public-interest analysis to yield the appropriate marketplace result that best promotes consumer welfare and a vibrant telecommunications market.

Mr. Chairman, this concludes my prepared statement. I am happy to address any questions that you or the other members of the Committee may have.

The CHAIRMAN. Thank you very much, and I will start with the questioning.

You have both gone to great lengths to explain your separate roles and where you can, with waivers, talk to each other. And I want to sort of make that clear because the FCC assesses the "public interest standard" in the Communications Act, and the DOJ considers mergers under the Clayton Act, which is a different matter. They are looking for substantially lessened competition or a tendency to create monopoly.

And frankly, I started thinking back after 9/11, the first bill that the Congress passed was allowing the CIA and the FBI to talk to each other. And it was embarrassing that we had to do that because it was embarrassing that they couldn't talk to each other. And just all of a sudden, everything changed.

Can you explain how and why this works? How the overlap works and how it helps and how it hurts, how it is frustrating, or whatever? We are having a hearing. We are only going to be able to hear part of what we want to hear. And if you were CIA or FBI, you would just talk to us openly.

Ms. VARNEY. I think we will both give some insight into that, Senator.

Under the current framework, much of the information that the Department of Justice receives is confidential. So we like to protect the business proprietary information and the confidential information we need to do merger reviews. I think that the companies that come before us have very sensitive information that should not be publicly disclosed.

However, what we can do and will likely do in any significant transaction that involves multiple agencies is we seek the party's waiver to provide the pertinent information to another reviewing agency. And generally, parties provide that waiver because they are interested in an expeditious Government review.

So, within the framework of the confidentiality that we work in, we are actually able to work fairly collaboratively with our sister agencies throughout the Government. So, on the process side, I think we have a mechanism in place that generally works. I will let you know if that process ever does not work.

On the substantive side, the Chairman will speak to it. But I think competition is a very important input into his broader analysis. And although they have great competition analysts at the FCC, we have a long history here, and I think we complement the piece of their review, which is the public interest based on competition, consumer welfare, investment, and innovation. Ours is more focused on the narrower competition question.

Chairman GENACHOWSKI. I think I agree with that. We have just started to collaborate together, largely as a result of this transaction, and I think we are both committed to having a process that is efficient, that serves the public, and that has benefits for everyone involved.

Our agencies have staffed with complementary expertise, and it is helpful to everyone involved in the process to have them speaking with each other, sharing data and information where it is appropriate, testing analysis on each other, and coordinating in a way that increases the chances of a better decision for the public and also reduce the costs on the parties by not duplicating where duplicating isn't necessary.

So there are opportunities, as I said, for both improved decisionmaking and more efficient decisionmaking by effective collaboration, and that is something that we are both committed to.

The CHAIRMAN. OK. Obviously, video markets are evolving. Consumers today have access to video content in more places than ever before. And I was arguing with my wife last night. She is in a different kind of television, superior television. And viewers can go, they can watch TV. They can watch the Internet screen.

Now how do your analyses take into account—this is to both of you—the evolving nature of video markets, and does the Internet video really compete today with traditional cable programming?

Chairman GENACHOWSKI. Let me field that first.

The first thing that I would note is that at least since the early 1990s, the Cable Act of 1992 and the Telecom Act of 1996, there has been a commitment on the part of Congress and the FCC to promote competition in this area as the best strategy to protect and empower consumers and to be very serious about it. And in fact, in the video marketplace, there have been, as you pointed out,

many changes since the early 1990s, a lot of good news and also some issues of concern.

We have a satellite industry, a competitor that didn't exist before. We have telcos now providing multichannel video programming in some markets, hopefully more, that didn't exist before. Those are good news increases in competition.

There are also issues of concern. We certainly hear from consumers regularly about their rates and concerns that whatever the competition is, it is not constraining rates. That is something we have to take very seriously. And we hear from consumers and also operators in rural areas saying that the competitive dynamics in smaller markets are very different and the FCC's policy should take those into account. And in fact, over time, both Congress and the FCC have taken into account the differences in rural areas.

Now, with respect to the Internet, an evolving story, we are in the early chapters of it. There's a lot of hope that it leads to more competition, more innovation, more consumer benefits, and lower prices for consumers. But this story continues to play out, and there are issues of concern.

I don't want to touch on items that will come up directly in the Comcast-NBC transaction, but there are issues that certainly we need to pay attention to with respect to competition in the overall broadband marketplace and with respect to developments on the Internet itself.

But if I could say one more word, the enduring values to me remain what they were—promoting effective competition, protecting and empowering consumers, ensuring that there is innovation, promoting investment, and even as the technologies and the landscapes change, our focus will be on making sure that those values, those goals are achieved.

The CHAIRMAN. Thank you, sir.

Ms. Varney, my time is up. And I apologize for that, and I call upon Senator Hutchison.

Senator HUTCHISON. In my previous life, I was general counsel of a bank holding company, and I have found that sometimes the regulators that had to approve mergers and acquisitions had no sense of timing. And a contract would expire and then be renegotiated at detriment to one party or the other.

So I would ask you, since this is going on two tracks, are you talking about timing and process? Is it going to be going together at the same time that you would be having your public comment period at the FCC and you would be doing your due diligence? Is that an issue or a factor in the way you are going to proceed, or were you looking at one and then the other, which I think could really make a difference in just the real world of contracts and also business?

I am sure when there is a limbo, that there probably is also a limbo in investment, and a limbo in decisions that probably ought to be made in the best interest of both companies. So I would just ask you what you are looking at?

Chairman GENACHOWSKI. First of all, we have already started and our staffs have started talking about how to ensure there is a process that takes place that is as efficient as possible while tackling the important issues that any transaction raises. In some

cases—we found this is true of both of our agencies—sometimes the delays in the process are due to understandable issues that the parties have in pulling together the information that is required.

I mentioned that in our case we are just now able to put out our public notice really beginning the process because, for completely understandable reasons, it took the parties some time to assemble the information they need. But I would say that we have already spoken. We will continue to speak about how we can best, most efficiently run these processes in a way that delivers on our important responsibility as reviewing agencies but recognizes that needless delay doesn't do anyone any good, and we have an objective to move as quickly as we can.

Ms. VARNEY. And Senator, they are parallel proceedings. One doesn't go first, one review and then the second. They go together at the same time. And that is why we are trying very hard to collaborate effectively. Our staffs are investigating innovative ways where they may be able to share documents in a manner consistent with the law and all the requirements, but that would be expeditious and would benefit both the review, the parties, the consumers, everyone.

Senator HUTCHISON. Thank you.

Let me just, in my final minute or so, ask you if you are of the opinion that I stated in my opening statement that—and everything you have said so far would indicate that you are. But, basically, do you believe you should stick to your Congressional responsibilities, as opposed to being creative and putting new issues in that maybe are not in your purview. How do you feel about that?

Especially the FCC, which has been a little more creative.

[Laughter.]

Chairman GENACHOWSKI. Yes. The public interest standard is obviously broad. I mentioned in my opening statement a series of important values and factors that we will take into account in reviewing transactions. We also are obliged to be open to issues that are raised with us as part of our public process, to analyze those, to take those seriously. That is our mandate.

Now, any decisions that we make in any transaction need to be tied to the issues that arise in that transaction. That is our focus. We have rulemaking processes to deal with broad issues of general applicability, but we also have very serious obligations to consider all the issues that arise. Any actions that the FCC would take, and I am sure the Assistant Attorney General will answer for herself, will be tied to issues raised in the transaction that are appropriate for decision and action in the transaction.

Ms. VARNEY. Senator, the same standard applies to merger review at the Department of Justice. Every merger is considered on the merits of the transaction and that alone.

We essentially on every merger have three courses of action. We can determine that the merger creates no anticompetitive effect, and we do nothing. We can determine that the merger is anticompetitive and cannot be remedied, and we would have to litigate that. So our view would be subject to judicial review. And finally, if we determine a transaction has anticompetitive effect but can be remedied, that remedy itself is subject to judicial review under the Tunney Act proceedings. So we stick to our knitting.

Senator HUTCHISON. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator, very much.

I am going to use my prerogative because telecommunications is a massive subcommittee. So, I am going to ask Senator Kerry and Senator Ensign, Chairman and Ranking Member, to ask their questions now.

STATEMENT OF HON. JOHN F. KERRY, U.S. SENATOR FROM MASSACHUSETTS

Senator KERRY. Thank you, Mr. Chairman.

Obviously, the proposed merger that we are discussing today would create an interesting and a unique company. I have confidence that the Chairman of the FCC and the Assistant Attorney General for antitrust are going to conduct a fair review and, if needed, impose sensible conditions on it.

Let me say at the outset, though, that I have immense respect for Brian Roberts and for his father, Ralph. They have been terrific corporate citizens. I think that everybody in the industry would acknowledge that, and we begin sort of there as a starting point in this. They have taken a small cable company and turned it into a communications giant, and I think that kind of success is admirable.

I have an open mind on this. I have met with Mr. Roberts. I have asked questions and listened to him explain some of the concerns that we might have about price increase, access, different things that obviously are on the table here. Clearly, your scrutiny is important to this, and I think they acknowledge that and welcome it.

We all know that without that, big mergers can distort a market. They can reduce consumer choice, drive up prices. But they can also provide and promote efficiencies and innovation if they are done properly.

My advocacy during the recent retransmission consent disputes, I think, has accented the fact that I try to focus on the consumers and encourage the market to maximize consumer access to content and to try to discourage prices from escalating without commensurate consumer benefits—I think that is sort of the principle that ought to guide us here—and have competition between cable, satellite, and television providers.

I also am a big believer in localism, diversity in programming, and the continued growth of the Internet as a tool for communication. So these are the principles that guide me in thinking about this.

And I would like to ask you, Mr. Chairman, if you would just comment quickly. I know you can't speak specifically to the case, but with respect to a merger of this scope, what are your considerations with respect to the retransmission consent negotiations and their impact on consumers as you have seen them?

Chairman GENACHOWSKI. I shouldn't and can't speak specifically to this transaction, but certainly, the topic of retransmission consent has been a topic of active consideration at the FCC, at least since Christmas week and New Year's Day, when we all were on the cusp of some stations shutting down. We saw it again last week.

There is a lot of consumer concern. A lot of consumers wonder why their lives should be affected because of business disputes between two different media companies. At the same time, media companies have a right to engage in transactions and determine the terms of those transactions. We have heard more increasingly recent arguments from various people who follow this closely, or are involved in it, that the framework that is in place, and that has been in place for a long time, may have lost pace with the changes in the marketplace, maybe changes in technology. And I think we are beginning the process of reviewing whether there are improvements to the framework that make sense.

We look forward to working with you and the Committee on that. It is a statutory framework. But certainly, it is something that we will be looking into and that we would like to be a resource to the Committee as we look at retransmission consent and whether the framework continues to make sense or whether reforms are sensible.

Senator KERRY. Fair enough. Ms. Varney, should we consider the Internet as a possible standalone alternative for multichannel television service delivery? And if so, how can standalone Internet video services be guaranteed access to the content that the other distributors have?

Ms. VARNEY. Senator, I think, as the Chairman has pointed out, the Internet is still in its early chapters, and we don't know where it is going yet. We at the department are committed to preserving competition, whether it is potential competition or incipient competition. So we are in many transactions in telecommunications and media very concerned about the role that the Internet can play as an effective competitor to increase output, to bring more diverse quantity and quality to consumers at hopefully lower prices.

So I am hesitant to say at this point what the Internet can and can't do to promote or inhibit competition. But in any transaction where there is an aspect of the Internet providing a competitive effect, it will be seriously evaluated.

Senator KERRY. Which means, obviously, that is one of the things you will look at in the context of this?

Ms. VARNEY. Without commenting on the specific merger, we will look at anything that is relevant in any transaction.

Senator KERRY. And Mr. Chairman, how do we ensure that independent programmers who have competing content have some effective redress under the nondiscriminatory protections in the Cable Act? And perhaps you might share with us how many complaints have you resolved, and how many carriage complaints are currently pending?

Chairman GENACHOWSKI. The issue of independent programmers having access to multichannel video providers, the issue of diversity of programming, independent voices has been a long-standing issue for Congress and the FCC. And as you mentioned, there are provisions of the statute in the FCC rules that provides the mechanisms for enforcement.

I can't tell you the specific number of complaints that we have had. We will get that to you separately. We have had some. We have also heard complaints that the existing framework can be improved to give independent programmers who believe they have a

complaint under the statute a more efficient process to have those complaints resolved.

But this is one of those areas where the values remain constant, and I think both the FCC and, I assume, the Committee will remain vigilant in thinking about how those values can be and should be applied in a changing marketplace and changing technology landscape.

Senator KERRY. And can you share with me, just as a matter of principle, do you think that consumers should lose access to broadcast programming when the broadcasters and the cable providers fail to reach an agreement?

Chairman GENACHOWSKI. I think that is certainly an issue. One of the things that concerns me the most in situations like that is when consumers are surprised. This was, I think, one of the biggest issues around the New Year's Day potential shutdown, the idea that a consumer could find out on December 30 that they might lose their TV signal on January 1 and have to figure out their options so that they can just have constancy of viewing. It is hard to explain to a consumer why that makes sense.

So without drawing a general rule about whether there are circumstances where——

Senator KERRY. Do you have a perception of what mechanism, if any, might be used to resolve this? Obviously, some people are now pushing for some kind of arbitration thing or something else. Others, there is a lot floating around on this issue. Do you have any thoughts about it?

Chairman GENACHOWSKI. The only thought I would say now is that I think the events of the last 2 or 3 months confirm that this is a subject that should be looked at seriously. All ideas should be looked at with the goal of coming up with a framework that works for consumers and that is fair for the parties involved, for the businesses involved.

Senator KERRY. That was avoided with skill.

[Laughter.]

Chairman GENACHOWSKI. Thank you.

Senator KERRY. Mr. Chairman?

The CHAIRMAN. That is it? OK.

Senator Ensign?

STATEMENT OF HON. JOHN ENSIGN, U.S. SENATOR FROM NEVADA

Senator ENSIGN. Thank you, Mr. Chairman.

Chairman Genachowski, I appreciated earlier when you were talking about wanting the Government to continue promoting investment in the expansion of broadband and encouraging more competition, all of those good principles that I think that we all share. Sometimes we have disagreements on exactly the best way to get there, but I think that we certainly all agree on those kind of guiding principles, and I know we have talked about that.

I want to turn just a little to deal with Title I, Title II issues—Title I being a much lighter regulatory touch, and Title II giving the FCC potentially much more heavy-handedness when it comes to regulation. So I would like to touch on that.

We have heard recently that some groups have called on the FCC to regulate the Internet under Title II of the Communications Act. I believe that this would reverse the successful deregulation that has helped lead to explosive growth in the broadband age that we have seen over the last several years.

Broadly speaking, we know that regulation has costs. At stake would be the tens of billions of dollars invested annually by the private sector in broadband. I would like to ask you, what would the impact on the private sector investment be if the FCC were to reclassify the Internet under Title II?

Chairman GENACHOWSKI. The first thing I would say, Senator, is that job number one right now at the FCC, our focus is on developing the policies that will promote universal broadband in America, rural America and urban America, so that we can have a world-class infrastructure that is an engine for job creation, for ongoing investment, for innovation, for helping improve our education. This is, to me, a major issue of global competitiveness for the United States. And we are working very hard, as you know, looking at what are the policies we need to do to promote those interests, to protect and empower consumers with a 21st century world-class infrastructure.

On the technical issue that you mentioned, as you know, the FCC has in the past relied on Title I as its authority to promote the interests of consumers, rural Americans, others, in and around broadband. Right now, we are arguing in court defending the position that Title I gives us the authority we need to do the right things for American communities, American businesses, American consumers.

We will continue to assert that position, and we will hope that we get a favorable decision from the court that is looking at it right now. Until then, our focus is on the issues that I mentioned. If the court does something that requires us to assess, consider issues, we will do that. But right now, I think there is nothing more important that we could do than to make sure we move forward on a national broadband plan that drives forward U.S. global competitiveness on our communications infrastructure.

Senator ENSIGN. Well, I appreciate that because, as I mentioned, I think that there is a real cost to heavier regulation, and we have to be so careful with this almost miracle of investment in the Internet that we have seen in America and across the world, that we want to continue to see that, that investment with 4G wireless broadband coming out, along with all of the other various exciting things that we are seeing. We know a lot of job creation and a lot of our economy's future lies in broadband investment.

And I just think that whether you get the favorable court decision or not, if the FCC decides or considers moving broadband from Title I to Title II, I think it could be a major, major mistake. And I think that that is why this issue needs to be aired out and discussed so that we consider all the ramifications if that does happen.

So I appreciate both of your service and both of you being here today, though.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Ensign.

Unfortunately, I have to go to the floor to do the Federal Aviation Administration. Senator Kerry will chair, and Senator Cantwell is next up.

STATEMENT OF HON. MARIA CANTWELL, U.S. SENATOR FROM WASHINGTON

Senator CANTWELL. Thank you, Mr. Chairman.

And thank you for your discussion this morning. It is challenging, because of your oversight review, to really get into some substance here.

So I do have a question, but I guess I would like to say at this point in time, I can't support this merger. Now maybe you will provide some facts on oversight and some qualifications that will help with this. But from the Seattle perspective, I see a lot of consumer groups are already very concerned about this.

And obviously, we like media diversity in the Northwest. If you have ever been there, you see that. We can turn out at less than 24 hours' notice for any FCC Chairman who ever wants to come there and discuss it.

But my concern today is that we are talking about one of the largest carriers of both Internet provider and phone service and cable and the merger with content. And specifically, right now Seattle is very upset about what happened with the Olympics. The fact that access was not provided to the Canadian Broadcast System—or the CTV in this case, which would have always provided an alternative coverage—was a great frustration. And then there was a lot of criticism and critique that basically online access was also blocked by various authentication measures, making it difficult for people to gain access.

And I know that my colleague Senator Kohl, who chairs the Antitrust Subcommittee, in his hearing said, "I fear that this practice of locking up certain content only for pay TV subscribers may be a preview of what is to come in respect to TV programming on the Internet, particularly in the context of the proposed Comcast-NBC merger."

So, or as I think the Seattle Times said it in their opposition to this merger, "It just leads to mischief." Now I am not sure we are going to be able to uncover all of the mischief that might happen and protect against it. That is my concern. How are we going to do that? But those two examples of how Seattle viewers were shortchanged on what is a digital age of content access is very frustrating.

But my question is this. As it relates to Chairman Genachowski, it is my understanding that Comcast is challenging the FCC's most recent extension of its program access rules, and so I am interested in what parts they are challenging. And if Comcast prevails, wouldn't this mortally wound one of the protections that we have in place to say you have to meet these programming requirements? And if we get rid of that rule, then aren't we going to see even more mischief in this process?

Chairman GENACHOWSKI. Senator, two things. On your first point, while I can't comment on the merits of the transaction and I shouldn't comment on the specifics that you mentioned, I can let you know that the interests of consumers will be heard in our re-

view of this transaction. They have to be. That is our obligation. A core principle for us is to protect and empower consumers, and we will be looking at all issues relevant to consumers as we review the transaction.

With respect to program access rules, certainly all the competitors in the video programming marketplace will tell you that over the last 10, 15, 20 years since those rules were adopted, they have been a force to promote competition in the marketplace, even though they may not have worked perfectly at times. And that has been our experience at the FCC as well.

In fact, recently, we improved those rules by closing what is called a "terrestrial loophole" and providing a better mechanism for competitors to get access to regional sports programming. So we take the program access rules very seriously. It is in court, as you mentioned. I am optimistic, and I think if issues arise there out of the litigation that we have to work on together, I would look forward to that because we have seen that rules like that in this landscape can promote competition.

Senator CANTWELL. Well, wouldn't you have to take—say that Comcast won on that, wouldn't you have to take that into consideration on this merger?

Chairman GENACHOWSKI. Well, we will take into consideration—I want to be careful, just given that it is a pending review. We will take into consideration in this merger all relevant issues, all issues that are raised by the parties in our proceeding. I imagine this issue will come up in the context of our proceeding, and you can be assured that we will review it very carefully.

Senator CANTWELL. Well, I think that we—I didn't agree with Mr. Martin on a lot of things. But I think this just begs the question for us to review a la carte because I just think we can't hold consumers hostage because we are building a vertical integration, and that is going to be my main concern about this.

Thank you.

Senator KERRY [presiding]. Thank you, Senator Cantwell.

Senator Snowe?

STATEMENT OF HON. OLYMPIA J. SNOWE, U.S. SENATOR FROM MAINE

Senator SNOWE. Thank you, Mr. Chairman.

Chairman Genachowski and Ms. Varney, with respect to some of the procedures involved in what has occurred even since the last mergers that have been considered by both the Justice Department and the FCC, I was wondering whether or not there have been any internal changes in both agencies with respect to the merger review process? Obviously, there has been a perception in the past that some of these mergers have been rubberstamped among media-related mergers.

If you are looking at some of the charts with respect to consolidation, which has been media consolidation, ownership, and cross-ownership issues, certainly they have been a central focus of this committee for an extended period of time, as these mergers have become more and more frequent.

It speaks volumes that the number of independent radio owners have plunged in the last 11 years by more than 39 percent, and be-

tween 1995 and 2003, ownership of the top 10 largest television stations has increased their ownership of the stations from 104 to 299, more than 187 percent increase. So, obviously, it is a major source of our consideration.

So, I would be interested in knowing with your respective agencies, what has changed in terms of the review process that you will apply, given the fact when you are seeing the number of corporations that now control the majority of broadcasters? And I have talked to Mr. Roberts, and he has made a number of commitments to the future because, obviously, it is going to be important, given this vertical integration that is going to occur between distribution and content.

But the number of corporations that control, it has gone from 50 entities to relatively a few. So the Department of Justice didn't apply any conditions to the XM-Sirius or AT&T-BellSouth. And the FCC provided nominal and temporary conditions on various mergers, XM-Sirius, Tribune-News Corp., and Dow Jones.

So starting with you, Chairman Genachowski, can you tell us what is going to change? You mentioned in your statement, as I noticed, that some have questioned in particular cases whether the Commission's processes were sufficiently open and reflected a sufficiently thorough analysis of relevant data and issues.

So what is going to counter that perception beyond that it is just a rubberstamp? Given the increasing consolidation that is occurring, it could affect diversity. It could affect competition. It could affect localism. It could affect independents, not negotiating fair deals for those who are not connected with Comcast.

Chairman GENACHOWSKI. Let me speak first about the FCC and then about our coordination because they are all relevant to your question.

At the FCC itself, we have set up an empowered cross-bureau team to make sure that we fully meet our mandate with respect to this merger and all other mergers. One of the first instructions that I gave the team was to go back and look at relevant transactions and do an honest assessment of what went right, what went wrong, what can we learn from what happened in the past so that we can do our job on behalf of the public and do it efficiently.

We are also looking very hard at the issues of openness and transparency in the context of merger reviews at the FCC. In this case, we have very different ground rules. The DOJ has to stay confidential. Ours should be an on-the-record, open process, and we are exploring the best ways to conduct a process to do that.

As you know, in other proceedings that we have managed over the last few months, we have revolutionized the way the FCC does business, over 50 public workshops around broadband. We are reforming our ex parte rules. So we take this very seriously.

With respect to coordination, we have each empowered our staffs to start coordinating, start collaborating, to both honor and respect our separate missions, but to make sure that we are helping each other achieve the goals that in each case the relevant statute has given us.

Senator SNOWE. Ms. Varney?

Ms. VARNEY. Senator, I can assure you there is no rubberstamp at the Department of Justice. I won't speak to the past, but I can tell you since I have been there, we have sued Dean Foods over its acquisition in Wisconsin, Illinois, and Michigan over milk consolidation. We are very troubled by that.

We announced we were going to sue Blue Cross Blue Shield over its acquisition in Lansing, Michigan. They abandoned the transaction. We are on the record in the court in the Southern District of New York with our concerns about the proposed Google book settlement.

We have approved some big transactions with conditions. We conditioned the Ticketmaster approval of Live Nation. We conditioned the voting machines acquisition, which has been in the press quite a bit lately. We conditioned the AT&T acquisition of Centennial, which is in the telecommunications space, and we put significant conditions on that. We have recently fined KeySpan, a major electric provider in New York for the way it was doing business.

So we are very, very active. We view every transaction on the merits of the transaction, and you can be sure we will do the same here.

Senator SNOWE. I know that in the Department of Justice instance that you have to review this transaction based on substantially lessening competition. But yet we have seen—I mean, it is just increased consolidation. Obviously, we have to evaluate these trends that are occurring not just on the short term, but also on the long term and what is going to occur.

Chairman Genachowski, one other question. On program access rules, what has changed in that regard?

Chairman GENACHOWSKI. I am not sure what you are getting at, Senator. What has changed in terms of——

Senator SNOWE. Yes, is there anything that has changed in terms of program access rules?

Chairman GENACHOWSKI. Well, the goal of program access rules, I believe, remains as important as it was. We have been reviewing the program access rules to make sure they are as effective as possible. A couple of months ago, we closed the so-called terrestrial loophole so that the rules could work more effectively for competitors, and we will continue to look at ways to make sure that rules designed to promote competition actually promote competition in practice.

Senator SNOWE. Yes. Because, obviously, in this instance, that will become even exponentially greater. I mean in terms of magnifying the problem in competition and making sure that there is fair competition and the incentive to negotiate fair deals or allowing their own programs that they have developed to be offered to non-affiliated stations.

Thank you.

Senator KERRY. Thank you, Senator Snowe.

Senator Thune?

STATEMENT OF HON. JOHN THUNE, U.S. SENATOR FROM SOUTH DAKOTA

Senator THUNE. Thank you, Mr. Chairman.

I want to thank our panelists for being with us today. This is an important subject and one that we obviously want answers on.

I know that you are limited in some of the things that you can say today, but I want to ask you, in South Dakota, we have a number of small, rural telecom companies that provide high-quality multi-program video distribution. To the extent that you can comment, I would direct this to you, Mr. Genachowski, how might these entities be impacted by this merger? And how much will that be a factor in your deliberations as you evaluate this?

Chairman GENACHOWSKI. Without addressing the specific transaction, I can tell you that the concerns and unique needs of rural multichannel video providers is something of real interest to the FCC. It has been to this committee for quite some time. Action has been taken in the past, for example, by enabling those companies to combine and by collectively trying to balance out the leverage as best as possible.

I can't talk about it in the context of this transaction other than to say that promoting the kinds of interests that have been pursued by Congress and the FCC in this area concerning rural providers are the kinds of objectives, the kinds of principles that are appropriate for review in this transaction. And assuming they are raised in our record as part of the proceeding, it is something that we would take very seriously.

Senator THUNE. Good. When you say "appropriate to review," my question gets at how much will that be a factor in your deliberations? Obviously, you have a public interest requirement that you have to look into, and I am trying to get at the issue with respect to this merger how the FCC might define the public interest standard. Would that include how this particular merger might impact the situation I just described in rural areas?

Chairman GENACHOWSKI. Traditionally, the public interest standard has included those kinds of interests, and so, without commenting on this transaction, it is safe to assume that it will here. Exactly how much, if any, action the Commission would take, that would have to be based on the record that is built in the proceeding. We will encourage the broadest possible participation and the submission of real facts and data because our responsibility is to get our arms around the actual facts in the marketplace and then to review the transaction against those facts and data.

Senator THUNE. OK. Without beating a dead horse, how would you define a public interest standard? You talked about all the various things that would be appropriate to, as you said, review as part of the public interest standard. But could you perhaps shed a little bit more light on that?

Chairman GENACHOWSKI. Our starting point is the core principles and objectives that the FCC has relied on in the past and that I have spoken about: promoting competition, protecting and empowering consumers, promoting investment and innovation, ensuring the widespread deployment of broadband and advanced communications, and to the extent it is a media transaction, promoting competition, localism, diversity, well-established principles under the public interest standard at the FCC and in Congress.

Senator THUNE. In your testimony, you noted that the FCC has not made decisions on past mergers in a timely and transparent

manner. What specific actions do you plan to take to remedy that observation?

Chairman GENACHOWSKI. I noted that the FCC has been criticized for that, and we do have a staff at the FCC that works very hard, is very committed to this, and they are very expert.

But I think an agency can always improve, and I have instructed the staff to identify the ways in which we can learn from past experiences, develop, improve processes that are efficient, that meet our obligations under the Communications Act, that maximize all appropriate coordination and cooperation with the Justice Department, and that specifically look at ways that we can have an open and transparent process that everyone understands, that is fair to everyone who has an interest in the transaction.

Senator THUNE. Let me ask you, because one of the things that critics argue is that the transaction is going to allow a single company to control the content that consumers receive and how they are permitted to access it. Do you agree with that statement, and are you concerned about that possibility?

Chairman GENACHOWSKI. I wouldn't comment specifically on this transaction and what the results might be. I think promoting competition is, as I said, a core principle. And so, transactions that have any element of consolidation require us under the public interest standard to ask hard questions about what effect does this have on competition? What effect does it have on consumers in terms of the provision of services and prices and innovation?

So those are exactly the kinds of questions we are obliged to ask in the context of reviews of this sort.

Senator THUNE. I am not trying to ignore you, Ms. Varney.

Ms. VARNEY. I associate myself——

[Laughter.]

Senator THUNE. If there is anything you would care to add to that, please do so.

I thank you, Mr. Chairman. I appreciate it.

Senator KERRY. Thank you very much, Senator Thune.

Senator Begich, coming from Alaska, I know you are used to being far away.

[Laughter.]

Senator KERRY. This annex is taking it to a new extreme.

STATEMENT OF HON. MARK BEGICH,
U.S. SENATOR FROM ALASKA

Senator BEGICH. I sometimes feel like a witness.

[Laughter.]

Ms. VARNEY. We can ask him questions.

Senator KERRY. Actually, you are in the penalty box.

[Laughter.]

Senator BEGICH. That is right, the penalty box. This is what happens when you are new and you cause trouble.

Let me—obviously, I am going to leave my questions really for the next panel. I just want to first say that my interests are going to be how local aspects are dealt with, how in the sense of intellectual rights and so forth are dealt with. The next panel is really going to be my Q&A.

I have to be very frank with you. Many people have already asked the questions I was interested in. I have faith that you will go through a process. It is a new organization over there, new people, and that is what I am banking on.

I wasn't here for the history of what has happened in the past with the organization. There have been some concerns over the past, but I have a feeling that the new folks, you guys included, are going to do the right thing over time and make sure consumers are heard. I have heard that over and over again.

So I am really not going to ask you questions because the next panel is a big panel, and my worry, the way the system works here, is everyone will have opening statements and because I am at the tail end here, it may never get to me for my questions.

So thank you all for being here.

Senator KERRY. Well, Senator Begich, that won't happen because there are not very many of us here right now.

[Laughter.]

Senator BEGICH. I am banking that they won't know we are doing this, so they won't come back.

Senator KERRY. In fact, I invite you to even move up, if you would like? Delusions of grandeur.

[Laughter.]

Senator KERRY. Mr. Chairman, thank you very much for coming and not commenting on any of the specifics.

[Laughter.]

Senator KERRY. We appreciate that. And the attorney general also. If I can just ask you quickly, can you give us a sense of timing? How long is this going to take?

Chairman GENACHOWSKI. I think it is actually that we are just going to put out our public notice in the next few days, and I think we will know more about what realistic timing is once we see what kind of record comes in. We are committed to doing this as fast and as efficiently as possible, but also honoring our obligations under the Communications Act to be thorough and look at all the issues.

Senator KERRY. Well, we want you to be thorough. We want you to do that, but I think many of us are frustrated by the length of time it takes to get business decisions out of Government. And I think that faster, more expeditiously we can do it, the better our reputation will be. So I hope you will do that.

Thank you. We will welcome——

Senator ENSIGN. Mr. Chairman?

Senator KERRY. Yes?

Senator ENSIGN. Could I—before you leave this panel, I have got some letters here from independent programmers that, if I could, I would like to submit for the record?

Senator KERRY. Without objection, they will be put in the record.

[The information referred to follows:]

OVATION
Santa Monica, CA, March 9, 2010

Hon. JOHN D. ROCKEFELLER IV,
Washington, DC.

Hon. KAY BAILEY HUTCHISON,
Washington, DC.

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 3 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.

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 3 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.

CC: Hon. John Kerry
Hon. John Ensign

OUTDOOR CHANNEL
Temecula, CA, March 10, 2010

JAY D. ROCKEFELLER IV,
Chairman,
Committee on Commerce, Science, and Transportation,
U.S. Senate,
Washington, DC.

KAY BAILEY HUTCHISON,
Ranking Member,
Committee on Commerce, Science, and Transportation,
U.S. Senate,
Washington, DC.

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 percent 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 2 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.

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 and 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

REELZCHANNEL
Albuquerque, NM, March 10, 2010

HON. JAY D. ROCKEFELLER IV,
Chairman,
Committee on Commerce, Science, and Transportation,
U.S. Senate,
Washington, DC.

Hon. KAY BAILEY HUTCHISON,
Ranking Member,
Committee on Commerce, Science, and Transportation,
U.S. Senate,
Washington, DC.

Re: TESTIMONY OF STANLEY E. HUBBARD BEFORE THE COMMERCE COMMITTEE OF THE U.S. 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 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 com-

mitments 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.

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 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 and CEO.

Senator KERRY. And we thank you very much for coming today.

We would like to have a seamless transition. If we could ask the next panel just to come up very quickly?

We welcome Mr. Brian Roberts, Chairman, CEO of Comcast Corporation; Mr. John Wells, President of the Writers Guild of America, West; Dr. Mark Cooper, Director of Research, Consumer Fed-

eration of America; Ms. Colleen Abdoulah, President and CEO of WOW! Internet, Cable and Phone; and Mr. Christopher Yoo, Professor of Law and Communication at the University of Pennsylvania.

Could we have order, please? And everybody take their seats rapidly.

Senator Dorgan, or who is going to be—Senator Dorgan is going to chair.

Senator DORGAN [presiding]. Why don't we begin? First of all, apologies to you. We have the FAA bill that this committee has written on the floor of the Senate, and so, a number of us are there and in other hearings as well. But I appreciate very much the witnesses on this panel coming to the Committee to testify.

We have Mr. Brian Roberts, Chairman and CEO of Comcast Corporation. I believe that Senator Rockefeller has properly identified all of those on this panel. So I will not do that again.

Why don't we begin, Mr. Roberts, with you? And as has been the case with all witnesses, the full statement will be made a part of the permanent record, and we would ask the witnesses to summarize.

Mr. Roberts, you may proceed.

STATEMENT OF BRIAN L. ROBERTS, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, COMCAST CORPORATION

Mr. ROBERTS. Thank you, Mr. Chairman.

It is a privilege to come here today and talk about Comcast's planned joint venture with GE regarding NBC Universal. My father, Ralph, seated behind me, started Comcast, as we heard, almost half a century ago with a single small cable system in Tupelo, Mississippi. And together, we have been able to build a national cable broadband and communications company, employing nearly 100,000 people.

So in proposing to combine with NBC Universal, we are taking the next step in our improbable journey. I am proud of what we have been able to accomplish and especially pleased that my father is here with me today to share this important moment in Comcast history.

Let me first briefly summarize the transaction. Under our agreement, Comcast will become the 51 percent owner and manager of NBC Universal. GE will still own 49 percent. We will create a new venture that combines NBCU's broadcast TV, cable programming, movie studio, and theme park businesses with Comcast limited video programming channels.

The transaction puts two great American media and entertainment companies under one roof. It will help to deliver more diverse programming to millions of households, and it will also help to accelerate a truly amazing digital future for consumers.

Together, Comcast and NBCU can help accelerate the delivery of anytime, anywhere multiplatform video experience Americans want. In combination, we will be a more creative and innovative company, and our success will stimulate our competitors to be more innovative, too. So this joint venture will 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 in writing, 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 quick examples.

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

Second, we want independent programmers with quality and diverse 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 system every year beginning in 2011.

Bringing NBCU and Comcast together is primarily a vertical combination. There is no significant overlap between the assets of the two companies. A vertical combination generally poses fewer competitive concerns. That also means no massive lay-offs, no closure of facilities, nothing to produce hundreds of millions of dollars of "synergies."

This is why some on Wall Street did not fall in love with this deal right away, but it is also why we believe 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. More than half 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 work in the future, and we are willing to discuss with the FCC having the program access rules bind 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 have spent billions of dollars upgrading cable systems to make them state-of-the-art. We created 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. We have created thousands of jobs and promoted diversity in our workforce. 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 very much.

[The prepared statement of Mr. Roberts follows:]

PREPARED STATEMENT OF BRIAN L. ROBERTS, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, COMCAST CORPORATION

Mr. Chairman, and members of the Committee, I am 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"). 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. And I believe 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 the new 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 in the U.S.

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 preserve NBCU's journalistic independence and to sustain and invest in the NBC broadcast network will promote the quality news, sports, and diverse programming that have made this network great over the last 50 years. I discuss these specific and verifiable public interest commitments later in this testimony; for a summary of all voluntary commitments, see Attachment 1.

The new NBCU will advance key communications 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 U.S. 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. They also have found that vertical combinations with limited horizontal overlaps 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 growing roster of content providers. There are literally hundreds of national television networks and scores of regional networks. These cable networks compete for programming, for viewer attention, and for distribution on various video platforms, not only with each other but also with countless other video choices.

In addition, content producers increasingly have alternative outlets available to distribute their works, free from any purported "gatekeeping" networks or distributors. Today, NBCU has powerful marketplace incentives to purchase the best available programming, regardless of source. NBCU's programming schedule bears this out. Last week, third parties accounted for well over half of the 47 primetime (8–11pm) programs on NBC and its major cable channels (USA, Bravo, Oxygen, and SyFy). Post-transaction, the new NBCU will have the incentive and the financial resources to compete effectively with other leading content providers such as Disney/ABC, Time Warner, Viacom, and News Corp. by providing consumers the high-quality programming they want, and it will have no incentive—or ability—to restrict competition or otherwise harm the public interest.

Competition is fierce among distributors as well. Today, consumers in every geographic area have multiple choices of multichannel video programming distributors ("MVPDs") and can also obtain video content from many non-MVPDs. 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 2 years, Comcast lost more than 1.2 million net video subscribers while its competitors continued to add subscribers—DirecTV, Dish Network, AT&T, and Verizon added more than 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, Vevo, Vimeo, VUDU, Vuze, Xbox, YouTube—and many more. These sites offer consumers historically unprecedented 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 distribution. Thus, consumers have a staggering variety of sources of video content beyond Comcast and its rival MVPDs.

The video marketplace truly has no gatekeepers. As the United States Court of Appeals for the D.C. Circuit observed last year, "[T]he record is replete with evidence of ever increasing competition among video providers: Satellite and fiber optic video providers have entered the market and grown in market share since the Congress passed the 1992 [Cable] Act, and particularly in recent years. Cable operators, therefore, no longer have the bottleneck power over programming that concerned

the Congress in 1992. Second, over the same period there has been a dramatic increase both in the number of cable networks and in the programming available to subscribers."

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 the companies have made 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, thus promoting *diversity*. This includes content of specific interest to diverse audiences, children and families, women, and other key audience segments. While NBCU and Comcast both already have solid records in creating and distributing diverse programming, the transaction will enable the new NBCU to expand the amount, quality, variety, and availability of content more than either company could do on its own. The new venture will also be able to provide more and better local programming, including local news and information programming, thereby advancing *localism*. The new 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, but will also encourage investment and innovation, accelerating 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 make available on a wider range of platforms, including the new NBCU's national and regional networks and Comcast's cable systems and video-on-demand ("VOD") platform, and online. This increase in the value of services offered to consumers by the new company will stimulate competitors—including non-affiliated networks, nonaffiliated MVPDs, and the large and growing roster of 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 reluctance to participate in 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 become very popular with consumers since it was invented in 2003—the same year Apple unveiled the iTunes Music Store. Comcast customers have now used Comcast's VOD service more than 14 billion times—that's over 40 percent more than the number of downloads that consumers have made from the iTunes Store since 2003. 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.

Similarly, 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.

Comcast and the new NBCU will also be well positioned to help lead constructive efforts to develop consensus solutions to the problem of content piracy. NBCU has been a leading voice in the effort to reduce piracy in all its forms because it costs American jobs and trade opportunities. Comcast has consistently supported voluntary industry initiatives to deter piracy, educate consumers about copyright, and redirect them to legitimate sources of content. Together, the companies will redouble their efforts to persuade all stakeholders to work together on the problem, while ensuring that consumer privacy and due process are always respected.

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. Even after the transaction, approximately six out of every seven channels carried by Comcast Cable will be unaffiliated with Comcast or the new NBCU. Comcast's national cable programming networks account for only about 3 percent of total national cable network advertising and affiliate revenues. While NBCU owns a larger number of networks, those assets account for only about 9 percent of overall national cable network advertising and affiliate revenues. Therefore, in total, the new NBCU will account for only about 12 percent of total national cable network advertising and affiliate revenues. The new NBCU will rank as the fourth largest owner of national cable networks (measured by total revenues), 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, higher advertising prices to advertisers, or higher retail prices to consumers.

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. Cross-ownership prohibitions that had been put in place decades ago 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 over-the-air television 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. Indeed, as Professor Matthew Spitzer of the University of Southern California noted in expert testimony submitted to the FCC, "[t]here is nothing in the fundamentally vertical structure of *this* transaction that would reduce the number of independent broadcast voices in any local market. After the transaction, all of NBCU's O&O broadcast stations will continue to operate and provide local news and other local programming. There is no consolidation of broadcast assets within any local markets as a consequence of this transaction." See Attachment 2, "Expert Declaration of Matthew L. Spitzer Concerning Diversity and Localism Issues Associated with the Proposed Comcast-NBCU Transaction," January 26, 2010, at 8.

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. 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 viewing. This puts Google well ahead of Microsoft, Viacom, and Hulu (a service in which NBCU holds a 32 percent, non-controlling interest), and even farther ahead of Fancast (operated by Comcast, and currently at well below one percent). All of these services competing with Google have low- or mid-single digits shares of online video viewing. 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 consistently failed to capture advances in distribution technologies. In this highly dynamic and increasingly competitive environment, speculative claims about theoretical problems arising from any 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. The program access and program carriage rules address different aspects of the relationship between networks and MVPDs, and the retransmission consent rules address aspects of the relationship between MVPDs and broadcasters.

In a nutshell, the *program access* rules govern the process by which a satellite-delivered cable programming network that is affiliated with a cable operator sells its programming to MVPDs. These rules generally prohibit a cable operator from: (i) unreasonably influencing whether an affiliated network sells its programming to an unaffiliated MVPD (or the terms on which it does so), (ii) unreasonably discriminating in the prices, terms, and conditions of carriage arrangements among competing MVPDs, and (iii) establishing exclusive contracts between satellite-delivered cable-affiliated programming networks and any cable operator.

The *program carriage* rules apply to the process by which a cable operator—or any other MVPD—buys cable programming from unaffiliated programmers. These rules generally prohibit MVPDs from: (i) requiring an equity interest in a program network as a condition of carriage; (ii) coercing an unaffiliated program network to provide (or punishing an unaffiliated program network for not providing) exclusive rights as a condition of carriage; and (iii) unreasonably restraining the ability of an unaffiliated program network to compete fairly by discriminating on the basis of affiliation in the selection, terms, or conditions for carriage.

The *retransmission consent* rules generally require that broadcasters and MVPDs bargain in good faith over retransmission consent (*i.e.,* the right to retransmit a broadcaster's signal). Like the program access rules, the good-faith bargaining rules generally ban exclusivity and unreasonable discrimination.

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. 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 (and Comcast has expressed a willingness to discuss with the FCC making the program access rules binding on it even if the rules were to be overturned by the courts).[1] Of particular note, Comcast will be pro-

[1] In October 2007, the FCC released an Order extending for an additional 5 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 have 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. Oral argument was held on September 22, 2009. Contrary to the claims of some outside parties, Comcast has not challenged all of the features of the program access rules in this litigation or asserted that the exclusivity ban, or any other portion of the program access rules, is unconstitutional. Rather, we have challenged only the extension of the exclusivity ban, and have reminded the FCC and

hibited 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 non-affiliated distributors. It would also shift to NBCU the burden of justifying any differential pricing between competing MVPDs. And the companies would accept the five-month "shot clock" that the Commission applies to program access adjudications that is intended to expedite resolution.

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 for 3 years following the closing of the transaction and will produce an additional 1,000 hours per year of local news and information programming for distribution on 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.

The companies also have committed that, within 12 months of closing the transaction, Telemundo will launch a new Spanish language digital broadcast channel drawing on programming from Telemundo's library. Additionally, 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 3 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, and will make available within 3 years of closing an additional 5,000 VOD choices over the course of each 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 next 3 years on customary terms and conditions. Independent programmers would be defined as networks that: (i) are not currently carried by Comcast Cable, and (ii) 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. Comcast has also committed to innovate in the delivery of PEG content On Demand and On Demand Online.

The parties 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 testimony.

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 not just be 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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the courts that they must take the First Amendment into account when they make, review, or apply the program access rules.

ATTACHMENT 1

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 3 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.

- 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 3 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 3 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 3 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 2 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 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 3 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 3 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.

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 3 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 3 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 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.

ATTACHMENT 2

Expert Declaration of Matthew L. Spitzer

Concerning Diversity and Localism Issues Associated with the Proposed Comcast-NBCU Transaction—January 26, 2010

I. Introduction

1. At the request of Comcast Corporation ("Comcast"), I have reviewed the proposed Comcast/General Electric ("GE") transaction relating to NBC Universal ("NBCU") with a focus on the core public interest concerns of diversity and localism that underlie the Federal Communications Commission's (the "Commission") broadcast ownership regulations.

2. Some critical commentary already surrounds the proposed transaction, casting it as everything from a "mega-merger"[1] to a "juggernaut"[2] to a "train wreck."[3] Such discourse rings hollow; familiar refrains and the automatic equation of "big" with "bad" media provide little insight into the Commission's appropriately nuanced public interest inquiry. Instead, conceptualizing the proposed transaction in the modern media marketplace requires considered thought, and such an analysis shows that this transaction is not the type of transaction that implicates the Commission's core concern about a reduction in the diversity of voices. Thus, amidst alarmist claims that the proposed transaction "poses a genuine threat to free expression and diversity of speech in our democratic society,"[4] I will calmly focus on the framework and core concerns of the Commission's traditional public interest inquiry.

3. As discussed in detail below, I conclude that the proposed transaction, representing a fundamentally vertical combination of a content producer and a distributor, does not raise the traditional diversity and localism concerns regarding media consolidation and the reduction of local broadcast voices. As demonstrated herein, the Commission has been very concerned about mergers that reduce diversity of voices, such as the combination of two competing broadcast outlets, two cross-service broadcast outlets, or a newspaper and broadcaster in the same market.[5] This is not that type of transaction.[6]

II. Qualifications

4. I am a lawyer and an economist. I have a J.D. from the University of Southern California ("USC") and a Ph.D. in Social Science from the California Institute of Technology ("Caltech"). I currently hold joint appointments at USC, where I am a Professor of Political Science and hold the Robert C. Packard Trustee Chair in Law, and at Caltech, where I am a Professor of Law and Social Science. Previously, from July 2000 through June 2006, I was Dean of the Gould School of Law at USC.

5. Over the past 30 years, I have studied, taught, hosted conferences, and written about the Commission's regulation of broadcasting and cable television, including its regulation of media ownership and concentration. I was the founding director of the USC Center for Communication Law and Policy (*http://cclp.usc.edu/*) and in that capacity I created and hosted many conferences and roundtables on broadcasting and cable regulation. The topics ranged from a retrospective on the deregulation of cable television to an evaluation of sex and violence on television. In this capacity, I followed closely the Commission, Congress, and the broadcasting and cable industries, and categorized and evaluated the various arguments about media ownership.

6. I currently teach Regulatory Policy and Administrative Law (at USC), Introduction to Law (at Caltech), and a graduate course in Law and Politics (at Caltech).

Previously during my academic career, I have taught Broadcasting Regulation, Telecommunications Regulation, Antitrust Policy, Law and Economics, Torts, Property, and Administrative Law.

7. I have published numerous books and articles on a variety of legal and economic issues associated with Broadcast and Cable Regulation.[7] These include *Public*

[1] Press Release, Free Press, Comcast/NBC Universal Merger Bad for the Public Interest (Oct. 13, 2009).

[2] *Id.*

[3] Josh Silver, *Too Big to Block? Why Obama Must Stop the Comcast-NBC Merger*, the *Huffington Post,* Nov. 13, 2009, *http://www.huffingtonpost.com/josh-silver/too-big-to-block-why-obam_b_356826.html*.

[4] The Editors, *Should Consumers Fear the Comcast Deal?,* N.Y. Times, Dec. 8, 2009 (quoting Andrew Jay Schwartzman, President, Media Access Project), *http://roomfordebate.blogs.nytimes.com/2009/12/08/should-consumers-fear-the-comcast-deal/?pagemode=print.*

[5] *See infra* Part III.

[6] I base my analysis on information provided to me by Comcast and NBCU, from the Commission and other government agencies, and from academic, journalistic, and foundation sources. Where I rely on such information, I cite it here.

[7] SEVEN DIRTY WORDS AND SIX OTHER STORIES: CONTROLLING THE CONTENT OF PRINT AND BROADCAST (1986). PUBLIC POLICY TOWARD CABLE TELEVISION (1997) (with Thomas Hazlett). *Multicriteria Choice Processes: An Application of Public Choice Theory to Bakke, the FCC, and the Courts, 88* YALE L.J. 717 (1979). *Radio Formats by Administrative Choice,* 47 U. CHI. L. REV. 647 (1980). *Controlling the Content of Print and Broadcast,* 58 S. CAL. L. REV. 1349 (1985). *Broadcasting and the First Amendment, in 1* NEW DIRECTIONS IN TELECOMMUNICATIONS POLICY 155 (Paula R. Newberg ed., 1989). *The Constitutionality of Licensing Broadcasters,* 64 N.Y.U. L. Rev. 990 (1989). *Justifying Minority Preferences in Broadcasting,* 64 S. CAL. L. REV. 293 (1990). *Testing Minority Preferences in Broadcasting, 68 S. CAL. L. REV. 841 (1995) (with Jeff Dubin). Dean Krattenmaker's Road Not Taken: The Political Economy of Broadcasting in the Telecommunications Act of 1996, 29* CONN. L. REV. 353 (1996). *An Introduction to the Law and Economics of the V-Chip,* 15 CARDOZO ARTS & ENT. L.J. 429 (1997). *A First Glance at the Constitutionality of the V-Chip Ratings System, in* TELEVISION VIOLENDE AND PUBLIC POLICY [*page

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Policy Toward Cable Television (1997, AEI/MIT Press, with Thomas Hazlett) and "Television Mergers and Diversity in Small Markets" in the *Journal of Competition Law and Economics* (forthcoming 2010). Finally, I have attached my curriculum vitae, which includes a more formal list of my background, experience and publications.

III. Summary of Transaction Structure

8. On December 3, 2009, Comcast and GE announced an agreement pursuant to which Comcast would acquire a majority interest in NBCU and its affiliated broadcast licensee companies from GE.[8] The transaction will create a joint venture that combines, inter alia, NBCU's national broadcast networks (NBC and Telemundo), NBCU's owned and operated ("O&O") broadcast television stations, cable programming networks, theme parks, and a motion picture studio (Universal), with Comcast's cable programming and regional sports networks, as well as certain online content businesses of Comcast. Upon closing, Comcast and GE will own 51-percent and 49-percent shares in the joint venture, respectively. Thus, the transaction is fundamentally a vertical integration of content (in the joint venture) with distribution (Comcast's cable systems held outside the joint venture).

9. This transaction is not the sort of horizontal merger that has been at the core of the concerns about localism and diversity over the past several decades. The Commission has been very concerned about mergers that combine two or more broadcasters within the same service in the same market. The Commission has also been concerned about mergers of broadcasters in different services within the same market.[9] These concerns, in fact, led the Commission decades ago to adopt numerous structural rules that control the ability of broadcasters to merge in the same market.[10] These rules are founded on the concepts that having a healthy and robust marketplace of ideas requires independent voices, that the public benefits from having many types of programs from which to choose, and that a broadcaster must address the needs, interests, and issues of concern of the community that it is licensed to serve. And, of course, horizontal mergers between television stations and daily newspapers in the same market have generally been prohibited by structural ownership rules adopted in 1975.[11]

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range*] (James T. Hamilton ed., 1998). *Turner, Denver and Reno, in* A COMMUNICATIONS CORNUCOPIA: MARKLE FOUNDATION ESSAYS ON INFORMATION POLICY 172–217 (Roger Noll & Monroe Price eds., 1998). *Digital Television and the Quid Pro Quo,* 2 BUS. & POL. 115 (2000) (with Thomas Hazlett). *Advanced Wireless Technologies and Public Policy,* 79 S. CAL. L. REV. 595 (2006) (with Thomas W. Hazlett). *Television Mergers and Diversity in Small Markets,* J. COMP. L. & ECON. (forthcoming 2010).

[8] Comcast and GE to Create Leading Entertainment Company, Joint Announcement by Comcast Corporation and General Electric Company (Dec. 3, 2009) available at *http://www.genewscenter.com/content/detaiLaspx?ReleaseID=9206&NewsAreaID=2*.

Accompanying the announcement, the applicants set forth certain voluntary Public Interest Commitments that build on their strengths and histories of service to the public, particularly in the areas of diversity and local programming. Of note, the applicants have committed to "continuing to provide free over-the-air television through [NBCU's 0&0] stations and through local broadcast affiliates across the nation," to "using the combined resources of NBC and Comcast to strengthen localism," to "ensuring that the content of NBC's news and public affairs programming [will] not be influenced by the non-media interests of [its corporate parents]," to "mak[ing] an expanded commitment to meeting the viewing needs of children, and the needs of parents to better control their family's viewing," and to "expand[ing] the availability of over-the-air programming to the Hispanic community." Letter from David L. Cohen, Executive Vice President, *Comcast Corporation, Comcast/ GE Announcement Regarding NBC Universal* (Dec. 3, 2009) ("December 3 Cohen Letter").

[9] *See, e.g., Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking,* 16 FCC Rcd 19861, 19863 ¶ 6 (2001) ("In the early 1970s, the Commission briefly restricted local radio ownership further by prohibiting, with certain exceptions, common ownership of different service broadcast stations in the same market. These limits were designed to advance diversity by maximizing the number of independent owners of broadcast media in a market.") (internal citation omitted).

[10] *Id.* at 19899 ("The effects of a proposed transaction on the diversity of voices and economic competition in a given market have long been core considerations in making this public interest determination. The Commission's concern for diversity and competition in broadcast markets has prompted us to adopt and maintain structural ownership rules intended to vindicate these interests.").

[11] *See 2006 Quadrennial Regulatory Review—Review of the Commissions Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,* 23 FCC Rcd 2010, 2018–19 1111 ¶¶ 13–14 (2008) ("2006 Quadrennial Review Order") (adopting a presumption that "certain limited combinations in the of newspaper and broadcast facilities in the largest markets are in the public interest"), *appeal pending, Prometheus Radio Project* v. *FCC,* Nos. 08–3078 *et al.,* (3d. Cir. Apr. 14, 2009); *See generally Chancellor Media/Shamrock Radio Licenses, L.L.C. and Cox Radio, Inc.,* 15 FCC Rcd 17053, 17055 ¶6 (2000) ("In adopting

10. But this transaction has none of these elements. It is, from the standpoint of traditional Commission concerns, almost entirely a vertical transaction. Comcast does not have a broadcast network (or a daily newspaper) and has modest cable programming assets, and NBCU is bringing a pair of broadcast networks and a number of local broadcasting stations. Conversely, NBCU does not provide cable, high-speed Internet, or digital voice services, which form the bulk of Comcast's business. Thus, in terms of traditional considerations, combining the NBCU content with Comcast distribution does not result in the sort of reduction in the number of local broadcast voices that has prompted Commission concern.[12] Instead, at its core, it is much more a vertical combination, putting together a company which produces popular content (NBCU) with a company that distributes content over cable television systems (Comcast).

IV. Public Interest Concerns of Diversity and Localism

11. The Commission must determine whether the proposed transaction would comply with the Communications Act of 1934 ("Communications Act"), other applicable statutes, and its own rules.[13] As part of this inquiry, the Commission must determine whether the applicants for transfer or assignment of broadcast licenses have shown that the public interest, convenience, and necessity will be served by the proposed transaction.[14]

12. There are a number of rules that control directly the ownership structure and market behavior of broadcasters, cable systems, and cable networks.[15] The Commission's structural rules, notably its media ownership rules, include limitations on newspaper/broadcast cross-ownership in a single market,[16] radio/television cross-ownership in particular markets,[17] ownership of multiple television stations in a single market,[18] ownership of multiple radio stations in a single market,[19] national reach of television stations owned by a single entity,[20] and dual broadcast network rules.[21] These media ownership rules are designed to foster the Commission's long-

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the 1975 rule that generally prohibited the common ownership of a newspaper and broadcast station serving the same community, the Commission made it clear that fostering diverse viewpoints from antagonistic sources is at the heart of our licensing responsibility.").

[12] There are some possible horizontal elements in the combination of cable networks, but these do not represent the traditional, core concerns of the Commission. Because the horizontal aspects of this merger involving cable networks are very unlikely to have any significant effect on over-the-air broadcast diversity and localism, I will not discuss them in this Declaration. In addition, there are vertical aspects of the transaction that will be examined, particularly under the competition prong of the public interest standard. Others will examine pricing issues within the vertical aspects of the transaction. In terms of diversity and localism, the vertical aspects of the transaction are extremely unlikely to be troublesome. Creation of a problem in diversity or localism in the broadcast markets, as a result of the vertical elements of this transaction, would require a very convoluted and improbable mechanism.

[13] *See Clear Channel Communications, Inc.,* 23 FCC Rcd 1421, 1423 ¶ 3 (2008); *Citadel Broadcasting Corp. and The Walt Disney Co.*, 22 FCC Red 7083, 7104 ¶ 50 (2007).

[14] 47 U.S.C. § 310(d).

[15] Also relevant to the proposed transaction is the lack of applicable rule. The DC Circuit vacated the once-extant cable/broadcast cross-ownership rule, opining "that the Commission's diversity rationale for retaining the [Cable/Broadcast Cross-Ownership] Rule is woefully inadequate." *Fox Television Stations, Inc.* v. *FCC,* 280 F.3d 1027 (D.C. Cir. 2002), rehearing granted, 293 F.3d 537 (D.C. Cir. 2002) (vacating cable-broadcast cross-ownership rule); *1998 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,* 18 FCC Rcd 3002 (2003) (repealing cable/broadcast cross-ownership rule)). The DC Circuit also has remanded the horizontal ownership rule adopted by the Commission for further consideration. *The Commission's Cable Horizontal and Vertical Ownership Limits, Fourth Report & Order and Further Notice of Proposed Rulemaking,* 23 FCC Rcd 2134, 2187–92 ¶¶ 125–34 (2008) ("2008 Cable Ownership Order"), *vacated Comcast Corp.* v. *FCC,* 579 F.3d 1, 23 (D.C. Cir. 2009) (holding the [horizontal] 30 percent subscribership limit as arbitrary and capricious because "the Commission failed adequately to take account of the substantial competition cable operators face from noncable video programming distributors.").

[16] *2006 Quadrennial Review Order,* 23 FCC Rcd at 2018–57 ¶¶ 13–79.

[17] *Id.* at 2057–60 ¶¶ 80–86.

[18] *Id.* at 2060–69 ¶¶ 87–109.

[19] *Id.* at 2069–82 IN 110–38.

[20] *See id.* at 2084 ¶ 142 n.454 (noting that Section 6290) of the 2004 Consolidated Appropriations Act "amends *Section 202(c)* of the 1996 Act to direct the Commission to modify the national television ownership limit, contained in *section 73.3555* of the Commission's rules, to specify 39 percent as the maximum aggregate national audience reach of any single television station owner.") (citing 47 U.S.C. §202(c)(1)).

[21] *Id.* at 2082–84 ¶¶ 139–41.

standing public interest policies of competition, diversity, and localism.[22] And more specifically, as further described below, each of these rules is intended to protect against reduction in the number of independent broadcast voices in a local market. Indeed, with respect to transactions involving broadcast licenses, the Commission's central theory has been that maintaining a sufficient number of independent voices is crucial to supporting the core concerns of diversity and localism.[23]

13. Throughout the last decade, the Commission has consistently applied a corresponding public interest framework to media transactions.[24] In this Declaration, I will address the public interest concerns of diversity and localism as they relate to the proposed transaction.

A. Diversity

14. Diversity has long been considered by the Commission to be a guiding principle for its regulation of the media marketplace because it resonates with values implicit in the First Amendment.[25] The two crucial aspects of diversity for purposes of evaluating this transaction are *viewpoint* diversity and *program* diversity.

15. Viewpoint diversity, defined as "the availability of media content reflecting a variety of perspectives,"[26] is of central importance to the Commission. The Commission has stated that viewpoint diversity helps to ensure an informed citizenry in our democratic society.[27] Accordingly, having independent voices in the media marketplace is needed for a healthy and robust marketplace of ideas, particularly with respect to news and public affairs.[28] The basic idea is that if a single person were to gain control of a substantial amount or all of the media in a market, he or she could tilt the discussion of news and public affairs in a way that would mold public opinion to resemble his or her own, even if the facts and arguments would not support such a result. On the other hand, if there is a large number of independent voices in the media marketplace, any attempt to tilt coverage of news and public affairs will be counterbalanced by others, who can be counted on to point out the tilt and correct it. Thus, preventing concentrated political influence provides the strongest justification for viewpoint diversity and the maintenance of a large number of independent voices in news and public affairs programming.[29]

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[22] *2006 Quadrennial Review Order*, 23 FCC Rcd at 2016–17 ¶ 9 ("The media ownership rules are designed to foster the Commission's longstanding policies of competition, diversity, and localism. We set these policies out in detail in the 2002 Biennial Review Order, and we reaffirm those goals.") (citing *2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd 13620, 13627–45 ¶¶ 17–79 (2003) ("2002 Biennial Review Order"), *aff'd in part and remanded in part, Prometheus Radio Project* v. *FCC*, 373 F.3d 372 (3d. Cir. 2004)).

[23] *UTV of San Francisco Inc. et al, and Fox Television Stations, Inc.,* 16 FCC Rcd 14975, 14977 ¶ 8 (2001) ("Where broadcast licenses are concerned, the effects of a proposed transaction on the diversity of voices and economic competition in a given market have long been core considerations in determining whether a transaction serves the public interest, convenience, and necessity.").

[24] *Applications for Consent to the Transfer of Control of Licenses from XM Satellite Radio Holdings Inc. to Sirius Satellite Radio Inc.,* 23 FCC Red 12348, 12364 ¶ 30 (2008); *News Corp. and DIRECTV Group, Inc. and Liberty Media Corp. for Authority to Transfer Control,* 23 FCC Rcd 3265, 3276–77 ¶ 22 (2008); *Applications for Consent of Assignment and/or Transfer of Control of Licenses from Adelphia Communications Corporation to Time Warner Cable Inc., and from Adelphia Communications Corporation to Comcast Corporation,* 21 FCC Rcd 8203, 8217–18 ¶ 23 (2006); *General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee,* 19 FCC Rcd 473, 483 ¶ 15 (2004); *Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee,* 17 FCC Rcd 23246, 23255 ¶ 26 (2002).

[25] *2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Cross-Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets,* 17 FCC Rcd 18503, 18516 ¶ 33 (2002) ("2002 Biennial Review Notice") ("It advances the values of the First Amendment, which, as the Supreme Court stated, 'rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.'") (quoting *Associated Press* v. *United States,* 326 U.S. 1, 20 (1945)).

[26] *2002 Biennial Review Order,* 18 FCC Rcd at 13627 ¶ 19.

[27] *Id.* (citing Richard Brown, *Early American Origins of the Information Age*, A Nation Transformed by Info.: How Information Has Shaped U.S. from Colonial Times to the Present (Oxford Univ. Press, New York, NY, 2000) at 44–49 *passim* ("Because people widely believed that their republican government required an informed citizenry, they scrambled to make sure that they, and often their neighbors, were properly informed.")).

[28] While the most important influence on our civic life comes from local news and public affairs, the Commission has acknowledged that entertainment programming may have significant public affairs content. *Id.* at 13631 ¶ 33.

[29] *See, e.g., 2006 Quadrennial Review Order*, 23 FCC Rcd at 2038 ¶ 49 ("[O]ur new rule is designed to promote diversity by presumptively prohibiting combinations in the markets with the

16. The main focus of concern for viewpoint diversity is *local* broadcast news, public affairs, and other local programming. Applying this insight, the Commission has stated that "the greater the diversity of ownership in a particular area, the less chance there is that a single person or group can have an inordinate effect, in a political, editorial, or similar programming sense, on public opinion at the regional level."[30] There is nothing in the fundamentally vertical structure of *this* transaction that would reduce the number of independent broadcast voices in any local market. After the transaction, all of NBCU's O&O broadcast stations will continue to operate and provide local news and other local programming. There is no consolidation of broadcast assets within any local market as a consequence of this transaction. Instead, this transaction transfers broadcast licenses from the control of GE to the control of Comcast. In no way does this combination of content with distribution impinge on the Commission's core concern—the *reduction* in the number of independent voices in local broadcast markets. Nor does the transaction impact *national* viewpoint diversity in any way.[31]

17. *Program* diversity refers to providing a large number of types of programs (dramas, sitcoms, "reality" a.k.a. nonscripted, science fiction, sports, news, children's, etc.) to viewers.[32] The Commission clearly prefers to rely, in general, on competition in the video marketplace to ensure diversity of programming, rather than try to regulate the provision of program types directly.[33]

18. There is no basis to anticipate that NBC, Telemundo, or any of their O&Os will alter programming in a way that would decrease the diversity of programming. The slight horizontal aspects of the merger (Comcast is contributing no over-the-air broadcast assets to the joint venture) indicate that there will be no significant, transaction-specific incentive to change or reduce programming for the NBC or Telemundo networks, or in the programming of their O&Os. All program types that are currently represented will continue to be represented—there is simply no credible incentive for the new entity to reduce program diversity, and no apparent reason to expect that such a reduction will take place. Thus, we should anticipate no reduction in program diversity in broadcast outlets. In addition, the December 3 Cohen Letter demonstrates that the companies intend to increase the diversity of content available on multiple platforms as well as adding programming targeted to children and the Hispanic community.[34] This provides further assurance that the public interest concern of diversity will be served by the transaction.

19. Of course, individual programs may be replaced as they lose popularity, as is the nature of series programming But the public interest goal—diversity of programming—is not about preserving individual shows. Rather, it is about ensuring a broad menu of *types* of programs for viewers. In this case, the types of programming that are supplied by the networks will almost certainly continue to be supplied; sports programming, comedies, dramas, science fiction, food, fashion, celebrity gossip, and so forth will continue to be available in abundance. In short, there is no significant probability that diversity of programming in broadcasting will be adversely affected by this transaction due to horizontal integration. The transaction

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fewest number of voices, while presumptively permitting certain combinations in the largest markets where the loss of diversity is not a significant risk."). *See generally, 2002 Biennial Review Order,* 18 FCC Rcd at 13630 ¶ 28 ("[O]wners of media outlets clearly have the ability to affect public discourse, including political and governmental affairs, through their coverage of news and public affairs. Even if our inquiry were to find that media outlets exhibited no apparent 'slant' or viewpoint in their news coverage, media outlets possess significant potential power in our system of government.").

[30] *Id.* at 13632 ¶ 38 (quoting *Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations,* 45 F.C.C. 1476, 1477 ¶ 3 (1964)).

[31] In any event, the Commission has clearly concluded that there is a very robust market in national news and public affairs. *Id.* at 13631 ¶ 35.

[32] *Id.* at 13631 ¶ 36.

[33] The Commission restated this preference within the last decade. *Id.* at 13632 ¶ 37. This is a long-running preference of the Commission. *See FCC* v. *WNCN Listener's Guild,* 450 U.S. 582, 590 (1981) ("[T]he Commission explained why it believed that market forces were the best available means of producing diversity in entertainment formats. First, in large markets, competition among broadcasters had already produced 'an almost bewildering array of diversity' in entertainment formats. Second, format allocation by market forces accommodates listeners' desires for diversity within a given format, and also produces a variety of formats. Third, the market is far more flexible than governmental regulation and responds more quickly to changing public tastes. Therefore, the Commission concluded that 'the market is the allocation mechanism of preference for entertainment formats, and . . . Commission supervision in this area will not be conducive either to producing program diversity [or] satisfied radio listeners.") (citing *Development of Policy re: Changes in the Entertainment Formats of Broadcast Stations, Memorandum Opinion and Order,* 60 F.C.C.2d 858, 863–866 (1976)).

[34] *Supra* note 8.

is predominantly vertical in nature, and such combinations do not tend to induce the parties to eliminate program types that would otherwise be profitable to produce and distribute.

B. Localism

20. The phrase "localism" covers many different topics,[35] linked by the concern that a broadcaster must address the needs, interests, and issues of concern of the community that it is licensed to serve.[36] The Comcast and NBCU transaction is irrelevant to most of these topics, and does not threaten, and in some cases may aid, the remainder. This result is reinforced by the applicants' voluntary public interest commitments in the December 3 Cohen Letter to strengthen localism through their owned-and-operated broadcast stations, On Demand and On Demand Online Programming platforms, and public, educational, and government ("PEG") access programming.[37] Putting more local content on more platforms will directly promote localism.

21. There is a significant overlap between *localism* and *diversity* because one of the central concerns of each goal is the extent to which broadcasters provide local news, public affairs, and other local programming Localism differs slightly because diversity focuses on the *number of different types* of local programs, while localism focuses more on the amount and source of local programs.[38]

22. The Commission has long been interested in whether broadcasters provide "enough" community-responsive programming.[39] Because there is no reduction in the number of independent voices in any broadcast market in this transaction, there is nothing about the transaction that would lead us to expect any reduction in local news or public affairs programming, or similar community-responsive broadcast programming.[40] In addition, the December 3 Cohen Letter demonstrates that the companies plan to increase locally-oriented programming.

23. Similarly, there is nothing about this transaction that would lead the applicants to reduce service to underserved audiences. The Commission has pursued policies directed at ensuring that "enough" programming is provided to underserved audiences, primarily women and racial and ethnic minorities.[41] The Commission's theory is that all significant groups in the community of a licensee should get some level of service.[42] This requires the Commission to walk a very fine line; intervening too far to require particular content threatens First Amendment values, while only issuing hortatory declarations may produce no action at all. The Commission's most recent approach to this subject relied on several structural responses. The Commission is proposing that broadcasters form community advisory boards that help to inform the broadcaster about the needs and issues of underserved audiences.[43] Further, the Commission is considering ways to increase ownership of broadcast outlets

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[35] There is a set of issues, usually addressed with fairly precise regulations, that is often addressed under the banner of localism. However, they are all quite tangential to evaluating the transaction *in this case.* These include disaster warnings, *In the Matter of Broadcast Localism, Report and Notice of Proposed Rulemaking*, MB Docket No. 04–233, 23 FCC Red 1324, 1358–61 ¶¶ 81–87 (2008) ("2008 Broadcast Localism Report"), Network Affiliation Rules, *id.* at 1361–64 ¶¶ 88–96, payola and sponsorship identification, *id.* at 1364–69 ¶¶ 97–112, and license renewal procedures, *id.* at 1370–73 ¶¶ 113–124. Because this transaction raises no genuine issue as to any of these concerns, I will not discuss them in text.

[36] *Id.* at 1326 ¶ 2.

[37] *Supra* note 8.

[38] Typical community-responsive content includes local news stories, investigative features, consumer advocacy issues, politics, sports, community events, cultural offerings, weather, and emergency notices. 2008 Broadcast Localism Report, 23 FCC Rcd at 1338 ¶ 31.

[39] *See id.* at ¶ 30 ("Having recognized that certain groups have long complained that broadcasters do not air enough community-responsive programming, the Commission sought comment on the nature and amount of such programming in the NOI. The Commission inquired as to how broadcasters were serving the needs of their communities, whether they were providing enough community-responsive programming, whether the Commission could or should take action to ensure that broadcasters aired programming that served their communities' needs and interests, and whether non-entertainment or non-locally originated programming should constitute local programming."). This, in turn, raises questions about what "counts" as community-responsive, how to combine time allocated to different categories (such as local public affairs and public service announcements), and whether the same rules should apply in all markets and to all classes of service.

[40] Thus, for example, regardless of how one views the studies cited by the Commission in its *2008 Broadcast Localism Report,* 23 FCC Rcd at 1341–42 ¶38 (citations omitted), and regardless of whether one thinks the amount of local news and public affairs increases with network ownership, all of the broadcast stations in this transaction were part of a network before the transaction, and will be part of a network after the transaction. In short, there is no change.

[41] *2008 Broadcast Localism Report,* 23 FCC Rcd at 1354–55 ¶ 70.

[42] *Id.* at 1354 ¶ 69.

[43] *Id.* at 1336–37 ¶¶ 25–27, 1356 ¶ 73. Note, this requirement is not yet effective.

by “Eligible Entities,” which may include minority- and women-owned businesses.[44] No matter how the Commission resolves the question of underserved audiences, there is nothing in this fundamentally vertical transaction that reduces incentives to serve underserved audiences. There is no consolidation of broadcast assets at the local market level. Hence, the broadcast outlets will continue to have every incentive to appeal to and retain as wide and diverse an audience as possible.

24. Within the localism sphere, the Commission also has expressed concern with the process of engagement among broadcasters, viewers, and community leaders. In the 1970s, the Commission promulgated a highly detailed set of regulations to govern the process of communication.[45] In the 1980s these regulations were relaxed,[46] but recently the Commission has proposed making them more formal for television.[47] Nothing about this transaction will produce any significant change in the O&Os' interactions with viewers and community leaders. The stations can be expected to continue to comply with applicable regulations, will continue to learn about the needs and interests of their local communities, and will continue to air programming that responds to these needs and interests. There is no reason why the structure of the proposed transaction would affect the merging entities' incentives to continue to comply with, or indeed exceed, regulations in this area. Moreover, as outlined in the December 3 Cohen Letter, the companies are undertaking additional efforts to promote localism, which will further enhance the public interest benefits of the transaction.

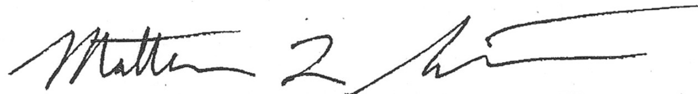
V. Conclusion

25. Based on public information provided to me by Comcast and NBCU, together with my analysis of publicly available information cited here, I have evaluated the consequences of the proposed transaction in terms of *diversity* and *localism*—two areas that have been at the center of the Commission's previous regulatory reviews with regard to the public interest. In my opinion, this transaction does not represent the sort of horizontal merger that has been at the core of the Commission's diversity and localism concerns over the past several decades. Notwithstanding the rhetoric of some, this transaction will not result in any reduction in the diversity of broadcast voices in a local market or any reduction in localism.

26. In summary, this transaction is, from the standpoint of traditional Commission diversity and localism concerns, almost entirely a vertical transaction. I conclude that the proposed transaction will have no adverse effect on localism and diversity and thus is fully consistent with the Commission's the public interest approach along these dimensions. It is not the type of transaction that implicates the core concern of reduction in the diversity of voices in a local market.

I, Matthew L. Spitzer, declare under penalty of perjury that the foregoing declaration is true and correct.

Executed on January 26, 2010



Matthew L. Spitzer

[44] *Id.* at 1356–57 ¶¶ 74–76.

[45] *Primer on Ascertainment of Community Problems by Broadcast Applicants, Report and Order,* 27 F.C.C.2d 650 (1971); *Ascertainment of Community Problems by Broadcast Applicants, First Report and Order,* 57 F.C.C.2d 418 (1976).

[46] *Deregulation of Radio, Report and Order,* 84 F.C.C.2d 968 (1981); *Revision of Programming and Commercialization Policies, Ascertainment Requirements and Program Log Requirements for Commercial Television Stations, Report and Order,* 98 F.C.C.2d 1076, 1099 (1984).

[47] *2008 Broadcast Localism Report,* 23 FCC Rcd at 1333–37 ¶¶ 16–27.

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Education

Ph.D. (Social Science) California Institute of Technology, 1979
J.D. University of Southern California, 1977
B.A. (Mathematics)University of California, Los Angeles, 1973

Professional Associations and Service Positions

Member, KUSC University Advisory Board, July 2000 to October 2001.
Member, USC Budget Steering Group, August 2000 to July 2001.
Member, USC Capital Planning Committee Radisson Subcommittee, August 2000 to August 2001.
Member, USC Urban Deans Council, July 2000 to March 2004.
Member, USC Provost's Council, August 2000 to June 2006.
Member, Executive Committee, USC Provost's Council, August 2001 to June 2005.
Member, Board of Directors, American Law and Economics Association, 1997 to 2000.
Member, Board of Editors, American Law & Economics Review, 1998 to 2000.
Director, American Law Deans Association, September 2000 to 2002.
Member, American Law Deans Association, September 2000 to June 2006.
Member, The American Law Institute, 2000 to present.
Member, The Fellows of the American Bar Foundation, 2003 to present.
Member, Board of Governors, Beverly Hills Bar Association, 2005 to 2006.
Member, Law School Council, The Committee of Bar Examiners of The State Bar of California, 2005 to 2006.
Member, Board of Directors, Telecommunications Policy Research Conference, 1993 to 1995.
Organizing Committee for Telecommunications Policy Research Conference, 1991 to 1994.

Appointments

Litigator with Nossaman, Krueger & Marsh, Los Angeles, California, from January 1977 to July 1979.
Assistant Professor of Law at the Northwestern University School of Law, July 1979 to August 1981.
Associate Professor of Law at the University of Southern California Law School, August 1981 to May 1984.
Professor of Law at the University of Southern California Law School, May 1984 to July 1987.
William T. Dalessi Professor of Law at the University of Southern California, August 1987 to June 2000.
Visiting Professor of Law and Social Science in Division of Humanities and Social Sciences at California Institute of Technology, Pasadena, California, January 1988 to June 1988; January 1990 to June 1990; January 1991 to June 1991; and January 1992 to June 1992.
Professor of Law and Social Science in Division of Humanities and Social Sciences at California Institute of Technology, Pasadena, California, July 1992 to June 2001 and July 2006 to present.
Visiting Associate in Division of Humanities and Social Sciences at California Institute of Technology, Pasadena, California, July 2001 to June 2006.
Visiting Professor of Law at University of Chicago, October 1996 to December 1996.
Visiting Professor of Law at Stanford University, September 1997 to December 1997.
Director, Olin Program in Law and Rational Choice at the University of Southern California Law School, July 1990 to June 2000.
Director, USC Center for Communications Law and Policy, August 1998 to June 2005.

Dean and Carl Mason Franklin Chair in Law at the University of Southern California Law School, July 2000 to June 2006.

Dean and Carl Mason Franklin Chair in Law and Professor of Political Science at the University of Southern California Law School, November 2002 to June 2006.

Robert C. Packard Trustee Chair in Law and Professor of Political Science at the University of Southern California Gould School of Law, July 2006 to present.

Publications—Books

Seven Dirty Words and Six Other Stories: Controlling the Content of Print and Broadcast (1986, Yale University Press).

Public Policy Toward Cable Television (1997, AEI/MIT Press)(with Thomas Hazlett).

Administrative Law and Regulatory Policy: Problems, Text, and Cases (5th Edition, 2002, Aspen Law & Business)(with Stephen Breyer, Richard Stewart, and Cass Sunstein).

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Prize

Ronald H. Coase Prize for excellence in law and economics

Senator DORGAN. Mr. Roberts, thank you very much.

Mr. Wells, nice to see you. You may proceed.

STATEMENT OF JOHN WELLS, PRESIDENT, WRITERS GUILD OF AMERICA, WEST

Mr. WELLS. Thank you. Thank you, Mr. Chairman.

I am honored to represent the 8,000 Writers Guild of America, West, WGAW, members working in film, television, and emerging media markets, including online video content. Virtually all of the entertainment programming and a significant portion of news pro-

gramming seen on television and in film is written by our members and the members of our affiliate, Writers Guild of America, East.

The WGAW has had a long association with NBC Universal. I have written and produced successful primetime television over the last few decades, including ER, The West Wing, and most recently, Southland. The WGAW is concerned that the impact of the proposed merger of NBC Universal and Comcast, what that merger will have on WGA content creators, entertainment industry workers, and U.S. consumers.

Over the past several decades, our industry has consolidated from literally dozens of independent entrepreneurs and suppliers to a handful of large media conglomerates controlling content from start to finish. This has not been good for writers, who face fewer creative and economic opportunities, which, in turn, has a negative effect on job creation for other entertainment workers.

The industry may point to the growth of channels and distribution platforms as evidence of opportunities for independent and diverse content, but the reality is that a handful of multinational companies control what viewers watch.

WGAW analysis of primetime series on the Fall 2009 network schedule found that only 16 percent of series were independently produced across the 5 broadcast networks, with only 10 percent independently produced on NBC. Twenty years ago, under the financial syndication regulation, 78 percent of primetime lineup was independently produced, including "Doogie Howser," "The Wonder Years," "Cosby Show," "Who's The Boss?," and "Designing Women."

With the integration of NBC Universal's cable networks, Comcast will have the incentive to bump other channels out of the most popular tiers in favor of its newly acquired networks. This new media superpower could, in effect, deny consumers the ability to select channels through its marketing practices of bundling channel position and tier placement.

This proposed media consolidation also promises to have a significant impact on news programming. Diverse news sources are necessary for our democracy, and this merger will concentrate a significant amount of local, national, and online news programming within one company. We do not want to see a repeat of Clear Channel's consolidation of the radio industry. While Comcast has said it plans to preserve NBC local news, we fear this is a promise that could easily be forgotten in pursuit of corporate cost efficiencies.

The greatest danger posed by the merger of the Comcast-NBC Universal is its effect on the developing online Internet video market. We believe Comcast may be tempted to use its position as the largest provider of residential Internet services to favor its newly acquired content and the content provided by other entertainment companies in reciprocal or monetary arrangements. This could come in the form of faster access to Comcast-NBC Universal content or other content that it chooses to favor, to the detriment of all other content now available to consumers over their Comcast-supplied Internet connections.

Comcast's Xfinity service, in conjunction with the proposed merger, raises horizontal competition concerns as Comcast attempts to leverage its dominance of the cable market to control online Internet video. It could stifle competition between online video providers

and strengthen the company's market control of video distribution by requiring a consumer to have a costly cable subscription to access online video.

Most recently, we have seen NBC embracing this practice, restricting online access to some 2010 Winter Olympics content only to authenticated subscribers of a cable, satellite, or IPTV service. Comcast control over NBC Universal content will only enhance these anticompetitive efforts. The WGAW has serious concerns about Comcast-NBC Universal serving as the gatekeeper for video content online.

In addition, Comcast would acquire 30 percent of Hulu and would likely put it behind an authentication wall. Consumers will no longer be able to watch TV episodes online without a cable subscription, which will reduce viewing of this content and, potentially, residual payments for writers and other talent.

The Internet is quickly becoming our town square. To ensure a free and open Internet, we must require companies like Comcast to remain neutral in the delivery of content through its online service, both in the speed of delivery and the cost of delivery. As the creators of intellectual property, we believe in strong copyright protection and that piracy must be addressed through a combination of new technology and a strong enforcement regime, all the while maintaining a free Internet.

Comcast has also said it would like to use its control over NBC Universal content to establish a model that can be replicated with other third parties. We are concerned that below-market transfer prices may become standards for pricing content from third-party suppliers. It is imperative that the interests of content creators and the entertainment industry workers not be sacrificed to enhance the value of Comcast's distribution business.

The Guild shares the concerns about labor practices that have been voiced by the Communication Workers of America, the CWA. The CWA's experience with Comcast has demonstrated a poor track record of respecting worker rights. If approved, the merger of Comcast and NBC Universal will lead to a further consolidation of distribution and programming. The WGA believes that any public interest commitments should be made legally binding and enforceable by regulators.

In the online space, regulators must require that Comcast-NBC Universal not discriminate in favor of or against content on the Internet by agreeing to network neutrality rules on its Internet access service. This merged entity should also not be allowed to use its market power to deny distribution of programming on alternative services on the Internet that might compete with Comcast-NBC Universal's various platforms or video on demand services.

To promote independent programming, Comcast must go beyond their offer of 2 independent channels, which will have little impact in a market of 500-plus channels, and be required to allocate 25 percent of primetime programming on its broadcast and cable networks to independent programming.

The definition of independent programming should be crafted in such a way as to ensure maximum diversity of voices and artists on such programming, not to just provide more programming space for other media conglomerates. Local news and public broadcasting

must be preserved to ensure community voices and diversity of opinions. And Comcast should be required to promote these programs through subsidized advertising campaigns.

Thank you again for the opportunity to testify today. I look forward to answering any questions.

[The prepared statement of Mr. Wells follows:]

PREPARED STATEMENT OF JOHN WELLS, PRESIDENT, WRITERS GUILD OF AMERICA, WEST

Thank you, Chairman Rockefeller, Ranking Member Hutchison and members of the Committee for the opportunity to testify today. I am honored to represent the 8,000 Writers Guild of America, West (WGAW) members working in film, television and emerging new media markets including online video content. Virtually all of the entertainment programming and a significant portion of news programming seen on television and in film is written by our members and the members of our affiliate Writers Guild of America, East. WGAW has had a long association with NBC Universal (NBCU). As Chairman Rockefeller noted in his introduction, I have written and produced successful prime-time television over the last few decades including *ER, The West Wing* and most recently, *Southland*.

Our entertainment industry is a shining example of the remarkable fruits that came come from the collaborative efforts between working people. As writers, the content we create results in hundreds, if not thousands of good paying jobs for electricians, caterers, truck drivers, technicians, actors, directors, and other skilled and unskilled workers. Our product is embraced by the public, as evidenced by the numbers at the box office and viewership of broadcast and cable television programming both here in America and abroad. We are also just beginning to unlock the potential of the online, Internet video market. Our workers are what make the American entertainment industry the envy of the world.

That is why, the WGAW is extremely concerned about the impact the proposed merger of NBC Universal and Comcast will have on WGA content creators, entertainment industry workers and U.S. consumers. Over the past several decades, our industry has consolidated from literally dozens of independent entrepreneurs and suppliers, including many writer-owners making innovative and ground-breaking programming, to a handful of large media conglomerates most often controlling content from start to finish.

This has not been good for writers who face fewer creative and economic opportunities, which in turn has a negative effect on job creation for other entertainment industry workers. Viewers are offered increasingly homogenized content driven by corporate decisionmaking and at higher and higher costs to the consumer.

WGAW analysis of primetime series on the Fall 2009 network schedule found that only 16 percent of series were independently produced across the five broadcast networks, with only 10 percent independently produced on NBC. By way of contrast, twenty years ago under the Financial-Syndication regulations, 78 percent of the primetime lineup was independently produced including *Doogie Howser, M.D., The Wonder Years, Cosby Show, Who's the Boss* and *Designing Women.*

The industry may point to the growth of channels and distribution platforms as evidence of opportunities for independent and diverse content, but the reality is that a handful of multinational companies control what viewers watch.

The combined entity being discussed today will control 20 percent of television viewing hours. Control of both content and distribution provide ample opportunity for abuses of power in the pursuit of corporate self-interest. In this case, we are concerned that bigger won't be better.

The vertical leverage created by this proposed merger will have a significant impact on competition in both the cable network and online video markets. In cable, there are now more than 500 channels for consumers to choose from. But the sheer number of channels means that cable network success is increasingly dependent upon cable tier placement, bundling and channel positioning. "500 channels and still nothing to watch," we have all heard that lament.

Comcast, as the largest provider of video services, is in a unique position to determine the fate of cable networks. With the integration of NBCU's cable networks, Comcast has an opportunity to abuse its dominant position to bump other channels out of the most popular tiers in favor of its newly acquired networks. This new media superpower could in effect deny consumers the ability to select channels, through its marketing practices of bundling channels, channel positioning and tier placement. With little transparency in pricing or rate increases, consumers will in-

creasingly be at the mercy of dominant cable and Internet providers, with little or no competition to ensure reasonable access fees.

The trend away from vertical integration between cable operators and cable networks, which includes separations by Viacom, News Corp and most recently Time Warner, has been a positive development for content creators and consumers. In order to attract viewers, cable channels have invested heavily in original content. The original dramas and comedies that once were only found on network television can now be seen on multiple cable channels including AMC, TNT, Lifetime, FX and many others. I have personally benefited from the rise of original programming on cable. When NBC Universal canceled *Southland* in a cost-saving decision to move Jay Leno to the 10 p.m. time slot, my series found a home on TNT. This trend has benefited content creators and entertainment industry workers who have found new outlets for their work. Thus the WGAW has serious concerns about the proposed increase in vertical integration, which could threaten to undermine progress made in this area and lead to increased cost for consumers.

This proposed media consolidation also promises to have a significant impact on news programming. Diverse news sources are necessary for our democracy and this merger will concentrate a significant amount of local, national and online news programming within one company. In pursuit of corporate profits, this merged entity may be tempted to cut costs and consolidate news programming, to the detriment of our vibrant democracy. We have witnessed this happen time and time again with media consolidation. We do not want to see a repeat of Clear Channel's consolidation of the radio industry, where cost-cutting jeopardized public safety when a train containing hundreds of thousands of gallons of toxic ammonia derailed in Minot, North Dakota. Six of the seven local radio stations had recently been purchased by Clear Channel Communications and were operated by computer, including the station designated for emergency announcements. Instead of emergency announcements alerting the public, music played uninterrupted across the Clear Channel stations, beamed in from out of state. While Comcast has said it plans to preserve NBC local news we fear this is a hollow promise that could easily be forgotten in pursuit of corporate cost efficiencies.

The greatest danger we see posed by the merger of Comcast-NBC Universal is it's possible effect on the developing online Internet, video market. A free and open Internet offers unforeseen possibilities for competitive and independent production and distribution of content free of traditional corporate controls.

Comcast's Xfinity service, in conjunction with the proposed merger raises horizontal competition concerns as Comcast attempts to leverage its dominance of the cable market to control online Internet video. It could stifle competition between online video providers and strengthen the company's market control of video distribution by requiring a consumer to have a costly cable subscription to access online video. Most recently, we've seen NBC embracing this practice, restricting online access to some 2010 Winter Olympics content only to authenticated subscribers of a cable, satellite or IPTV service. Comcast control over NBC Universal content will only enhance these anti-competitive efforts. The WGAW has serious concerns about Comcast-NBC Universal serving as the gatekeeper for video content online.

In addition, Comcast would acquire 30 percent of Hulu and would likely put it behind an authentication wall. Consumers will no longer be able to watch TV episodes online without a cable subscription, which will reduce viewing of this content and, potentially, residual payments for writers and other talent.

Comcast's desire to stifle competition on the Internet is not new or merely hypothetical. In October 2007, the Associated Press reported that Comcast was unilaterally blocking access to the Web application BitTorrent. This violation was pursued by the Federal Communications Commission and in 2008 the FCC ordered a "cease and desist." Comcast is appealing the order in court.

In light of these actions, we believe Comcast may be tempted to use its position as the largest provider of residential Internet services to in favor its newly acquired content and the content provided by other multinational entertainment companies in reciprocal or monetary arrangements, and authentication walls that favor other deep-pocketed providers, not consumers. This could come in the form of faster access to Comcast-NBC Universal content or other content that it chooses to favor—to the detriment of all other content now available to consumers over their Comcast-supplied Internet connections. This proposed merger is very much linked to the discussion of network neutrality, more properly called "Net Freedom." The Internet is quickly becoming our town square, with access available to all Americans for the discussion of ideas, the viewing of news, commentary and entertainment, and for social networking. To ensure a free and open Internet, we must require companies like Comcast to remain neutral in the delivery of content through its online service, both in the speed of delivery and the cost of delivery. As the creators of intellectual

property we believe in strong copyright protection and that piracy must be addressed, through a combination of new technology and a strong enforcement regime, all the while maintaining a free Internet.

A real concern for talent including the writers I represent is the potential devaluation of content resulting from the combination of a major content producer and one of the country's largest content distributors. Comcast, which is primarily a distribution company will now have control over a large amount of content, much of which is written and produced by WGAW members. In documents filed with the FCC, Comcast has stated that a key rationale for the merger has been its inability to reach "optimal agreements" with producers that allow Comcast to distribute content as it sees fit. We are troubled by this statement.

The consolidation of such a major producer and distributor creates a scenario where the transfer prices imputed to content created by the joint venture may well understate its value for competitive advantage and deprive talent of the fair market payments they are due under our contracts. Comcast and its shareholders may realize the benefits of bringing this content in-house but talent is likely to be left behind in the process, and consumers will certainly pay higher subscription costs as competition is further reduced and consumer delivery choices are narrowed. The combination of these companies may permit Comcast to operate in a more efficient economic marketplace, but the marketplace of ideas and consumer choice will be diminished in the process.

Comcast has also said it would like to use its control over NBC Universal content to establish a model that can be replicated with other third-parties. We are concerned that these below-market transfer prices may become standards for pricing content from third-party suppliers. It is imperative that the interests of content creators and entertainment industry workers within the merged company and elsewhere not be sacrificed to enhance the value of Comcast's distribution business.

Writers and other members of the Hollywood community depend on residual payments derived from the reuse of content in order to sustain their careers and support their Health and Pension Plans. Writers and other entertainment industry workers receive initial compensation for their work but also subsequently receive residual payments when their product is aired in syndication, sold on DVD, or purchased online. These payments essentially serve as R&D for the entertainment industry, allowing writers to develop new material while waiting for their next employment opportunity. Any devaluation of content could significantly impact the ability of writers to spend time developing original content and entertainment industry workers to remain available for their next job. To protect the value of content, regulators should require transparency and fair market valuation of all transactions between commonly owned or controlled parties.

The Guild, shares the concerns about labor practices that have been voiced by the Communication Workers of America (CWA). The CWA's experience with Comcast has demonstrated a poor track record of respecting worker rights. Where Comcast has inherited union contracts through business acquisitions it has failed to abide by promises to respect employee's rights and collective bargaining. The entertainment industry including NBC Universal has a long and honored tradition of cooperative labor relations, which has produced quality employment for every person working on a project I have had the privilege to be associated with as a WGAW member. Our entertainment industry is the envy of the world because we have been able to maintain and support a talented union workforce for decades. This workforce stability is what keeps our industry strong and has made our product one of America's leading exports.

If approved, the merger of Comcast and NBC Universal will lead to a further consolidation of distribution and programming, which will result in a decrease in the number of alternative, independent, and diverse programs. Such an outcome hurts the culture of the United States and results in fewer job opportunities for writers and all entertainment industry workers. While we are encouraged by the public interest commitments made by Comcast and NBC Universal, we believe that the concerns we have outlined are not sufficiently addressed by these proposed voluntary measures.

If approved, the proposed public interest commitments should be made legally binding and enforceable by regulators. To promote independent programming Comcast must go beyond their offer of 2 independent channels, which will have little impact in a market of 500 plus channels. A merged Comcast NBC Universal should be required to allocate 25 percent of primetime programming on its broadcast and cable networks to independent programming. The definition of independent programming should be crafted in such a way as to ensure maximum diversity of voices and artists on such programming, not to just provide more programming space for other media conglomerates. Local news and public broadcasting must be preserved

to ensure community voices and a diversity of opinions. Further, Comcast should be required to promote these programs through subsidized advertising campaigns.

In the online space, regulators must require that Comcast-NBC Universal not discriminate in favor of or against content on the Internet by agreeing to network neutrality rules on its Internet access service. The merged entity should also not be allowed to use its market power to deny distribution of programming on alternative services on the Internet that might compete with Comcast—NBC Universal's various platforms or Video On Demand services.

Without additional binding enforceable mandates—WGAW has grave concerns that the voluntary commitments offered will fail to protect consumers and content creators from the negative impact of this merger.

Thank you, again for the opportunity to testify today. I look forward to answering any questions.

Senator DORGAN. Mr. Wells, thank you very much.

Dr. Cooper, welcome. You may proceed.

STATEMENT OF DR. MARK COOPER, DIRECTOR OF RESEARCH, CONSUMER FEDERATION OF AMERICA ON BEHALF OF CONSUMER FEDERATION OF AMERICA, FREE PRESS, AND CONSUMERS UNION

Dr. COOPER. Thank you, Mr. Chairman, members of the Committee.

When Comcast claims that there is a little for antitrust authorities to look at in this merger, they must think we are still living in the "don't worry, be happy, do nothing" era of antitrust and regulation. Thankfully for consumers, as you heard this morning, that is not the case.

Officials who understand that concentration and vertical integration can be bad for consumers and the economy, who understand that public interest principles are good for citizens and civic discourse, are in office, and not a moment too soon. This merger is uniquely anticompetitive across a number of markets and threatens to restrict consumer choice, reduce programming diversity, and raise prices.

Comcast and NBC compete head-to-head in local distribution of video content in a dozen of the Nation's most important local markets. They compete head-to-head in the production of video content for multichannel distribution with Comcast sports and news lined up against NBC's sports and news. They compete head-to-head in the distribution of video content online. Indeed, NBC is a major partner in Hulu, an Internet-based, multichannel video distribution platform.

In addition to the outright elimination of direct competition between NBC and Comcast in these markets, the marriage of the Nation's largest cable operator with one of the Nation's premier video content producers will give Comcast an immense amount of vertical leverage to use against competing video programmers and distributors favoring its own content with access to cable systems that reach one quarter of the MVPD market and denying competing programmers access to those cable systems places a very heavy thumb on the scale of competition in the video content market.

Withholding must-have content from competing distributors undermines competition for eyeballs in distribution. The merged entity will also have the incentive and ability to raise prices for its large suite of programming or to force that programming on cable

systems, which raises consumers' prices as the bundles get larger and more expensive.

The history of the cable industry since the passage of the 1996 Act has been a history of consolidation and higher prices. We are all familiar with the fact that cable prices have increased twice as fast as the rate of inflation since 1996. It is less widely known but equally important to note that the operating cash-flow of the cable operators—that is the cash left over after all operating expenses, including programming—has increased four times at the rate of inflation. That is where Comcast gets $6.5 billion in cash during the worst recession since the Great Depression to buy a 51 percent interest in NBC.

Many of these processes have operated to push up prices over the last decade. This merger will reinforce all of those processes, perpetuating the problem of rising prices.

But the most ominous threat to future competition is to the Internet as a platform for video competition. Comcast has already signaled its intention to extend the ugly cable business model to the Internet by proposing a market division scheme with the second-largest cable operator, Time Warner. Comcast is seeking to prevent local sports teams from making their content available online. NBC moved its Olympic coverage behind an Internet pay wall.

The marriage of the Nation's largest broadband service provider with one of the Nation's premier video content producers heightens the dangers of these threats dramatically.

Geography is not supposed to matter on the Internet. There are no franchises, no rights-of-way, no regulatory impediments to entry, few, if any, construction course. There is no reason that cable operators don't compete head-to-head on the Internet for every eyeball, no matter where they are located. But their proposal, called "TV Everywhere," would actually restrict that competition, tying the Internet product to their physical cable product. In the lexicon of the cable industry, TV Everywhere means competition nowhere.

Federal authorities must do more than just preserve the current industry structure, which is riddled with anticompetitive and anticonsumer institutions and practices. They should seize this moment to implement the long-overdue reform across the six areas that I mentioned in my testimony—local markets, affiliate relations, cable program access, cable carriage, Internet distribution, and independent programming.

If policymakers allow this merger to go forward without fundamental reform of the underlying industry structure, the prospects for a more competitive, consumer-friendly, competition-friendly, multichannel video marketplace will be dealt a severe blow.

Thank you.

[The prepared statement of Dr. Cooper follows:]

PREPARED STATEMENT OF DR. MARK COOPER, DIRECTOR OF RESEARCH, CONSUMER FEDERATION OF AMERICA ON BEHALF OF CONSUMER FEDERATION OF AMERICA, FREE PRESS, AND CONSUMERS UNION

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 on media markets and a merger that is unique in the history of the video market, one that 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 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 com-

petitive 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, as shown in Exhibit 1. 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, 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

The history of the cable industry since the passage of the Telecommunications Act of 1996 has been a history of consolidation and higher prices. We are all familiar with the fact that cable prices have increase twice as fast as the rate of inflation since the 1996 (as shown Exhibit 2, cable rates increased approximately 100 percent, while Consumer Price Index increased about 50 percent). It is less widely known, but equally important to note that the operating cash-flow of the cable operators—that is the cash left over after all operating expenses, including programming costs—has increased four times faster than the rate of inflation. That is how during the worst recession since the Great Depression, Comcast has secured the $6.5 billion in cash necessary to pay General Electric for 51 percent of NBC-Universal. Many of the processes that have operated in the cable market to enable cable to push up prices and cash-flow in the decade and a half since the telecommunications Act of 1996 will be reinforced and perpetuated by this merger.

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] The concentration of local markets and increase in concentration created by this merger, as measured by local advertising vastly exceed the level that should trigger close antitrust scrutiny under the DOJ/FTC *Merger Guidelines*. 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 also the merger will be to the detriment of other local broadcasters—particularly smaller, independent ones—who are already facing ad revenue

[1] NBC Media Ownership Comments, FCC Docket 06–121 (filed Oct. 2006).

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.

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. "TV Everywhere" is a blatant market division scheme intended to extend the cable "non-compete" regimen from physical space to cyberspace.

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 anti-competitive 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. Strangely enough, Comcast's CEO promised Members of Congress in a previous hearing that the company would continue to abide by these rules even if they were successful in getting the court to throw them out. Yet Comcast continues to spend shareholder dollars trying to overturn an FCC regulation that it promises to follow regardless of the case's outcome. As a show of good faith, we have asked Comcast to withdraw its suit. In response Comcast has equivocated. Now it claims it made no such promise.

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.

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."* Recently, disputes over retransmission consent payments between broadcasters and cable TV providers have escalated to the point where local television stations have pulled their broadcast signals from cable operators—leaving consumers without access to important local news and entertainment programming. Comcast's takeover of NBC will exacerbate this trend. Through its takeover of local NBC broadcast stations, Comcast will gain the retransmission consent rights to negotiate fees for cable carriage of NBC's 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. Once Comcast acquires NBC, it will a two-fold incentive to drive-up retransmission rates for NBC broadcast stations: first, higher rates mean more revenues for Comcast. Even if Comcast also pays those higher rates, it is essentially charging itself. Second, Comcast has a strong incentive to raise rates on competitive MVPDs to force them to either absorb these extra costs, or to pass them through to consumers who will then have an incentive to switch to Comcast. Moreover, if retransmission consent negations reach a stalemate, Comcast has additional incentive to pull NBC's signal from competing pay TV operators as a way to induce customers to switch to Comcast. Either way Comcast wins, but consumers and competition are caught in the crosshairs.

Empirically Grounded, Responsible Merger Analysis v. "Do Nothing Theory"

In response to my February 4, 2010 testimony in the House Commerce Committee and the Senate Judiciary Committees, the Free State Foundation has posted a rebuttal by Richard Epstein, a law professor at the University of Chicago and a Senior Fellow at the Hoover Institution.[2] His response to my testimony is an example of the predictable chorus of free market ideologues who inevitably parrot the claims of the merging parties that new efficiencies will benefit consumers and that there is more than enough competition to prevent abuses.

[2] Richard Epstein, "The Comcast and NBCU Merger: The Upside Down Analysis of Dr. Mark Cooper," *Perspectives from FSF Scholars*, 5:4, February 12, 2010.

Thankfully, the era of "don't worry, be happy" antitrust enforcement in America is over.[3] Professor Epstein's approach to merger analysis reflects all of the worst weaknesses of the Chicago School approach that he espouses. It is based on pure theory, no facts.[4] Moreover, it is premised on a theory that is biased toward the approval of mergers[5] because it favors the creation of monopoly rents[6] by dominant firms[7] and ignores the importance of dynamic efficiency and disruptive entrants and mavericks.[8]

Professor Epstein ignores the mountain of evidence that there are numerous clearly defined markets in which Comcast and NBC compete head-to-head. In part this stems from the fact that he never attempts to define product and geographic markets. This failure is rooted conceptual and empirical flaws in his approach. On the one hand, the Chicago School approach assumes that self-correcting markets will automatically respond to the market power created by mergers,[9] because entry is easy.[10] One the other hand, the approach defines markets too broadly[11] and underestimates the importance of horizontal market power.[12]

Efficiency gains and benefits are overblown in the Chicago School approach. Indeed, they are used as an excuse to justify market power, rather than an empirically demonstrated fact.[13] All merging parties claim efficiency gains and "synergies", though few actually deliver on those promises. Nevertheless, the Chicago School treats those claims as a bona fide magic wand that blesses every merger that comes along.[14] Professor Epstein provides no evidence of efficiency gains or that the assumed benefits will be passed on to consumers and ignores the importance of wealth transfers as a consumer harm that can result from mergers, weaknesses that are endemic to this school of thought.[15]

The theoretically induced blindness to horizontal problems of this merger is matched by the utter ignorance of the vertical problems that it poses.[16] Abuse of vertical leverage has long been recognized as a critical problem that is ignored by Chicago School theory.[17] The cable industry has long been afflicted by the use of vertical leverage to undermine horizontal competition and Comcast has been in the forefront of that practice.[18] Empirical studies have repeatedly shown that by discriminating against independent programmers in affording carriage, cable operators have advanced the interest of their own programming and undermined the prospect for independent programming, impairing competition in content markets. By denying competing distribution platforms access to video content, cable operator have retarded competition in the distribution market, a practice that has led to repeated disputes at the Federal Communications Commission.

The bitter fruit of lax, "don't worry, be happy" antitrust enforcement has been tasted by the public in the approval of a string of mergers that have allowed the MVPD market to become concentrated and sustained the constant increase in prices in the cable industry. Professor Epstein asks us to ignore this central fact of life in the MVPD market because Chicago School Theory pays little attention to consumer welfare.[19] Responsible antitrust authorities cannot do so.

The track record of past mergers and merger conditions has become a bone of contention in the Comcast NBC case. In a thin attempt to soothe worries regarding the merger, merger supporters have listed a number of recent media and communications mergers, which they claim, did not result in the sky falling-in on consumers (to wit, AT&T-SBC, Verizon-MCI, News Corp.-DirecTV, AOL-Time Warner, XM-Sir-

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[3] This critique of the Chicago School is amply documented in Robert Pitfosky (Ed.), *How the Chicago School Overshot the Mark: The Effects of Conservative Economic Analysis on U.S. Antitrust* (Oxford: Oxford University Press, 2008). On the under enforcement that results from the Chicago school approach see 6, 36, 244–247.

[4] *Id.*, at 5, 42, 57, 82.

[5] *Id.*, at 48, 52, 123.

[6] *Id.*, at 6, 37–38, 85, 183.

[7] *Id.*, at 86, 127, 165.

[8] *Id.*, 79–81.

[9] *Id.*, at 5.

[10] *Id.*, at 42, 236.

[11] *Id.*, 243.

[12] *Id.*, 27, 57, 80, 126.

[13] *Id.*, at 5, 18, 42, 263.

[14] *Id.*, at 5.

[15] *Id.*, at 90, 263.

[16] *Id.*, at 52, 127, 141.

[17] *Id.*, at 148–149.

[18] Mark Cooper, *Cable Mergers and Monopolies: Market Power in Digital Media and Communications Markets* (Washington, D.C.: Economic Policy Institute, 2002).

[19] *Id.*, at 93–97.

ius). However, in referencing past mergers as a defense, supporters of the present merger draw the wrong conclusions in four crucial respects.

First, these mergers pale in comparison to consolidation of control over both programming production and distribution that would occur as a result of a Comcast takeover of NBC. The Comcast-NBC merger is much larger and involves uniquely anticompetitive threats resulting from the marriage of a major video content producer to the Nation's largest cable television provider and broadband service provider.

Second, many of these past mergers were prevented from doing their worst because, in every case, antitrust authorities imposed important conditions to prevent the anticompetitive, anti-consumer harms that the consolidation would have produced. These conditions were, of course, opposed by the Chicago School ideologues, just as they now oppose the imposition of any conditions on the current merger.

Third, virtually all of these mergers all resulted in consumer harm, even in spite of conditions that helped to mitigate the damage to some extent. The telecom mergers, in particular were disastrous for consumers. They eliminated major competitors in the marketplace for wireline broadband service, reversed the outcomes of the procompetitive breakup of AT&T and the pro-competitive 1996 Telecommunications Act, and delivered a wireline duopoly that has resisted meaningful price competition ever since. These mergers also resulted in massive consolidation in the wireless industry (by virtue of granting huge market power to these wireline companies that also had wireless services)—pushing AT&T and Verizon into dominant positions that are quickly giving us the same problems in mobile communications.

Finally, these mergers did not produce the synergies and efficiencies that these companies promised. Instead, the claims of efficiency, that were used to justify mergers in the past decade, were vastly overblown or failed to materialize at all. The "efficient market hypothesis" at the center of the Chicago School analytic framework, which allowed companies to wave a magic efficiency wand and blind the antitrust authorities to the anticompetitive impact of merger, was the cornerstone of the "don't' worry, be happy" era. The "efficient market hypothesis" is crumbling; buried, if not dead, beneath the rubble of the financial system.[20]

A Comcast/NBC Merger Should Not Be Allowed to Proceed Without Major Structural Reforms of the Video Market

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. Moreover, such claims are undercut by the fact that Comcast is presently opposing the very rules it says will prevent it from anticompetitive conduct. The challenges that 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 im-

[20] The charge that set off the implosion of the theory was ignited by Allan Greenspan's admission that there is a fundamental flaw in the theory. "Those of us who looked to the self-interest of lending institutions to protect shareholders' equity, myself included, are in a state of shocked disbelief. Such counterparty surveillance is a central pillar of our financial markets state of balance. . . . If it fails, as occurred this year, market stability is undermined . . . "I made a mistake in presuming that the self-interests of organizations, specifically banks and others, were such that they were best capable of protecting their own shareholders and their equity in the firms (U.S. House of Representatives, Committee on Oversight and Government Reform, October 23, 2008) This has set off a series of analyses on all sides that retrospectively examine the cracks and weaknesses in the intellectual structure that should have been recognized (see for example Justin Fox, *The Myth of the Rational Market: A History of Risk, Reward and Delusion on Wall Street* (New York: Harper Collins, 2009); Richard Posner, *A Failure of Capitalism: The Crisis of and the Decent Into Depression* (Cambridge: Harvard University Press, 2009); John Cassidy, *How Markets Fail: the Logic of Economic Calamities*; New York: Farrar, Straus and Giroux, 2009). There were, of course, critics who recognized the problems much earlier, but whose warnings went unheeded (see for example, Joseph E. Stiglitz, *The Roaring Nineties* (New York: Norton, 2003); Robert Pollin, *Contours of Descent: U.S. Economic Fractures and the Landscape of Austerity* (Verso, 2005); Frank Portnoy, *Infectious Greed* (New York Holt, 2003); Robert Schiller, *Irrational Exuberance* (New York: Currency/Doublday, 2005); Pitofsky, *op. cit.*; George Cooper, *The Origin of Financial Crises: Central Banks, Credit Bubbles and the Efficiency Market Fallacy* (New York: Vintage, 2008).

portantly, 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.

We recognize that the company has made some promises that address some specific concerns of Members of the Congress and this committee. We appreciate the fact that everyone recognizes that those special interest promises are far from adequate to protect the interests of the broader public. So in my remarks today I will take up the challenge that some members of the Committee have laid down in terms of identifying the conditions that would begin to address the broader problems with this merger and in this industry. I emphasize the structure and process of enforcement of conditions, rather than the details.

First, all of the major areas of competitive concern should be addressed, in addition to the localism and diversity areas that Comcast has admitted are a problem—local markets/affiliate relations, cable program access, cable carriage, Internet distribution, independent programming in broadcast and prime time. If Federal authorities allow this merger to go forward, they should not merely impose conditions on the merger, they should reform the regulatory structure of the industry to address the underlying problems that this merger will make much worse. The only way to address the harm that this merger will do to competition and consumers is to address the underlying problems that afflict video consumers in America.

To ensure that the conditions are enforceable, we believe that the Federal authorities with oversight over this merger should complete industry-wide proceedings that address the underlying problems before the merger is approved. In every one of the areas where we believe that broad public interest is at risk, there is a pending proceeding or complaint that provides the opportunity to address the underlying problems in the industry that would be made so much worse by this merger. When it comes to relations between the networks and their affiliates, cable program access, cable program carriage, and independent programming on broadcast networks, the FCC has available vehicles to move quickly to adopt strong rules to protect the public. The antitrust authorities have been asked to examine the anti-consumer, anti-competitive market division scheme Comcast is pushing for Internet distribution of video content. These agencies should act to outline the rules of the road and create the institutional structures that will prevent the abuse of market power and promote competition in the MVPD market.

Once these industry-wide mechanisms are in place, the agencies should then consider whether additional conditions are necessary to meet the unique threat to competition and the public interest embodied in this merger.

Finally, Federal authorities must not only impose meaningful conditions with enforceable sanctions, but Comcast should also agree not to challenge the legality of the conditions or render aid and comfort to those who do. If they challenge the legality of the regulatory mechanisms that underlie any of the major conditions imposed on the merger that should immediately trigger a reconsideration of the merger and a reconsideration of the transfer of the broadcast licenses in a proceeding that is treated as a *de novo* review of the merger. Since Comcast has volunteered to give up its right to stop obeying a law in the event it is declared illegal or unconstitutional, it should have no problem giving up it right to challenge such a law.

Fundamental Reform Is Long Overdue, Federal Authorities Should Seize the Moment of the Largest Merger in History to Jump Start the Reform Process

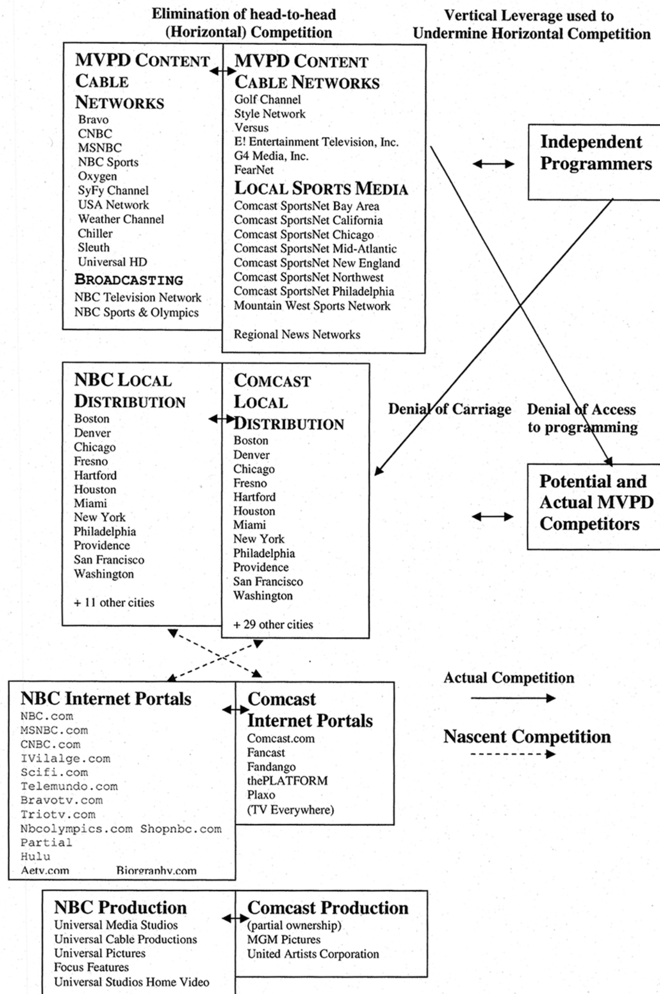
Over the past quarter century there have been a few moments when a technology comes along that holds the possibility of breaking the chokehold that cable has on the multi-channel video programming market, but on each occasion policy mistakes were made that allowed the cable industry to strangle competition. This is the first big policy moment for determining whether the Internet will function as an alternative platform to compete with cable. We all hope the Internet will change everything in the video product space, but it has not yet. According to the Nielsen "Three Screen Report," 95 percent of TV viewing and 90 percent of the time spent with the media is still the traditional media. If policymakers allow this merger to go forward without fundamental reform of the underlying industry structure, the prospects for a more competition-friendly, consumer-friendly multi-channel video marketplace will be dealt a severe setback.

It is only by taking the approach I have outlined that Federal authorities can do more than just preserve the current industry structure, which is riddled with anti-competitive and anti-consumer institutions and practices, that they can improve the

terrain of the American video marketplace. This merger is an opportunity to jump-start the industry reform process.

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.

EXHIBIT 1:
THE ANTICOMPETITIVE EFFECTS OF THE COMCAST-NBC MERGER



ADDITIONAL LOCAL DISTRIBUTION

NBCU DISTRIBUTION

NBC Stations:

KNBC
Los Angeles

KNTV
San Jose/San Francisco

KXAS
Dallas/Fort Worth

WTVJ
San Diego

WNCN
Raleigh

WCMH
Columbus

WVTM
Birmingham

Telemundo Stations:

KVEA
Los Angeles

KWHY
Los Angeles

WSCV
Dallas/Fort Worth

KVDA
San Antonio

KDRX
Phoenix

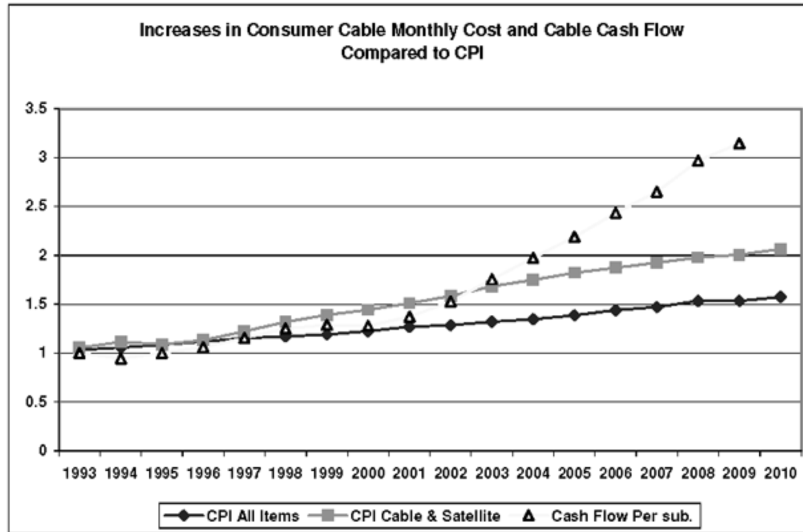
KHRR
Tucson

WKAQ
Puerto Rico

COMCAST DISTRIBUTION

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

EXHIBIT 2:



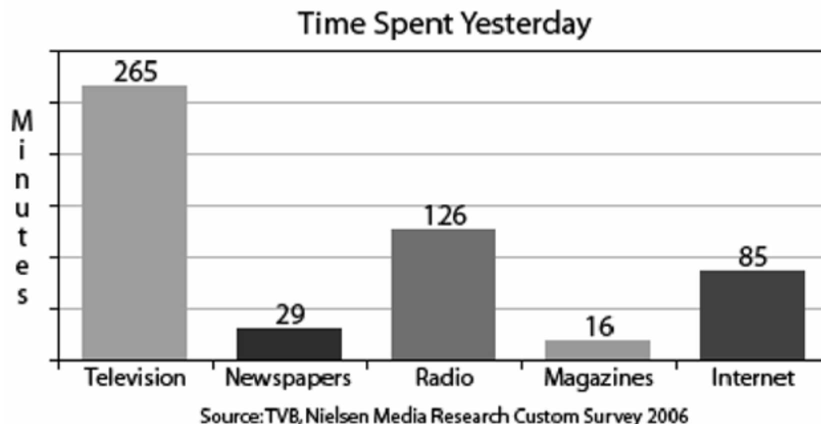
Sources: Prices: Bureau of Labor Statistics, Cash Flow: Federal Communications Commission, Annual Video Competition Reports (1993-2006), Comcast Annual Report (2007-2009).

Appetite For Media Seems Insatiable

Monthly Time Spent in Hours: Minutes Per User 2+

	Q3 2009	Q3 2008	% Diff	Absolute Diff
Watching TV in the home*	140:20	140:48	-0.3%	:28
Watching Timeshifted TV*	7:54	6:27	+22.5%	1:27
Using the Internet**	27:32	27:18	+0.9%	:14
Watching Video on Internet**	3:24	2:31	+34.9%	:53
Mobile Subscribers Watching Video on a Mobile Phone^	3:15	3:37	-10.0%	:22

Source: The Nielsen Company Q3 2009; * TV in the home includes live viewing plus playback within 7 days. ** Internet includes home and work who used internet to watch online video. ^ Mobile video audience consist of 13 or older mobile phone users who access video through any means.



Senator DORGAN. Dr. Cooper, thank you very much.
Ms. Abdoulah, you may proceed. Thank you.

STATEMENT OF COLLEEN ABDOULAH, PRESIDENT AND CHIEF EXECUTIVE OFFICER, WOW!; BOARD MEMBER, AMERICAN CABLE ASSOCIATION

Ms. ABDOULAH. Hi. I appreciate the opportunity to represent WOW! and the 900 small and medium-sized companies who are members of the ACA.

WOW! is a broadband competitive provider in five Midwest markets. One million of our households compete directly with Comcast in Michigan and Illinois. We differentiate ourselves through the customer experience that we provide, and customers appreciate having a choice.

They recently recognized us as the number-one cable, Internet, and phone provider in last month's *Consumer Reports*. They have recognized us with 10 J.D. Power awards.

Our customer-centric approach really works. We know how to compete. We are not here today to ask for favors from you, or Government assistance, or special advantages. We are here as a buyer of content, both cable and online.

The prospect of having Comcast-NBCU combining their programming, much of which has been deemed by the FCC as "must-have," will give them significantly more market power. And I believe that should concern you on behalf of consumers. We are going to pay substantially more for the programming that we distribute today if this merger is approved without conditions, and we will have no other choice but to pass that on to consumers.

And let me explain specifically why they will have more market power after the deal goes through. Comcast, as you know, is not just a large cable operator. It is also a significant owner of programming, including 10 must-have regional sports networks. And you can imagine how hard it would be to compete in our markets without local sports.

Then NBC has 10 broadcast networks, also must-have. NBC owns popular cable networks that we need in order to compete.

Comcast owns cable channels. You combine all that together, that is increased market power. And, post-merger, we will be negotiating with one consolidated entity with much greater leverage to extract higher prices and broader distribution of their programming. And I know this because it happens today.

In a filing with the FCC, Suddenlink, another cable provider, demonstrated when they had to negotiate with one company for two must-have broadcast stations in their same market, their rates were 20 percent higher than in markets where Suddenlink negotiated on a station-by-station basis. And our experience at WOW! validates this experience, these kind of fees, and higher. And I am told that the DOJ finds a proposed transaction is anticompetitive if prices are likely to go up by more than 5 percent after a deal closes.

So here are the harms that will result from the merger if it is not conditioned. Operators like WOW! are charged higher prices. As a result, consumers will pay more. Comcast will use its increased market power to demand that operators like WOW! carry additional networks not watched or wanted by customers.

Mr. Roberts himself was quoted a few weeks ago that services like Comcast's G4 channel would "enjoy the benefit of NBCU's scale." To me, that means more bundling, more tying of low-value networks with high-value networks, and charging more. And for direct competitors to Comcast, they will have every incentive to deny us both online content and advanced services.

And in defense of my concerns, Comcast has offered to abide by little more than the existing program access rules. These concessions are meaningless since the program access rules fail to remedy abuses today and will continue to be meaningless if the merger is approved without conditions and reform.

Here are the problems that need to be addressed specifically. Program access rules provide no automatic right to continued carriage of the network while the case is pending, and we all know the impact that has on customers. Program access rules are rife with loopholes that allow for discriminatory pricing. There is no price transparency to allow the FCC to resolve program access disputes. And finally, the current arbitration process is limited only to must-have sports programming and broadcast stations, and it is time-consuming and costly. So much so that it is beyond the means of any ACA member to utilize.

So, in closing, I believe companies like WOW! are just the kind of competitors sought in the 1992 and 1996 Acts. I am not here to suggest that the merger not be approved. However, I am here to say that the FCC and DOJ need to consider structural and behavioral relief such as stronger, more effective program access requirements. The goal has to be to prevent increased consumer pricing, preserve competition, and most of all, set a positive precedent for future mergers of this type.

Thank you for having me.

[The prepared statement of Ms. Abdoulah follows:]

PREPARED STATEMENT OF COLLEEN ABDOULAH, PRESIDENT AND CHIEF EXECUTIVE OFFICER, WOW!; BOARD MEMBER, AMERICAN CABLE ASSOCIATION

Chairman Rockefeller, Ranking Member Hutchison, and members of the Committee, 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, mid-sized 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. We also, by the very nature of our business, are a major consumer of programming on behalf of our subscribers. WOW! negotiates programming deals with some of the largest media conglomerates to secure rights to distribute broadcast stations and cable networks that are essential to our company's viability in the market.

I am here today both in WOW!'s capacity as a consumer of programming and competitive MVPD (Multichannel Video Programming Distributor) to tell the Committee that the proposed combination of Comcast and NBC Universal is a major transaction—bringing together key programming assets from both companies as well as joining that programming with Comcast's extensive cable assets—that would cause significant horizontal and vertical harms, threatening both consumers and competition. The Federal Communications Commission (FCC) or the Department of Justice (DOJ) must impose robust relief to remedy these harms.

I. Introduction to WOW! and the American Cable Association

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 our customers. 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, Verizon, 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 5 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.

WOW! is a major consumer of content from Comcast and NBC Universal. It carries the majority of NBC Universal's 14 national cable networks on all of its systems, and the NBC and Telemundo Owned & Operated (O&O) stations in the relevant markets we serve. We also distribute most of Comcast's 5 national cable networks and its Regional Sports Networks (RSNs) in their relevant markets.[2]

In addition to being a consumer of programming, in our Chicago and Detroit markets, covering approximately 1 million households, 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. 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!, all of these providers are consumers of content controlled by Comcast and NBC Universal, and many of them compete as described above. More specifically, all ACA members purchase national programming from Comcast and NBC Universal; more than 100 purchase programming from Comcast's RSNs; and, more than 20 purchase programming both from a Comcast RSN and a NBC Universal O&O television station in the same market. Moreover, in addition to WOW!, more than

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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.

[2] 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 "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.

35 ACA members compete directly against Comcast's cable systems, including in West Virginia, California, Maryland, and Washington. So, harms caused by the proposed combination will be felt across the country.

II. Overview of Harms from the Proposed Combination and Focus of Relief

In addressing the proposed combination of Comcast and NBC Universal, it is important for the Committee to understand at the outset that Comcast and NBC Universal have already admitted that the deal raises competitive concerns and have proffered a series of voluntary, albeit insufficient, commitments to address these concerns.[3] Of course, Comcast and NBC Universal have greatly understated both the type and extent of harms that would result should this proposed combination be approved by the FCC and the DOJ. Let me summarize our concerns with the transaction:

- First, the harms. 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. 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—which by itself would raise competitive concerns.[4] Rather, the deal is also a horizontal combination of key content assets of the two firms, giving Comcast substantially increased market power that it would employ either to withhold content or extract additional fees and impose unreasonable carriage requirements from video distributors across the country. The harm would be especially great for video distributors that compete directly with Comcast's cable systems. The harm also would extend to the evolving online marketplace where Comcast could either withhold content from competitors or impose higher-fees and discriminatory or other unreasonable conditions for carriage. In the end, should this proposed combination be approved, as programming fees ratchet-up and MVPDs are forced to carry low-value networks, consumers across the country will see significant increases in prices to access video programming, both via traditional cable services and online.
- Second, the relief. In fashioning relief to address the anticompetitive harms caused by the proposed combination, it would be a grave error to rely on the current Program Access statute and rules or upon conditions, including arbitration, agreed to in previous mergers with programmers and distributors. Both are riddled with so many loopholes and flaws and are so costly and resource-intensive that they are simply ineffective in remedying access to programming issues, particularly for smaller operators most vulnerable to market power abuses. Rather, the FCC and the DOJ need to develop both robust structural relief, including divestitures, and behavioral relief, including much stronger program access requirements, if the severe harms are to be remedied.

III. 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.

Through strategic acquisitions, Comcast has become the country's largest cable operator with 23.8 million subscribers, and the largest residential broadband access provider with 15.7 million customers. In recent years, Comcast also has emerged as a major cable content owner, including its 10 highly powerful Regional Sports Networks, or RSNs—which MVPDs must carry to compete effectively. It also owns such cable networks as the Golf Channel, E! Entertainment Television, Style Network, Versus, and G4. Moreover, it has a robust video-on-demand platform, and has devel-

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[3] 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.

[4] The vertical integration issues raised by the proposed combination, of course, raise anticompetitive concerns that the FCC and Department of Justice must address.

oped a TV Everywhere type of service (Fancast Xfinity TV) where cable programming is streamed over the Internet only for its cable customers.

NBC Universal also controls key assets in the broadcast and cable programming markets, including the NBC network, 10 NBC O&O broadcast stations, 15 Telemundo O&O broadcast stations, and 14 popular cable networks, including the #1 rated USA Network, and others, like Syfy, Bravo, CNBC, MSNBC, and Oxygen. For MVPDs, most of this programming also is considered "must have." The company also is an owner of the Internet-provided Hulu platform.

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 in competing against other MVPDs despite having fewer customers and resources. WOW! has no problem with robust competition.

However, when the programmers from whom you purchase content all of sudden acquire substantial additional key programming assets, problems are certain to ensue. Moreover, when your competitor also is a major vendor, supplying video content essential or important for any competitive provider to access, issues 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, DOJ, 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 advanced broadband services as distributors are forced to expend bandwidth for services consumers do not want.

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 Committee general and frequent problems that MVPDs have encountered and currently face when negotiating content deals.[5] 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. In negotiations for retransmission consent 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 advanced, higher-speed broadband services.

2. An 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.

3. 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

[5] 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.

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.

4. 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.

B. Horizontal and Vertical 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 to extract higher prices from purchasers and also to use that power vertically to reduce or eliminate competition, in either traditional or Internet-based markets. Let me elaborate.

Horizontal Harms

The DOJ and Federal Trade Commission have adopted policies to govern mergers with horizontal effects, the *Horizontal Merger Guidelines*. These policies contain a rigorous framework the agencies use to determine whether a merger is "likely substantially to lessen competition" and the focus is on whether the merger will enable the entity to enhance its market power or facilitate its exercise. The key is to focus on the overlap of assets between the two merging entities to determine if, when combined, it will result in the entity possessing sufficiently greater power in the market.

As discussed at the outset of my testimony, setting aside the fact that Comcast is the largest cable operator in the United States, it owns or controls significant programming assets, including 10 RSNs and a variety of national programming networks. NBC Universal also owns or controls the NBC O&O stations and a great array of cable programming networks. As I will discuss below, by combining these overlapping assets, Comcast will significantly increase the market power of the combined entity in programming markets across the country. As a result, pay television providers that purchase programming from the entity will pay higher prices and be burdened with more restrictive terms and conditions for this programming which will be passed on to subscribers.

In a series of rulings over the past 5 years—one just recently[6]—the FCC has determined that sports programming was "non-replicable" or "must have." In other words, a video distributor such as WOW! or another ACA member 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. It also should be noted that a bundle of cable programming, which is how such programming is normally sold, can become similar to "must have" individual programming depending on its overall ratings. A main driver of the proposed combination is to "lever" the market power of these "must have" content anchors—Comcast's RSNs, NBC's O&O

[6] *In the Matter of Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, MB Docket No. 07–198 (rel. Jan. 20, 2010) at ¶8.

stations, and NBC's extensive cable programming networks—and squeeze unaffiliated downstream multi-channel video providers to extract appreciably higher fees.[7]

In the post-combination world Comcast will have sufficient additional market power that it can create its own economic reality and make one plus one equal five. This makes all distributors 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.

An example will help make this point clearly. In Chicago today, WOW! carries 19 networks from Comcast and NBC Universal, including both Comcast's RSN and NBC's O&O television station. We negotiate separately with the two firms, and I know firsthand that each firm leverages its existing "market power content" to the maximum extent. But, at least, Comcast and NBC Universal bargain independently, not knowing what the other would do. In other words, neither is completely certain of the effect on WOW! if all of this "must have" programming were withheld. Obviously, post-combination, that all changes. It will be as if Comcast and NBC Universal could collude today with each knowing how the other will bargain with WOW!. In the end, WOW! will pay more for programming, and it will have little choice but to pass this on to consumers.

WOW!'s concern is not imaginary or merely academic. There are numerous instances of programmers combining or colluding to extract additional rents. The DOJ, for instance, filed a civil antitrust complaint against several broadcasters in a market for engaging in a combination and conspiracy to increase the price of retransmission rights to cable operators. The consent decree ending this litigation found that the broadcasters had restrained competition and enjoined them from agreeing to bargain jointly with cable operators.[8]

More recently, the MVPD, Suddenlink, in a filing to the FCC stated:

> "Suddenlink has examined its own retransmission consent agreements and has concluded that, where a single entity controls retransmission consent negotiations for more than one Big 4 station in a single market, the average retransmission consent fees Suddenlink pays for such entity's Big 4 stations (in all Suddenlink markets where the entity represents one or more stations) is 21.6 percent higher than the average retransmission consent fees Suddenlink pays for other 'Big 4' stations in those same markets. This is compelling evidence that an entity combining the retransmission consent efforts of two 'Big 4' stations in the same market is able to secure a substantial premium by leveraging its ability to withhold programming from multiple stations."

WOW! has been told by the ACA that various members have had experiences similar to Suddenlink, and, based on its own experience, WOW! can verify the increase in retransmission fees documented by Suddenlink.

The harm resulting from these horizontal effects will be felt by consumers of all MVPDs that must negotiate for Comcast RSN programming.[9] Because satellite television subscription prices are uniform across the country, this means that consumers nationwide will be effected by Comcast's leverage to extract higher programming fees in select markets. In the 7 television markets where there is both a Comcast RSN and an NBC O&O, Comcast will be able to exercise enormous newfound market power over local MVPDs who operate in only one market. In the most extreme case—the San Francisco-Oakland-San Jose television market—the combined company would own an NBC broadcast station, two Spanish-language broadcast stations, and two Comcast Regional Sports Networks.

Vertical Harms

The Comcast-NBC Universal transaction is also a vertical integration of broadcast, cable-programming, and online content with distribution that will result in significant harms to consumers and competition across the country. By adding NBC Universal's vast array of "must have" programming with its own cable distribution

[7] In their application to transfer control filed Jan. 28, 2010 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.

[8] *United States* v. *Texas Television et al.*, Competitive Impact Statement, U.S. District Court, Southern District of Texas, Corpus Christi Division, 1996.

[9] Comcast's RSN are available in 53 television markets across the country or 38 percent of all television homes.

assets, Comcast will have increased abilities to raise cable and satellite rates 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 the U.S. Office of Government Accountability,[10] 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 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. In 69 television markets across the country, Comcast competes against DirecTV, Dish Network, Verizon's FiOS, AT&T U-Verse and more than three dozen small and medium-sized cable and telephone companies retailing video programming. As discussed above, because satellite subscription prices are uniform across the country, Comcast's increased leverage in certain regions of the country will result in increased prices nationwide. When satellite companies raise their prices, this will also reduce competitive pressures on cable companies that compete with satellite companies.

Harms in the Online Distribution Market

WOW! urges the Committee to pay particular attention to the harms that would be felt by online distributors of content and broadband users. WOW! recently experienced problems with initiating its own version of Comcast's Fancast XFINITY TV service because it was unable to obtain content from Comcast and other content providers with whom Comcast had struck deals. This despite the fact that Comcast claims the content used in its online service is non-exclusive. We're pleased to note that since raising this issue as a witness at other Congressional hearings on the Comcast-NBCU deal last month, Comcast has been willing to engage in talks for the online rights to their content. However, it is far from certain that these rights will ultimately be made available to WOW!.

With the advent of Internet-delivered video content, the hundreds of ACA members who currently do not compete with Comcast's cable systems may 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.

We also have concerns about the ability of Comcast-NBCU to use its market power to force cable and broadband providers to adopt the ESPN360 model, where an Internet service provider is foreclosed from having its users access online content unless it pays a fee for every user regardless of whether the user ever accesses that content. It is evident to us that Comcast wants to combine this business model with all the "must have" content it will control post-combination to extract additional fees from consumers.

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.

IV. The FCC and DOJ Must Adopt Relief Sufficient to Address Both the Horizontal and Vertical Harms Caused Post-Combination; Traditional Behavioral Remedies are Insufficient to Remedy the Vertical Harms

The FCC and DOJ need to fashion relief that addresses both the horizontal and vertical harms caused post-combination. As noted above, the horizontal harms are most substantial and troubling for consumers and competition. The agencies thus must seriously consider structural relief, including divestitures of assets that are

[10] *Wire-Based Competition Benefited Consumers in Selected Markets*, U.S. General Accountability Office, Report to the Subcommittee on Antitrust, Competition Policy and Consumer Rights, Committee on the Judiciary, U.S. Senate, GAO–04–241, Feb. 2004.

the cause of these 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.

As for dealing with the vertical effects, the Committee should understand that the program access statute and rules and related past merger conditions have serious flaws, which if not corrected will be inadequate to remedy harms arising from the combination of Comcast and NBC Universal. (It also should be noted that Comcast, which contends that the program access rules will remedy any harms from the proposed combination, has decided to challenge the FCC's 2007 extension of the rules in court.) WOW! is particularly concerned that the processes associated with pursuing a program access complaint (or any similar matter before the FCC or an arbitrator) are so burdensome and resource-intensive that any rights we might have are effectively nullified. For instance, without an automatic "standstill" provision, enabling carriage during the many months while the dispute is pending, any program access rights are rendered meaningless.

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. The following are the major problems with the rules:

- The program access rules place no restriction on quantity discounts. So long as a competing MVPD has fewer subscribers than Comcast cable, Comcast has practically unlimited freedom to charge the MVPD higher programming prices per subscriber than it charges itself. Since the inception of the program access rules in 1992, the ACA is aware of only two instances in which the FCC has ruled in favor of a complaint alleging price discrimination,[11] and none since 1998.
- Even with very large MVPDs, Comcast can avoid any constraint on the prices it charges its competitors simply by raising the internal transfer price that it charges itself for programming.
- There are long delays in deciding cases with no automatic right to continued carriage of programming while the case is pending.
- It is uncertain that the program access rules apply to an MVPD seeking to obtain rights for provision of online "TV Everywhere" type services.

As a result of these many flaws, the ACA estimates that its members are paying at least 20–30 percent more for programming that the larger cable operators.

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:

- The arbitration process is very costly because, while the costs of arbitration are fixed, the benefits vary with the size of the subscriber based. It is thus not feasible for small operators to participate in their own individual arbitration, and it is uncertain under what circumstances operators could join together in a single arbitration. Finally, the terms resulting from arbitrations undertaken by larger operators are not available to smaller operators.
- Arbitration applies only to RSNs and retransmission consent but not to national cable networks.
- The "quantity discounts" loophole is not clearly blocked.

As a result, the ACA is aware of only one completed arbitration involving its members.[12]

WOW! and the ACA are committed to addressing problems with behavioral relief and devising enhanced measures. They expect to present their proposals shortly.

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[11] *Corporate Media Partners* v. *Rainbow*, 12 FCC Red. 15209, 1997; *Turner Vision et al.,* v. *CNN*, 12 FCC Red. 12610, 1998.

[12] *See, http://www.multichannel.com/article/131183-Massillon__Cable__Wins__Its__Case.php*.

V. 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.

Senator DORGAN. Ms. Abdoulah, thank you very much.

And finally, we will hear from Professor Yoo. You may proceed.

STATEMENT OF CHRISTOPHER S. YOO, PROFESSOR OF LAW AND COMMUNICATION, AND FOUNDING DIRECTOR, CENTER FOR TECHNOLOGY, INNOVATION, AND COMPETITION, UNIVERSITY OF PENNSYLVANIA

Mr. YOO. Thank you to the Committee for inviting me here to testify on how consolidation in the video and broadband markets will affect consumers.

My written testimony contains a complete analysis of the likely consumer impact the proposed merger between Comcast and NBC Universal will have. Rather than rehearse those arguments here, I would like to use my time to emphasize two basic points.

First, any antitrust analysis begins with the principles embodied by the decisions of the Supreme Court, this Congress, the antitrust regulatory agencies, and the FCC. And the starting point for the merger analysis is typically the merger guidelines issued by the Federal Trade Commission and the Justice Department.

Those merger guidelines and the analysis that it lays out indicates that the proposed merger is unlikely to harm consumers. The guidelines also indicate that the markets affected by these mergers are competitive enough to protect consumers against anticompetitive effects.

On the issues of horizontal integration, the decisions by this Congress, the courts, and the FCC recognize that local broadcasting and local cable operators constitute separate markets. Despite repeated attempts by the FCC to enact measures to prohibit combining television stations and cable operators under the same corporate umbrella, those rules were invariably struck down by the courts as arbitrary, capricious, and inconsistent with the statutory obligations established by this Congress.

The FCC has now abandoned all efforts to reinstate these rules. Merger conditions limiting this type of cross-ownership would constitute a form of back door regulation that would allow the FCC to impose restrictions through the merger process that it was unable to enact through regular administrative processes.

On vertical integration, the decisions of the Supreme Court and the merger guidelines establish that the proposed merger is unlikely to have any anticompetitive vertical effects. Any arguments

about likely vertical effects must also take into account that the industry has undergone massive vertical disintegration over the past 15 years. During that time, the level of vertical integration has plummeted from a high of 56 percent in 1994 to a mere 6 percent in 2009. This effect becomes even starker if one focuses only on the most highly-rated television networks.

The lateral or vertical concentration among the most highly-rated networks has plummeted from a high of 93 percent in 1994 to a low of 13 percent today. Moreover, the past 2 years have witnessed the dissolution of the two largest vertically integrated companies operating in this sector.

In 2008, News Corp., the owner of the Fox Television properties, reversed its 2004 acquisition of DirecTV. In 2009, Time Warner, the owner of such leading networks as TBS, CNN, and HBO, spun off its cable operations into a separate company. In short, while vertical integration may arguably have once been a concern at some point in the past, it is hard to make this case in the current business environment.

Anyone suggesting that this merger will harm consumers, thus, bears a heavy burden. They must justify deviating from the standards established by this Congress, the Supreme Court, the FCC, and the antitrust authorities. They must then refute the facts indicating that the merger is so unlikely to hurt consumers that it should be approved under the merger guidelines without further analysis.

Rebutting these arguments requires more than just opinions and conjecture. It requires reasoned analysis and empirical research. This makes the FCC's recent commitment to fact-based decision-making particularly welcome.

The second point I would like to make is to focus attention on the recognized problems associated with using merger reviews to make regulatory policy. Traditional regulatory processes address problems on an industry-wide basis, guarantee public participation, and are subject to meaningful judicial review. Each of these features leads to better decisions and ensures that policies that are enacted remain fair.

The same cannot be said of conditions imposed during the merger review process. Opportunities for public participation are more limited, and even when public participation is permitted, they tend to focus narrowly on the issues raised by a particular transaction instead of on how those issues affect the entire industry. Merger conditions are also less likely to yield clear statements of regulatory policy and are immune from scrutiny by the courts.

Conditions on this merger also would necessarily only address 26 percent of the industry and would leave the vast majority of the problem unaddressed. The use of company-specific adjudications to address issues that confront the entire industry threatens to skew the competitive landscape and raises serious issues of fairness.

This is not to say that the current regulatory regime is perfect. Many industry participants have identified what they see as flaws in the process and have suggested possible reforms. The best course of action, when confronted with regulations that are imperfect, is not to jerry-rig a company-specific solution simply because a particular party happens to be seeking clearance of a merger.

The best practice is to open a general proceeding to address any problems that may exist on an industry-wide basis.

As Chairman Genachowski said, the FCC has exercised ongoing oversight authority in this matter in the past and stands ready to do so in the future. In the wake of an era where the FCC was criticized by this Congress for failing to follow good administrative practices, maintaining the integrity of regulatory process would appear to be particularly important. Any other solution risks turning merger review into a source of back door regulation that hurts consumers, creates bad policy, skews the competitive landscape, and undermines democratic values, as well as the integrity of agency processes.

Thank you.

[The prepared statement of Mr. Yoo follows:]

PREPARED STATEMENT OF CHRISTOPHER S. YOO, PROFESSOR OF LAW AND COMMUNICATION, AND FOUNDING DIRECTOR, CENTER FOR TECHNOLOGY, INNOVATION, AND COMPETITION, UNIVERSITY OF PENNSYLVANIA

Mr. Chairman, Ranking Member Hutchinson, and members of the Committee, I am grateful for the opportunity to testify on the proposed merger between Comcast and NBC Universal. I am happy to offer my analysis of how the merger will affect consumers.

Anyone who examines Title 47 of the U.S. Code can attest to the fact that broadcast and cable television are governed by a complex and elaborate array of regulatory requirements and restrictions. As a result, when two media companies in these sectors merge, they typically have to divest themselves of a number of assets and request a variety of waivers before they can complete their merger. When a merger violates one of these rules or creates market conditions likely to harm consumers, it is entirely appropriate to include conditions in the order clearing the transaction requiring that the merging parties bring themselves into compliance.

One of the most striking aspects of the proposed transaction is how clean the combination of Comcast and NBC Universal would be in this regard. The transaction does not create any new compliance issues,[1] and as I will discuss in greater detail later in my testimony, conventional antitrust analysis indicates that the relevant markets are structured in a way that makes it unlikely that the merger will harm consumers.

Despite the fact that consummation of this merger would not create any violation any of the existing rules or any anticompetitive harms, opponents of the transaction are asking regulatory authorities to use the merger clearance process to impose additional conditions on the merging parties.

Commissioners of the Federal Communications Commission (FCC) and commentators have long criticized the use of merger conditions as a mechanism for making

[1] NBC Universal and its parent company, General Electric, are addressing two minor, preexisting compliance issues. Applications and Public Interest Statement by Comcast Corp. General Electric Co., and NBC Universal, Inc., at 73–75 (filed Jan. 28, 2010), *Applications for Consent to the Transfer of Control of Licenses, General Electric Co., Transferor, to Comcast Corp., Transferee* (MB Dkt No. 10–56). NBC's acquisition of Telemundo gave it control of three television stations in the Los Angeles market. Because the Los Angeles broadcast television market is home to more independent ownership groups than any city in the Nation and because forced sales reduce the value of stations and artificially limit the range of potential buyers, the FCC ruled that it was in the public interest to grant NBC a temporary waiver of its duopoly rule. *Telemundo Communications Group, Inc. Transferor, and TN Acquisition Corp., Transferee,* Memorandum Opinion and Order, 17 F.C.C.R. 6968–79¶¶46–53 (2002). In addition, the bankruptcy of American Community Newspapers caused debt owned by General Electric to be converted into nonvoting equity, which under the FCC's rules turned General Electric into a partial owner of two small community newspapers in Fort Worth, Texas, whose communities of service fall within the contour of one of its television stations. Given the involuntary nature of such changes, FCC policy usually accords parties subject to such a change in status a reasonable time to come into compliance with these rules. The Public Interest Statement reaffirmed the merging parties' commitment to resolving these issues in a reasonable timeframe.

It bears noting that neither of these compliance issues is the result of the proposed merger. They are preexisting issues that are independent of the merger and would exist even if this merger had never been contemplated.

policy.[2] Traditional notice-and-comment rulemaking promotes public participation. By their nature, merger conditions restrict conduct permitted by the existing rules (otherwise the restriction would be imposed by general regulation rather than by the order clearing the merger). The problem is that they are imposed outside of the normal regulatory processes, and even when orders clearing the merger are subject to notice and comment, the resolution of the issues is more likely to be driven by the issues raised by a particular transaction and less likely to yield a clear statement of agency policy.

In many cases, merger conditions address conduct that is not the result of the merger, and in most, if not all, cases, these issues addressed by the merger conditions are the subject of ongoing proceedings before the FCC. The use of company-specific adjudications to address issues that confront the entire industry threatens to skew the competitive landscape and raises serious issues of fairness. Moreover, merger conditions cannot be appealed, because the voluntariness of the commitment may well immunize it from meaningful judicial review.

At best, the use of the merger review process to impose conditions represents a source of delay and uncertainty that reduces the industry's ability to adjust to a rapidly changing and increasingly challenging technological and economic landscape. At worst, it represents a form of backdoor regulation that hurts consumers, singles out individual companies for restrictions that could not necessarily withstand the rigors of normal regulatory processes, and undermines democratic values as well as the integrity of agency processes.

It is no doubt tempting to use company-specific measures to address industry-wide problems. Even if the existing regulatory regime is not perfect, the better and fairer course is to address these shortcomings through the standard administrative processes. Consistent with these concerns, the current Commission has expressed reluctance to impose merger conditions that "are not narrowly tailored to prevent a transaction-specific harm" and has admonished that for harms that "apply broadly across the industry," it is "more appropriate for a Commission proceeding where all interested industry parties have an opportunity to file comments."[3] Particularly given Congress's recent criticisms of the FCC for its failure to adhere to sound regulatory practices,[4] such commitments are particularly welcome.

The Standard Framework for Analyzing the Consumer Impact of Mergers

The standard framework for evaluating the consumer impact of any merger is enshrined in the *Merger Guidelines* jointly promulgated by the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice.[5] Recent studies

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[2] For FCC Commissioner's criticisms of the merger conditions, see *Verizon Communications Inc. and MCI, Inc.*, Memorandum Opinion and Order, 20 F.C.C.R. 18433, 18573 (2005) (separate statement of Abernathy, Comm'r); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee,* Memorandum Report and Order, 16 F.C.C.R. 6547, 6713 (2001) (Powell, Comm'r, concurring in part and dissenting in part); *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee,* Memorandum Opinion and Order, 14 F.C.C.R. 14712, 15197–200 (1999) (Powell, Comm'r, concurring in part and dissenting in part); *id.* at 15174–96 (Furchtgott-Roth, Comm'r, concurring in part and dissenting in part); *Application of Worldcom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to Worldcom, Inc.,* Memorandum Report and Order, 13 F.C.C.R. 18025, 18166 (1998) (separate statement of Powell, Comm'r); id. at 18159 (separate statement of Furchtgott-Roth, Comm'r).

For commentators' criticisms of the merger conditions, see Rachel Barkow & Peter Huber, *A Tale of Two Agencies: A Comparative Analysis of FCC and DOJ Review of Telecommunications Mergers,* 2000 U. CHI. LEGAL F. 29, 54, 62–66, 69–81; Harold Furchtgott-Roth, *The FCC Racket*, WALL ST. J., Nov. 5, 1999, at A18; Bryan Tramont, *Too Much Power, Too Little Restraint: How the FCC Expands Its Reach Through Unenforceable and Unwieldy "Voluntary Agreements,"* 53 FED. COMM. L.J. 49, 51–59 (2000); Daniel E. Troy, *Advice to the New President on the FCC and Communications Policy,* 24 HARV. J.L. & PUB. POL'Y 503, 505–09 (2001); Philip J. Weiser, *Institutional Design FCC Reform and the Hidden Side of the Administrative State,* 61 ADMIN. L. REV. 675, 708–11 (2009); Christopher S. Yoo, *New Models of Regulation and Interagency Governance,* 2003 MICH. ST. DCL L. REV. 701, 704.

[3] *Applications of AT&T Inc. and Centennial Communications Corp.,* Memorandum Opinion and Order, 48 Communications Reg. (P & F) 1186 ¶ 141 (Nov. 5, 2009).

[4] STAFF OF H. COMM. ON ENERGY AND COMMERCE, 110TH CONG., DECEPTION AND DISTRUST: THE FCC UNDER CHAIRMAN KEVIN J. MARTIN (Dec. 2008), available at *http://energycommerce.house.gov/images/stories/Documents/PDF/Newsroom/fcc%20majority%20staff%20report%20081209.pdf*.

[5] First promulgated in 1968, the portion of the guidelines governing horizontal mergers was last revised in 1997. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (revised Apr. 8, 1997), available at *http://www.justice.gov/atr/public/guidelines/hmg.pdf* [hereinafter HORIZONTAL MERGER GUIDELINES]. That revision left in place the existing guidelines governing nonhorizontal (including vertical) mergers, which were last revised in 1984.

conducted by Federal Trade Commission and the Justice Department reveal that actual enforcement policy is even more permissive.[6] The thresholds contained in the *Merger Guidelines* should thus be considered a safe harbor within which parties should not expect to be challenged. Conversely, the fact that a merger may exceed the relevant thresholds by a small amount should not be regarded as inherently problematic.

The *Merger Guidelines* draw a distinction between *horizontal mergers* and *vertical mergers*. A merger is horizontal if it is between two firms that sell products that substitute for one another. In short, consumers are likely to buy one or the other, but not both, which makes the firms selling these products direct competitors. A merger is vertical if it is between firms that sell products that complement one another, in that they are consumed together. In these cases, the fact that consumers typically have to buy both products if they are to enjoy them means that these parties to a vertical merger do not compete directly with one another.

To use a concrete example, consider the difference between computers and the software that runs on them. Suppose there were two computer manufacturers that made devices with similar capabilities and vie to sell their goods to the same consumers. To the extent that consumers regard the decision between these two computers as an either-or choice, these products are considered substitutes, and a combination between those two computer manufacturers would be a horizontal merger.

Consumers do not regard the choice between software and hardware as an either-or choice. On the contrary, a computer that has no software is useless, as is software without a computer on which to run it. As a result, consumers must buy both types of products and use them together to gain any benefit from the products. Rather than being an either-or choice, a consumer buying a computer is more likely to buy software and vice versa. Software and hardware are thus considered complements, and a merger between a software and hardware manufacturer would be considered a vertical merger.

Vertical mergers raise fewer competitive concerns than horizontal mergers.[7] Consequently, the *Merger Guidelines* incorporate more permissive standards for vertical mergers than for horizontal mergers.

The proposed Comcast-NBC Universal merger has both horizontal and vertical aspects. Both firms provide two distinct products. Both serve as a source of video programming through broadcast networks (such as NBC and Telemundo) and cable networks (such as the USA Network and the Golf Channel). Both also provide retail distribution of video programming through broadcast television stations owned and operated by NBC or through cable operators owned by Comcast.

The merging firms predominantly operate in one or the other product market. NBC Universal predominantly provides television network programming. Comcast's primary business is in retail distribution. The focus of the inquiry into this merger should be on vertical combination of these two adjacent levels of production. The merger does have potential horizontal effects as well, although these are very likely to be quite small. For completeness, I will analyze each issue in turn, beginning with the horizontal effects.

Horizontal Integration in the Market for Retail Video Distribution

The proposed Comcast-NBC Universal merger does raise issues of horizontal concentration in the market for retail video distribution. That said, these issues are relatively minor. Simply put, while Comcast is a major player in the market for retail video distribution, NBC Universal is not.

The analytical framework laid out in the *Merger Guidelines* turns on a measure of concentration known as the Herfindhal-Hirschman Index (HHI), which measures the degree of market concentration by ranking it on a scale from 0 to 10,000.[8] Markets with HHIs below 1,000 are considered unconcentrated. Markets with HHIs between 1,000 and 1,800 are considered moderately concentrated. Markets with HHIs

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U.S. DEP'T OF JUSTICE, MERGER GUIDELINES (revised June 14, 1984), available at *http://www.justice.gov/atr/public/guidelines/2614.pdf* [hereinafter NON-HORIZONTAL MERGER GUIDELINES].

[6] FED. TRADE COMM'N, HORIZONTAL MERGER INVESTIGATION DATA, FISCAL YEARS 1996–2005 tbl. 3.1 (Jan. 25, 2007), available at *http://www.ftc.gov/os/2007/01/P035603horizmergerinvestigationdata1996-2005.pdf*; FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, MERGER CHALLENGES DATA, FISCAL YEARS 1999–2003 tbl. 1(Dec. 18, 2003), available at *http://www.justice.gov/atr/public/201898.htm*.

[7] NON-HORIZONTAL MERGER GUIDELINES, *supra* note 5, § 4.0, at 23.

[8] According to the *Merger Guidelines,* HHI is calculated by summing the squares of the individual market shares of all the participants. For example, a market consisting of four firms with market shares of 30 percent, 30 percent, 20 percent and 20 percent has an HHI of $30^2 + 30^2 + 20^2 + 20^2 = 2{,}600$. HORIZONTAL MERGER GUIDELINES, *supra* note 5, § 1.5, at 15 & n.17.

above 1,800 are considered highly concentrated. The degree of market concentration in turn determines the degree of antitrust scrutiny:

Figure 1: HHI Thresholds Under the Merger Guidelines

Post-Merger HHI	Increase in HHI Caused by Merger	Outcome
Less than 1,000	N/a	Approved w/o further analysis
1,000–1,800	Less than 100	Approved w/o further analysis
1,000–1,800	More than 100	Further analysis required
More than 1,800	Less than 50	Approved w/o further analysis
More than 1,800	More than 50	Further analysis required
More than 1,800	More than 100	Presumed anticompetitive

Source: HORIZONTAL MERGER GUIDELINES, *supra* note 5, § 1.51, at 16.

When one looks at actual enforcement policy, the numbers become even more striking. During the decade under study (which spanned both Democratic and Republican Administrations), neither the Federal Trade Commission nor the Justice Department ever brought an enforcement action when the HHI was less than 2000 and the post-merger increase in HHI was less than 100.[9] Actual enforcement practice in the telecommunications industry appears to be even more permissive,[10] which is understandable given the scale economies inherent in the industry.

In the market for retail distribution, competition policy has traditionally drawn a distinction between single-channel television providers (such as broadcasters) and multichannel television providers (such as cable operators like Comcast, satellite television providers like DirecTV, and similar offerings provided by telephone companies, such as Verizon's FiOS or AT&T's U-verse), which the statute calls multichannel video programming distributors (MVPDs).

MVPDs participate in multiple markets. First, they serve household subscribers, who consume video programming. Second, they sell advertising. Third, they obtain programs from various programming sources. The geographic scope of these markets differs substantially. The first two markets are local in scope. The third is national.

The FCC's Annual Assessments of the Status of Competition in the Market for the Delivery of Video Programming (Video Competition Reports) routinely report HHI numbers for the MVPD market. Because the FCC has not released data since 2006, I have attempted to reconstruct their calculation from similar sources.

Figure 2: HHI in the National Market for MVPDs (as of June 2009)

Company	Subscribers	Share	HHI
Comcast	23,891,000	23.3%	541
DirecTV	18,304,999	17.8%	317
DISH Network	13,610,000	13.2%	176
Time Warner Cable	13,048,000	12.7%	161
Cox	5,316,055	5.2%	27
Charter	4,929,900	4.8%	23
Cablevision	3,093,000	3.0%	9
Verizon FiOS	2,515,551	2.4%	6
Bright House	2,301,320	2.2%	5
AT&T U-verse	1,585,470	1.5%	2
Other	14,139,493	13.8%	5
Total	102,734,788	100.0%	1,272

Sources: SNL Kagan, Top Cable MSOs, June 2009; SNL Kagan, Basic & HD Cable Economics, 2009-2018; Media Business Corp., Media Census: All Video by DMA, 2Q2009.

I calculate that as of the end of 2009, the HHI in the national MVPD market was 1,272. This represents a drop of 75 points from the year before. This implies that the national market for MVPDs is moderately competitive. Moreover, because NBC Universal does not control any MVPD assets, the post-merger increase in HHI is zero. Thus, under the approach described in the *Merger Guidelines,* which represents the starting point for all antitrust analyses, the Comcast-NBC Universal merger is unlikely to have any adverse effect on consumers. Under the *Merger*

[9] FED. TRADE COMM'N, *supra* note 6, tbl. 3.1; FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, *supra* note 6, tbl. 1.

[10] FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, *supra* note 6, tbl. 6.

Guidelines, policymakers may thus set aside without any further analysis any concerns about the impact on horizontal concentration in the national market in which MVPDs bargain with sources of television programming.

National numbers fail to capture conditions in the local market in which MVPDs provide service to subscribers and advertisers. Clearly, many consumers do not have as many MVPD options as they would like. That fact should not overshadow the ever-increasing competitiveness of local markets for MVPDs. Congress has established a threshold for determining when an MVPD faces sufficiently effective competition to justify exempting it from rate regulation. Under this standard, an MVPD faces effective competition if another MVPD offers service to at least 50 percent of households in the service area and the unaffiliated MVPDs together capture more than 15 percent of the market. An MVPD also faces effective competition if the local exchange carrier offers multichannel service regardless of how many subscribers they have.[11]

Studies show that direct broadcast satellite (DBS) providers, such as DirecTV and the DISH Network, have emerged as direct competitors to cable companies.[12] DBS is available to any household with a clear view of the southern sky and thus should be available in well over 50 percent of every service area. Moreover, as of the end of 2009, DirecTV's national market share is now 18 percent, and the DISH Network's market share is now 13 percent. Published reports indicate that as of mid–2009, DirecTV's share of video subscribers exceeded 15 percent in 181 out of 211 DMAs, and the DISH Network's share exceeded 15 percent in 132 out of 211 DMAs. When DBS subscribership is combined with the new offering by telephone companies discussed below, the market share of unaffiliated MVPDs exceeds the 15 percent threshold in virtually every DMA in the country.[13]

At the same time, telephone companies are investing billions to increase the capacity of their networks and are actively competing with cable operators in the market for distributing multichannel video. Verizon has committed approximately $24 billion to build out its fiber-based FiOS network. AT&T is investing $7 billion in its U-verse network. This competition should intensify further as the buildout of these networks continues. As noted earlier, the fact that the local telephone company is offering MVPD services in these service areas automatically indicates that these areas should be considered as subject to effective competition.

Because NBC Universal does not possess any MVPD properties, the proposed merger would neither increase nor decrease concentration in the MVPD market. As a result, the merger would have no horizontal effects on the 87 percent of U.S. households that depend on an MVPD for their television service.[14] Although many subscribers complain about cable prices, these subscribers are also receiving significantly larger numbers of channels. Empirical studies indicate that when adjusted for the number of channels, rate regulation caused quality-adjusted cable rates to rise, while deregulation caused quality-adjusted cable rates to fall.[15] Although I am certain that these consumers could wish for more options and more competition, the evidence suggests that the market is already quite competitive and becoming more so.

At the same time, Comcast possesses no broadcast television stations. The proposed merger will thus have no effect on the remaining 13 percent of U.S. households that rely solely on over-the-air service for the television needs. An analysis of the number of over-the-air channels available in these markets suggests that the broadcast-only portions of these markets remain relatively competitive. Moreover, where competition is lacking, it is the result of the FCC's spectrum allocation properties and would remain whether or not the merger is allowed to proceed.

Figure 3: Number of Commercial Over-the-Air Channels Available in Overlap DMAs

Market	Total Channels	Channels Owned by NBC
Chicago	40	5
San Francisco	31	3

[11] 47 U.S.C. § 543(l)(1)(B) & (D).

[12] *See Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992,* Report on Cable Industry Prices, 16 F.C.C.R. 4346, 4364–65 ¶ 53 (2001); Austin Goolsbee & Amil Petrin, *The Consumer Gains from Direct Broadcast Satellites and the Competition with Cable TV,* 72 ECONOMETRICA 351 (2004).

[13] Media Business Corp., Media Census: All Video by DMA, 2Q2009.

[14] SNL Kagan, *Basic & HD Cable Economics, 2009–2018*.

[15] *See* THOMAS W. HAZLETT & MATTHEW L. SPITZER, PUBLIC POLICY TOWARD CABLE TELEVISION (1997); Gregory S. Crawford, *The Impact of the Household Demand and Welfare*, 31 RAND J. ECON. 422 (2000).

Figure 3: Number of Commercial Over-the-Air Channels Available in Overlap DMAs—Continued

Market	Total Channels	Channels Owned by NBC
Washington	32	3
Miami	27	4
Philadelphia	30	2
Hartford-New Haven	21	1

Source: BIA Media Access Pro 4.5 Television Analyzer Data base, 2009 data.

Although the FCC has previously considered treating broadcast stations and MVPDs as being in the same product market, subsequent congressional action foreclosed this possibility.[16] Moreover, the FCC addressed precisely this issue when determining whether combining DirecTV with the Fox television stations owned by News Corp. raised any horizontal issues. The FCC concluded that a merger combining broadcast stations with an MVPD "does not present horizontal concentration issues" because the FCC has already determined that MVPDs and broadcast television are not sufficiently substitutable to fall within the same product market.[17]

Equally importantly, the FCC once imposed a rule preventing a single entity from owning both a cable operator and a television station in the same market. The court reviewing this rule concluded that it was inconsistent with the FCC's statutory obligations and ordered the FCC to vacate it.[18] The FCC subsequently did so and appears to have abandoned all efforts to reinstate it.[19]

Any attempt to impose merger conditions treating the cross-ownership of a television station and cable operator serving the same area as problematic would amount to ad hoc, company-specific regulation of the type that would raise both fairness and procedural concerns. The fact that the courts overturned the rule because of the FCC's inability to offer a principled basis for it dictates that any attempt to penalize the merging parties for such a cross-ownership arrangement would raise concerns under the rule of law. Even if these considerations are taken for all they are worth, it bears noting that with 26 stations, the merged entity would control less than 2 percent of the nearly 1400 commercial broadcast television stations in the U.S., and only 6 of those stations (representing roughly 0.6 percent of the total number of commercial stations) operate in areas also predominantly served by Comcast.[20]

That said, the decisions ruling that broadcasting and MVPDs constitute distinct product markets antedated the digital television transition. As I have noted in my previous work, digital broadcasters have the option to use their channels to transmit multiple streams of standard-definition television.[21] The result is a dramatic increase in the number of channels available. For example, Los Angeles residents can now receive nearly 70 over-the-air television stations. News reports indicate that the increase is so dramatic that some viewers are considering dropping their MVPD service and instead simply relying on broadcasting.[22] Including broadcasters and MVPDs in the same product market would radically deconcentrate the market for local television distribution and make them more competitive.

But perhaps the most dramatic development of recent years is the emergence of the Internet as an important means for distributing video programming, demonstrated most forcefully by the growing importance of properties such as YouTube and Hulu. The proliferation of new last-mile broadband technologies has made de-

[16] For the regulatory history examining the circumstances under which broadcasting could be regarded as a substitute for cable, see Christopher S. Yoo, *Vertical Integration and Media Regulation in the New Economy,* 19 YALE J. ON REG. 171, 228 & n.218 (2002).

[17] *General Motors Corp. and Hughes Electronics Corp., Transferors, and News Corp., Ltd., Transferee,* Memorandum Opinion and Order, 19 F.C.C.R. 473 (2004) (citing *Competition, Rate Deregulation, and the Commission's Policies Relating to the Provision of Cable Services,* Report 5 F.C.C.R. 4962, 5001 ¶62 (1990); *EchoStar Communications Corp., General Motors Corp., Hughes Electronics Corp. (Transferors) and EchoStar Communications Corp. (Transferees),* Hearing Designation Order, 17 F.C.C.R. 20559, 20607–09 ¶¶109–115 (2002)).

[18] *Fox Television Stations, Inc.* v. *FCC,* 280 F.3d 1027, 1049–53 (D.C. Cir. 2002).

[19] *1998 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Pursuant to Section 202 of the Telecommunications Act of 1996,* Order, 18 F.C.C.R. 3002 (2003).

[20] Comcast also has a relatively small presence in the New York DMA, in which it serves less than 10 percent of the area.

[21] Yoo, *supra* note 12, at 213.

[22] *After Digital Switch, Basic TV Offers Cable Alternative*, NPR WEEKEND EDITION, Feb. 27, 2010, available at *http://www.npr.org/templates/story/story.php?storyId=124056416;* David Sarno, *In the Digital TV Era, Rabbit Ears Multiply*, L.A. TIMES, Dec. 25, 2009, at 1.

termining the level of horizontal concentration in the market for high speed data more difficult.

Figure 4: HHI in the National Market for High Speed Data (as of September 2009)

Company	Subscribers	Share	HHI
Comcast	15,684,000	21.4%	459
AT&T	15,638,000	21.4%	456
Verizon	9,174,000	12.5%	157
Time Warner Cable	9,167,000	12.5%	157
Cox	4,150,000	5.7%	32
Charter	3,010,100	4.1%	17
Qwest	2,951,000	4.0%	16
Cablevision	2,522,000	3.4%	12
CenturyLink	2,189,000	3.0%	9
Bright House	1,441,384	2.0%	4
Other	7,310,768	10.0	7
Total	73,237,252	100.0%	1,326

Sources: SNL Kagan, Top Cable MSOs, September 2009; Press Release, Leichtman Research Group, Over 900,000 Add Broadband in the Third Quarter of 2009 (Nov. 13, 2009), available at *http://www.leichtmanresearch.com/press/111309release.html*.

The calculation is further complicated by the advent of wireless broadband technologies. The most recent data reported by the FCC indicate that wireless broadband has already captured nearly 25 percent of the market for high-speed lines (defined as connections providing 200 kbps in at least one direction) and nearly 17 percent of the market for advanced service lines (defined as connections providing 200 kbps in both directions).[23] Because the market for wireless broadband services are even more competitive than the market for wireline broadband services, the addition of wireless broadband services would probably deconcentrate the market still further and make it even more price competitive.

As a result, the market for high speed data is moderately unconcentrated. Again, it bears emphasizing that only one of the merging parties (Comcast) offers high-speed broadband services. The level of competitiveness is determined by the economics of the industry, which typically involves significant fixed costs, not the merger. Thus, permitting the merger to proceed would not alter the level of concentration in this market one iota. Conversely, to the extent that the concern is too few options in last-mile broadband services, blocking the merger would not address this concern in any way.

Horizontal Integration in the Market for Television Networks

The horizontal issues in the market for video programming are the converse of those raised in the market for retail video distribution. In the case of retail video distribution, NBC Universal has a miniscule presence, while Comcast has a significant share of the market. In the market for television networks, it is the other way around.

It is obvious that NBC Universal is a significant player in the market for television networks. If one considers only cable networks (and ignores broadcast networks) and measures market share in terms of total industry revenue, NBC Universal, led by USA Network, SyFy, CNBC, and Bravo, has earned an 8.8 percent share of the market revenue, good for 4th place among all cable programmers. Comcast in comparison is a relatively minor provider of cable programming. Its highest ranked channel is E! Entertainment Television, which checks in as the 34th-highest grossing channel.[24] Altogether, Comcast's cable programming properties account for only 3.3 percent of overall market revenues. The combined company would control only 12.1 percent of the market, which would leave the merged company in 4th place among cable programming companies. Most importantly, post-merger HHIs would only be 1,202, and the merger would lead to an increase of only 58 points. Under the thresholds provided by the Merger Guidelines, regulatory authorities should conclude without further analysis that the horizontal impact of this merger on the market for television networks will not adversely affect consumers.

[23] FED. COMMC'NS COMM'N, HIGH-SPEED SERVICES FOR INTERNET ACCESS: STATUS AS OF DECEMBER 31, 2008, at 8–9 (Feb. 2010), available at *http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296239A1.pdf*.

[24] Estimates by SNL Kagan 2009 (combining advertising and affiliate revenue).

Figure 5: HHI in the Market for National Cable Networks as Measured by Total Revenue

(as of April 2009)

Company	Revenue (millions)	Pre-Merger Share	HHI	Post-Merger Share	HHI
Walt Disney	$9,388	20.6%	426	20.6%	426
Time Warner Inc.	$8,471	18.6%	347	18.6%	347
Viacom	$5,528	12.2%	148	12.2%	148
NBC Universal	$4,003	8.8%	77	12.1%	147
News Corp. (Fox)	$3,260	7.2%	51	7.2%	51
A&E Networks	$2,504	5.5%	30	5.5%	30
Discovery	$1,944	4.3%	18	4.3%	18
Comcast	$1,505	3.3%	11	N/A	N/A
Liberty Media	$1,371	3.0%	9	3.0%	9
Scripps	$1,251	2.7%	8	2.7%	8
Other	$6,265	13.8%	19	13.8%	19
Total	$45,491	100.0%	1,144	100.0%	1,202

Source: SNL Kagan, SNL Kagan Cable Network Ownership Data, Economics of Basic Cable Networks (2009 ed.).

Evaluating the market power in terms of primetime Nielsen ratings instead of total revenue tells a similar story. NBC is again in 4th place, with a market share of 11.5 percent, while Comcast controls a mere 2.4 percent of the market for cable television networks. The post-merger HHI would be 1249, and the merger would lead to an increase of only 55 points. Calculating market shares based on total-day Nielsen ratings instead of primetime Nielsen ratings yields similar results. Again, under the Merger Guidelines, this data also supports the conclusion that the horizontal effects of this merger on the market for television networks will not adversely affect consumers.

Figure 6: HHI in the Market for National Cable Networks as Measured by Primetime Nielsen Ratings

(Full-Year Average for 2009)

Owner	Nielsen Rating	Pre-Merger Share	HHI	Post-Merger Share	HHI
Viacom	7.0	19.9%	396	19.9%	396
Time Warner Inc.	6.0	17.1%	291	17.1%	291
Walt Disney	4.6	13.1%	171	13.1%	171
NBC Universal	4.0	11.5%	132	13.9%	192
A&E Networks	3.0	8.5%	72	8.5%	72
News Corp. (Fox)	2.7	7.5%	57	7.5%	57
Discovery	2.2	6.2%	38	6.2%	38
Scripps	1.5	4.4%	19	4.4%	19
Cablevision	0.9	2.4%	6	2.4%	6
Comcast	0.8	2.4%	6	N/A	N/A
Other	2.5	7.1%	7	7.1%	8
Total	35.1	100.0%	1,194	100.0%	1,249

Sources: Nielsen Media Research National MIT; SNL Kagan, Economics of Basic Cable Networks (2009 ed.).

This basic conclusion does not change if one expands the analysis to include broadcast television networks as well as cable networks. Beginning again by measuring markets in terms of total revenue, the post-merger HHI is 1186, and the merger would lead to an increase of only 67 points.

Figure 7: HHI in the Market for All National Television Networks as Measured by Total Revenue

(as of April 2009)

Company	Revenue (millions)	Pre-Merger Share	HHI	Post-Merger Share	HHI
Walt Disney	$12,638	20.7%	428	20.7%	428
Time Warner Inc.	$8,766	14.3%	206	14.3%	206
General Electric	$8,260	13.5%	183	16.0%	255
News Corp. (Fox)	$5,724	9.4%	88	9.4%	88
CBS Corp.	$5,546	9.1%	82	9.1%	82
Viacom	$5,528	9.0%	82	9.0%	82
A&E Networks	$2,504	4.1%	17	4.1%	17

Figure 7: HHI in the Market for All National Television Networks as Measured by Total Revenue—Continued

(as of April 2009)

Company	Revenue (millions)	Pre-Merger Share	HHI	Post-Merger Share	HHI
Discovery	$1,944	3.2%	10	3.2%	10
Comcast	$1,505	2.5%	6	N/A	N/A
Liberty Media	$1,371	2.2%	5	2.2%	5
Other	$7,328	12.0%	13	12.0%	13
Total	$61,114	100.0%	1,119	100.0%	1,186

Sources: SNL Kagan, SNL Kagan Cable Network Ownership Data, Economics of Basic Cable Networks (2009 ed.).

The same is true if one includes both broadcast and cable networks and measure market share in terms of primetime Nielsen rating. The post-merger HHI is 1,114, and the merger would lead to an increase of only 42 points. Similar results hold if one uses total day Nielsen ratings instead of primetime ratings.

Figure 8: HHI in the Market for All National Television Networks as Measured by Primetime Nielsen Ratings

(Full-Year Average for 2009)

Company	Nielsen Rating	Pre-Merger Share	HHI	Post-Merger Share	HHI
Walt Disney	8.8	15.0%	225	15.0%	225
NBC Universal	8.7	14.7%	217	16.2%	261
News Corp. (Fox)	8.0	13.6%	184	13.6%	184
Viacom	7.0	11.9%	141	11.9%	141
Time Warner Inc.	6.5	11.0%	121	11.0%	121
CBS Corp.	6.3	10.8%	116	10.8%	116
A&E Networks	3.0	5.1%	26	5.1%	26
Univision	2.2	3.7%	14	3.7%	14
Discovery	2.2	3.7%	13	3.7%	13
Scripps	1.5	2.6%	7	2.6%	7
Cablevision	0.9	1.4%	2	1.4%	2
Comcast	0.8	1.4%	2	N/A	N/A
Other	3.0	5.1%	4	5.1%	4
Total	58.8	100.0%	1,072	100.0%	1,114

Sources: Nielsen Media Research National MIT; SNL Kagan, Economics of Basic Cable Networks (2009 ed.); Company websites and Form 10-K filings.

As noted earlier, the Internet has become an increasingly important source of video programming. In this market, the amounts controlled by the merging parties are trivial. NBC Universal controls only 0.7 percent of online video properties as measured by videos viewed. Comcast is even smaller at 0.3 percent.[25] As a result, the merger would only cause HHI to increase by 3. NBC Universal holds a 32 percent stake interest in Hulu. It is not clear whether this holding is sufficient to attribute an ownership interest to NBC Universal. Hulu operates independently of both companies and has its own management. In any event, Hulu controls only 4.0 percent of the online video market. Even if it is included and all nonprofessional video content is omitted, the merger would only cause HHI to increase by 19.

No matter how one frames the issue, the level of horizontal concentration in the market for video programming resulting from this merger is sufficiently low to justify clearing the merger without any serious inquiry. In one respect, however, the advent of Internet video serves as a cautionary tale. One of the major differences between Internet distribution and conventional distribution of video programming is that advertising rates are much lower on the Internet. As a result, producers of video programming are facing much the same quandary as newspapers, another great source of high-quality content. As the shift to online distribution caused advertising revenue to dwindle, newspapers were forced to change their business model. Either they needed to find new sources of revenue, or they needed to drastically reduce their costs. Newspapers also sought repeal of the newspaper-broadcast cross-ownership rule, only to see these efforts blocked by opponents. Many of those who initially opposed these reform efforts have since changed course and are now looking for ways to bolster the newspaper industry.

[25] comScore, Media Matrix Report, Nov. 209, available at *http://www.comscore.com*.

Producers of video programming face the same challenge. They are responding to the reduction in advertising revenue by exploring new pricing models, even those that may require consumers to pay for content that they received for free during the early, exploratory days of Internet video. In addition, they are exploring new forms of cross-ownership to reduce costs and to better leverage their programming properties. The path followed by the newspaper industry should serve as a reminder of the dramatic changes that are transforming media industries and the potential costs of limiting companies' ability to respond to those changes.

Vertical Integration Between the Market for Television Networks and the Market for Retail Video Distribution

The preceding discussion established that the horizontal aspects of the proposed Comcast-NBC Universal merger do not exceed the thresholds generally used to evaluate when such a merger might potentially harm consumers. Whatever potential harms that may result from the merger must thus lie in the vertical integration between video programming and distribution.

Vertical integration theory has long been a source of tremendous controversy in antitrust law.[26] Some basic points of consensus have emerged and are now reflected in the *Non-Horizontal Merger Guidelines*.

First, the firm must have market power in one market (typically called the primary market). Without market power in the primary market, the merging firm would have nothing to use as leverage over the other market. Market power in the primary market is assessed according to HHI. Because, as noted earlier, vertical mergers raise fewer anticompetitive concerns than horizontal mergers, the guidelines indicate that antitrust authorities are unlikely to challenge a vertical merger unless HHI in the primary market exceeds 1,800.[27]

Second, the other, vertically related market (typically called the secondary market), must be structured in a way that makes it vulnerable to monopolization. Otherwise, any attempt by the merging firm to use its control over the primary market to exert pressure on the secondary market would simply cause consumers to shift their purchases to other producers. This typically requires that the secondary market be concentrated and protected by entry barriers.[28]

Third, even if these structural preconditions are met, the *Merger Guidelines* recognize that the presence of offsetting efficiencies might nonetheless justify permitting a merger to go forward even when the market is structured in such a manner as to raise the possibility that the merger might have some anticompetitive effects.[29]

In the case of the proposed Comcast-NBC Universal merger, the primary market is presumably the market for retail video distribution, which is to be used as leverage over the programming market. Although television networks would, of course, like to have the broadest reach possible, they do not care if they can reach viewers in any particular location so long as they can reach a sufficient number of viewers nationwide to achieve minimum efficient scale. The market in which networks contract with MVPDs is thus a national one. To programmers, it is national reach, not local reach, that matters.

The foregoing discussion of the potential horizontal issues reveals that the national market for retail video distribution is not even remotely close to the 1800 HHI level of concentration needed for vertical integration to even plausibly pose an anticompetitive threat. Moreover, as of 2006, there were 565 cable networks already on the air, with another 83 in the planning stages.[30] Given this level of deconcentration and the ease of entry, it is hard to see how anyone could credibly argue that the merger poses a threat to consumers.

In addition, over the past decade, the level of vertical integration between cable networks and MVPDs has been dropping like a stone. For example, in 2008, News Corp. divested itself of its 2004 acquisition of DirecTV. Furthermore, in early 2009, Time Warner separated its programming and retail distribution assets when it spun off its cable operations into a separate company known as Time Warner Cable. As a result, vertical integration in the cable industry has never been lower.

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[26] *See* Yoo, *supra* note 12, at 187–205 (tracing the longstanding debate between the Chicago and post-Chicago schools of antitrust law and economics).

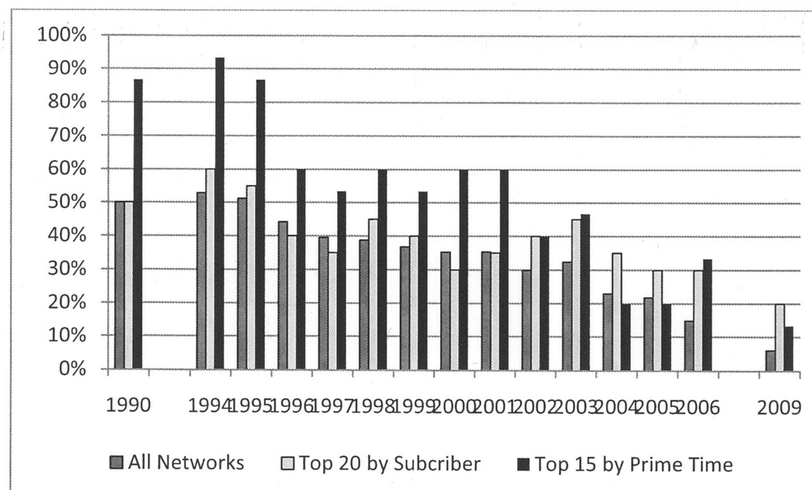
[27] NON-HORIZONTAL MERGER GUIDELINES, *supra* note 5, § 4.213, at 28.

[28] *Id.* § 4.212, at 27–28.

[29] *Id.* § 4.24, at 30.

[30] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* Thirteenth Annual Report, 24 F.C.C.R. 542, 550 ¶ 20, 635 ¶ 193 (2009).

Figure 9: Vertical Integration Between Cable Networks and MVPDs



Sources: FCC Annual Video Competition Reports; Nielsen Media Research National MIT, Annual Prime HH 2005–2009; SNL Kagan, Economics of Basic Cable Networks 2008, pp. 88–90, 117, 161; SNL Kagan, TV Network Summary; SNL Kagan, Economics of Basic Cable Networks 2009, Section VII.

The belief that vertical integration is unlikely to harm consumers unless the structural preconditions specified in the *Merger Guidelines* are met is based on more than just theory. Recent years have witnessed numerous vertical mergers in relevant industries, including News Corp.'s 2004 acquisition (and subsequent spinoff) of DirecTV, America Online's 2001 acquisition (and subsequent spinoff) of Time Warner, as well as Time Warner's 1996 acquisition of Turner Broadcasting. In each case, the vertical aspects of the merger did not pose a threat to consumers.

The likelihood that vertical integration will not harm consumers draws further support from the empirical studies on vertical restraints. For example, a recent study conducted by four members of the FTC's staff surveying twenty-two published empirical studies (including four studies of vertical integration in the cable industry) found "a paucity of support for the proposition that vertical restraints/vertical integration are likely to harm consumers." Indeed, only one study unambiguously found that vertical integration harmed consumers, and "in this instance, the losses are miniscule ($0.60 per cable subscriber per year)." On the other hand, "a far greater number of studies found that the use of vertical restraints in the particular context studied improved welfare unambiguously," including at least one study in the cable industry. The survey thus concluded that "[m]ost studies find evidence that vertical restraints/vertical integration are pro-competitive." The weight of the evidence thus "suggests that vertical restraints are likely to be benign or welfare enhancing."[31]

Another survey published in the *Handbook of Antitrust Economics* similarly reviewed twenty-three published empirical studies of vertical restraints. Despite the relatively small sample size, the authors found the empirical evidence to be "quite striking," "surprisingly consistent," "consistent and convincing," and even "compelling." As a general matter, "privately imposed vertical restraints benefit consumers or at least do not harm them," while government mandates or prohibitions of vertical restraints "systematically reduce consumer welfare or at least do not improve it." Together "[t]he evidence . . . supports the conclusion that in these markets, manufacturer and consumer interests are apt to be aligned, while interference in the market [by the government] is accomplished at the expense of consumers (and of course manufacturers)." The authors conclude that "the empirical evidence

[31] James C. Cooper *et al., Vertical Antitrust Policy as a Problem of Inference, 123* INT'L J. INDUS. ORG. 1639, 648, 658, 662 (2005).

suggests that in fact a relaxed antitrust attitude toward [vertical] restraints may well be warranted.”[32]

In the absence of structural considerations that make it likely that the proposed merger will harm consumers and in light of the strong empirical evidence that vertical integration typically does not harm and often benefits consumers, there seems little justification for imposing additional conditions on this merger.

Conclusion

In evaluating the proposed merger between Comcast and NBC Universal, one should recall that this process began when General Electric decided to divest its media assets in order to refocus management attention on its core businesses. At this point, then, the question is not *if* NBC Universal will be sold, but rather *to whom.* In a perfect world, General Electric would sell NBC Universal to a merging party that would not increase horizontal concentration in any market and for whom the merger would not create any violations of FCC rules. Although the elaborate nature of the regulatory regime makes finding such merger partners exceedingly difficult, General Electric has found just such a merger partner in Comcast. Regulators considering whether to approve this transaction must not only evaluate this merger on its own terms. They must also evaluate it in comparison to who else that General Electric would sell NBC Universal if not Comcast. They should move to block the merger only if they believe that the next potential transaction would pose fewer problems under competition policy as the transaction under review today.

The conventional benchmarks associated with antitrust law strongly suggest that the proposed Comcast-NBC Universal merger is very unlikely to harm consumers. The markets are not structured in a way that the combination of these two firms will have any anticompetitive horizontal or vertical effects. Suggestions that regulatory authorities subject the merger to additional conditions before clearing it thus seem unjustified. To the extent that vertical concerns exist, regulatory provisions such as the program access and leased access rules are already in place to address the problem.

One need not believe that the existing regulatory regimes are perfect in order to oppose imposing conditions on this merger. At best, such conditions would apply to only one cable operator without addressing what is an industry-wide problem. The correct course of action when confronted with regulations that are imperfect is not to jury rig a company-specific solution simply because a particular party happens to be seeking clearance of a merger. Instead, the best practice is to open a general proceeding to address any problems that may exist on an industry-wide basis. In the wake of an era during which the FCC was often criticized for failing to follow good administrative practices, insisting on the integrity of regulatory processes would appear to be particularly important.

Senator DORGAN. Professor Yoo, thank you very much for your testimony.

I indicated to Senator Rockefeller that I would come back and chair the second panel. And I would just make a very brief statement, and then I will ask some questions.

You know, I have a history on this committee with Senator Lott, the Dorgan-Lott provision. I think we were the first to exercise what was a legislative veto on the media ownership rules of the FCC some years ago.

I have long been concerned about concentration, particularly in media ownership. I don’t think big is always bad or small is always good, but I do think that we should always ask the question what does this mean to the free market? The free market works best when you have robust competitors competing around price and product differential.

And so, the question is—I would have some disagreement perhaps with you, Professor Yoo. I think the burden is on those who come to us with a proposal to combine, for them to describe why

[32] Francine Lafontaine and Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy,* in HANDBOOK OF ANTITRUST ECONOMICS 392, 408–09 (Paolo Buccirossi ed., 2008).

this combination is not going to harm the free market system, why it is not going to be destructive of the public interest, and why it is not going to retard competition. I think that burden exists, and I would expect Mr. Roberts probably also agrees that he has that burden.

There are a smaller number of interests in the country—I agree with Mr. Wells—that really determine what we see and hear and read each day. And so, we should be cognizant of that and understand what that means in terms of future concentrations.

I mean, I have been here long enough so that I have watched Mr. Levin and Mr. Case sit at that table and tell us what an unbelievably wonderful idea it was to combine Time Warner and AOL. I am telling you, they were missionaries on a mission, absolutely completely convinced it was not only in the public interest, but in their interest. Of course, it turns out history answers a lot of those questions, and it certainly answered that in a very aggressive way.

I am concerned about a number of things, which I will ask questions about. And I think what we want to do here is learn. We have differences of opinion on this panel.

The independent programming issue is one that I am interested in. I am concerned that we have seen such diminished activity and opportunity for independent programming, and I fear more of that. And I think Mr. Wells raised the question. It is a very important question I am going to ask Mr. Roberts about that.

Mr. Yoo, I will ask you, I didn't quite understand whether you were saying that the FCC should decide yes or no, but in any event should not establish conditions because you don't think conditions are appropriate. Either this merger should be approved or not approved, but you don't support conditions on the merger. That is kind of a fair piece from where I think most of us would expect. I mean, we have seen conditions attached to a fair number of mergers recently.

Let me begin to ask just a few questions, and then I will turn to my colleagues, and we will all have an ample opportunity to ask these questions.

Mr. Roberts, you have heard a lot of testimony about what you are trying to do and the testimony about Ms. Abdoulah's issue of how she has to—she is a smaller enterprise. So she has to deal with you, and you have more leverage. Mr. Wells's contention that he is worried about what you might do to Hulu. Give us your response and your retort to some of the questions that have been asked about what kind of leverage Comcast will have and what it will mean for the consumer.

Mr. ROBERTS. Thank you very much.

I think I would start with your point about AOL-Time Warner, that people who sit where I am sitting may have aspirations. At the time, there were many fears about that transaction. And as history, as you pointed out, proved, they made a mistake and they paid a very heavy price.

And so, many have said, as we heard in Professor Yoo's testimony and as I have pointed out before, Time Warner and Time Warner Cable have separated, News Corp. and DirecTV, both deals that were approved through a similar process. But it didn't prove to be right for them as they wanted to operate their businesses.

So I think I began by saying it is not a sure thing, and you start with what is your principal motivation? My opinion, principal motivation is an opportunity, at a time when our economy has really suffered in the last year or so, to make a bet that we are going to see a rebound and that this is a good time to bet on America, on advertising coming back, and on consumers wanting more and more content.

And one of my answers to Mr. Wells is you don't buy the fourth-place network that was once, for my formative years, the number-one network and want to do harm, but rather, you want to invest and grow it and restore it to its grandeur.

One of the reasons General Electric has chosen us to pick us to partner with in a 51/49 transaction is that they think we will be more focused and more committed to wanting to see innovation and investment. We know—as was discussed with the Internet, we know consumers are looking for more ways to get content on more devices. This is a very nascent market. I have said repeatedly I think video over the Internet is our friend, and we are trying to find ways to accelerate that.

We have just invested billions of dollars to upgrade the speeds of our Internet capacity so that we can find more applications, be they, 3–D, high-definition, or whatever the great engineers will dream up next. So I have no desire to want to see that trend not continue to flourish. It is what is a big part of our growth of our company is broadband.

To Ms. Abdoulah's points, I think that our company has been in the content business. She, I believe, carries a lot of our programming. Some of the things that are being talked about, as was pointed out, are industry wide. If the FCC process for program access has frustrated her in the past, I am not aware of any specific complaints that she has ever had about Comcast up until this transaction. But to me, the Chairman has an opportunity to do reform at the FCC, to look at that on an industry-wide basis. And I certainly would welcome a process like that, but I don't see how it relates specifically to this merger.

Senator DORGAN. You have nearly exhausted my time.

Mr. ROBERTS. Oh, I am sorry.

Senator DORGAN. No, that is all right. What we want to do—and I will have plenty of time to answer questions when everybody else has left, I guess.

[Laughter.]

Senator DORGAN. But let me ask this question again of you, Mr. Roberts. Because I think if this merger is approved—I have no idea whether it will be or not. I have no idea whether it is worthy. I have no idea whether it retards competition or is violative of the public interest. I think that is something that is going to be investigated substantially by Justice and the FCC.

If it is subsequently approved, it is going to be approved with conditions. But I believe Comcast is actually even now contesting the FCC's authority with respect to certain conditions, the net neutrality issues and so on. So, tell me, is that a conflict for you?

Mr. ROBERTS. You know, that has been raised, and I want to—I appreciate the chance to try to address it, and I will do it as

quickly as I can. So I don't want to exhaust time, but I think it is an important issue.

The certain parts of some of the rules that have been placed do get reviewed. The past FCC had some policies that I think have been overturned against the industry and about our company in specifics. So I think there is always that issue.

What we tried to address here is we made voluntary commitments that we would be prepared to sign in a binding way with the FCC such as the program access, such as free broadcast television remaining free over-the-air, some of the issues that have been discussed in the prior panel and have been discussed previously. So, no, I don't believe—and in the event that they were overturned by the courts, we are prepared to have them apply to us and have that conversation with the FCC.

Senator DORGAN. I have other questions for you, and I will ask a question of you when we are all done. Why should this merger be allowed? So, but don't answer that at the moment.

Let me say this. I am going to ask all of you some questions because you have all raised a lot of really interesting issues that I think the purpose of this hearing is to explore those issues, and you have all contributed something substantial. But I want to have my colleagues have the opportunity to ask questions, and then I will continue when they are completed.

Senator Johanns, in order of arrival?

[Laughter.]

STATEMENT OF HON. MIKE JOHANNS, U.S. SENATOR FROM NEBRASKA

Senator JOHANNS. Yes, way back when. Thank you very much, Mr. Chairman.

I appreciate you all being here. You all have, I guess, a different view of the world. So let me, if I might, zero in on some things.

Mr. Wells, at various points in your testimony, you reference a free Internet. I was just curious what you meant by "free Internet?"

Mr. WELLS. I think that content creators have concern, both on the news side and on the entertainment side and also just on the community discussion side, that the companies that are providing Internet service to many, many of the homes in this country continue to provide that in an equal access fashion to everyone who wants to come through that pipe, through that Internet connection.

I think we have concerns that there will be preferential financial treatment given to the speeds with which or with the costs which are associated with the difference between bundled content that might come from an NBC Universal-Comcast company together and also arrangement where others would be required to get that higher-speed delivery. And so, I think we have real concerns that there be an equal access in the speeds and in the cost of everything that is available through Internet connections.

Senator JOHANNS. OK. Let me dig a little deeper on that. I don't use the Internet a lot. I maybe turn on the computer. I look at half a dozen sites because I am interested in what they are doing there. If I spend an hour a day on the Internet, that would be a lot for me.

There are other people that spend most of their day. They download things, and they are watching movies or whatever they are doing. Should the two of us pay the same for that?

Mr. WELLS. Well, I think that everyone who wants to access material should be paying the same amount. So my question isn't so much exactly what the consumer is paying, although I think that is a concern. I think the concern is, will the speeds with which things that move through the Internet because video use and the band that video uses, which is why there was such a substantial amount of investment that has been made, require larger and larger amounts?

And the problem with that is that people who do not have the financial resources to give that preferential treatment but may be very important to the way in which we actually receive everything that we get, particularly as I think we are seeing a diminution in local news, whether that be through the diminishment of local newspapers, whether that be through the diminishment of what will actually—I think many of us believe will end up happening with local news or a lot of local news and local broadcasting, that everyone have that same opportunity and through entertainment as well.

So, I am just saying that we are concerned that if it takes when you sit down at the computer, that you get a very quick connection and an immediate feed on, let us say, NBC News. But that if you want to see a *Huffington Post* or another blog or something, that that comes through much more slowly. I think there are real concerns about that, and there are questions about this when we get into pirated materials, too, when we start talking about copyright and intellectual property.

Senator JOHANNS. Mr. Roberts, let me turn to you, if I might? Your family kind of epitomizes what has happened in this arena. I am old enough where I remember the first TV being walked into the living room. I grew up in northern Iowa on a farm, and our method of changing channels was somebody had to be out back. We had a 2-x-4 wrapped around a pole with an antenna at the top, and then somebody inside would scream, "Too far, too far." And then you would constantly adjust so you could get that picture.

[Laughter.]

Senator JOHANNS. So, if you wanted to change channels in the dead of winter, somebody had to run around to the back of the house while somebody was screaming inside.

Now I look at what we have done, and I have to tell you, there is probably a cost difference between the old system that I grew up with and today's system. But it is remarkable what we have the ability to access.

So, I want to ask you, with the criticism that you have gotten here, how do you anticipate you will serve your consumers better, and what about this merger will allow you to take yet the next step and the next step and the next step?

I read that pretty soon I will be able to sit in front of my TV and have a conversation in a video link with my grandchildren back in Nebraska. Tell me how you think you can benefit consumers because there are some here that are raising criticisms about what you are heading out to do.

Mr. ROBERTS. Senator, I appreciate really putting it in historical concept because—in historical context. As I think about what my father's generation of entrepreneurs and what I have been doing for 30 years now is all about, people forget where we were, and we have liberated the viewer viewing experience.

Not always for the better, you know? Some of the points that have been made, not all content is perfect. But in reality, it is breathtaking what has changed in such a short period of time, and what will happen in the next 5 or 10 years I dare try to guess.

What I am trying to do for our company and for our customers is to, in this transaction, try to associate ourselves with some of the most creative and talented creators, try to find the technological ways to create successful businesses for them and to make it great for the consumer, to take this technology like wideband, which is beyond broadband, so that you could do the video conference in high-definition back home, and it is tremendous risk. There is absolutely no assurance that this is right or that this will work, but that is what American business is all about.

And what I would suggest to some of the criticism is, sure, there is always a potential you might do this, you might do that. First of all, it is a very visible industry. There are many regulatory oversight agencies, and we have a track record of wanting to innovate. Our goal was not to get into cable to slow down innovation, but to speed it up.

And as I look at this merger, I see that as a once-in-a-lifetime opportunity, really, to try to associate ourselves with the best content that isn't doing quite as well, that is inside a company like General Electric that today has other business opportunities unique to them all over the world. And for us, this will be a defining opportunity.

Senator JOHANNS. My time has expired. Thank you, Mr. Chairman.

Senator DORGAN. Senator Johanns, your description makes us sound like fossils. But we didn't have individual television sets. In my town of 300, we had only one, and that was at the car dealership.

And since it was 125 miles from the nearest television station, the only television we got was what were called "skips," and occasionally, we would get a skip signal from somebody broadcasting professional—I guess wrestling, not professional wrestling. And the whole town would come down to see that skip and watch wrestling from West Virginia for about 8 minutes and then snow.

[Laughter.]

Senator DORGAN. Senator Isakson has gone. Senator Begich? Or Senator Klobuchar, I am sorry.

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

Senator KLOBUCHAR. You can see why they are so productive in North Dakota. There is not much time to mess around.

It is good to see all of you again. I feel like Groundhog Day. I am the only Senator on both Judiciary and Commerce, and we all remember that Judiciary hearing well.

So I thought I would start with you, Mr. Roberts. I actually did some follow-up questions after that hearing, and I raised this issue at the Judiciary hearing about the price of expanded basic cable that has gone up faster than the rate of inflation since 1995, four times faster. And customers are concerned in these tough economic times with their cable bills. And what assurances can you give that this merger won't result in higher fees for customers?

Mr. ROBERTS. Well, first of all, we are always focused on that question. I don't think anything specific to this merger would incentivize us or cause us to want to raise cable rates. We are in a competitive business. We compete against Ms. Abdoulah. We compete against DirecTV. We compete against Dish. We compete against Verizon, FiOS, U-verse. It is a very different business than it has ever been, and it is very much on customers' minds.

Today, for instance, in Washington, D.C., we start as low as $15. We have 14 different levels of service. We are much more competitively sensitive. We are trying to improve our programming with On Demand and other technologies. And you know, I still believe digital video, for which Comcast, by the way, is not the highest cost. I think there are many providers who charge more than we do.

But as a group, the number of hours and what you get versus just going to a movie continues to be starkly different for the number of hours, of 300 hours a month that the average cable household watches, in excess of that. It turns out to be 33 cents per viewing hour versus $15 to go to a movie for an hour for a family of four.

So I think we still have a great value. It is why the industry has been healthy, been able to reinvest, and create jobs. But I am very mindful of that question. I don't believe this deal will cause that to change, and we have got to stay focused. And it is competitive.

Senator KLOBUCHAR. And I know there will be a lot of lawyers looking at this deal, but I just thought I would run through a few things that I have heard, that people have raised with me about concerns.

One is that NBC and its affiliates have succeeded by getting its programming to as many viewers as possible and providing this content—we talked about this at Judiciary—for free over-the-air or over the Internet. Will Comcast use NBC's 30 percent stake in *Hulu.com* to restrict the selection of NBC programming that is available on *Hulu.com* or *NBC.com*?

Mr. ROBERTS. I have never even personally met with the Hulu team. We will own about 30 percent, 31 percent. It is a non-controlling stake. We have no intention of changing NBC's relationship with Hulu.

And Hulu itself, from what I have read in the trade press, is going through business model reviews and how to fund it and what its future will be. We are not at that table, and I look forward to learning more about that business once we get together, if we do get together.

Senator KLOBUCHAR. And do you expect Comcast to block any NBC content from the Internet, and what about charging subscriber fees?

Mr. ROBERTS. I don't. Comcast does not want to block NBC content or, frankly, block any content on the Internet. And I don't think that—as I said, I think that there is—my vision is the content creator in different windows has different business models. Sometimes they want to be pay-per-view, like going to a movie in a movie theater. Sometimes you do that in your home. Sometimes it is ad-supported only. Sometimes it is part of a subscription. And who knows what other business models will come out in the future?

From a Comcast perspective, my vision is to technologically try to create platforms and making sure that the content is not pirated—you know, that it is authentic—and finding a way to let the content companies create their own business models that work for their businesses into the future.

Senator KLOBUCHAR. OK. Now, Ms. Abdoulah has raised this issue about small and mid-sized cable operators, and they have long objected to how they are compelled to negotiate programming contracts, both with cable channels and with broadcast affiliates. Concerns about the leverage that you would have over both your video distributor competitors, your program distributor competitors—and I am going to ask her this, too—but what protections do you think should be in place to make sure Comcast doesn't have unfair advantage over its competitors in these negotiations?

Mr. ROBERTS. Well, I believe that we have had an ability to resolve because we want her carriage and we want other competitors' carriage. You don't go spend what has been written, a $30 billion overall transaction value potentially, or some number that is very substantial, to not want—when you are about 24 percent of the distribution marketplace, you are hoping to get the other 76.

So it is very much in our interest as a business matter. As was referenced in some of the other testimonies, there are antitrust laws. But in addition to that, there is the competitive reality that we all—you won't have a very vibrant channel if you are not distributed.

And then you go to the program access rules, which we have talked about. And if there is not complete satisfaction with those, there is hopefully an opportunity for the FCC to make it more attractive across all companies, not just our own.

We have also seen other video distributors, DirecTV and Time Warner Cable, be separated from their parent companies who were making content because they didn't see that there was some advantage. So I think there is a lot of answers to that question, but——

Senator KLOBUCHAR. Could I just get—I am running out of time here?

Mr. ROBERTS. Please.

Senator KLOBUCHAR. Thank you very much.

Ms. Abdoulah, what protections—and Dr. Cooper—do you think would most help with this issue here?

Ms. ABDOULAH. Well, you asked the great question about will prices go up for Comcast customers? And Mr. Roberts answered that. I would like to answer it. I can say it might not for Comcast, but I can tell you it will for us because of the reasons that I mentioned in my testimony.

The issues for us are cost and carriage as a competitor and all people who compete for the product. In essence, your wholesaler is

also your retailer. And so, here I am buying product now from these two large companies, and the remedies that you talk about, where do we go if we can't get what we need, if we can't represent our consumers' wants appropriately——

Senator KLOBUCHAR. So what protections would help with that?

Ms. ABDOULAH. And it is the access rules. Let us get them revised and reformed because——

Senator KLOBUCHAR. And they are set to expire 2012, right?

Ms. ABDOULAH. Yes.

Senator KLOBUCHAR. And you find them inadequate?

Ms. ABDOULAH. And I am saying if we are going to approve this merger before that, that is inadequate. To say that we will—for Comcast to say we will adhere to the current access rules, which are not effectual—if they don't help protect us in the ways that we need to from a competitive standpoint, then that is meaningless.

So we would ask that the conditions be placed especially—very specifically, if we have an issue, give us the right to make sure that that network stays on the air while we are negotiating. Put a "time sensitive" on it, which I noticed Comcast put in their conditions they would be willing to put a time on it.

But also make sure that the network has to stay on during the time of the negotiation. Otherwise, we see what happens to customers. We witnessed that with the Academy Awards recently.

Senator KLOBUCHAR. What happened with the——

Senator DORGAN. Senator Begich?

Senator KLOBUCHAR. Oh, I wanted to know what happened with the Academy Awards. I will ask her later. And Dr. Cooper—and I am going way over my time. And so, could you and I talk about this later?

Senator DORGAN. Senator Begich, please?

Senator KLOBUCHAR. I will call you, and then, one, you could put the answer in writing for me. Thank you.

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

Just some very quick questions, if I can? Mr. Roberts, if I can just walk through, just so I understand the magnitude. What is your current Comcast gross revenues?

Mr. ROBERTS. About $35 billion.

Senator BEGICH. And with NBC, what will it be?

Mr. ROBERTS. About $50 billion.

Senator BEGICH. And what is your customer base for Comcast?

Mr. ROBERTS. About 24 million.

Senator BEGICH. About 24 million?

Mr. ROBERTS. Customers, cable customers.

Senator BEGICH. Let me, if I can walk through just a couple questions that I have? In the purchase, in the agreement, are you personally financing it through equity and debt? Is it a combo or is it——

Mr. ROBERTS. It is a joint venture, 51 percent Comcast, 49 percent GE. We are contributing some assets of some of our cable programming assets, as well as somewhere around $6.5 billion in cash. We will borrow that cash, plus cash that we already have on hand. So the equity——

Senator BEGICH. That gives me a sense.

Mr. ROBERTS.—is GE remains 49 percent of the equity.

Senator BEGICH. So it is a combo?

Mr. ROBERTS. Combo.

Senator BEGICH. In your investment, expected—can I ask the rate of return that you are expecting?

Mr. ROBERTS. What we hope—we don't, haven't made a public forecast. What we said is we are hopeful to have a positive and hopefully double-digit rate of return.

Senator BEGICH. Low, high?

Mr. ROBERTS. It is——

Senator BEGICH. Twelve, 13, or 17, 18?

Mr. ROBERTS. No. High single, low double digits. Maybe mid double. It depends, your view of the economy and the strength of——

Senator BEGICH. I have your faith that we are in the right mood, and that is why you are moving down this path.

Mr. ROBERTS. We are also long term. We are looking—so it depends what time period you would ask that question. I want to clarify that.

Senator BEGICH. Now, with that information, are you anticipating that to be all recovered through your rate structure both for residential and commercial rates?

Mr. ROBERTS. No.

Senator BEGICH. Do you anticipate more than 50 percent of it to be recovered?

Mr. ROBERTS. The rate of return for this would be not related to our cable. What I was referring to was NBC Universal——

Senator BEGICH. Understood.

Mr. ROBERTS.—and their businesses, which don't—for the most part don't directly touch our rates.

Senator BEGICH. But your investment that you are making into your ownership, are you expecting that to be partially repaid by users who are Comcast. And I am calling—I am from a state that doesn't have Comcast.

Mr. ROBERTS. Right.

Senator BEGICH. Great NBC affiliates, and I will get into that in a second. But are you expecting a rate of return from those customers, both residential—the users of Comcast, but also commercial users who put product in. And if so, how much of that volume of dollars——

Mr. ROBERTS. Well, I think more than half or some percentage of NBC cable and NBC broadcast is an advertising-supported business. So a large part of the answer is advertising. A second part of the answer would be improved quality. So you get higher ratings. Then you get higher advertising not just from a healthier market, but from a better product.

Senator BEGICH. You moved from 4 to 3 to 2 to 1?

Mr. ROBERTS. Correct. And same goes for their cable channels, and then there are subscription fees that the cable channels have. And traditionally, NBC has been a fairly priced, widely distributed group of cable channels like USA, Syfy, and we are counting on sort of business as usual in that regard.

Senator BEGICH. OK. Let me ask you—and again, I am new to this process, and I am watching my time very quickly. So the question has come up on union contracts, or there has been some commentary that Comcast hasn't been as fair. And I am not saying

those are my words. I am just repeating what I have heard and so forth.

So here is the question. How many of your employees currently are under union contract in Comcast, in any form, any kind of union?

Mr. ROBERTS. Understood. We have two basic businesses. In the cable business, it is around 2 to 3 percent. That is pretty normal for cable operators. And you will find that that is not an outlier, in my opinion. In our programming business, it is north of 10 to 14 percent, in that range, which is maybe in some of our business a little bit higher—in our regional sports business—which is also, I think, inside the norms.

We have tried to stress that we intend to honor and support all of the agreements with the guilds and the trades that NBC has. It is a very different business than cable distribution. But we are very proud of what we have built at Comcast with 100,000 employees and a company a lot of people would like to work for, and I am very proud of that.

Senator BEGICH. No problem. Let me get to one quick question. And then, Mr. Wells, I have a quick one. Then I will submit the rest for the record because of time.

Do you agree that conditions could potentially be placed on you during the agreement, and why not just not wait for Congress, because if you wait for Congress to do something on access rules, I may be dead and gone by then. But why not just work it out, insert it into the conditions, and move forward?

Mr. ROBERTS. Well, in some ways, I think we have suggested that. On day one, we acknowledged that there were certain areas—how we compete, how we invest, how we feel about localism, how we feel about free over-the-air broadcasts, and how we feel about some of the union issues. In all of those instances, we made upfront commitments. One of the commitments that we have clarified that we are also prepared to talk to the FCC and make binding is if the court case were to overturn some of the access conditions. They tended to be focused on exclusivity and some of the issues like Sunday Ticket or NASCAR.

Senator BEGICH. Let me in there. I apologize. My time is up.

Mr. Wells, I have some questions. I will submit them to you for the record. But again, on the conditions issues because I think the Chairman asked an interesting question, and that is let us assume—I guess here is the question.

Would you allow and work to make sure the conditions are in whatever agreement without the argument that, well, Congress will do it later? In other words, forget about what we are going to do. Because if you wait, you will never do this transaction.

Mr. ROBERTS. No, the conditions we made have—the conditions that we have suggested and that we are prepared to further talk about and try to clarify would not premise themselves on Congress.

Senator BEGICH. Great. Thank you, Mr. Chairman.

Senator DORGAN. Senator LeMieux?

STATEMENT OF HON. GEORGE S. LeMIEUX, U.S. SENATOR FROM FLORIDA

Senator LEMIEUX. Thank you, Mr. Chairman.

Professor Yoo, I want to start with you. My memory of antitrust analysis, and it has been some time, is that one of the first things you talk about is the market. What is the relevant market here in determining whether or not this transaction meets antitrust standards?

Mr. YOO. I really appreciate focusing on this. We have heard many dire warnings, a little discussion of law, a little discussion of facts, a little discussion of markets. There is basically two markets here.

One is the market for distributing video programming locally, typically done by a local broadcast television station or a local cable operator. The second is the market for television networks, either broadcast television networks or cable networks. And in general, these are considered to be completely independent markets.

There is a well-established framework by the merger guidelines for analyzing these mergers and the setting of concentration levels. It measures through the Hirschman-Herfindahl Index, called HHI. The guidelines set up benchmarks for each kind of merger. There are some mergers which require strict scrutiny. Some get a light look, and some are approved without any extensive analysis at all.

What is most interesting is when you define these markets properly, by actually looking at the facts, it falls into the category of things that should be approved without any significant scrutiny at all. And in fact, if you look at actual enforcement policy over the decade of about 1996 to 2005, spanning both Democratic and Republican administrations, no antitrust authority has ever challenged a merger at the low levels of concentration that are here.

I think that there are real concerns that people have and mergers do—change is disruptive to a lot of people, and it is going to create different patterns. But that is an inevitable part of the business.

Senator LEMIEUX. And when you say the relatively low concentrations, I am looking at your testimony on pages 14 and 15, and you say that NBC Universal has 8.8 percent share of the market revenue, which makes them fourth place among cable programmers. The combined company, 12.1 percent of the market, fourth place among cable programming companies.

So even in these markets—and it is also my sense that these markets are changing so quickly. I mean, the way that we get programming, you know, we are getting it on our BlackBerry. We are getting it on the Internet. Who knows what the next thing is going to be? It seems like it is a very dynamic changing. But even within the marketplace as it is now, which won't stay static, but even if it did, it seems like it is pretty low concentration.

Mr. YOO. Absolutely. And if you look at the trends, they are becoming less concentrated with every passing year.

You also bring up the fact that the traditional models are changing. In a very real sense, there is an archaic aspect to this discussion. If you look at the way our kids access video, it bears no resemblance to any of the markets we are talking about now. And in those markets, the parties that are merging here have 0.7 percent of the market and 0.3 percent of the market, and the merger will yield an entity of 1 percent.

We have heard much discussion about Hulu, which is run—independently managed, independently financed. Even Hulu, as important as it is in people's minds, has 4 percent of the market. And so, we are talking about a very different landscape and very, very small players.

Senator LEMIEUX. Mr. Roberts, one thing that occurred to me is, as you acquire more content, I guess one concern would be whether or not you would seek to charge more for other content to come on your cable network or whether you would give preferential pricing to your content so that it would be anticompetitive. Can you address those concerns?

Mr. ROBERTS. You know, I have heard the concern, and it has been referenced a little bit. First of all, if that was such an achievable objective, why did News Corp. get out of DirecTV? Why did Time Warner spin off Time Warner Cable?

Because it is such a competitive market, as you were just discussing with the professor, that I don't think that is really the motivation, nor do I really think that is truly viable. And there are—it is a very visible industry, and there are these program access opportunities at the FCC if that were one's behavior.

What our motivation is, is to try to make these channels better, more relevant. Invest in them, be more focused on them than their current situation, and that we think they are good businesses, as you describe, as the next generation wants them on more platforms.

And I don't know how we can state it that that is really what our goal is. And I think if we do all that, we will have a successful deal here.

Senator LEMIEUX. Can you speak to what is going to happen to employees of NBC, and specifically, as you may expect, being a Senator from Florida, I am concerned about NBC Universal. They are headquartered—the theme park operation, I guess, is headquartered there. I expect that you are going to commit that there are no plans to move that to Philadelphia?

[Laughter.]

Mr. ROBERTS. People would love to be in the snow that we have had in Philadelphia all winter long and here in Washington.

Yes, we are excited about other businesses that we haven't talked about at all today, NBC Universal and what have you, and the investment that is being made in Universal theme parks with Harry Potter. That is, in my opinion, under talked about is GE decided to sell. And in all likelihood, it was going to sell to somebody, and most of those somebodies that I can see would have had duplicative businesses, and there would have been real job reductions.

The fact is Comcast doesn't own a theme park, doesn't own a news channel, doesn't own a broadcast, doesn't own a film studio, and doesn't own many of those cable type of news channels. So we don't anticipate any reductions and movements and all the disruption to people's lives at this really sensitive time in the economy.

And I think that is maybe not the sole determinant factor, but a reality that GE had chosen to sell. And if they sold to somebody with more "synergy," Wall Street would have liked it. Washington perhaps would have had more dislike.

Senator LEMIEUX. And if you would like to move the general headquarters down to Florida, we would welcome that.

Thank you, Mr. Chairman.

Senator DORGAN. Senator Wicker?

STATEMENT OF HON. ROGER F. WICKER, U.S. SENATOR FROM MISSISSIPPI

Senator WICKER. Well, speaking of headquarters, I think members of the panel might be interested to know that this giant of Comcast actually had its beginnings in my hometown of Tupelo, Mississippi. And Mr. Roberts's father, Mr. Ralph Roberts, is sitting right behind him, if you would wave to the audience, Mr. Roberts?

He is not from Mississippi, but he chose the City of Tupelo, Mississippi, in 1963 to start American Cable Systems, which has now grown into Comcast. I did not want this opportunity to pass without giving the members that little history lesson and to give our welcome on behalf of the Committee to Mr. Ralph Roberts.

But to our witness Mr. Roberts, what do I tell my folks, regardless of where they get their signal, give me some specific benefits they are going to get. You are going to get this, this, and this that you haven't had, and it is going to be better if this gets approved.

Mr. ROBERTS. First of all, thank you on behalf of the Roberts family. Somehow he gets the nice part, and I get the tough questions.

[Laughter.]

Mr. ROBERTS. But I have been living with that for a long time, and I am very comfortable.

Senator WICKER. By the way, it occurs to me you might want to hasten to add that you really do love Philadelphia, snowy though it may be.

Mr. ROBERTS. Yes. But I have been to Tupelo, and we are very proud of the Mississippi heritage in the company.

Senator WICKER. And we are proud of it.

Mr. ROBERT. So let me, right off the bat, I would tell your constituents I hope we are going to make better programs, and I hope that we are going to invest in localism because we are a local company. And whether that is the TV station or the cable station, there has been a trend to cut back on local public affairs programming, local news programming.

Take something like On Demand. We today have 14 billion On Demand shows that have been downloaded on Comcast systems in the last several years, more than anybody else. That is as many as iTunes, more than iTunes across the whole United States.

These are half an hour approximately, on average. That is a technology we sort of helped invent. The number-one criticism I get when I talk to customers about On Demand is, "Why can't I get more movies? Why can't I get more TV shows On Demand?"

Well, we have 4,000 movies in a library and 3,000 television shows in a library. I certainly hope that we can hasten consumers' access to older content, newer content, on more distribution platforms than ever before.

We are at heart a technology company that is embracing change, and I think both from the product itself side and from the availability and changing nature of how consumers at different ages

want to consume, that is one of the goals I have. So more On Demand content, and I hope more content available over the Internet, not, as has been described, less content available over the Internet. That is not in keeping with what our goal would be for this transaction.

Senator WICKER. OK. So more local programming, quicker access to On Demand, and more content over the Internet.

Mr. COOPER OR MS. Abdoulah, would either of you care to challenge that?

Dr. COOPER. Well, the economic interest of Comcast is to maximize its profit. And if it, in doing so——

Senator WICKER. You don't object to that, do you?

Dr. COOPER. Oh, no. I don't object to that at all.

Senator WICKER. Neither do I.

Dr. COOPER. But the antitrust laws believe that competition is the way to accomplish that. So here is an example of the math that Mr. Roberts might discover. If he can deny Ms. Abdoulah access to must-have regional sports programming, and thereby, he shrunk his audience, but undermine her right to steal eyeballs from him, he makes more money that way.

He uses his control of access to this programming to reduce competition in the local distribution of video programming and increases his profit. And in all the numbers you heard about market shares, one number was left out. In almost every market where he said this is a local business, of the multichannel video market, he has at least a 50 percent market share. In many of his markets, he might have a 60 percent market share.

That is local market power. That is the one number you didn't hear at all in this ocean of numbers. That is the heart of his market power. That gives him the ability. That is the business he is protecting. That is how he exercises market power there.

Now you can take that arithmetic and apply it across the board. With NBC programming, he has guaranteed them access to 24 percent of the market because now he owns them, right?

Senator WICKER. Ms. Abdoulah wants to jump in, and we only have a minute left. And then maybe Mr. Roberts would like to have a rebuttal?

Ms. ABDOULAH. Well, and it is similar points. I mean, again, I am not here to debate whether it should be approved or not. If and when it is approved, it is critical that it has conditions for the very reasons that Mr. Cooper was saying. The numbers here, you can talk national numbers all you want. The concern competitively comes down to the local level. In Illinois——

Senator WICKER. OK. But you are reiterating your previous points. What I was asking is, are my folks going to get more local shows, more access to On Demand, and more content over the Internet?

Ms. ABDOULAH. Well, if they are from Comcast, yes. If they are from a competitor, it depends whether they can negotiate for that content at a reasonable price, at reasonable carriage, and reasonable terms and conditions. And if they are not reasonable, right now the program access rules do not give us clear opportunity to resolve them.

Senator WICKER. Can we ask Mr. Roberts to give a 30- second rebuttal?

Mr. ROBERTS. I will do it in less than 30, I hope, because I think you are talking around all the issues, and I think there will be a thorough review. And the program access, the FCC said maybe they can do reform.

NBC content today is not subject to those program access rules. So by combining with Comcast, there is now an additional governmental review process for any dealings on that content with Ms. Abdoulah's company that doesn't exist if GE kept the business.

Senator WICKER. Thank you, Mr. Chairman.

Senator DORGAN. All right. Senator McCaskill?

STATEMENT OF HON. CLAIRE MCCASKILL, U.S. SENATOR FROM MISSOURI

Senator MCCASKILL. Thank you, Mr. Chairman.

Dr. Cooper discussed the obvious, and I do want to make sure, Mr. Roberts, there is absolutely nothing wrong with your company making a profit. Obviously, your job is to make sure that your company makes a profit. You would be in big trouble if your company wasn't making a profit.

So I think I want to ask the basic question. I am assuming you want this merger because you think you can make more money?

Mr. ROBERTS. I think we—I stated earlier we hope to have a positive return on our investment. But as the chairman pointed out at the start, not all mergers have worked for shareholders. Others, like AOL-Time Warner or like DirecTV and News Corp. or Time Warner and Time Warner Cable——

Senator MCCASKILL. You keep using those as examples, but I am assuming that you are only going forward because you believe you are going to make money?

Mr. ROBERTS. I think we made a—I hope we have made a good deal.

Senator MCCASKILL. You figured out something that Time Warner and AOL didn't figure out or what DirecTV and News Corp. didn't figure out, I am assuming, and you are telling your shareholders you have figured something out because you plan on making money on this deal.

Mr. ROBERTS. We hope that the economy, perhaps the biggest difference is the moment in time—you have to, you know, AOL was at the peak of the Internet bubble, and we are hoping that we are at the bottom of the U.S. economy.

Senator MCCASKILL. And let us assume that you do make money on it. Let us assume that this is a risk which is part of the fabric of American business, and it is a great part of the fabric of American business. It is one we should all relish. All of us in this room are in our hearts risk takers, or we wouldn't be here. There is a lot of risks in coming to this place, too.

So let us assume your risk is a solid risk, and you make great money. I am assuming you have no problem with other consolidations that are similar to this, and let me ask you a hypothetical question. If, in fact, a year from now or 2 years from now, and you have been very successful at this, I would assume you would have no problem with Time Warner buying ABC?

Mr. ROBERTS. If I might, which Time Warner—Time Warner or Time Warner Cable?

Senator MCCASKILL. Time Warner Cable, your competitor.

Mr. ROBERTS. Thank you. I would have no problem.

Senator MCCASKILL. And you would have no problem with Dish buying CBS?

Mr. ROBERTS. You know, again, the only comment I would make—I don't think so. But the only comment I would make is in the world of hypothetical, what are the facts at that time? I just want to caveat that answer.

But I think the market the way I see it, it is more competitive than ever. There are new technologies, and we compete. And I think for the most part, what you are positing—I don't think that is where the market will go, by the way, because the trend has been the other way.

Senator MCCASKILL. But you are bucking that trend, and you wouldn't be doing it if you didn't think there was a money-making opportunity there.

Mr. ROBERTS. The CEOs of the companies you have just referenced have publicly come out and said they are not sure they like the trend we are on.

Senator MCCASKILL. Well, the CEOs have a way of coming and going. I imagine——

Mr. ROBERTS. Well, they have both been there a long time, but I understand your point.

Senator MCCASKILL. And I guess what I am saying here is we are going down a road with this merger, and I want to make sure, since you may be the first one down the road, that you are perfectly fine with saying, "Come on, everybody. Follow me. Let us do the same thing."

Mr. ROBERTS. You know, if we are successful, as I hope we are, and people want to follow that road, under the right circumstances, depending on what the conditions are, what the facts are at the time, one of the points I would use the chance to make is I am not sure that is what the trend will be, if you ask my opinion. But hypothetically, I don't think we own any media voices in the market. So different hypotheticals have different realities. We don't happen to own a news channel—we are a broadcast network—or a movie studio or a theme park.

Senator MCCASKILL. OK. Do you charge yourself a lower rate for your regional sports network than you charge other operators?

Mr. ROBERTS. We are in 10 different cities, hundreds of different agreements. We have more scale in some markets than some distributors. So I don't know off the top of my head every deal, every rate. I think for the most part, there is a transparent process.

Senator MCCASKILL. Well, if you would get us that information, I think that would be helpful to know.

Mr. ROBERTS. Well, some of those agreements are—I will have our team follow up with the best they can, given our confidentiality agreements. But we can try to summarize or generalize.

Senator MCCASKILL. OK. I think it is important that we get a handle on whether or not you are, if there is a price premium to others for what you own. Because I think it is a good indicator of what may come in the future.

Mr. ROBERTS. I would point out also that our regional sports business, the question you specifically asked, are subject to a condition we had on a previous deal that anyone who is not happy can complain to the FCC and go through a process.

Senator MCCASKILL. That is good. That is good.

OK, finally, I know there has been a lot of talk about program access rules and how they are going to be protective. And here is my question about that. And this is pointed, but that is kind of my job here.

If you are relying on the program access rules to reassure people that there won't be problems associated with this, isn't it true that you are in court challenging those very program access rules as we speak?

Mr. ROBERTS. Well, let me say, I said earlier in the testimony up front that previous to this transaction, there was a challenge made by, I think, it was Cablevision that we joined in on the exclusivity—primarily the exclusivity provision because those rules were written 20 years ago. In the last 20 years, things like Sunday Ticket and NASCAR are exclusively on our competitor, DirecTV. Dish Network has something like 50 or 60 or 80 ethnic channels that are exclusive.

And so, the question was should the rules apply to these new platforms that are now way more successful than they were 20 years ago when they didn't exist, or should the rules sunset? But what we have volunteered is that even if we were to win that case, we would want the program access rules to apply to us, and we are prepared to talk to the FCC about how to do that as part of this review.

Senator MCCASKILL. Thank you.

Mr. Chairman, I think that the Committee should take a look at those program access rules and see if there is something that we could be helpful on in making sure that they are tight enough and broad enough in this day and age. Because anything that is 20 years old in this current market obviously has huge issues with applicability today. So I would suggest that it is something we might want to take a look at.

Thank you, Mr. Chairman. Thank you.

Senator DORGAN. Thank you, Senator McCaskill.

Senator Lautenberg?

STATEMENT OF HON. FRANK R. LAUTENBERG, U.S. SENATOR FROM NEW JERSEY

Senator LAUTENBERG. Thanks, Mr. Chairman, and welcome all of you. While I wasn't in the room, I was able to listen to your testimony, all of it was very helpful.

Mr. Roberts, in the promotion of the Comcast-NBC merger, you have committed to expanding local broadcast news and public interest programming. Now, New Jersey, though its size would make it the fourth-largest media market in the country, lacks its own market, and the only commercial high-power station in New Jersey, WWOR, in my view, has not adequately served the people of New Jersey.

Now what ways might a combined Comcast and NBC expand and improve and give us some assurance that our local coverage of New Jersey issues and events will be a major thing as a result of this?

Mr. ROBERTS. Well, I am not sure I can completely change the broadcast business the way it has historically operated. So I don't want to create a false answer.

But NBC Universal has 30,000 creative people and folks and talent that Comcast today doesn't have. And what we have committed to is trying to figure a way to take some of the news talent, the news gathering, rather than cut it back try, to find ways to have more airtime and more on demand for news, minority programming, diverse programming, and public affairs programming. So we will have more expertise in the company than we do if we don't do this deal.

We are certainly not going in the other direction. And you know, as you know, we have many cable systems in New Jersey that now will have the resources of an NBC in New York, an NBC in Philadelphia. Whether that gets to New Jersey, I have got to—I know, sir, I have got to work on.

Senator LAUTENBERG. Well, if we can be a little more specific? With the multicast, multiple channels, might Comcast and NBC seriously consider devoting a broadcast channel exclusively to the issues and needs of the people in New Jersey, as opposed to us reaching to New York or Philadelphia to get that?

Mr. ROBERTS. I think it is something we should look at. There is an opportunity and a talent and a company looking to do more. We have New Jersey. I don't—I just don't know the answer as to why it hasn't happened before, and I am not an expert in broadcast news.

Senator LAUTENBERG. But you will have a significant increase in the number of channels that are available. And we are—I am asking for some degree of comfort to be offered in terms of making sure that New Jersey, 9 million people, 9th largest state in the country, can get the attention it rightfully deserves.

Mr. ROBERTS. So what I would like to do, Senator, is talk with NBC about that and, if we can, get back to you. And I would like to give a thoughtful response to that. It sounds like a market that is underserved and there is an opportunity there, and I don't know why we wouldn't want to focus on it.

Senator LAUTENBERG. You mean these haven't been thoughtful things that we have been talking about here?

Mr. ROBERTS. I am saying NBC——

Senator LAUTENBERG. I am kidding you, obviously.

Mr. ROBERTS. OK. Fair enough.

Senator LAUTENBERG. What about new technologies? I had a chance to meet with your colleagues and your senior partner yesterday, and we discussed—unless the alliances have changed somewhat, but I thought Ralph was the senior partner.

Mr. ROBERTS. Without a doubt.

Senator LAUTENBERG. But talking about the advent of new technologies, the 3–D and so forth, what might this merger produce by way of acceleration to these new technologies and availability, would you think? What kind of pricing might be out there for people who want to use that technology, see the technology?

Mr. ROBERTS. I think we are seeing an extraordinary moment right now with technology and its change, and it is generational in part. So if you look at the two largest movies in recent memory, one of which of all time, Avatar, and now Disney's latest movie with Johnny Depp, Alice in Wonderland, incredible response by the consumer to 3–D.

How to bring that, you are seeing in the next couple of weeks or right now several television set manufacturers announced they are going to put 3–D into TVs. That is a great new consumer experience. I personally don't believe people want to watch with glasses 8 hours-a-day. But for events and for special high well-produced content, it can be a whole new business.

By the way, I think if you speed up your Internet connections, you are going to be able to enjoy 3–D over the Internet. And we are going to do some demonstrations of that in the near future.

So, I think that is what gets me most energized about this transaction is to work with—and that is sort of what I was saying before is certainly on a national basis, can you take this content and, by the way, export it around the world? And Comcast really transforms ourselves from a local company to a national and an international company and uses our technology roots and our historical roots and tries to now say can we put more energy and aggressiveness around this than, frankly, GE can or others are doing in this space?

I don't know that it will all be perfect, all be simple. But that is really what motivates me.

Senator LAUTENBERG. We had, as everyone is aware, a recent breakdown in negotiations between ABC–TV and Cablevision. Suggest that FCC's rules governing such negotiation may no longer be—and really, Professor Yoo, I would like your comment on it—sufficient to protect consumers. Might you suggest a change in the rules for retransmission consent and negotiation so that consumers are not constantly caught in the middle?

This was a series of embarrassments, a feeling that too much muscle was being exercised over the viewing audience, and it was disturbing. And we jumped in, other people jumped in. I wasn't the lifeguard, the sole lifeguard in this. But a last-minute change was finally induced.

Is there something that you might suggest, Professor Yoo?

Mr. YOO. Can I think of something that will make it so that every bargain goes to completion successfully when you have two people bargain over money? The answer is no. There are times in every bargain where one party has to walk away from the table. It happens in union bargaining. It happened when I bought my house.

If two sides have a different sense of their value, there is going to be deadlock. And if we are going to have a system built around arm's length bargaining, that is going to be the case. Can we do things that will help the process, start things earlier? Absolutely. Ms. Abdoulah has raised a number of concerns. I think they are all valid.

The point I was trying to make, I am not opposed to merger conditions. I misspoke. I apologize to the Committee. I think that if

a merger raises issues, it is, of course, entirely appropriate to impose conditions.

What I am concerned about is, to take a general problem that affects the entire industry and to put that into a merger review process where the parties will do anything to consummate the merger and agree to anything gives short shrift to the issues.

Network neutrality has been mentioned here today. We have an open proceeding since October, lots of filings. Comments are due, reply comments are due April 8. We have a proceeding that is going to consider every aspect of that decision. We should allow that proceeding to go run its course because that is how we make good policy, subject to judicial review, subject to public participation.

The danger is if we do it ad hoc, we have a 21 percent part of the market in high-speed data. And to do it piecemeal through merger review processes actually hurts the process and leads to bad policy.

Senator LAUTENBERG. And one can agree with you, as you review this. The question is, who is in charge? Are the people who use TV as a commodity in their lives today, and you know that certainly, Mr. Roberts. People consider that TV is rightfully an opportunity for them to learn and amuse, all of the things that occupy time. It is a wonderful addition to life for people who are in their later years, can seek communications from real-live situations.

And so, the question is, who is the determination to be made by? And I am not suggesting that we impose rules there, except that I think there ought to be some sense of loyalty to the viewing public that says, OK, if you act to suspend or continue your negotiation, but don't grab a whole bunch, millions of people and say we are going to keep you from seeing something that is really important as part of this.

Ms. ABDOULAH. And if I may answer that, that is a great question, who is in charge? The programmers who provide the content have all the leverage. I can tell you a very quick story.

We were negotiating with a programmer who had a suite of services. We took off one of the services because it wasn't viewed. We never wanted it in the first place. Two weeks later, not one customer complaint. I get a call saying that if we don't put it back on, their other service, which was highly viewed, would be taken off by midnight.

Now it wasn't a Comcast-NBC programmer that I am talking about, but it is that kind of leverage that they have on operators, who are representing consumers. That wasn't going to be good for our consumers, and I had very little leverage because I could go and file a complaint. But even while I file a complaint, they can pull the network.

Senator LAUTENBERG. Mr. Chairman, will the record—the record, I assume, will be kept open for a bit of time?

Senator DORGAN. It will. It will. Yes.

Senator LAUTENBERG. Thanks for your indulgence for my overrun here.

Senator DORGAN. Let me ask some questions, following which I will turn it over to Senator Cantwell. Senator Cantwell, welcome.

There are so many questions here.

[Laughter.]

Senator DORGAN. Ms. Abdoulah?

Ms. ABDOULAH. Yes?

Senator DORGAN. The thing you have just described to this committee goes on all the time, and we hear about it all the time.

Ms. ABDOULAH. Yes, sir.

Senator DORGAN. A provider saying we have four channels here, and you have to take all four of them despite the fact you don't want all four. And if you don't take two of them, they are going to yank the most popular. I mean, that is leverage, and there is a lot of leverage.

Ms. ABDOULAH. Yes, sir.

Senator DORGAN. That is part of what we are talking about here. How is leverage used? Who is going to have the leverage? How will it affect what the consumer gets in the end? So that is important.

Ms. ABDOULAH. That is it.

Senator DORGAN. Professor Yoo, I think you have at least resolved one question. You seemed to start in your testimony suggesting this is a slam dunk, yes or no—in your case, yes—and no conditions. I think you have just disabused us of that. There is no problem with conditions. Right?

Mr. YOO. No problems with conditions.

Senator DORGAN. OK. And let me just tell you that the ATT-BellSouth merger included a condition of network neutrality, which I strongly support and, by the way, which, in my judgment, was very constructive in leading us to more progress at the FCC on network neutrality. Now that is not complete, thanks to a whole lot of folks that are fighting it tooth and nail. But I mean, I think things like network neutrality or Internet freedom, as I call it, are really important, and I would not want to have big interests decide to get married without a requirement.

And famously, Mr. Whitaker, as you know—and he and I talk about it every time I see him—said, look, these wires belong to me, and I intend to—I don't want Google or somebody using my wires free of charge. So that set off, of course, exactly what the basic issue is with respect to Internet freedom and gatekeepers and tollbooths and so on.

So, anyway, having said all that, you have no problem with conditions. I don't have a problem with conditions. And if in the future this is approved, there are going to be conditions.

Mr. YOO. If I may, I have no problem with the conditions that are implicated by the merger. If people use the opportunity of merger review to expand beyond the scope of what is implicated by the merger, I think that should go back to a normal regulatory process.

To give you an example, the network neutrality example you gave leads to this very peculiar order. If you actually read the AT&T-BellSouth order, it says we as a Commission do not decide that network neutrality is not required. But they have voluntarily offered to do it, and we accept their voluntary condition as in the public interest. And it has created a very, very strange policy posture for the FCC.

Senator DORGAN. A perfect public policy, in my judgment.

[Laughter.]

Senator DORGAN. Mr. Cooper, you wanted to comment?

Dr. COOPER. Well, I mean, the interesting thing is that I actually agree with Professor Yoo, a fairly rare occurrence, about how we ought to deal with the fundamental problems. And Mr. Roberts has said these are fundamental problems in the industry.

In my testimony, I suggest that the way to really handle this is to insist that the FCC and the other relevant agencies do the industry-wide rulemakings first so that we have the basic structure of protection that we need and then consider whether because of this merger there are additional things that need to be done. So I am agreeing with——

Senator DORGAN. Dr. Cooper, you understand that some of the biggest interests in the country are doing all they can to prevent the FCC from moving. So I guess you can say that, but the fact is some of the biggest interests spend all of their time trying to prevent action being taken industry wide.

So I understand your point, but I understand also why we have not made progress.

Dr. COOPER. The dockets have been open for years. They simply need to be finished, and then we will have a base for understanding how market power can be controlled.

Senator DORGAN. Let me ask Mr. Wells. Independent programming, I said earlier it is very important, and it is diminished and continues to be diminished. And so, how do you see us making progress on this?

And I have, by the way, there is—who is doing the investigation? The GAO is doing the investigation at my request on independent programming. It is a very important area, and I would like to understand, between you and Mr. Roberts, how what is being proposed with respect to this merger will affect or can affect independent programming and the quantity of it.

Mr. WELLS. I think they are two separate issues. One, of course, is on the broadcast network itself, which is NBC, which has been very aggressive in attempting internally to produce things for themselves, and I think anything that could be done in what is now voluntary to compel some more independent programming would be terrific.

And in the cable world, again, they control a great deal of it, and there is very little that is actually going on that they are not actually doing for themselves. And that has changed in a way that has made it very difficult for independent producers to bring things to the marketplace without conditions.

Senator DORGAN. And why is that the case? I mean, why has it changed?

Mr. WELLS. It has changed——

Senator DORGAN. Mr. Roberts can answer that as well perhaps?

Mr. WELLS. Yes, it has changed historically because the companies that have used the leverage of it is going to go on the air or not go on the air to either insist that it be produced through their own entity or to insist that it be a co-production in some fashion before it goes on the air. There are numerous examples of that that could be brought forward.

Senator DORGAN. Do—I am sorry.

Mr. WELLS. Yes. And I was just going to say that—and again, this is why we have tremendous concerns about the net neutrality acts because we believe that independent producers may be able to get some sort of leg up on doing things independently if they actually have another distribution outlet, which we might be able to use for people to produce independently, assuming that we won't end up having the exact same kinds of financial restrictions to getting that material on, particularly since it is going to require greater speed with which to put on that video content.

Senator DORGAN. Mr. Roberts, for those of us that believe that more independent programming, rather than dramatically less independent programming, is good for the country, what can we take from this, from the recent history and from your proposal to get larger through this acquisition?

Mr. ROBERTS. First of all, I put it in the context that the previous Senator mentioned. Let us go back in time. There were three TV channels, and today, there are hundreds. So I think, Comcast has helped totally open up choice, as have other cable companies. I think many independent producers exist and many have been—sold their company, chosen to consolidate into other providers.

I think we should separate some of these issues that we are talking about. We have never really made broadcast television programming. So, first of all, whatever NBC has done to be in fourth place, we hope we can do better in the future. So I come with an open mind on how to do better. I don't know that I would support a Government quota that would apply to us that is an X percentage should be this and Y percentage should be that, and it doesn't apply to anybody else.

So there are other rules in the past that seem to affect this area, like fin-syn, and if there should be an industry review, I am sure NBC will have a point of view on that matter, but I don't think this merger changes that trend or that existence. If anything, we come with an open mind not to just want to make it ourselves. Our history with our Comcast networks is not to do that.

A substantial percentage of our programming is from independent producers. Six out of every seven cable channels we carry after the merger we will have no financial interest in. And we have got to compete with other carriers and the programs they want to carry. So whatever has been happening inside this industry, we come and want to try to see how to get the best programming possible in the future.

Senator DORGAN. You will inherit through this acquisition, I believe, 10 NBC television stations?

Mr. ROBERTS. Yes.

Senator DORGAN. And 17 Telemundo stations?

Mr. ROBERTS. Yes.

Senator DORGAN. Are there communities in which you would have two NBC stations or two stations and also in which you are the dominant cable provider? And then, is that an issue, or should it be an issue?

Mr. ROBERTS. There are some markets where both Telemundo and NBC are there, and Comcast is the cable operator. I don't believe so because one of the conditions we voluntarily started with was retransmission consent for those broadcast stations that would

have program access apply to it, where heretofore program access has never applied to retransmission consent.

Senator DORGAN. Well, I mean, I think—Ms. Abdoulah, do you want to——

Ms. ABDOULAH. Well, applying a meaningless rule to something is still meaningless. And it is an issue. In Illinois, we would negotiate for the regional sports network. We have the O&O NBC network, and we have Telemundo. So now we are going to be—instead of negotiating with two different providers, now we negotiate with one for all of the suite of those services. And that is intense leverage that they are going to have on us today, increasing from today.

Senator DORGAN. I am going to call on Senator Cantwell. Let me say that I think this is a significant issue. We should think through it carefully, understand the consequences, pro and con, and then make judgments.

If it is approved, it would have to be approved with the conditions, in my judgment. But it is not for us. I mean, it is for the two regulatory agencies, and my hope is from this hearing, they will take a good look at this and understand the consequences.

I think there are two different views here. One is at what level are you talking about competition, the local level or a national level? And these are always difficult and interesting issues. And I—as I said, my background on the issue of media concentration and the media ownership rules at the FCC have caused me to have a substantial amount of concern about concentration.

On the other hand, I don't think that in every circumstance, big is bad and small is beautiful. I mean, I think that there are circumstances where concentration can provide benefits to consumers.

But I will tell you something, I think concentration and leverage has to be tempered with rules and regulations and conditions. We have seen many examples where they were not tempered in such a way, and it turned out much, much different than was suggested.

Mr. Roberts, you, Mr. Wells, Dr. Cooper, and Ms. Abdoulah, and Professor Yoo have spent almost 3 hours with this committee and answered all of the questions. I say to all five of you we appreciate that very much.

I am going to call on Senator Cantwell and ask Senator Cantwell, would you mind finishing the questioning and then just adjourn the hearing? I have to be at the Capitol. Our FAA bill is on the floor, and so I have to be on the Senate floor.

Senator CANTWELL. Thank you.

Senator DORGAN. Thank you. I thank all of the witnesses.

Senator Cantwell, why don't you proceed?

Senator CANTWELL [presiding]. Thank you, Mr. Chairman. And I want to recognize your long leadership in media consolidation issues and the importance of that. And not that you are going anywhere today or tomorrow, but we certainly will miss that voice at the end of this Congress. And it has been a critically important one, and we in the Pacific Northwest value it. So thank you for your leadership on that.

I am not going to keep you here. I only have two questions. I am sure that you have been through many questions from my colleagues here, and I have watched most of it.

So I wanted to ask, Mr. Roberts, one of the reasons I think that people think cable rates keep going up. And I know my colleague Senator Klobuchar alluded to the fact I think it is something like between 1995 and 2008, basic services increased 122 percent, which is—you know, CPI only grew by 38 percent.

But one reason why people think that this growth in cable rate has been the cable networks' willingness to bid up rights to broadcast sports programming because they know that they can pass that through to the subscriber base. And a number of my Washington State broadcasters have expressed a concern that they—at the crux of this is this rabbit ear world of advertising eyeball content as a business model versus your business model.

And I am sure there are some people who are wishing we could go back because of the costs, and the networks are worried that they are going to be eventually priced out of major sporting events because their business model and inability to pass those costs on to advertisers is going to be challenged. So some people have even said that we in the not-too-distant future will be watching the Super Bowl on cable, which means that we will be paying for the Super Bowl, as opposed to having an advertising model, which would give access to a broader number of people.

So do you share those concerns, and Mr. Cooper, Ms. Abdoulah, do you want to comment on that?

Mr. ROBERTS. Thanks, Senator Cantwell.

I think there are some industry trends that have been going on. Just pick two examples, the BCS game is going from Fox to ESPN in the future, and Monday Night Football went from ABC to ESPN. So I don't think this merger actually changes that potential in a way—we wouldn't be buying NBC if we didn't want to find ways to make NBC vibrant, valuable, great, and sort of back to some of the glory of what it did in the past and, hopefully, what it can do in the future.

So I think some of the questions that get raised by that are retransmission consent that we have been talking about today on the panel, and I think our industry—and I think we can now perhaps play a constructive role. We will be basically 80 percent a cable operator, 20 percent a content company after the transaction.

So, in a sense, we are going to look at it from both sides and say are there creative and good for consumer solutions that we can propose that apply to the whole industry, not just to one company, that address some of the things that I think are very real that you have raised.

Senator CANTWELL. Dr. Cooper, do you worry that we are going to have to pay for the Super Bowl in the future?

Dr. COOPER. Yes. The only reason that the cable operators are able to pass through the outrageous costs for sports programming is because they force consumers to buy bundles, and deny consumers per-channel choice. One study done of those channels was that three-quarters of the American people would not pay the price that they are being charged.

So the answer is that the market power they have at the local level and the changed incentives NBC today has an incentive to be on every TV set. Once they are owned by Comcast, they have a different incentive because now they are on 24 percent of the Nation's

TV sets. And so, all of their incentives will change. Their willingness to maximize profits will change.

TV Everywhere is a perfect example of tying the cable fee to another service. That is another bundle. So that is the way we must address this. There is a real incentive here to extract from consumers what is called surplus. By tying those products together, they will have that incentive. So it is a very real concern.

Senator CANTWELL. Ms. Abdoulah, did you have——

Ms. ABDOULAH. Yes, from our perspective, the content providers have such leverage during negotiation. Not only do they make sure we take the product that they want us to take and not necessarily what consumers want or want to pay for, but also how we carry it.

For a long time, I have wished that our programming agreements allowed us to tier the service appropriately. So that when I got customer complaints—I have a direct e-mail and a direct 800 number for customers to call me directly. And they will say, "Why do I have to pay for this sports programming? Why is my bill continuing to go up?"

I can't tier that because I am not allowed to. I would love to be able to offer services in a way that if we have sports fanatics, they can buy it and pay extra for it. But that is not how our program agreements are currently structured.

Senator CANTWELL. Thank you. I have one more question I wanted to ask Mr. Roberts about customer service.

When I think about the vertical integration, and I think this whole area we have some barriers to entry here, and we have challenges even for the consumers in switching from one competitor to another. It isn't as easy as people might think to just do that. And if we are only talking about two or three or we are going to continue to see integration, to me, customer service is very important.

And when you think about the amount of money that Comcast has been able to make, how much are you pouring into increased quality on customer service?

Mr. ROBERTS. Well, let me first give a bad statistic, which is we have lost 1.2 million cable customers in the last couple of years. So there is real competition that is hurting us, and some of that is self-inflicted with mistakes we have made on customer service.

So I have made it a top priority for our company to improve customer service and the customer experience because it is not just when you call. It is how well the entire experience is defined.

Senator CANTWELL. What grade would you give your——

Mr. ROBERTS. I think we have improved. I would say we were—I don't know. This is—we spent over $2 billion in the last 2 years more to improve the customer experience. And the number-one thing that we are rolling out and we rolled out in the last 6 months all across the Nation, including in your market, is a guarantee to our customers. If we mess up, we fess up.

And that is a huge change. So if we are late for an appointment, it is on us. We will pay your bill. We will give you free premium service. We will pay $25. There is on-the-spot——

Senator CANTWELL. You will get free premium service?

Mr. ROBERTS. For that month, a couple of months. Different markets have different specifics, but if we are late, here is $25. Here

is a free install. Here is a guarantee. If you don't like the product, give it back to us at the end of the first month. The kinds of things you have seen in other businesses that back up their claims is now something that we have across the entire footprint.

We are upgrading the speeds of the Internet, but we know that it has to work. And we know that even if we have more choices than we have ever had before, the TV, if it breaks, there is a car crash and the cable goes out because the pole got knocked down. Sometimes it is not our fault. You, the consumer, don't want to hear that. You want to know how fast am I back up, and can you text me a message that the cable is out and you are on it, and you know about it?

So we are building diagnostics into the system so that we know there is a problem. Maybe you are not even home watching, and we are already on it before you call us. All sorts of improvements along those nature because of competition, because it is the right thing to do, because it is good business.

And I think we have made progress. I would say the grade is improving, but it is still not perfect.

Senator CANTWELL. I think it is probably far from perfect, and I think really the issue, from my perspective, is that you are taking this revenue that you are making off of this consumer base and trying to consolidate in a more vertical way, which is going to leave the market with even less choice. And it would be one thing if the consumer experience continued to get great customer service.

So, I would just encourage you to go back and look at your business from that perspective and I think there are some interesting things out there. But saying to people that you are going to come within a 4-hour window and then not showing up and saying, well, here is $20, I think that hardly helps the consumer, and when they have to spend the time to change to another service.

So we are making—this vertical integration makes it even more challenging. And we want to see that the consumer definitely has choice, definitely has competition, but is also going to have a good experience and can easily move toward other competitors if that experience isn't delivered.

Mr. ROBERTS. If I might, just to that point. I agree with you, and just to demonstrate a couple of points of progress. We had 2 million, 2.2 million fewer customer-reported problems in the last quarter or in the last month from a year prior. We had—we went from 87 or 84 percent on-time by putting the guarantee in place.

Our employees, even if it is not—it doesn't completely compensate the consumer, to your point, our system, nobody wants to report that they spent that money. So we have gotten to 95 percent on-time from 87 percent just by putting that insurance in place and that guarantee in place. So there is momentum in this direction.

I take your constructive points that this should be the main focus of what we have to do well. We just recruited a new head of Comcast Cable, and this is the number-one thing in recruiting him that I suggested that we focus on, which is continually improving the customer experience.

Senator CANTWELL. Thank you.

Thank you. Well, I want to thank all the panelists. I know that we are going to leave the record open for 2 weeks, and if you can

help respond to any questions from members or any additional statements that they put in for the record.

And again, thank you for your time today. I am sure that this is going to be a continued discussion. As you can see from my colleagues, we will be following it closely.

So the hearing is adjourned.

[Whereupon, at 1:07 p.m., the hearing was adjourned.]

A P P E N D I X

PREPARED STATEMENT OF GREGORY BABYAK, HEAD, GOVERNMENT RELATIONS, BLOOMBERG TV

Bloomberg TV ("BTV" or "Bloomberg") appreciates the opportunity to express its views and concerns about the proposed combination of Comcast and NBC-Universal ("NBCU") and respectfully requests that the testimony be entered into the written record. BTV, which is wholly owned by Bloomberg, L.P., an internationally recognized provider of financial news and information, is an independent news channel that provides 24 hour business news programming. BTV has been in existence for nearly 15 years. In the past two years, Bloomberg has invested substantially to revitalize BTV to be a stronger provider of news and information. These investments have included the hiring of Andrew Lack, the former chairman and CEO of Sony Music Entertainment and president and COO of NBC, and an entirely new management team. As a result, BTV is fast becoming a formidable competitor to CNBC, the dominant provider of televised business news, as well as Fox Business News. As BTV's new business strategy evolves, it will become even more competitive.

BTV is the principal news and information channel not affiliated with any national programming network or other national producer of video programming, including programming channels affiliated with multichannel video programming distributors ("MVPDs"). Congress, in particular the Senate Commerce Committee, has historically been very concerned about preserving and advancing independent sources of news and information. In an era of increased media consolidation, ensuring that the public maintains access to independent sources of news and information, such as Bloomberg, is critically important to the public interest. A robust marketplace of ideas is by necessity one that reflects varied perspectives and viewpoints. Indeed, the opportunity to express diverse viewpoints lies at the heart of our democracy.

The Comcast-NBCU merger will join together the country's largest cable operator with the country's oldest broadcast network. The combined company will be the largest cable operator, own outright 26 television stations in the largest markets, own the NBC network which reaches nearly every designated market area ("DMA") in the United States, own several of the highest rated cable television networks and the Universal film library, and be one of the largest broadband providers in the country. The NBCU networks include such "must-haves" as NBC, The Weather Channel, MSNBC, NBC Sports and, of course, CNBC. CNBC is far and away the dominant business news network in the United States with more than 75 percent of viewership and revenue in the business news programming market. Comcast also owns a number of "must-have" networks in these markets including principally its regional sports networks. In addition, Comcast is already the largest cable operator in the United States with market shares in excess of 50 percent in such important DMAs as Chicago, Philadelphia, San Francisco, Boston, Detroit, Seattle-Tacoma, Miami-Ft. Lauderdale, Denver, Pittsburgh, Baltimore, West Palm Beach, Harrisburg and Jacksonville and in excess of 45 percent in Washington, D.C., and other major markets.

This horizontal and vertical combination will create a powerhouse, which could have the incentive and ability to eliminate consumer and advertiser choice and to deprive competing independent programmers, such as Bloomberg, from access to a level playing field in the market for viewers and advertisers.

Bloomberg does not oppose the merger per se. In fact, Bloomberg looks forward to Comcast continuing to be an important distributor of BTV, right alongside CNBC, MSNBC, and any other Comcast-owned or -controlled news programming. Indeed, our goal is to ensure that Comcast-NBCU plays a critical role as an unbiased and nondiscriminatory distributor.

Bloomberg is seeking, however, to ensure that the merger will not impede Bloomberg's mission as an independent source of news. Bloomberg is seeking voluntary commitments by Comcast or, in the alternative, conditions required by the Federal Communications Commission ("FCC") and the Department of Justice on the

merger that will protect the ability of it and other independent providers, and particularly independent news providers, to continue to serve the public interest by being an important source of news and information for the entire country.

Let me outline some of the more significant steps that the merged entity could take that would significantly harm BTV's competitiveness.

1. *Discriminatory Channel Placement*—As an independent news channel, it is important for Bloomberg's programming to be placed in the channel line-up near other news channels. "Neighborhooding" refers to an industry practice of putting all program channels in the same genre adjacent to one another in the channel line-up. Thus, for example, on modern distribution systems such as DirectTV, Dish, Fios and U-Verse, children's programs, shopping, cooking and, most important, business news and 24 hour cable news channels are clustered together. Neighborhooding is especially preferred by viewers because it allows them to easily scroll between programs within the genre that interests them.

BTV's concern is that Comcast will place CNBC and MSNBC in more favorable positions. This is already the case, for example, on Comcast's Washington, D.C. area systems, where CNN, CNN Headline News, Fox News, MSNBC and CNBC are clustered together, but BTV is located on a much higher channel number.

Although other MVPDs are expected to transition to neighborhooding as they transition to fully digital technology, as a result of the transaction, Comcast will have a strong incentive to hinder this pro-consumer development on its systems and disadvantage networks like Bloomberg that compete with its "owned" networks like CNBC. This issue will be presented immediately upon consummation of the merger, as Comcast has stated in a public earnings call on Feb. 3, 2010 that "by the end of 2010" it expects to have "80 percent of its systems to have made the conversion to All-Digital."

Comcast could also decrease viewership of BTV relative to CNBC by placing BTV on a higher, more expensive tier, while keeping CNBC on the basic non-premium tier.

2. *Discriminatory Payment Terms*—As BTV increases viewership, any license fees it gets paid by Comcast should be raised accordingly. Following the merger, Comcast would have an incentive to pay BTV less than marketplace rates relative to CNBC.

3. *Disadvantaging BTV's Ability to Obtain Advertisers*—Comcast's carriage agreements frequently require programmers like BTV to provide Comcast with free advertising time on the BTV network. As a result, after the merger Comcast will be able to bundle ads on BTV with slots on its own news networks in a way that would deprive BTV of a fair opportunity to sell advertising to advertisers who prefer the BTV network.

4. *Limiting or Degrading Internet Access*—As a news provider who simultaneously distributes all its content over the Internet, BTV is concerned that Comcast-NBCU could unreasonably inhibit users' access to Bloomberg TV video on the Internet. Comcast could pressure alternative content providers into removing or limiting content availability on the Internet by offering them discriminatory or unfavorable terms if the provider used other platforms such as the Internet to distribute their content.

To address these potential harms we hope that Congress will work with the Department of Justice and the Federal Communications Commission to find ways to protect important independent sources of news and information. For example, the FCC and the Department of Justice could insist on a judicial decree or conditions that require Comcast to provide Bloomberg and other similarly situated independent programmers with at least the following protections, which correspond by number to the potential harms outlined above:

1. Neighborhooding of independent business news programming with Comcast-owned business news programming by channel position and programming tier.

2. Most favored and non-discriminatory terms and conditions of carriage for independent business programming networks on all Comcast platforms so that they obtain the same terms as CNBC.

3. Prohibition against the offering by Comcast of advertising time on competing business networks combined with the purchase of advertising time on Comcast-owned networks.

4. Prohibition of any restriction, limitation or disincentive on the ability of alternative business news networks to offer their content on other platforms, including the Internet.

We look forward to any assistance that the Committee can provide in ensuring ComcastNBC does not engage in the foregoing activities or any others that will harm the public by unfairly diminishing the ability of independent programmers, including BTV, to compete on the merits with CNBC.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN D. ROCKEFELLER IV TO HON. JULIUS GENACHOWSKI

In the Cable Television and Consumer Protection Act of 1992, Congress expressed concern about discrimination that can result from the vertical integration of multichannel video programming distributors and video programming vendors. Pursuant to this law, the FCC set up a regulatory regime to govern program carriage disputes. These rules are an important part of making sure that independent programmers have a fair chance of securing carriage on multichannel video programming distributors, like cable companies and satellite companies. It is my impression, however, that the FCC rarely resolves carriage disputes in a timely way.

These concerns, which I have previously expressed to you in questions for the record, rise anew in the context of the proposed combination of Comcast and NBC-Universal.

To this end, I have several questions:

Question 1. Has the FCC ever taken an enforcement action involving a carriage complaint against a multichannel video programming distributor?

Answer. In eight program carriage cases, the Commission staff has found that the complainant met its initial burden of establishing a prima facie case of a violation of the program carriage rules. The Commission staff referred these matters to an Administrative Law Judge ("ALJ") to conduct further fact finding. In four of the eight cases, the parties settled their dispute before a decision was reached on the merits of the dispute. In the remaining four cases, the ALJ's decision on the merits is currently under review by the Commission.

Question 2. Are there existing complaints pending at the FCC involving carriage under either FCC rules or merger-specific carriage complaint procedures? If so, how long have they been pending and when will the agency resolve them?

Answer. There are six pending program carriage cases, one of which involves an appeal of an arbitrator's ruling pursuant to merger-specific carriage complaint procedures. Five of these cases have already been ruled upon by either Commission staff or an ALJ, and these initial decisions are currently on appeal to the Commission. Of these appeals, four have been pending for 5 months since the appeal was filed with Commission and the remaining case has been pending for 16 months since the appeal was filed. The pleading cycle on the remaining pending complaint closed in late March 2010 and is awaiting an initial decision by the Commission staff The Commission intends to resolve all of these matters as quickly as possible.

Question 3. How can the FCC be a more efficient forum for the resolution of these disputes?

Answer. In the Commission's recent program access order dealing with the so-called "terrestrial loophole," the Commission took an approach that will expedite proceedings by establishing a presumption that will resolve the case unless factually rebutted. We will explore whether similar rules or presumptions can expedite decisions in program carriage disputes.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DANIEL K. INOUYE TO HON. JULIUS GENACHOWSKI

Question 1. This past weekend, more than 3 million subscribers in New York, New Jersey and Connecticut lost access to the New York City ABC affiliate only to have service suddenly restored fifteen minutes into the Oscar telecast. In the context of these recent disputes while the FCC has urged the parties to resolve their differences, it seems clear to me that the Commission needs to do more to protect innocent consumers.

During the debate over the retransmission consent provision in 1992, we anticipated the possibility of what we hoped would be rare instances when negotiations might breakdown and provided the authority to address these situations.

In light of this legislative history, and the fact that changes in the marketplace are leading to more disruptions what, if anything, will the FCC do to ensure that consumers are not harmed as a result of retransmission consent disputes. Do you need any assistance from the Congress?

Answer. First, I share your concern about the effect on consumers of programming disruptions. It is not fair to consumers that they suffer loss of service and are needlessly inconvenienced when two private sector entities fail to agree on carriage arrangements.

There are legitimate questions about whether to update the 20-year old framework for retransmission consent and must carry. While it is understandable that broadcasters desire cash compensation for their programming from cable operators and other multichannel providers, commercial negotiations affect third parties who aren't at the table, namely consumers. As we move forward, we will be reviewing retransmission consent rules and I will be focused on making sure we have a framework that is fair to consumers, as well as each of the businesses involved.

To that end, on March 19, 2010, the Commission released a Public Notice seeking comment on a petition for rulemaking. The petition requests that the Commission amend and supplement its retransmission consent rules and was filed by 14 entities, including small, medium and large cable companies, satellite operators, and consumer groups. Comments are due on May 18, 2010, and reply comments are due on June 3, 2010. The staff will evaluate the record developed in the proceeding in order to determine how to proceed. I look forward to working with you on this matter.

Question 2. Over the course of the past few months, we have witnessed some very high-profile retransmission consent disputes, including Cablevision-Disney and Time Warner Cable-FOX. Consumers are clearly caught in the middle of these fights. Is it appropriate for the FCC to intervene in these disputes when the public interest is harmed?

Answer. The FCC becomes formally involved in these disputes when one or both parties files a complaint alleging that the good faith retransmission consent rules have been violated. In 2006 and again last year, Mediacom brought such a complaint to the Commission involving its negotiations with Sinclair Broadcasting. In 2006, the Commission's Media Bureau determined that, based on the totality of the circumstances, Sinclair had not breached its good faith duty. Mediacom appealed that decision to the full Commission; however, the parties settled their dispute while that appeal was pending. In the 2009 dispute, the Commission was involved in attempting to bring the parties to resolution. I was pleased that the parties ultimately agreed to a short term extension that allowed Mediacom's subscribers to view the New Years bowl games and enabled the parties to complete their negotiations. Even when the parties do not bring a formal complaint to the Commission, if agency staff become aware that negotiations are reaching a standstill, Commission staff have reached out to the parties, requested status updates and encouraged retransmission consent extensions so that subscribers are not subjected to a service disruption. The petition for rulemaking on retransmission consent rules that was put on public notice includes a request for comment on the issue of whether and to what extent the Commission should intervene and has authority to intervene in retransmission consent disputes. The record developed in the proceeding will be evaluated and a determination on how to proceed will soon follow.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. FRANK R. LAUTENBERG TO HON. JULIUS GENACHOWSKI

Question. While we work to bring new communications services to more Americans, New Jerseyans still lack basic TV coverage of local news and events. WWOR, New Jersey's only high-power commercial TV station, has not adequately served the people of New Jersey and is operating under a license that expired almost three years ago. When will the FCC be in a position to act on WWOR's renewal application and concerns about its local news coverage?

Answer. As of course you are aware, a petition to deny was filed against the renewal application of WWOR questioning the quantity and quality of New Jersey specific news provided by the station. Recently the petitioner submitted new information into the docket in this proceeding which could bear on the course of action taken regarding the renewal application, currently are under review in the Media Bureau. I am hopeful this matter can be concluded expeditiously.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARK WARNER TO HON. JULIUS GENACHOWSKI

Question 1. Content negotiations seem to be getting tougher over time. This past December's carriage negotiations between Fox and Time Warner Cable almost re-

sulted in loss of service to subscribers. If the Comcast-NBCU merger is approved, how do we find a balance between marketplace negotiations between distributors and content providers and a process that unfairly gives advantage to one party? Should the merger have standstill protections for consumers or binding arbitration if parties reach an impasse? If not, why not?

Answer. Among the commitments that Comcast Corporation, General Electric Company and NBC Universal, Inc. (the "Applicants") have made is to commit to the "key components" of the Commission's program access rules in negotiations with MVPDs for retransmission rights to the signals of the NBC and Telemundo owned-and-operated television stations for as long as the Commission's current program access rules remain in place. While the transaction is pending before the agency, and until we have compiled and reviewed the full record in the proceeding, it would be premature for me to comment on the specifics of the Comcast/NBCU transaction, including the sufficiency of this commitment. However, generally speaking, I remain concerned about recent retransmission disputes that have left consumers stranded with the threat of—and in some cases the actual loss of—their favorite programming while the parties work out their differences. For that reason, we have played an active role in trying to facilitate agreement among the parties in those retransmission disputes that have occurred during the past several months. The Commission also recently sought public comment on a Petition for Rulemaking filed by various multichannel video programming distributors ("MVPDs") and public interest organizations, asking the Commission to amend its retransmission consent rules. By seeking comment on the Petition, the Commission will be in a better position to assess any possible next steps in this area.

Question 2. Rising cable prices over the past decade have been a big issue for consumers. One of the concerns expressed about the merger is that it may lead to higher prices for both Comcast subscribers and for other consumers because their distribution company (satellite or a smaller cable provider) may have to pay more for content sold by the merged company. What are your thoughts about this contention?

Answer. At this time, it would be inappropriate for me to comment on the specifics of any possible impact of the proposed Comcast/NBCU transaction, including that on MVPD rates, while the transaction is pending before the agency. We are proceeding with an open and transparent review of the proposed merger, and encourage public comment on all issues of concern, including the potential impact of the merger on the rates that consumers will pay for video content. We will carefully review the record on this and any other issues regarding the proposed transaction.

Question 3. Does a la carte pricing of cable makes sense as a possible way to provide content to consumers at a more affordable price? If not, why not?

Answer. There has been much debate regarding the potential benefits and harms if cable television system operators and other MVPDs were to market their service on an a la carte basis, rather than by requiring fees based upon a bundled group of channels. On the one hand, proponents of a la carte maintain that it would provide subscribers more choice in the programming channels that they receive and allow them to pay only for those channels that they select. Opponents argue that the a la carte model would threaten the economic viability of less popular or niche channels, particularly those that program for the benefit of smaller audiences, including some targeted to minorities or women. While the Commission does not have the explicit authority to require MVPDs to provide service on an a la carte basis, there is no legal impediment to the provision of most services on that basis.

Question 4. There has been much discussion about the gatekeeper role of broadband providers. Both in terms of net neutrality protections, and also because the nascent Internet TV sector may depend on consumers being able to access content either through a distribution agreement (such as cable) or directly through an ISP, some consumer groups have expressed concerns about the merger because of these issues. What are your thoughts about these concerns?

Answer. I believe that the Commission's role in promoting competition in the video marketplace is essential. The Commission is charged under the Communications Act with ensuring effective competition; promoting innovation; and encouraging investment and the broad and rapid deployment of broadband and other advanced communications services throughout the United States. Specifically with respect to video programming, the Commission's goals include protecting and advancing the interests of consumers while fostering a vibrant marketplace. In the Comcast-NBCU proceeding, Commission staff specifically requested that the Applicants submit an economic report on the potential impact of the proposed merger on the Internet video sector. In anticipation of that filing, in order to allow all interested parties sufficient time to comment on that submission, earlier this month, we suspended the public comment deadlines, and will allow a full 45 days for the filing

of petitions and comments, once the Applicants have filed that report and another addressing the benefits that they have claimed will accrue from their merger.

Question 5. How do we ensure that all content will be available to all distributors in the marketplace on the same terms and conditions?

Answer. At the outset, the Commission's program access rules, which are intended to ensure that the content of certain cable-affiliated programming networks is available on non-discriminatory terms to all MVPDs, will apply to the merged Comcast-NBCU entity and its affiliates. Among the commitments that the Applicants have made is to accept the application of those rules to the high definition feeds of any network whose standard definition feeds are subject to the program access rules for as long as those rules remain in place. While the transaction is pending before the agency, and until we have compiled and reviewed the full record in the proceeding, it would be premature for me to comment on the specifics of the Comcast/NBCU transaction, including the sufficiency of this commitment.

Question 6. Comcast made a voluntary commitment to add at least 2 independent programming channels to its line up for the next 3 years. Some independent programmers have expressed concerns about this level of commitment. What do you think is a reasonable level of independent, unaffiliated content?

Answer. The Commission is charged with ensuring that any proposed transfer or assignment of FCC licenses or authorizations is in the public interest. Thus, as we review the transaction that is before us, we will consider the complete record, including all comments that we receive on this commitment, in evaluating its sufficiency, as well as the possibility of imposing other conditions that serve the public interest as conditions on the merger. It would be premature for me to comment on the specifics of the Comcast/NBCU transaction while it is pending before the agency, including the adequacy of this or any of the applicants' other commitments.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARK BEGICH TO HON. JULIUS GENACHOWSKI

Question 1. The Washington Post, CNN and other news sources continue to talk about the existing and future disputes between broadcasters and distributors. I know the market continues to evolve, but no matter the dispute, consumers continue to be put in the middle. What process would you favor to protect consumers?

Answer. First, I share your concern about the effect on consumers of programming disruptions. It is not fair to consumers that they suffer loss of service and are needlessly inconvenienced when two private sector entities fail to agree on carriage arrangements.

There are legitimate questions about whether to update the 20-year old framework for retransmission consent and must carry. While it is understandable that broadcasters desire cash compensation for their programming from cable operators and other multichannel providers, commercial negotiations affect third parties who aren't at the table, namely consumers. As we move forward, we will be reviewing retransmission consent rules and I will be focused on making sure we have a framework that is fair to consumers, as well as each of the businesses involved.

To that end, on March 19, 2010, the Commission released a Public Notice seeking comment on a petition for rulemaking. The petition requests that the Commission amend and supplement its retransmission consent rules and was filed by 14 entities, including small, medium and large cable companies, satellite operators, and consumer groups. Comments are due on May 18, 2010, and reply comments are due on June 3, 2010. The staff will evaluate the record developed in the proceeding in order to determine how to proceed. I look forward to working with you on this matter.

Question 2. The head of tech policy research at Stifel Nichols, Rebecca Arbogast, is quoted as saying that the retransmission "spat will increase policy maker interest in reviewing the legal framework governing negotiations." Given the recent filing by a number of key players in the industry, is it appropriate for the Commission to consider ways to provide a process that protects consumers during the negotiations, and uses the sword of arbitration as a mechanism to force compromise?

Answer. The above-mentioned proposes arbitration as a potential reform to the retransmission consent process. We will evaluate this and other reforms to ensure that viewers are fully protected. If after reviewing the record developed in the petition for rulemaking, we determine that assistance from Congress is necessary to correct any problems with the retransmission consent regime, we will promptly inform Congress.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JIM DEMINT TO HON. JULIUS GENACHOWSKI

Question 1. You have testified that the scope of the FCC's review of a potential merger, such as that between Comcast and NBC, is based on an FCC finding that transaction is in the public interest. You detailed a number of considerations that the FCC utilizes in reaching this decision, including: "protecting and advancing the interests of consumers, as well as those of children, and families; ensuring effective competition; promoting innovation; and encouraging investment and the broad and rapid deployment of broadband and other advanced communications services throughout the United States." You further testified that "some of these considerations may be more centrally at issue than others"—in your opinion, which of these factors, whether among those you listed or not, are more centrally at issue in the present case than others? If the FCC resolves these considerations to its affirmative satisfaction, are there any other reasons that the FCC would not pursue a final decision on this proposed merger in an expeditious and timely fashion?

Answer. It would be inappropriate to comment on the specifics of the Comcast/NBCU transaction while it is pending before the agency. Moreover, speculating about which considerations might be centrally at issue before the Commission has received and reviewed all public comments and completed a full and thorough investigation would not only be premature, it could adversely affect the fairness of the Commission's review process under the Communications Act and the Administrative Procedure Act. The Commission is dedicated to providing a thorough, efficient, and transparent review of the proposed transaction as quickly as possible. On March 18, 2010 (after the parties had submitted their economic study), we sought public comment on the proposed transaction. Initial comments are due on May 3, with the formal pleading cycle ending on June 17. After the record is complete and the Commission has concluded its investigation, the Commission will issue its decision in a timely manner.

Question 2. At recent speech to the Media Institute, NTIA Administrator Strickling stated that a hands-off approach to the Internet was the right call in the 1990s but suggested this is no longer the right policy. I see the Internet as even more competitive now then in the '90s—do you agree with his belief that greater government regulation of the Internet is necessary? Are you concerned that such an approach would chill the additional investment in broadband network infrastructure that is critical to the Internet's continued explosive growth? In comparison to the last 5 years, do you feel that there is currently more competition in the broadband market or less?

Answer. Competition is crucial for promoting consumer welfare and spurring innovation and investment in broadband access networks. The FCC's recently-released National Broadband Plan, quoting the Department of Justice, noted that the critical question is not an abstract notion of whether or not broadband markets are "competitive," but rather whether there are policy levers around competition policy that can be used to produce the best possible level of competition. The National Broadband Plan did not look backward and attempt to compare the competitiveness of today's broadband market with that of broadband markets earlier in the decade.

Question 3. In its previous decisions, the FCC has determined that broadband services contain two "inextricably intertwine[d]" components—one that involves information processing, retrieval, and storage, and another that provides the transmission of information from the consumer to the Internet. This factual determination has been based, in part, upon the manner in which consumers obtain broadband service—through the purchase of a single, integrated offering rather than two separate services. Do you disagree that broadband services contain these two "inextricably intertwine[d]" components, or that consumers obtain broadband through the purchase of a single, integrated offering?

Answer. As your question points out, the FCC's determination in 2002 and in later follow-on orders concerning the classification of broadband services were based on the facts and market conditions that existed then, the facts and market conditions that were expected to develop in the future, assessments of the Commission's legal authority under the existing case law, and policy judgments by the Commission. With respect to cable modem service, a majority of the Supreme Court upheld the Commission's conclusions as "a reasonable policy choice for the Commission to make." *NCTA* v. *Brand X Internet Servs., Inc.*, 545 U.S. 967, 997 (2005) (brackets omitted). The Commission has not undertaken any recent reexamination of these questions. If such a proceeding were commenced, it would involve notice, a full opportunity for comment, and a record-driven inquiry. I will not prejudge the facts or predictive judgments the Commission might develop through such a proceeding, nor its ultimate outcome. Moreover, Commission's Office of General Counsel is currently

reviewing the U.S. Court of Appeals for the District of Columbia's opinion in *Comcast Corporation* vs. *FCC* and is assessing its implications for Commission authority and policies.

Question 4. Recent statements by high-ranking FCC officials indicate that the FCC is contemplating a reclassification of broadband services from "information services" to "telecommunications services." Do you believe that such a reclassification would comport with the definitions of each service under the Communications Act? Do you believe that such a reclassification is justified, and if so, could you please explain your rationale in detail?

Answer. See answer to Question 3, above.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. DAVID VITTER TO HON. JULIUS GENACHOWSKI

Question. Do you believe your agency currently has adequate authority to exercise responsibility to review certain transactions? If not, can you cite examples where you feel more government invention into private market decisions and negotiations is warranted in the video and broadband market?

Answer. I believe the Commission's current authority to review transactions is adequate to allow us to consider the effect of those proposed transactions under the broad public interest mandate established by the Communications Act, which includes, among other things, protecting and advancing the interests of consumers, as well as those of children and families; ensuring effective competition; promoting innovation; and encouraging investment and the broad and rapid deployment of broadband and other advanced communications services throughout the United States. The Commission has a unique statutory role that complements the Department of Justice's/Federal Trade Commission's review of transactions, which focuses on the impact of the transaction on competition.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. SAM BROWNBACK TO HON. JULIUS GENACHOWSKI

Question 1. If broadband services are reclassified as telecommunications services, and thus subject to more regulation, do you think that broadband providers would increase or decrease investment in broadband networks?

Answer. The FCC's determinations in 2002 and in later follow-on orders concerning the classification of broadband services were based on the facts and market conditions that existed then, the facts and market conditions that were expected to develop in the future, assessments of the Commission's legal authority under the existing case law, and policy judgments by the Commission. With respect to cable modem service, a majority of the Supreme Court upheld the Commission's conclusions as "a reasonable policy choice for the Commission to make." *NCTA* v. *Brand X Internet Servs., Inc.,* 545 U.S. 967, 997 (2005). The Commission has not undertaken any recent reexamination of these questions. If such a proceeding were commenced, it would involve notice, a full opportunity for comment, and a record-driven inquiry. I will not prejudge the facts or predictive judgments the Commission might develop through such a proceeding, nor its ultimate outcome. Moreover, Commission's Office of General Counsel is currently reviewing the U.S. Court of Appeals for the District of Columbia's opinion in *Comcast Corporation* vs. *FCC* and is assessing its implications for Commission authority and policies.

Question 2. If broadband services are reclassified as telecommunications services, would such an outcome increase or decrease innovation in network management?

Answer. See answer to Question 1, above.

Question 3. The FCC concluded in 2002, 2005, 2006, and 2007 that broadband competition was robust, negating the need for stringent regulation of broadband services. Do you believe that there is more broadband competition in 2010, or less broadband competition than in previous years?

Answer. Competition is crucial for promoting consumer welfare and spurring innovation and investment in broadband access networks. I agree with the Broadband Plan, quoting the Department of Justice, that the critical question is not some abstract notion of whether or not broadband markets are "competitive," but rather whether there are policy levers around competition policy that can be used to produce the best level of competition. The Broadband Plan did not look backward and attempt to compare the competitiveness of today's broadband market with that of broadband markets earlier in the decade.

Question 4. In its previous decisions, the FCC has determined that broadband services contain two "inextricably intertwine[d]" components—one that involves information processing, retrieval, and storage, and another that provides the transmission of information from the consumer to the Internet. This factual determination has been based, in part, upon on the manner in which consumers obtain broadband service—through the purchase of a single, integrated offering rather than two separate services. Do you disagree that broadband services contain these two "inextricably intertwine[d]" components, or that consumers obtain broadband through the purchase of a single, integrated offering?

Answer. See answer to Question 1, above.

Question 5. The Supreme Court has accepted the FCC's factual conclusion that broadband service is a unified service: "the high-speed transmission used to provide cable modem service is a functionally integrated component of that service because it transmits data only in connection with further processing of information and is necessary to provide Internet service." Do you disagree with the Supreme Court's view that broadband service is a single, unified service?

Answer. See answer to Question 1, above.

Question 6. As the Supreme Court articulated, "classif[ying] as telecommunications carriers all entities that use telecommunications inputs to provide information services, . . . would subject to mandatory common-carrier regulation all information-service providers that use telecommunications as an input to provide information service." Do you agree that, if the FCC classified broadband providers as telecommunications carriers, Internet applications providers would also have to be classified as telecommunications carriers?

Answer. No. The quoted passage is from the Supreme Court's decision in *NCTA* v. *Brand X Internet Servs., Inc.,* 545 U.S. 967, 994 (2005). The Court was there rejecting a statutory argument "that the Communications Act unambiguously classifies as telecommunications carriers all entities that use telecommunications inputs to provide information service." The Commission has never held that view of the Communications Act and I do not believe it is correct.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. GEORGE S. LEMIEUX TO HON. JULIUS GENACHOWSKI

Question 1. The video marketplace is currently going through a tremendous phase of growth and evolution as content becomes increasingly available through multiple mediums. With some change occurring, how do you view the role of the FCC in ensuring competition and promoting innovation in this environment? Are there particular challenges facing the FCC that are of concern to you as monitor this marketplace?

Answer. The Commission is charged under the Communications Act with ensuring effective competition; promoting innovation; and encouraging investment and the broad and rapid deployment of broadband and other advanced communications services throughout the United States. Specifically with respect to video programming, the Commission's goals include fostering a vibrant and healthy marketplace. In this regard, the Commission is guided by well-settled public policies grounded in the Communications Act, including promotion of the values of competition, diversity, localism, and the importance of the First Amendment. Thus, the Commission's role is essential. The Commission is dedicated to fulfilling its statutory mandates of ensuring effective competition and the unfettered flow of video programming to consumers.

Question 2. It is my understanding that some cable and satellite companies have weighed in with Congress and the FCC regarding the retransmission consent process. By statute, retransmission consent requires cable and satellite companies to obtain the consent of a television station before carrying the station's signal. While these negotiations have historically been conducted privately, some are now suggesting that the Federal government needs to have a greater role in mediating these negotiations with the broadcasters. As a principle, I am not so sure involving the Federal government more deeply in yet another industry is such a good idea at this time, especially when so many changes are going on within the industry. I am concerned about any efforts that put the government in a position of choosing winners and losers in this market place. Could you please share with us some possible unintended consequences of greater government intervention in the marketplace, in particular with regards to the retransmission consent process?

Answer. It is difficult to speculate on any impact to the marketplace with regard to retransmission consent process. I am concerned about recent disputes that have

left consumers stranded with the threat of—and actual loss of—their favorite programming while the parties work out their differences. For that reason, we have played an active role in trying to facilitate agreement in each of the retransmission disputes that have occurred in recent months. The Commission also recently put out for public comment a Petition for Rulemaking filed by various multichannel video programming distributors, asking the Commission to amend its retransmission consent rules. By asking for public comment on the Petition, the Commission will be in a better position to assess any possible next steps in this area. I also am happy to work with the Committee to further discuss the issue and what role the Commission can constructively play.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. JIM DEMINT TO HON. CHRISTINE A. VARNEY

Question. The approval process for this potential merger is shared by the Federal Communications Commission and the Department of Justice. Chairman Genachowski has testified that the FCC's review is based on it finding affirmatively "that the transfer is in the public interest." Since the DOJ reviews a potential merger on a different standard, can you please outline what that standard is and list the specific considerations that will govern DOJ's review in this particular case? In your opinion, is the scope of this standard of review a broader inquiry than that the FCC uses, or is it a more narrow test?

Answer. Section 7 of the Clayton Act (15 U.S.C. § 18) makes illegal mergers and acquisitions when the effect of such merger or acquisition "may be substantially to lessen competition, or tend to create a monopoly." This is a different standard than that of the FCC, and focuses specifically on the merger or acquisition's competitive effect, not other regulatory issues that could be encompassed in a public interest determination.

The specific considerations that the Department has applied to reviews of proposed mergers are described in detail in the Horizontal Merger Guidelines and the Commentary to the Horizontal Merger Guidelines, available on the Department's website at *www.justice.gov/atr/public/premerger.htm*. These documents were developed and issued jointly with the Federal Trade Commission, with which the Department shares antitrust enforcement authority. The Guidelines set forth the analytical framework and standards, consistent with the law and with economic learning, that the agencies use to assess whether an anticompetitive outcome is likely.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. DAVID VITTER TO HON. CHRISTINE A. VARNEY

Question. Do you believe your agency currently has adequate authority to exercise responsibility to review certain transactions? If not, can you cite examples where you feel more government invention into private market decisions and negotiations is warranted in the video and broadband market?

Answer. Since the passage of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act), the Department typically reviews mergers within the HSR Act's framework. Under the HSR Act, parties to proposed transactions in 2010 valued at over $63.4 million typically must provide to us information regarding their proposed merger or acquisition and businesses before consummating their transaction. For those transactions that require a closer look for us to make an informed judgment about their likely competitive effects, the HSR Act provides the Department the authority to issue what is called a second request, which is essentially a request for a more complete set of party documents and data. Until they comply with the second request and provide us time to review their materials, parties are not allowed to consummate their proposed deal. During the period of time when the parties are complying with a second request, we typically conduct interviews with customers and competitors, and often request documents and data from industry participants. Working together, the Antitrust Division's economists and lawyers examine the transaction's likely competitive effects based on the facts as they present themselves, and the Division pursues enforcement actions when appropriate. If a transaction falls outside the statute's reporting thresholds, any review can be more difficult, however, the Department can still investigate under its Civil Investigative Demand authority.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. JOHN ENSIGN TO
BRIAN L. ROBERTS

Question. Mr. Roberts, many people have expressed concern about the possibility that Comcast might move all of NBC's and Telemundo's good broadcast content to your cable properties, and thus starving your broadcast properties. Are those fears justified, or is Comcast committed to NBC Universal's free over-the-air broadcast networks?

Answer. Comcast and NBCU remain committed to continuing to provide free, over-the-air broadcast television, through NBC's owned and operated stations, and through local broadcast affiliates throughout the Nation. Comcast wants to invest in the broadcast industry and help it grow. Broadcasting is so important to us that it topped our list of voluntary public interest commitments. Consistent with this commitment, we intend to continue to invest in high-quality programming for broadcast on the NBC Television Network. We have no intention of removing attractive NBC network content from the broadcast platform, and viewers will continue to find their favorite shows like The Office, Meet the Press, and Saturday Night Live on their local NBC station. This is not to say that no show will ever be moved from a broadcast network to a cable network; such moves have happened in the past and may happen again in the future. For example, Law & Order: Criminal Intent originally aired on the NBC Television Network, and has since migrated to USA. And on occasion, shows have migrated from cable to broadcast and syndication, such as Monk. But our intention is to strengthen the NBC Television Network. We are acquiring a network that is often fourth in prime-time ratings and we want to work toward making it number one again.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. SAM BROWNBACK TO
BRIAN L. ROBERTS

Question 1. Many of my fellow members of this committee are concerned about jobs. Mergers aren't always so friendly to the workers at affected companies—what will this deal mean for jobs at NBC and Universal?

Answer. For over 45 years, Comcast has been a job creator. When we started Comcast in Tupelo Mississippi in 1963, we had 12 employees, and today we have over 100,000. As recently reported in Fortune Magazine, despite massive layoffs nationwide, Comcast is one of 28 major U.S. companies creating jobs. In addition to this internal job growth, NBCU's 33,000 employees will join the Comcast family.

Because the proposed combination between Comcast and NBCU is largely a vertical combination, we do not expect that the proposed synergies of this combination will include job losses. Comcast is primarily a distribution company, and NBCU is primarily a content and production company. As a result, there is very little overlapping employment of the sort you would typically find with horizontal mergers (and which typically is the cause of job reductions in a merged entity).

Question 2. How would Comcast be willing to ensure that the new entity does not have the incentive to deny carriage to competitors' networks on Comcast Cable?

Answer. Competition in the video marketplace requires us to supply the attractive, compelling programming that our customers demand. The need to meet competition 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. 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. That's why the vast majority of the networks we carry today are unaffiliated—and, even post-transaction, approximately six out of seven channels we carry will be unaffiliated with Comcast. Thus, intense competition provides a powerful discipline against anticompetitive behavior in the buying of programming.

Beyond the competitive incentive, the program carriage rules provide further assurance against our ability to discriminate against programmers based on affiliation. The program carriage rules generally require that MVPDs act fairly in selecting the programming that they assemble in packages for sale to consumers. Parties who believe that they have been treated unfairly have available to them a complaint process at the FCC through which claims of violations can be adjudicated. Comcast has always conducted its business in full accordance with these rules and has never been found to have violated them.

Question 3. Comcast has one of the largest broadband footprints in the country. How much has Comcast invested in its network, and how many Americans are able to access the network?

Answer. Since 1996, Comcast and its predecessors-in-ownership have invested nearly $60 billion to upgrade network infrastructure by installing fiber optics and other technological enhancements like DOCSIS 1.0, 2.0, and most recently, 3.0. Comcast's network has approximately 140,000 miles of fiber optic plant, enough to crisscross the country more than 45 times. As a result of these investments, Comcast now provides access to our state-of-the-art, two-way network to nearly 51 million people, or over 99 percent of the homes passed by Comcast.

Question 4. You have said in the past that you believe that an open Internet is important. How involved do you think the government should be in keeping the Internet open—and what steps has Comcast taken to keep the Internet open?

Answer. Comcast was one of the very first companies to deliver on 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 principles of openness embodied by the FCC in its 2005 Internet Policy Statement. Our commitment to doing so in the future is unwavering, regardless of whether the FCC chooses to adopt any of the open Internet rules currently under consideration.

In the comments we've filed in the FCC's "Open Internet" proceeding, we made three major points. First, we believe the FCC still needs to clearly articulate its statutory authority to adopt the specific rules proposed. Second, we believe the record still lacks any evidence or data demonstrating a problem in the marketplace that these rules would help to address, and it may be that adopting rules in the absence of a clearly identifiable problem might present more risks than benefits. Third, we said that if the FCC can establish both that it has the necessary authority and that there is a need for rules to achieve the core goal of "preserving a free and open Internet" (as Chairman Genachowski has put it), the FCC's proposed rules should be amended in several respects to minimize the potential for unintended consequences that may hurt consumers.

In particular, we noted that the FCC would be better served by a prohibition on unreasonable and anticompetitive discrimination, rather than an absolute prohibition on discrimination, as this would allow broadband Internet service providers and content and application providers to experiment with various technologies and business models that may lead to socially-beneficial differentiation. We also urged the FCC to ensure that any rules it may adopt apply to all players in and all layers of the Internet ecosystem, because that is the only way to ensure that the potential risks to the open Internet are addressed no matter where they may occur or who causes them—otherwise, the Commission's concerns about potential threats to a "free and open Internet" cannot be effectively addressed.

For further elaboration on some of the points made above, I am attaching a blog posting from our Executive Vice President, David Cohen, earlier this year.

Comcast, the FCC, and "Open Internet" Rules: Where We Stand

Posted by David L. Cohen, Executive Vice President, January 11, 2010

On Friday, Comcast presented oral argument before the U.S. Court of Appeals for the D.C. Circuit in the company's challenge to the FCC's "Bit Torrent" Order. Comcast has challenged the FCC's 2008 Order which found, in the absence of any applicable Federal law, that Comcast violated "Federal Internet policy" in the way it chose to manage congestion on its network—engineering decisions designed in good faith to provide the best possible Internet experience to as many of our customers as possible. In March 2008, while the FCC was considering the matter, Comcast announced that it had chosen to move to a different technique for managing network congestion. Unfortunately, the FCC proceeded to issue an order against Comcast in August 2008. We and many others (including two FCC Commissioners) thought the order was simply wrong, both legally and factually.

A little history: In 2005, the FCC had adopted a very short, four-point "Internet Policy Statement" that, among other things, described what consumers should be able to expect from their Internet service provider, including "reasonable network management." But policy statements are not law. They are not the same thing as enforceable rules. Members of the FCC and even advocates of "net neutrality" regulation made that very point at the time. When that Statement was issued, Comcast made it clear that we supported the four principles. We served (and still serve) our customers consistent with those principles.

When in 2007 the FCC instituted proceedings based on a complaint against Comcast's network management and told us we needed to show why we had not violated "Federal Internet policy," we were surprised. And when the FCC ultimately issued an order telling us what they thought we had done wrong—and telling the

world for the first time how the FCC intended to interpret and enforce this "policy"—we were very disappointed. We felt our network management practices were reasonable and consistent with the Internet Policy Statement. Perhaps more importantly, from a legal standpoint, we felt the FCC had not given us (or anyone else) fair notice of what its standard was for determining whether conduct (including network management) was permissible. It also didn't give fair notice that it would try to directly enforce the aspirational Policy Statement regarding consumer expectations against us (or anyone else).

When the FCC issued its Order finding of a violation of Federal standards based on our network management practices that we believed in good faith were reasonable, we had no choice but to challenge it in court.

It remains our hope that the court will tell the FCC to vacate (withdraw) the Comcast order, and thereby set the record straight and clear our name. In the meantime, last fall the new FCC began doing what the previous FCC should have done in the first place—FCC Chairman Julius Genachowski asked the agency to start a proceeding to adopt rules to "preserve an open Internet" that are based, in significant part, on the FCC's 2005 Internet Policy Statement. In other words, the FCC is now determining whether there is a need for enforceable rules and, if so, to properly establish them and to decide what guidance those rules should give to Internet Service Providers and others in the Internet ecosystem. The current rulemaking proceeding will also create a proper record for the FCC to consider its legal authority to proceed with any rules it ultimately decides to adopt. And Comcast, in turn, has been supportive of this FCC's actions to bring some clarity to this unsettled area.

Some activists insist that Comcast's challenge to the FCC is "a fight about net neutrality." That's simply not true. The primary basis for our challenge, and the basis on which we hope the court will decide this case, is that no Federal agency can subject any company or individual to sanctions for violation of Federal standards when there was no law in the first place. This is a basic issue of fair notice, regardless of the issue at stake. So it shouldn't matter whether you are for or against "net neutrality" regulation—this is simply not the way the government should conduct its business. If the FCC—or any agency—wants to regulate in an area, it needs first to establish binding regulations and apply them properly, consistent with the process that Chairman Genachowski has now proposed.

So where does Comcast stand on whether rules are needed? As I've noted before, we support the Chairman's commitment to an "open, transparent, fact-based and data-driven" rulemaking proceeding on this topic. In an interview on CNBC last Friday, our Chairman and CEO Brian Roberts also endorsed the FCC trying to make clear what the rules of the road are moving forward. He noted our support of the Chairman's process, and pledged our constructive participation.

And while, as we will make clear in our comments, we continue to question whether the record will show a need for new rules—because broadband competition and consumer demand will ensure that the Internet remain open as it has always been—the FCC may decide otherwise. If that is the result, we are obviously better off having "clear rules," as Brian stated, than with the confusion of having the FCC try to enforce an unenforceable and vague "policy statement."

It's truly sad that the debate around "net neutrality," or the need to regulate to "preserve an open Internet," has been filled with so much rhetoric, vituperation, and confusion. That's gone on long enough. It is time to move on, and for the FCC to decide, in a clear and reasoned way, whether and what rules are needed to "preserve an open Internet," and to whom they should apply and how. In launching the rulemaking, the FCC said that greater clarity is required, and we agree. Comcast will join many other interested parties in making comments to the FCC this week regarding its proposed open Internet rules. Our goal is to move past the rhetoric and to provide thoughtful, constructive, and fact-based guidance as the FCC looks for a way forward that will be lawful and that will effectively balance all the important interests at stake.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. GEORGE S. LEMIEUX TO BRIAN L. ROBERTS

Question 1. Mergers aren't always so friendly to the workers at affected companies—what will this deal mean for jobs at NBC and Universal? I have a significant number of constituents who work for Universal and NBC. What will this deal mean for them?

Answer. For over 45 years, Comcast has been a job creator. When we started Comcast in Tupelo Mississippi in 1963, we had 12 employees, and today we have

over 100,000. As recently reported in Fortune Magazine, despite massive layoffs nationwide, Comcast is one of 28 major U.S. companies creating jobs. In addition to this internal job growth, NBCU's 33,000 employees will join the Comcast family.

Because the proposed combination between Comcast and NBCU is largely a vertical combination, we do not expect that the proposed synergies of this combination will include job losses. Comcast is primarily a distribution company, and NBCU is primarily a content and production company. As a result, there is very little overlapping employment of the sort you would typically find with horizontal mergers (and which typically is the cause of job reductions in a merged entity).

Question 2. Online video is an emerging market. What is the amount of online content already available, and where does Comcast fit in? How sizable do you foresee Comcast's presence becoming in the online video market? How will the new entity's market share compare to the rest of the current providers in the online video market?

Answer. The amount of online content today is vast and growing. High-quality video content is increasingly available from a rapidly growing number of online sources including but not limited to Amazon, Apple TV, Blinkx, Blip.tv, Blockbuster, Boxee, Clicker.com, Crackle, Electus, Hulu, iReel, iTunes, Netflix, Sezmi, SlashControl, Sling, Vevo, Vimeo, VUDU, Vuze, Wal-Mart, Xbox, Yahoo, and YouTube, and there are new entrants all the time. These sites offer significant quantities of professionally-produced content that can be accessed from a variety of devices, including computers, Internet-equipped televisions, videogame boxes, Bluray 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 distribution business, currently receives and stores an entire day's worth of video content for its viewers *every minute*.

Comcast and NBCU are both relatively small players in both the production and distribution 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, accounts for only 4 percent of online video views. Even if NBCU's minority, non-controlling interest in Hulu meant that Hulu viewing was 100 percent attributed to NBCU, the combined company's share of online video views would total approximately 5 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) and countless other web-based providers large and small.

Question 3. Some of the concerns about the merger have focused on potential anticompetitive behavior. How would Comcast be willing to ensure that the new entity does not have the incentive to deny carriage to competitors' networks on Comcast Cable?

Answer. Competition in the video marketplace requires us to supply the attractive, compelling programming that our customers demand. The need to meet competition 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. 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. That's why the vast majority of the networks we carry today are unaffiliated—and, even post-transaction, approximately six out of seven channels we carry will be unaffiliated with Comcast. Thus, intense competition provides a powerful discipline against anticompetitive behavior in the buying of programming.

Beyond the competitive incentive, the program carriage rules provide further assurance against our ability to discriminate against programmers based on affiliation. The program carriage rules generally require that MVPDs act fairly in selecting the programming that they assemble in packages for sale to consumers. Parties who believe that they have been treated unfairly have available to them a complaint process at the FCC through which claims of violations can be adjudicated. Comcast has always conducted its business in full accordance with these rules and has never been found to have violated them.

Question 4. The entire media landscape is going through a transformation right now. The economic recession and the push for content online have caused many newspapers to lay off staff members, or fold altogether. Has Comcast made news

content a priority in this transaction and is Comcast working to expand in this area?

Answer. In their Public Interest Statement filed with the FCC in support of their application for approval, Comcast, GE, and NBCU made unprecedented commitments to continuing to provide free overthe-air broadcasting and preserving and enriching valuable content that is currently broadcast on NBC O&O broadcast stations. We said and I firmly believe that this transaction will help to preserve and enhance traditional broadcast television. Our objective is to strengthen the NBC Television Network and restore its former glory, not weaken it.

The proposed transaction will strengthen the companies' local content businesses, both by making the existing local news and other local programming available to consumers at more times and on more platforms than ever before, and by facilitating and encouraging the creation of new local programming. For example, the NBC O&Os air their locally produced, regularly-scheduled news programs in limited time periods each day. The proposed transaction creates significant opportunities to extend that local news content to other outlets and platforms, such as Comcast's local and regional cable networks, VOD, and online, thereby increasing consumers' access to high-quality local news and information.

As we said in our Public Interest Statement, we remain committed to preserving and enriching 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, we believe we can expand the availability of all types of local and public interest programming. Specifically, we committed that for 3 years following the closing of the transaction, the NBC O&Os will maintain the same amount of local news and information programming they currently provide. This is a particularly significant commitment to promote localism given the economic challenges facing all broadcasters today. In addition, we also said that the NBC O&Os will collectively produce an additional 1,000 hours per year of local news and information programming, consisting of a range of local and regional content, including general interest news and public affairs programming, weather, traffic, and other informational programming focused on community events, local lifestyle, fashion, arts, and multicultural features. We will use a combination of distribution platforms to make this new local content available to consumers, including the NBC O&O stations, Comcast's local and regional networks, VOD, and online, as appropriate for each local market.

Finally, we are also committed to preserving NBCU's tradition of independent news and public affairs programming and its commitment to promoting a diversity of viewpoints. Comcast has committed to 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 to effect the position and authority of the NBC News ombudsman to address any issues that may arise.

Question 5. Comcast has a substantial share of the broadband market and has been involved in the FCC's effort at putting together a National Broadband Plan. How do you see the acquisition fitting in with other important priorities like broadband deployment?

Answer. Comcast was one of the very first companies to deliver on the promise of broadband to American homes. Ever since we first started offering our High-Speed Internet service in 1996, we have invested and innovated to remain a leader, deploying high-speed service as broadly as possible throughout our footprint. We keep providing faster speeds and greater security, and doing the other things required to continuously improve the performance of the network. In the past 15 years, we have invested tens of billions of dollars in our network infrastructure, and we are continuing to invest and innovate. Today, over 99.5 percent of the homes we pass have access to our High-Speed Internet service, and about 80 percent (and growing) of the homes we pass have access to DOCSIS 3.0 technology, which enables us to offer download speeds of up to 50 Mbps, and soon 100 Mbps and greater. Comcast is committed to delivering its customers a world-class, state-of-the-art broadband Internet service.

In the recently released "National Broadband Plan," the FCC's Omnibus Broadband Initiative staff recognized what they called the "virtuous cycle" of innovation that is driven by the relationship between applications, content, and networks. They also recognized that lack of "relevance" is one of the major reasons why people choose not to subscribe to broadband. In other words, despite the wonderful array of content, applications, and services available on the Internet today, some

consumers do not yet see the value in subscribing to a broadband Internet service. We hope to change their minds.

We at Comcast have always recognized the symbiotic, interdependent relationship amongst the various stakeholders in the Internet ecosystem. At a very high level, the development of innovative content, applications, and services on the Internet drives demand for our product, while our high-speed Internet service facilitates this innovation by providing a platform for entrepreneurs to reach millions of potential customers. A primary reason that Comcast and NBCU have entered into this joint venture is because, by marrying NBCU's content with Comcast's multiple distribution platforms, we believe we can accelerate the creation and adoption of "new media" entertainment. In so doing, we will improve the value proposition of broadband Internet service, driving demand for the service and, hopefully, improving the business case for further investment in and deployment of world-class, state-of-the-art networks by *all* broadband Internet service providers.

Question 6. A keystone of the FCC's mission is promoting localism and diversity. How can this transaction—with Comcast's distribution platforms and NBCU's content—continue to foster these longstanding policy goals?

Answer. We think that the proposed transaction will foster both localism and diversity. The new venture will provide more and better local programming, including local news and information programming, thereby advancing localism. It will also expand the amount, quality, variety, and availability of content more than either company could do on its own, thus promoting diversity. In addition, Comcast and NBCU have made a number of commitments regarding localism and diversity.

With respect to localism, and as discussed above, Comcast is committed to maintaining free, over-the-air broadcast television, through NBC's owned and operated stations, and through local broadcast affiliates throughout the Nation. The proposed transaction will strengthen the companies' local content businesses, both by making the existing local news and other local programming available to consumers at more time and on more platforms than ever before, and by facilitating and encouraging the creation of new local programming. Comcast intends to preserve and enrich the output of local news, local public affairs, and other public interest programming on NBC O&O stations. Specifically, we committed that for 3 years following the closing of the transaction, the NBC O&Os will maintain the same amount of local news and information programming they currently provide. This is a particularly significant commitment to promote localism given the economic challenges facing all broadcasters today. In addition, we also said that the NBC O&Os will collectively produce an additional 1,000 hours per year of local news and information programming, consisting of a range of local and regional content, including general interest news and public affairs programming, weather, traffic, and other informational programming focused on community events, local lifestyle, fashion, arts, and multicultural features. We will use a combination of distribution platforms to make this new local content available to consumers, including the NBC O&O stations, Comcast's local and regional networks, VOD, and online, as appropriate for each local market.

With respect to diversity, the proposed transaction will provide the combined entity with the ability and incentive to make more programming available for diverse audiences. Comcast has been working hard to increase the diverse programming options available to its subscribers for several years.[1] The combined entity will be able to explore ways to deliver more diverse programming faster, on top of what Comcast alone would otherwise achieve. Because the combined entity will be able to increase the number of platforms on which such programming can be delivered—in effect expanding the potential audience—it will have a greater incentive to explore innovative business models to support the production and distribution of more and higher quality diverse programming. With NBCU's interest in Telemundo and mun2, and with Comcast's founding role in TV One and its extensive offerings of cable channels meeting the needs and interests of diverse viewers, the combined entity will be second to none in providing and promoting programming that reflects a wide range of perspectives in a variety of formats and content, furthering the Commission's goal of viewpoint and program diversity.

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, Applicants will launch a new multicast channel, using Telemundo's li-

[1] For example, Comcast's digital migration brought Portland viewers more than 20 new Spanish-language channels (for a total of more than 45 Spanish-language channels), in addition to 65 new HD channels (for a total of more than 100 HD channels), four new international channels, and six new standard-definition channels.

brary of programming. Comcast has also committed to using its On Demand and On Demand Online platforms to feature Telemundo programming, and Comcast intends to continue expanding the availability of mun2 on the Comcast Cable, On Demand, and On Demand Online platforms.

Question 7. Though most consumers pay for cable services, there is still a substantial segment of the population that relies on free, over-the-air broadcasts. How will the new entity continue to service the interests of this group?

Answer. Comcast and NBCU remain committed to continuing to provide free, over-the-air broadcast television, through NBC's owned and operated stations, and through local broadcast affiliates throughout the Nation. Comcast wants to invest in the broadcast industry and help it grow. Broadcasting is so important to us that it topped our list of voluntary public interest commitments. Consistent with this commitment, we intend to continue to invest in high-quality programming for broadcast on the NBC Television Network. We have no intention of removing attractive NBC network content from the broadcast platform, and viewers will continue to find their favorite shows like The Office, Meet the Press, and Saturday Night Live on their local NBC station. This is not to say that no show will ever be moved from a broadcast network to a cable network; such moves have happened in the past and may happen again in the future. For example, Law & Order: Criminal Intent originally aired on the NBC Television Network, and has since migrated to USA. And on occasion, shows have migrated from cable to broadcast and syndication, such as Monk. But our intention is to strengthen the NBC Television Network. We are acquiring a network that is often fourth in prime-time ratings and we want to work toward making it number one again.

Response to Written Question Submitted by Hon. Jim DeMint to Dr. Mark Cooper

Question. In your written testimony, you expressed concern that, if the Comcast/NBC merger is successful, the new entity would be able to offer "package deals and volume discounts for advertising across multiple channels." Whether in the advertising context or in the broader context of video and broadband market, aren't lower prices and greater efficiencies desirable outcomes?

Answer. Short-term lower prices that result in exit from the industry and ultimately greater concentration can result in higher prices in the long term. An efficient monopoly in the media is an unacceptable outcome, as it contradicts the essential goal of media policy that is the "widest possible dissemination from diverse and antagonistic source," as defined by the Supreme Court in a number of media decisions dating back to Associated Press in 1945.

Response to Written Question Submitted by Hon. David Vitter to Dr. Mark Cooper

Question. You've claimed that the only cost savings from the Comcast-NBCU transaction would come from massive job cuts. Please provide the Committee with your analysis in support of this assertion.

Answer. The experience in this industry, as well as many others, has been that the first place merging parties look for cost savings is labor cuts. The loss of potential new jobs is also a concern. For example, Comcast's efforts to create regional news operations will likely be cut back as exiting NBC operations will be repurposed.

Response to Written Questions Submitted by Hon. George S. LeMieux to Dr. Mark Cooper

Question 1. You have expressed concerns that the only cost savings from this transaction will come from massive job cuts. This is of serious concern to me since others have claimed that the merger would not result in job losses. Could you please provide the Committee with your data and analysis in support of this assertion?

The experience in this industry, as well as many others, has been that the first place merging parties look for cost savings is labor cuts. The loss of potential new jobs is also a concern. For example, Comcast's efforts to create regional news operations will likely be cut back as exiting NBC operations will be repurposed.

Question 2. In your testimony, you indicated that NBC and Comcast should be considered competitive rivals because they often disagree and must negotiate the

terms of the services and content they provide each other. Do antitrust scholars and regulators ordinarily consider suppliers and distributors to be "head to head" competitors, because they often disagree and must negotiate the price and terms of distribution?

The local broadcast stations and cable operators are direct competitors in distribution of video content. NBC and Comcast compete head-to-head in the distribution of content on the Internet. In merger review, potential competition is a focal point of attention. In high tech, platform industries strong complements are frequently an ideal base from which to launch disruptive competition. The ongoing disputes between cable and broadcasters demonstrate that they have divergent interests. The merger would eliminate those divergent interests. This speaks to the incentives that the firms have. For example, in the bargaining over retransmission consent, today Comcast has a pure cable companies incentives. It has no interest in higher retransmission rates or in being forced to take bigger bundles. After Comcast acquires NBC, it will have, in part, a broadcaster's view of retransmission and could use those rights to harm competitors by raising their costs and squeezing their profits.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. JOHN ENSIGN TO DR. MARK COOPER

Question. Dr. Cooper, in your testimony you state that the Comcast/NBCU "merger will stimulate a domino effect of concentration between distributors and programmers." What was the level of vertical ownership of distribution and programming in the cable and satellite industries 10 years ago? What is the level of vertical ownership today? Please indicate the source of your data. Does the data support your thesis?

Answer. Viewed in terms of audience, vertical integration in the video marketplace has increased dramatically since the early 1990s. Five media corporations have come to dominate the top 30 shows and expanded basic channels with large bundles of channels (NBC/U, Newscorp., ABC/Disney, CBS-Viacom, and Time Warner). These same five corporations own the major movie studios and own all the national broadcast networks. The NBC-Comcast merger would dramatically increase vertical integration by joining one of the big five video companies with the dominant cable operator. The vertical leverage that Comcast would gain will place the other four video giants at a disadvantage, giving them a strong incentive to seek a similar union. The data on which I base this analysis is contained in the attached paper.*

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARK BEGICH TO COLLEEN ABDOULAH

Question 1. During your testimony in committee you called on some conditions to be added to the merger agreements. Can you provide more detail what you feel would be appropriate conditions?

Answer. The proposed joint venture brings together Comcast's regional sports networks with NBCU's national programming and local broadcast signals. It also combines NBCU's programming with Comcast's cable assets. The transaction will result in significant harms to both consumers and competition from these proposed combinations unless the FCC and DOJ impose adequate remedies.

In fashioning relief to address the anticompetitive harms caused by the proposed combination, it would be a mistake to rely exclusively on the Program Access statute and rules or upon conditions, such as arbitration, that were imposed in previous mergers involving programmers and distributors. Rather, more robust relief is required to improve upon previous remedies. This relief should include such conditions as prohibiting Comcast-NBCU from unfairly charging higher programming fees to other MVPDs, especially those smaller than Comcast, and denying these operators online distribution rights to all of its programming.

Question 2. In Alaska, there is a much smaller population that has access to cable television. I am concerned the impacts this merger will further harm small cable companies. Can you describe the potential impact on small cable operators?

Answer. A once functional wholesale programming market is no longer working for all pay TV operators. Today, smaller operators find themselves at the mercy of

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* *The Negative Effect of Concentration and Vertical Integration on Diversity and Quality In Video Entertainment* by Mark Cooper, Fellow, Donald McGannon Center for Communications Research, Fordham University and Derek Turner, *Free Press.* This document is retained in Committee files and can be found at: *http://www.policyarchive.org/handle/10207/bitstreams/8001.pdf.*

a handful of supersized companies with market power that unfairly charge these providers significantly higher fees than larger ones for national and local programming. This price discrimination harms consumers living in smaller markets and rural areas by forcing them to pay drastically more for the same programming as their urban counterparts. Smaller operators prefer market-based solutions, but the market as it exists today is simply not working.

As highlighted in the previous question, the Comcast-NBCU deal will combine Comcast's regional sports networks with NBCU's national programming and local broadcast signals, creating a single entity with significantly more market power than the companies in aggregate possess today. The new company will be able extract higher fees and impose more onerous terms and conditions on all pay TV providers, but smaller operators and their customers will be impacted the most because the differences in bargaining power will be the greatest.

Question 3. During the Committee hearing, you seemed as though you wanted to discuss the negotiation position especially related to regional sports networks. Do you care to elaborate on any negotiations you have been a part of?

Answer. Smaller operators have little bargaining power in negotiations for regional sports programming. The Federal Communications Commission has deemed these regional sports networks (RSNs) and network-affiliated broadcast stations "must have" because not carrying this programming would significantly harm an operators' ability to compete against other MVPDs in the market. As a result, owners of this content have significant market power during carriage talks, particularly against smaller operators. In instances where the programming supplier is also a competing MVPD, the problem is compounded because the company's programming business has an added incentive and ability to charge higher fees or withhold the programming from competing distributors because it will benefit the company's distribution business.

In the Chicago metro region, Comcast Sports Net Chicago (CSNC) is a RSN that features four local professional sports teams. The network is affiliated with Comcast Corporation. In this market, there are also five video providers serving the same set of households, including Comcast which is the largest and WOW! which is the smallest.

In our last negotiation with CSNC, the programmer insisted that we accept a deal that would force us to pay approximately two million dollars more than what we believed was its fair market value. We were in a pickle. CSNC wouldn't budge on the price, and dropping the network from our lineup wasn't an option because we'd lose a large number of subscribers, the majority of whom would likely become Comcast subscribers.

We had few regulatory options to address CSNC's exploitation of the circumstance. Under existing program access rules, we had no viable relief because of the loophole in the regulations that permit excessive and discriminatory "volume discounts." Our only choice was to bring our dispute to arbitration under baseball-style rules which was a condition imposed on Comcast by the FCC in exchange for the Commission's approval of the company's purchase of Adelphia cable systems in 2006. When we told CSNC that we were considering seeking arbitration, their response was, in effect, "fine, go ahead."

We soon learned that the cost of arbitration could easily exceed one million dollars, and take a year or longer to conclude. For a smaller operator like WOW!, we just couldn't afford to spend the money on arbitration. Thus, we had no choice but to accept CSNC's final offer, knowing that this result would lead to higher cable TV prices for our subscribers; fewer dollars to devote to independent programming; and fewer resources to spend on upgrading our systems to offer more advanced services, including broadband.

The lesson here is that the wholesale programming market is not working for smaller operators, particularly with respect to "must have" programming. Moreover, the program access rules and the conditions imposed by the FCC on the past deals to address the harms that flow from vertical integration, such as arbitration, do not provide any meaningful relief for smaller operators. Before approving the Comcast-NBCU deal, we believe the DOJ and the FCC must take these issues into account in fashioning proper relief.

Question 4. In your testimony, you discussed some of the vertical and horizontal harms that might occur should this merger be approved. Can you please compare and contrast the vertical and horizontal harms in this situation compared with other mergers?

In the last decade, there have been two big deals similar to the Comcast-NBCU transaction, although neither has the same combination of significant horizontal and vertical harms as the currently proposed transaction: News Corp.-DIRECTV

and Adelphia-Time Warner-Comcast. As per your request, I compare and contrast the harms of these deals to the present one below.

The News Corp.-DIRECTV deal combined the key programming assets of News Corp., which included national programming networks, regional sports networks, and local broadcast stations with DIRECTV, a satellite TV provider who was the second largest MVPD in the country. With respect to programming matters affecting smaller operators, this deal was mainly a vertical integration because neither company had competing programming or distribution assets—there was no significant horizontal combination.

The Adelphia-Time Warner-Comcast deal integrated Adelphia's cable distribution assets, which included systems across the country, with Time Warner and Comcast's distribution and programming assets, which included national and regional sports networks. Regarding the programming matters most important to ACA members, this transaction was both a horizontal combination of the Adelphia's cable systems with Time Warner and Comcast's systems, and a vertical integration of Time Warner and Comcast's programming and Adelphia's cable systems.

The Comcast-NBCU deal is similar to News Corp.-DIRECTV and Adelphia-Time Warner-Comcast concerning the vertical harms. Comcast-NBCU, like the other companies, will integrate its programming and distributions assets giving it the incentive and ability after the deal is completed to increase costs or withhold programming from its direct MVPD competitors. For this reason, the FCC and DOJ must impose more robust conditions on the deal to address these vertical harms.

With respect to the horizontal harms, the Comcast-NBCU joint venture is different. First, there is no horizontal combination of cable or satellite distribution assets in the Comcast-NBCU deal like there was in Adelphia-Time Warner-Comcast. In this regard, the deal is similar to News Corp.-DIRECTV. However, Comcast-NBCU differs from both Adelphia-Time Warner-Comcast and News Corp.-DIRECTV in that neither one of those deals combined significant programming assets, like in the present deal. Comcast-NBCU combines key programming assets from both companies that will substantially increase the market power of the new entity allowing the company to extract higher fees and more onerous carriage requirements from operators in the market, particularly smaller operators. This is a unique harm, and one that the DOJ and FCC must specifically remedy before approving this deal. The agencies should consider both structural and behavioral remedies to address these significant concerns.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. JOHN ENSIGN TO COLLEEN ABDOULAH

Question. Ms. Abdoulah, my understanding is that small cable operators often work cooperatively to negotiate collective deals with content providers in order to take advantage of economies of scale. I also understand that your company is a member of the National Cable Television Cooperative (NCTC). In your testimony you talk about the possibility of having to pay "supra-competitive prices for content." However, as a member of NCTC, don't you have the ability to pool your resources with other smaller cable operators in order to negotiate volume discounts and better terms? While it may not be perfect, doesn't such collective bargaining power offset some of the leverage of major content providers?

Answer. Wide Open West is a member of the National Cable Television Cooperative (NCTC) whose principal mission is to reduce its members' costs through the negotiation and administration of cooperative purchasing of business goods and services. NCTC's membership consists of small to medium-sized cable operators—but all of them are small relative to the size of Comcast.

With regard to programming deals, the NCTC negotiates with major content and independent programmers for national cable networks, such as TBS, Discovery, Nickelodeon, USA Network, etc. However, the NCTC does not bargain on behalf of its members for any regional sports networks, nor for the local network-affiliated or Owned & Operated broadcast stations, which are often among the most expensive programming carried. NCTC's members negotiate these deals directly with these networks and stations' owners.

By bargaining with NCTC, national programmers can reduce the costly and time-consuming process of negotiating and administering individual deals with the NCTC's more than 900 members (*e.g.,* contract management, single-point billing, subscriber reporting, etc.), and as a result, they can pass these costs savings along to the Cooperative's members. However, even though it has a lower cost structure, the Cooperative still cannot secure programming prices and terms that are equivalent to other MVPDs with an equivalent number of subscribers as the total number

of customers of all of NCTC's members. As a result, the Cooperative's members' programming costs are generally not competitive with those of larger MVPDs, like Comcast.

The existence of the NCTC as a cooperative purchase of programming for its members does not diminish the anticompetitive harms that will result from the Comcast-NBCU transaction. First, regardless of the NCTC, Comcast-NBCU will be able to exercise its increased market power against any Cooperative member who must negotiate directly with the new entity for its regional sports networks or its NBCU broadcast stations. Second, Comcast-NBCU is under no obligation to bargain with the NCTC at all, or, as the process is now constituted, it could seek to limit the size or identity of members who can participate in the Cooperative's master programming agreement. For these reasons, the NCTC is unable to provide any adequate safeguards to the harms that would result from a Comcast-NBCU deal that is approved without conditions.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN ENSIGN TO CHRISTOPHER S. YOO

Question 1. Professor Yoo, since this is a hearing on consumers and the broadband market, I would like to hear what your thoughts are on the potential reclassification of Internet services under Title II of the Communications Act. Is such re-regulation necessary to protect consumers, and what would the impact of such action be on the broadband marketplace, particularly in terms of investment?

Answer. Any attempt to subject broadband Internet access to Title II of the Communications Act faces substantial legal obstacles. In order to fall within Title II, broadband Internet access must be a telecommunications service, which the statute defines as the offering of "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received" for a fee directly to the public. In *NCTA* v. *Brand X Internet Services*, 545 U.S. 967, 998–1000 (2005), the Supreme Court upheld the FCC's determination that broadband Internet access services provider end users with access to the domain name system and caching services that go beyond the simple transmission necessary to bring it within the ambit of Title II. Any attempt to reclassify broadband Internet access as a Title II service must thus overcome a leading Supreme Court precedent pointing in the other direction.

The history of past efforts to regulate the telephone industry indicate that reclassifying broadband Internet access as a Title II service would likely harm consumers. Any regulatory regime mandating that a network operator provide access to an outside party would inevitably require two unwilling parties to do business with one another. Under these circumstances, the regulators must oversee the terms and conditions of interconnection. Although some commentators have suggested that all this would require is a simple nondiscrimination mandate, such a strategy would not provide any meaningful limitation on vertically integrated enterprises, which would simply charge both its vertically integrated subsidiary and similarly situated unaffiliated companies an exorbitantly high price. For the vertically integrated company, this would simply transfer profits from the subsidiary to network operations, which would have no adverse effect on the company whatsoever. It would effectively exclude unaffiliated companies.

This is why it is generally recognized that any regime of mandated access must necessarily regulate prices. There is a large body of research studying how to determine what a fair price is. There is a question the proper rate of return as well as which costs on which the network operator should be permitted to earn a rate of return. In an attempt not to create a system that is inherently inflationary, regulators typically limit returns to investments that are "prudent," based on whether the assets are "used and useful." This approach falls into the trap of hindsight bias, in that many investments that were prudent when they were made turn out not to be after the fact. Even after determining which assets to include, regulators have also struggled to determine the best way to value those assets, as reflected in the more-than-century old fight over whether historical cost or replacement cost represents the better measure. The standard method for computing prices induces a well-known bias in the technology used known as the Averch-Johnson effect. If the same assets are used for more than one service, regulators must allocate the cost of shared assets to multiple services. This is a problem to which there is no clear theoretical answer. Access regimes also only work when the interface is relatively simple. Alternative approaches, such as price caps, have failed to resolve all of these problems. On a broader level, price regulation only works when products are relatively uniform, the underlying technology is uniform and relatively static, market

shares are relatively stable, and regulators are allocating access to a network that already exists and thus do not have to worry about investment incentives.

None of these things are true for the Internet. When that is the case, imposing Title II regulation on broadband Internet access would likely harm consumers. Even for telephony, the evidence suggests that Title II regulation facilitated collusion, raised prices, and stifled innovation. Such problems would likely be even worse for broadband Internet access.

Finally, as the Supreme Court recognized in *Verizon Communications Inc*. v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407–08 (2004), the manner in which compelling access reduces incentives to invest in telecommunications networks. Empirical studies of both competitive local telephone service and broadband Internet service have confirmed this key insight.[1]

Question 2. Professor Yoo, Dr. Cooper believes that the Comcast/NBCU merger would make the already uncompetitive video market even less competitive and that binding merger conditions should be imposed on the deal. On the other hand, you looked extensively at vertical mergers and the media marketplace and have found that competition is robust and that merger conditions would be unjustified. What factors led you to a conclusion that is so different than Dr. Cooper's?

Answer. My testimony regarding the likely impact of the Comcast-NBC Universal merger represents an updated version of my earlier work analyzing the impact of vertical integration in the cable industry initially published in 2002.[2] The factors that led me to a conclusion that is so different from Dr. Cooper's is that my analysis applied the conventional wisdom on the likely competitive impact of vertical mergers on competition laid out in the Merger Guidelines promulgated by the Federal Trade Commission and the Justice Department to the actual data. This analysis indicated that the relevant markets fall below the levels of concentration generally thought to give rise to anticompetitive concern. Dr. Cooper's analysis represents a departure from these well accepted principles and did not analyze the underlying data at all.

Question 3. Professor Yoo, doesn't the media sector go through cycles of acquisition and divestiture along with changes in the broader economy? If Comcast and NBC Universal are right that this deal creates a stronger competitor that can better serve viewers in this economy, the joint venture will succeed. If they are wrong, it will fail, just as the AOL-Time Warner merger did. Does the government need to intervene here?

Answer. Various industries do go through periods of acquisition followed by periods of divestiture. Although some mergers are successful, others are not. Policy-

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[1] For empirical studies of the adverse impact of unbundling on investment in new telephone facilities, see Robert W. Crandall *et al., Do Unbundling Policies Discourage CLEC Facilities-Based Investment?*, 4 TOPICS IN ECON. ANALYSIS & POL'Y 14 (June 7, 2004), *http://www.bepress.com/bejeap/topics/vol4/iss1/art14/*; Jerry A. Hausman & J. Gregory Sidak, *Did Mandatory Unbundling Achieve Its Purpose? Empirical Evidence from Five Countries*, 1 J. COMPETITION L. & ECON. 173 (2005); Thomas W. Hazlett, *Rivalrous Telecommunications Networks With and Without Mandatory Sharing*, 58 FED. COMM. L.J. 477 (2006); Augustin J. Ros & Karl McDermott, *Are Residential Local Exchange Prices Too Low?*, in EXPANDING COMPETITION IN REGULATED INDUSTRIES 149 (Michael A. Crew ed., 2000); James Zolnierek *et al., An Empirical Examination of Entry Patterns in Local Telephone Markets*, 19 J. REG. ECON. 143 (2001); James Eisner & Dale E. Lehman, Regulatory Behavior and Competitive Entry (2001) (unpublished manuscript presented at the 14th Annual Western Conference, Center for Research in Regulated Industries), *http://www.aestudies.com/library/elpaper.pdf*; ROBERT S. PINDYCK, MANDATORY UNBUNDLING AND IRREVERSIBLE INVESTMENT IN TELECOM NETWORKS (Nat'l Bureau of Econ. Research, Working Paper No. 10287, 2004), *http://www.nber.org/papers/w10287.pdf*.

For empirical studies of the adverse impact of unbundling on investment in new broadband facilities, see Debra J. Aron & David E. Burnstein, *Broadband Adoption in the United States: An Empirical Analysis, in* DOWN TO THE WIRE: STUDIES IN THE DIFFUSION AND REGULATION OF TELECOMMUNICATIONS TECHNOLOGIES (Allan L. Shampine ed., 2003); Bronwyn Howell, *Infrastructure Regulation and the Demand for Broadband Services: Evidence from OECD Countries*, 47 COMM. & STRATEGIES 33 (2002) (employing bivariate analysis to find no detectable positive effect of unbundling on broadband uptake); *see also* Johannes M. Bauer *et al.,* Broadband Uptake in OECD Countries: Policy Lessons and Unexplained Patterns (Sept. 20, 2003), (unpublished manuscript), available at *http://userpage.fu-berlin.de/~jmueller/its/conf/helsinki03/abstracts/Bauer__Kim__Wildman.pdf*; Johannes M. Bauer *et al.,* Effects of National Policy on the Diffusion of Broadband in OECD Countries 15 (Jan. 25, 2005) (unpublished manuscript), available at *http://bear.cba.ufl.edu/centers/purc/docs/presentations/events/0205%20LBS/ paper/Bauer-Kim-Wildman-UFL–2005.pdf* (finding variable representing unbundling and two other policy attributes not statistically significantly related to broadband diffusion); Thomas Hazlett & Coleman Bazelon, Regulated Unbundling of Telecommunications Networks: A Stepping Stone to Facilities-Based Competition? 16–19 (Oct. 4, 2005) (unpublished manuscript), available at *http://mason.gmu.edu/thazlett/pubs/Stepping%20stone%20TPRC.10.04.05%20.pdf*.

[2] Christopher S. Yoo, *Vertical Integration and Media Regulation in the New Economy*, 19 Yale J. on Reg. 171, 226–43 (2002).

makers and business executives have never been able to reliably predict in advance which mergers will succeed. In such an environment and absent some definitive showing that the markets are sufficiently concentrated that the merger is likely to lead to consumer harm, the government's role is to permit the merger to proceed. The merger may succeed. If it does so, the shareholders will enjoy the equity returns that go along with taking those risks. Conversely, the merger may fail. If so, it is not the government's job to protect shareholders against such downside risks. Instead, shareholders should be left free to experiment with different business models.

Question 4. Professor Yoo, we have heard a lot today about how vertical mergers can potentially be harmful for consumers and competition. Are there any instances, however, of vertical transactions being pro-competitive?

Answer. The economic literature has recognized a wide variety of ways in which vertical mergers may be procompetitive. As I have detailed in my previous work, vertical integration may yield lower prices, reduce transaction costs, and limit cable operators' vulnerability to strategic behavior.[3] The FCC's decisions explicitly recognize how vertical mergers in the cable industry may benefit consumers.[4]

Question 5. Professor Yoo, Dr. Cooper and Ms. Abdoulah have suggested that Comcast might use NBC Universal programming as an anticompetitive tool against competing pay-TV providers by refusing to license NBC content to them. Having spent billions of dollars to buy NBCU and its content, do you think it would make economic sense for Comcast to act in this manner?

Answer. Content owners have strong economic incentives to license their content to the venue that would generate the most revenue. To pick one leading example, the highest rated show on television these days is often CSI. Even though this show is produced by Disney, it is broadcast on CBS, not ABC (which is owned by Disney). Although the theoretical literature does identify circumstances under which a vertically integrated enterprise might operate in an inefficient manner, these theories require that a number of strict structural preconditions be satisfied in order for such effects to arise. An empirical analysis of the cable industry reveals that it is not structured in a manner to give rise to such concerns.

Even if such concerns were met, regulatory controls such as the program access rules exist to ensure that competing pay television providers have adequate access to NBC Universal's programming. To the extent that these rules are imperfect, such flaws are not the product of the merger. They are thus more appropriately addressed through a general regulatory proceeding rather than through merger conditions.

Question 6. Professor Yoo, in Dr. Cooper's testimony, he claims that the TV Everywhere initiative is "a disaster for video competition" and "merits its own antitrust investigation." It seems to me, however, that TV Everywhere provides viewers with more online options, not less, and that it gives cable subscribers more bang for their buck. Do you agree that TV Everywhere is a disaster for video competition?

Answer. TV Everywhere represents an innovative approach to online video distribution that incorporates a different pricing model and provides greater copy protection than other models. Such innovation enriches consumers' options and should be encouraged. As I noted in my written testimony, the market share of these initiatives are vanishingly small in antitrust terms. NBC Universal controls only 0.7 percent of market for online videos properties as measured by videos viewed. Comcast is even smaller at 0.3 percent. The merger would thus create a company that controls only 1 percent of the market, which would fall well below the thresholds that would justify any further antitrust scrutiny.

NBC Universal holds a 32 percent stake interest in Hulu. The fact that Hulu operates independently of both companies and has its own management makes it unclear whether its share should be attributed to the merged entity. Even if it is, the merged entity would control only 4.0 percent of the online video market. These market shares are too low to cause any anticompetitive concerns.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. GEORGE S. LEMIEUX TO CHRISTOPHER S. YOO

Question 1. Some experts have suggested that Comcast will use NBCU content as an anticompetitive tool to exclude rival cable, satellite, and TV distributors. Comcast would do this by refusing to license NBCU content to rival distributors.

[3] *Id.* at 232–38.

[4] Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, Report, 5 F.C.C.R. 4962, 5009 ¶¶ 83–84, 5010 ¶ 86, 5037, ¶ 144(a) (1990).

In your opinion, would it make sense for Comcast to limit the value of that content in this way? If so, why? If not, why not?

Answer. As noted above in my answer to question 5, it would rarely make sense for Comcast to refuse to license NBC Universal's content to rival distributors. To repeat the example given above, the highest-rated show on television these days is often *CSI*. Even though this show is produced by Disney, it is broadcast on CBS, not ABC (which is owned by Disney). The reason is that content owners have powerful incentives to license their shows to the distribution outlet that would generate the most revenue. Although limited circumstances exist when such problems may arise, the data show that the cable industry is not structured in a manner to make such concerns plausible. Any remaining concerns are not the product of the merger and should be addressed through general regulatory proceedings rather than through merger conditions.

Question 2. Following the proposed transaction, will Comcast have an incentive to "go it alone" and rely exclusively on NBCU programming to the detriment of unaffiliated programmers? What would stop Comcast from following that course of action?

The Comcast-NBC Universal merger would not be the first example of vertical integration in the pay television industry. Time Warner merged its cable distribution properties with content when it acquired Turner Broadcasting and developed such leading pay channels as HBO. Similarly, News Corp. combined the Fox programming properties with distribution when it acquired DirecTV. In both cases, the pay television provider did not "go it alone." Instead, they remained highly motivated to identify and carry the content that viewers wanted most. Regulatory regimes, such as leased access and program access, exist to address any problems that may arise.

Question 3. What impact will this merger likely have on competition in local advertising?

Answer. Cable operators do not generate significant revenue from local advertising. As such, merging Comcast's cable distribution operations with NBC Universal's content is not likely to harm competition in local advertising.

Question 4. There have been some concerns expressed about the impact this merger could have on competition in online video. What would be the combined market share of the new company and how does this compare with other anti-trust situations that have been of concern in the past?

Answer. As noted in my answer to question 6 above, the combined market share of the new company in the market for online video distribution would only be 1.0 percent. Even if the entirety of Hulu is attributed to the merged company, the market share would only be 4.0 percent. These market shares are far below the levels that have historically raised concern under the antitrust laws in the context of vertical mergers.

PATTON BOGGS LLP, ATTORNEYS AT LAW
Washington, DC, March 24, 2010

Hon. JOHN D. ROCKEFELLER IV,
Chairman,
Senate Committee on Commerce, Science, and Transportation,
Washington, DC.

Dear Chairman Rockefeller:

The Fair Access to Content and Telecommunications (FACT) Coalition[1] applauds you and your Committee for recently examining Comcast Corporation's (Comcast) proposed acquisition of NBC Universal (NBCU) during the Committee's March 11th hearing on "Consumers, Competition and Consolidation in the Video and Broadband Market." As the Committee continues to examine the implications of the proposed

[1] The FACT Coalition represents smaller telecommunications carriers that distribute data, voice and video services. The National Rural Telecommunications Cooperative (NRTC), the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO), and the Rural Independent Competitive Alliance (RICA) formed FACT out of concern that the proposed Comcast-NBCU combination would harm the ability of their members to maintain and expand the provision of innovative broadband and video services to their customers. Many of the carriers represented by FACT are video competitors in both the existing television market and the emerging online video market.

merger and its impact on consumers and competition, FACT offers its views and respectfully requests that this letter be submitted into the written record.

In recent years, rural telecommunications providers have invested considerable resources building out their broadband networks to improve voice and broadband services. These robust networks are also capable of providing consumers with new video services, including both traditional subscription video and innovative new "over the top" broadband video applications. FACT's founding members are deeply concerned that the ability of the customers to obtain the video content they desire, and in the manner of the customers choosing, will be significantly impaired if the Comcast-NBCU merger is permitted without stringent protective conditions.

The Federal Communications Commission (FCC) has correctly recognized that there is an intrinsic link between a provider's ability to offer video service and to deploy broadband networks.[2] Indeed, rural carriers that are able to bundle video with broadband services have experienced broadband adoption rates that are nearly 24 percent higher than those carriers that offer broadband alone.[3] Therefore, nondiscriminatory access to programming is a vital component to broadband deployment and adoption, in addition to being necessary to enable more consumer choice in the video marketplace.

However, the FCC has also found that, ". . . absent a prohibition, cable-affiliated programmers will engage in withholding of programming from [competitors]."[4] Beyond the outright withholding of content, programmers with this kind of market power also routinely charge discriminatory rates, and/or provide access to vital content only under onerous terms and conditions. These circumstances diminish consumer choice, raise customers' costs, and impede broadband deployment and adoption.

Comcast is the Nation's largest cable and broadband operator with more than 23.6 million cable homes, 15.9 million high-speed broadband homes, and 7.6 million digital voice customers. If the merger is consummated, Comcast will control 20 cable channels, have attributable ownership interests in 24 additional cable channels, own 10 regional sports networks (RSNs), 2 broadcast networks, 26 owned and operated broadcast TV stations, 32 online video properties, as well as Universal Studios and Focus Features.[5] Comcast also controls iN DEMAND, the Nation's dominant video-on-demand/pay-per-view provider which distributes content via satellite to cable and Internet Protocol television (IPTV) operators across the country.

This potential concentration of ownership in content by an entity that is already the Nation's largest distribution outlet is unprecedented. Owning or controlling such an enormous interest in TV, online and theatrical content is real cause for concern for competitive video distributors and broadband providers.

Comcast's control of the principal video pipes into the home—both cable and broadband—will give it market power to favor the programming it owns today and that which it would acquire from NBCU on its cable system, to block competitors' access to popular and must-have programming, to raise cable and advertising rates above competitive levels, and to impede, if not prevent, competition in the nascent online video market.

In the existing television market, Comcast will have the incentive and the ability to use its control over sports and other regional programming to foreclose entry by competitors. In its Eleventh Annual Report on Video programming, the FCC highlighted the "strategic significance" of sports programming for multichannel video programming distributors because of its widespread appeal, noting that these networks are owned in whole or in part by multiple system operators.[6] Due to the large number of subscribers that Comcast has in many metropolitan areas, it will have

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[2] *Implementation of Section 621 (a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05–311, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5132–33, ¶62 (2007).

[3] *See*, National Exchange Carrier Association comments, GN Docket Nos. 09–47, 09–51, 09–137, p. 6 (01. Dec. 7, 2009).

[4] *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity, in Video Programming Distribution; Sunset of Exclusive Contract Prohibition*, Report and Order and Notice of Proposed Rulemaking, MB Docket 07–29, FCC 07–169, ¶51 (rel. Oct. 1, 2007).

[5] A listing of the media properties that will be owned or controlled by the proposed merged entity follows this letter. The listing is published by Comcast and GE and may be accessed at the following link: *http://www.nbcutransaction.com/pdfs/JointVentureFactSheet.pdf*.

[6] *In the Matter of Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming, Eleventh Annual Report*, MB Docket No. 04–227, ¶¶ 166–167, Feb. 4, 2005.

the market power to deny competitors access to their affiliated programming, particularly must-have regional sports networks.

Distributors that have deployed advanced technology, such as Internet Protocol television (IPTV), often are subject to carriage conditions and costs imposed by programming rights-holders that are far more burdensome than those imposed on incumbent cable operators. Often the practice involves forcing carriage and packaging unpopular and unwanted programming with programmers' most widely viewed services. With ownership interests in 44 cable channels and 10 regional sports networks, there is great potential for the merged Comcast—NBCU entity to engage in practices that force carriage of more channels and further drive up costs for competitive distributors and their customers. (FACT members are constrained by confidentiality clauses in their programming agreements and cannot reveal specific details, but FACT would urge the Committee, the Department of Justice, and the FCC to examine the current practices of programmers, including NBCU, with respect to licensing of content to incumbent cable systems vis-à-vis to IPTV distributors.)

The proposed merger's potential effect on the emerging online video market is perhaps even more significant and daunting. In some cases, popular cable services have tied licensing of online content for a fee (with a requirement that the fee not be disclosed to broadband consumers) to the licensing of the service's mainstream cable programming, either as a condition of carriage or through punitive pricing. The Comcast—GE website referenced at footnote 5 reflects that the merged entity would will have ownership in 32 online (digital) media properties, including *NBC.com, nbcsports.com, nbcolympics.com, weather.com,* and the popular online video platform, *Hulu.com.* Consumers recently experienced a rather dubious practice during the 2010 Winter Olympics when NBCU denied online access to some Olympics coverage unless the consumer first proved that he or she was a subscriber to the mainstream NBCU cable services.

Competitive distributors represented by FACT are deeply concerned that the new Comcast/NBCU entity will either restrict access to online content the entity controls, or will tie carriage of cable programming to online distribution at a fee. Neither possibility is good for consumers, for competition, or for the growth of broadband adoption, because service providers will have to raise rates and/or divert resources to content costs, away from infrastructure maintenance, upgrades, and expansion.

Retransmission consent for carriage of broadcast stations is another area of concern. There have been cases—and not rare ones—where content rights owners that own both cable programming services and broadcast affiliates have conditioned retransmission consent for the broadcast signal upon carriage of the cable content that is under common ownership with that broadcaster. With the Comcast—NBCU merger, the Nation will have an entity with 10 owned and operated NBC broadcast stations, 234 non-owned NBC affiliates, and 15 owned and operated Telemundo broadcast stations. Experience indicates that the potential for tying retransmission rights for broadcast signals to carriage of cable services will be great.

One additional area of concern—conspicuously absent from any Comcast-disseminated data regarding the merger—is in the area of pay-per-view (PPV) and video-on-demand (VOD) distribution. Comcast owns a majority stake in "iN DEMAND Networks," the Nation's dominant distributor of VOD content to the cable industry.[7] (Other owners of iN DEMAND include subsidiaries of cable giants Time Warner and Cox.)

According to the iN DEMAND website, it is the "world leader in providing exciting entertainment delivered through television's most innovative technologies."[8] iN DEMAND reportedly holds exclusive rights to PPV and VOD distribution of Major League Soccer, the National Hockey League, and Major League Baseball. With the merger, Comcast will gain ownership of Universal Studios and Focus Features, key distributors of theatrical films. For competitive distributors that rely upon iN DEMAND for their PPV and VOD content, experience again leads to great fear that this level of market power will result in discriminatory pricing, withholding of content, or other unfair practices.

Unless clear and stringent conditions are imposed on Comcast, should the merger be allowed, the potential consequences will be higher programming costs for consumers and fewer resources for competitive video distribution services. These results will disproportionately impact rural markets where higher costs are least affordable, and sparse populations make investment more difficult from the outset. Anti-competitive practices also make it exceedingly difficult for new market entrants to

[7] FACT member NRTC owns a minority stake in Avail/TVN, a competitive VOD and PPV distributor.

[8] *http://www.indemand.com/about/.*

compete, thereby impacting consumers' access to affordable cable and online content of their choosing.

While one avenue of recourse exists at the FCC under the program access rules,[9] which would be applicable to much of the cable programming the merged entity would offer, those rules have historically been of little effect. The financial and time costs of prosecuting a complaint at the FCC under the rules have deterred competitive distributors from filing complaints. Also, the broad volume discount loophole that exists in the rules has been employed by many programmers to ensure that significant rate disparities continue to benefit large incumbent distributors while impeding new market competitors.

Furthermore, there are no similar protections for online video, broadcast retransmissions, or VOD/PPV services. In short, the existing program access rules do not afford an adequate shield or sword for competitive video distributors—in either cable or broadband operations.

For these reasons, FACT respectfully urges Congress, the Department of Justice and the FCC to carefully consider the impact pact of the proposed merger on consumers and competition in video distribution in cable, broadband (including "over the top" video distribution), VOD and PPV. If the merger is allowed to proceed, Congress should urge the FCC and, to the extent relevant, DOJ, to impose clear, enforceable conditions, including:

- Prohibit the merged entity from compelling the tying of multiple channels, including a prohibition against forced tying via pricing differentials;
- Mandate fair, reasonable and non-discriminatory licensing of all Comcast—NBCU content without a volume-based loophole;
- Prohibit the tying of online content to cable subscriptions or the forced carriage of online content;
- Apply provisions of Title 47 CFR Sec. 76.1000, et seq.—the program access rules—to all Comcast—NBCU-owned channels retroactively (*i.e.,* contracts entered into pre-and post-merger);
- Compel the divestiture of iN DEMAND or, alternatively, prohibit the tying of on demand content (*e.g.,* MLB, NHL, and Comcast/NBCU-owned studios' films) as a condition of licensing and pricing;
- Examine and address anticompetitive concerns with respect to the distribution of digital media online, including, Comcast's "Fancast" (TV Everywhere) and other "over the top" delivery of content; and
- Address requirements with respect to NBCU broadcast network retransmission consent.

More broadly, FACT urges Congress and the reviewing Federal agencies to:

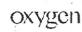
- Address programmers' practice of mandating carriage and forced tying of channels;
- Ensure nondiscriminatory volume discounting to all distributors;
- Apply the FCC's competitive access rules to all programming regardless of method of distribution, whether by satellite, terrestrial, cable or broadband;
- Conduct a full review of FCC rules with regard to access and price discrimination and the application of rules to *all* programmers (not just those that are vertically integrated with cable systems) and ensure that volume discounts are truly justifiable;
- Provide a means for the Congress, the FCC, DOJ, and any other Federal agencies to review programming license terms to ensure fairness; and
- Prohibit the tying of broadband over-the-top content as a condition of licensing mainstream television content.

FACT greatly appreciates the Committee's consideration of the aforementioned concerns and conditions and its ongoing attention to the proposed merger of Comcast-NBCU. FACT looks forward to working with you and thanks you for your consideration.

Sincerely,

MARK C. ELLISON, Esq.,
Patton Boggs LLP,
For the FACT Coalition.

[9] 47 C.F.R. § 76.1000, et seq.



(65%)*

(40%)*

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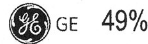
For more information please visit: www.comcast.com/nbcutransaction

- World-class cable network portfolio
- A leader in multicultural programming with Telemundo Network, 15 owned and operated Telemundo TV stations, mun2, and an interest in TVOne
- NBC, one of the country's best known broadcast networks
- 234 NBC-affiliated stations; 10 owned and operated stations
- One of the world's most successful movie production studios
- A premier sports entertainment platform
- Emmy Award-winning television production studio
- Attractive online portfolio of Internet properties, with more than 40 million monthly unique visitors
- Reaching audiences in about 200 countries
- Renowned theme parks in Orlando and Hollywood

Comcast 51%



49%

- Managed by Comcast
- Headquartered in New York
- 5 Member Board
  - 3 Nominated by Comcast
  - 2 Nominated by GE
- CEO: Jeff Zucker

*partial ownership percentage

For more information please visit: www.comcast.com/nbcutransaction

NBC UNIVERSAL

Cable TV Networks
- USA
- Bravo
- Syfy
- Universal HD
- CNBC
- CNBC World
- MSNBC
- Chiller
- mun2
- Sleuth
- Oxygen
- E!
- Golf Channel
- Style Network
- Versus
- G4
- The Comcast Network
- Comcast Regional Sports Networks
  - CSN Bay Area (67%)*
  - CSN California
  - CSN Mid-Atlantic
  - CSN Chicago (30%)*
  - CSN MTN (50%)*
  - CSN New England
  - CSN Northwest
  - CSN Philadelphia (85%)*
  - CSS (81%)*
  - SNY (8%)* (not managed)
- New England Cable News
- Exercise TV (65%)*
- Sprout (40%)*
- ShopNBC (39%)* (not managed)
- The Weather Channel (25%)* (not managed)
- Universal Sports (8%)* (not managed)
- FearNet (33%)* (not managed)
- A&E (16%)* (not managed)
- A&E HD (16%)* (not managed)
- Biography (16%)* (not managed)
- History (16%)* (not managed)
- History International (16%)* (not managed)
- History en Espanol (16%)* (not managed)
- Military History (16%)* (not managed)
- Lifetime (16%)* (not managed)
- Lifetime Movie Network (16%)*(not managed)
- Lifetime Real Women (16%)* (not managed)
- Crime and Investigation (16%)*(not managed)
- TVOne (33%)* (not managed)
- Retirement Living TV (RL TV) (3.4%)* (not managed)

International Channels
- Syfy Universal
- Diva Universal
- Studio Universal
- Universal Channel
- 13th Street Universal
- CNBC Europe
- CNBC Asia

Broadcast Networks
- NBC
- Telemundo

NBC Television Network
- 234 NBC-affiliated stations across the country

Digital Media Properties
- CNBC.com
- ivillage.com
- NBC.com
- fandango.com
- movies.com
- dailycandy.com
- bravotv.com
- eonline.com
- thegolfchannel.com
- golfnow.com
- usanetwork.com
- oxygen.com
- style.com
- chillertv.com
- syfy.com
- versus.com
- comcastsportsnet.com
- holamun2.com
- universalhd.com
- g4tv.com
- sleuthchannel.com
- accesshollywood.com
- nbcsports.com
- nbcolympics.com
- televisionwithoutpity.com
- exercisetv.tv (65%)*
- sproutonline.com (40%)*
- universalsports.com (8%)* (not managed)
- fearnet.com (33%)* (not managed)
- msnbc.com (50%)* (not managed)
- hulu.com (27%)* (not managed)
- weather.com (25%)* (not managed)

NBC Local Media Division
- 10 NBC owned and operated broadcast TV stations
  - New York / WNBC
  - Los Angeles / KNBC
  - Chicago / WMAQ
  - Philadelphia / WCAU
  - San Jose / KNTV
  - Dallas/Ft.Worth / KXAS
  - Washington / WRC
  - Miami / WTVJ
  - San Diego / KNSD
  - Hartford / WVIT

Telemundo Stations
- 15 Telemundo owned and operated stations
  - Los Angeles / KVEA
  - New York / WNJU
  - Miami / WSCV
  - Houston / KTMD
  - Chicago / WSNS
  - Dallas/Ft.Worth / KXTX
  - San Antonio / KVDA
  - Las Vegas / KBLR
  - San Francisco/San Jose / KSTS
  - Phoenix / KTAZ
  - Fresno / KNSO
  - Denver / KDEN
  - Boston/Merrimack / WNEU
  - Tucson / KHRR
  - Puerto Rico / WKAQ
- 1 independent Spanish-language owned and operated station
  - Los Angeles/KWHY

NBC Universal Domestic & International Distribution
- Distributes NBC Universal's first-run, syndicated and library content nationally and internationally, including more than 55,000 TV episodes

Universal Studios/Production
- Universal Pictures
- Focus Features
- Universal Media Studios
- Universal Cable Productions
- Carnival
- Cattleya (18.5%)* (not managed)

Universal Studios Home Entertainment
- Distributes more than 4,000 film titles

Parks & Resorts
- Universal theme parks
- Orlando (50%)*
- Hollywood

*partial ownership percentage

For more information please visit: www.comcast.com/nbcutransaction

HITN
Brooklyn, NY, March 25, 2010

HON. JOHN D. (JAY) ROCKEFELLER IV,
Chairman,
Committee on Commerce, Science, and Transportation,
U.S. Senate,
Washington, DC.

Hon. KAY BAILEY HUTCHISON,
Ranking Member,
Committee on Commerce, Science, and Transportation,
U.S. Senate,
Washington, DC.

Dear Chairman Rockefeller and Ranking Member Hutchison:

I respectfully submit for your committee's consideration and for the public record comments on behalf of the Hispanic Information and Telecommunications Network (HITN). This is being done as a follow-up to the Committee's Hearing on "Consumers, Competition, and Consolidation in the Video and Broadband Market," held on Thursday, March 11.

HITN is America's oldest and only Spanish language non-profit public interest educational television network. It was established in 1983 as a non-profit organization, to use technologies to serve America's growing Hispanic community and to provide engaging, educational, and entertaining programming. HITN's mission is dedicated to using telecommunications technologies for the advancement of Hispanic Americans and minority audiences. The network invites individuals and families to live fuller lives and enables them to serve as an ever-growing engine of intellectual power and economic progress.

As such, we strongly believe that HITN, much like PBS or C-SPAN should be afforded the opportunity to reach the maximum number of Hispanic and non-Hispanic viewers through national and basic tier carriage. HITN is very proud to be associated with and carried nationally on: DirecTV; Dish Network; AT&T U-verse and Verizon FiOS. These satellite and Telco providers clearly see the needs and benefits to providing a national or system-wide viewer link to the expanding Hispanic community. It is clearly a win-win proposition. In addition, HITN is carried on TimeWarner Cable (NJ, NY, and TX) and Charter (CA, GA. NV, and WA).

We are also proud to be carried on Comcast in Colorado and Illinois However, we have struggled for years to be made available to all Comcast subscribers with very limited success. We will continue to seek every opportunity to make the clear business case with Corneas' as to the benefits of national, basic tier carriage for HITN programming.

HITN is also the largest holder of Educational Broadband Service ("EBS") spectrum in the United States, with spectrum in more than 90 markets covering over 100 million people in the U.S. and Puerto Rico. Through a partnership with Clearwire Corporation. HITN plans to provide WiMAX 4G wireless services to educational institutions and non-profits nationwide using this spectrum.

Since its inception. HITN has worked with community-based organizations serving and representing the Hispanic community. HITN also has close relationships with Hispanic organizations such as the Congressional Hispanic Caucus Foundation, National Hispanic Caucus of State Legislators (NHCSL), and NCLR, U.S. Hispanic Chamber of Commerce, LULAC, ASPIRA, NALEO, LISTA and other Latino organizations. This provides HITN a strong audience base from the membership of these organizations. It also affords an opportunity for Hispanics and non-Hispanics alike to have a glimpse into what is happening with the exciting, vibrant and growing Hispanic community.

These relationships allow HITN to produce programming originating from the conventions, events, and meetings of Latino organizations as well as showcasing those proceedings on *www.hitnonline.tv*.

The questions surrounding the proposed merger between NBC-Universal and Comcast represent a major turning point for the future of U.S. media policy. If approved, the proposed merger would create the largest entertainment company in the U.S. if not the world. Additional consolidations are certain to follow. This transaction represents one of the first major tests for the Justice Department's Anti-Trust division under the leadership of Christine Varney and the FCC under Chairman Julius Genachowski. As both testified at your Committee Hearing their approach to competition, media diversity and opportunity is an issue of great importance. Those policies are very important to HITN as well as the larger Hispanic and minority communities.

The issue of competition and diversity is further heightened by the FCC's National Broadband Plan which seeks to address the needs of disadvantaged and minority populations to gain greater access to broadband across multiple platforms.

The consolidation of media entities over the last twenty years has had profound effects on our American life, economy and democracy. The sources of media, whether

it be entertainment, news, or education have rapidly been concentrated in fewer and fewer corporate hands.

Media diversity has long been one of the fundamental tenets of our communications law. Diversity of voices has, unfortunately, not been a major component of recent media mergers and acquisitions. If this merger should proceed, then real diversity must be a pan of the NBC-Universal and Comcast transaction and all similar transactions going forward.

In his written testimony, Brian Roberts, Chairman and CEO of Comcast Corp, stated, that ". . . the new venture will be able to increase the amount, quality, variety, and availability of content, thus promoting *diversity*. This includes content of specific interest to diverse audiences, children and families, women, and other key audience segments." HITN applauds efforts to create more programming options for Latino families. However, in the commitment to expand content and distribution of a new Telemundo channel; which will be owned by the merged entity highlights precisely the risks of the merger to independent and minority viewers, programmers and networks.

Rather than reach out to Latino networks like HITN which itself is ready, willing and able to provide its popular network to all Comcast viewers, the merged entity proposes to reach into its own vaults to grow its own network in the Hispanic market.

There is nothing wrong with Comcast mining its own assets to find new uses as long as the combined company does not crowd out or put up barriers to others. Brand extension and consolidation—does not equal diversity. Diversity is achieved when there arc multiple voices or speakers; not just one voice speaking on multiple channels even speaking in multiple languages. The merger gives the new Telemundo channel instant system-wide access while others not part of the NBC-Universal Comcast family are held at bay.

HITN fully agrees with Mr. Robert's stated goals of diversity and service. We believe him to be a man of good character and intention. As a network carried on Comcast systems in Denver and Chicago, we have sought and continue to seek to be one of the sources of diverse programming available to all Comcast viewers.

Recent media consolidations have moved the Nation away from Mr. Robert's stated goal. If the combined NBC-Universal and Comcast family use brand extensions to occupy cable capacity on their systems and others without making room for truly diverse and independent networks like HITN, this moves things in the opposite direction of diversity.

In the consolidated media environment, diversity of voices reinternets important as ever, even in the Internet age. Some have argued that the Internet has reduced the need for diversity policies. Because broadcast and cable channels so dominate the Internet, and because of the increasing troubles facing print media, diversity of voices and policies geared to that end are increasingly critical to our democracy. Indeed, if the Internet were such a perfect substitute for broadcast and cable distribution, there would be no business case for a merger of this size and breadth.

HITN respectfully urges the Senate Committee on Commerce, Science, and Transportation, as well as other Congressional Committees with jurisdiction over these matters to be vigilant and aggressive in assuring that independent, minority, non-profit, unaffiliated and educational networks are not crushed in this proposed transaction. They should have a fair opportunity to succeed in the emerging media environment. Specifically, there should be at least some meaningful capacity set aside for the nation-wide distribution of non-profit, educational public interest channels as is done on direct broadcast satellite.

As the Telemundo announcement illustrates, this proposed transaction will give NBC-Universal complete and instant access to Comcast's national distribution network and Comcast access to NBC's broadcast and interne assets. It will also give the merged entity extraordinary leverage to secure access for its content on competing cable systems at very favorable terms.

Our concern with this transaction is how it affects the underrepresented millions of viewers and audiences that have too often been left behind. It should be possible for a network which is not affiliated with the large media conglomerates, or an educational network which serves minority families such as HITN-TV or an emerging network to gain national carriage on multi-channel video platforms. For example, the proposed merged entity should not be allowed to discriminate in favor of its own content or brand extensions.

Comcast has additionally committed that once the merged entity has ". . . completed its digital migration company-wide (anticipated no later than 2011), it will add two new independently-owned and -operated channels to its digital line-up each year for the next 3 years . . ." That's six new channels.

The merged company would constitute the largest media and entertainment entity in the U.S. with a reach and penetration into literally every television household in the Nation as well as access to millions of individuals both nationally and globally through multiple programming platforms. Certainly it can find room for more than six independent stations over the next several years.

The public record is full of examples of smaller networks struggling for years to secure access to cable systems while new channels owned by the large media conglomerates are added quickly with case.

Comcast CEO Roberts also stated that ". . . 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 (and Comcast has expressed a willingness to discuss with the FCC making the program access rules binding on it even if the rules were to be overturned by the courts)."

Comcast clearly changed its position on program access, perhaps because if the merger proceeds it will be the beneficiary of such rules. Policymakers should also look to channel access rules from the perspective of those networks which seek to be carried on Comcast on other networks.

We respectfully urge Congress as well as the 1301 and FCC to carefully review this transaction and consider at a minimum mechanisms that would:

- Provide for national system-wide basic-tier access to independent non-profit educational networks;
- Eliminate barriers and ensure opportunities for minority controlled networks;
- Reserve a meaningful amount of capacity exclusively for independent networks not owned or controlled by media giants; and
- End "most favored nation" pricing clauses in carriage agreements which effectively amount to price fixing among cable giants.

We understand the desire among merger partners for efficiency, synergy and productivity; but believe that the American people have an equal interest in the free flow of information and access to a full spectrum of opinions. Our media environment should value a diversity of voices both in fact as well as in spirit and provide an opportunity for even the smallest network to survive and thrive. We ask you to carefully scrutinize this transaction.

We realize that due diligence in reviewing a proposed merger of this size will take time and that this committee session is unlikely to be the last word on this issue. As such, we look forward to working closely in the months ahead with your committee as well as with Congress on these important issues.

Sincerely,

JOSÉ LUIS RODRIGUEZ,
President and CEO.