COMPETITION IN THE MEDIA AND ENTERTAINMENT DISTRIBUTION MARKET

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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THURSDAY, FEBRUARY 25, 2010

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:04 a.m., in room 2141, Rayburn House Office Building, the Honorable John Conyers, Jr. (Chairman of the Committee) presiding.

Present: Representatives Conyers, Berman, Nadler, Lofgren, Jackson Lee, Waters, Cohen, Johnson, Pierluisi, Quigley, Chu, Gutierrez, Gonzalez, Wiener, Schiff, Sánchez, Maffei, Smith, Sensenbrenner, Coble, Goodlatte, Lungren, Issa, Forbes, Franks, Gohmert, Poe, Chaffetz, Rooney, and Harper.

Staff present: (Majority) Perry Apelbaum, Staff Director and Chief Counsel; Christel Sheppard, Counsel; (Minority) Sean McLaughlin, Chief of Staff and General Counsel; and Stewart Jeffries, Counsel.

Mr. CONYERS. The Committee will come to order.

We are in a difficult situation in terms of our economy. We are coming out of a financial crisis that was triggered by the prime mortgage—subprime mortgage meltdown. We have invested over $1.5 trillion in the economy, finally turning toward creation of jobs.

I remember that since the Clinton administration, there has been consolidation, takeover and mergers unparalleled in American economic history, only slightly down-turned in number and scope over the last several years. And I must say that I have always been alarmed about these combinations that have developed in our economy. I have never thought that the antitrust division had operated with any real effectiveness.

And I start off this discussion this morning with the suspicion that there are cases in which vertical mergers can be more dangerous than horizontal mergers and that the role of the Internet and—versus the role of cable is something we have got to begin to look at on a far larger basis than the one proposed merger before this Committee this morning.

And, of course, I have never yet entertained a merger discussion in which there was complete assurance that there would be no diminution of jobs, never. And never has that ever happened. There was always job loss.

There are now places in Michigan in which 30 percent of its population is unemployed. There are places that would meet the definition of a depression before the crisis that caused so much angst.

And now we have a proposal before us that I am approaching very carefully.

And I will put my statement in the record, make it available, and I would like our Ranking Member, who has worked with me more closely and in a way without compromising his own point of view, but where he and I and this Committee could reach agreement as we did with the considerations that were on the floor just last night.

I wanted to thank him and the Committee for the close scrutiny that we gave each other's approach to these very important problems. And I recognize Mr. Smith of Texas, the Ranking Member.

[The prepared statement of Mr. Conyers follows:]

Statement of John Conyers, Jr.
Hearing on "Competition in the Media and Entertainment Distribution Market"
10:00 am, 2141 Rayburn HOB
February 25, 2010

This proposed merger between Comcast and NBC involves a number of cutting edge issues that will undoubtedly impact the way consumers interact with the entertainment industry and the internet.

Comcast is an important media and telecommunications provider for millions of Americans, with over 23 million cable television customers, over 15 million high-speed internet customers, and 14 regional sports networks. NBC consists of 26 local broadcast stations, a dozen cable channels, 2 major cable news channels, a movie studio, and an extensive online presence through which millions of Americans access NBC content every month.

There are several key issues implicated by the proposed merger that I hope to explore today.

First, is this a somewhat benign vertical merger involving companies in different markets, or alternatively, will it allow Comcast to use their power over the cable market to unfairly dominate the content business?

Proponents of the merger assert that cable is but a small piece of the multi channel distribution business fighting fierce competition from satellite and the internet, and that Comcast is in no position to abuse its market position. They also note that to the extent market power exists, there are a series of current and pending regulatory constraints that limit any opportunity for harm.

On the other hand, opponents, argue that Comcast has a history of using its power over cable customers to negotiate unfair deals with cable channels, and that this will only get worse if they control NBC and its cable affiliates. As for regulatory limits, they contend that Comcast can't praise the regulators on the one hand while simultaneously lobbying against new rules such as net neutrality.

Second, what impact will the merger have on diversity in our media?

Those in favor of the merger point out that both Comcast and NBC have been developers and supporters of diversity in the media through such programming as Comcast's TV One channel and NBC's TheGrio.com. They suggest this is a good omen for the combined company's commitment to seeking out diversity in the future.

Others, such as the Independent Film and Television Alliance, argue that there is already too much media consolidation. In the past 20 years we have moved away from over 50% independently programed content on the major broadcast networks to only 5% today. This merger, it is said, will only make the problem worse.

Third, we need to consider what role conditions can play in the merger review process. To their credit, Comcast and NBC have already agreed to a series of commitments, including pledges to continue free over-the-air broadcasting, maintain local affiliates, add additional independent programming, and protect the journalistic independent of NBC News. As I noted on January 28th, this is a good start. However, their opponents argue that further conditions need to be imposed, such as a timely method of resolving program access disputes in order to ensure the ability of consumers to access NBC content on a variety of distribution platforms.

Fourth, and perhaps most important, what impact will the merger have on jobs? With unemployment running at nearly 10% nationwide, and nearly 33% in Detroit, we simply cannot tolerate consolidations that take away jobs.

Proponents assert that since Comcast and NBC are in separate lines of business, this should not be a concern, and since the merger will likely spur increased capital investment by Comcast and a plethora of new products and entertainment options, the merger will eventually be a net job creator. It is for this reason that unions such as the Teamsters support the merger.

Others, including the Communications Workers, could not disagree more. They believe that the merger does have significant horizontal components – such as in the production and transmission of programming – and that this will lead to job losses. They also argue that Comcast has a poor labor relations record and that they will use their new power to harm workers.

Finally, what is the impact of this merger in the context of the consolidation that has taken place in the economy in the past half century. In that time, there has been a marked trend toward consolidation. Some say that this is a sign of progress, and that many mergers make the economy more efficient.

However, others are concerned about this trend, and worry that our antitrust merger enforcement is too lax. According to the Department of Justice's Antitrust Division, there were 4,642 merger notifications filed in 2000 and only 48 merger challenges that year. In 2008, there were 1,656 mergers and only 16 merger challenges by the DOJ. Many find this drop in merger enforcement concerning, and worry that this latest merger represents more of the same.

The future is coming. The question before us today is whether a future characterized by mergers such as NBC and Comcast allow vibrant competition, new products and consumer choice, or paves the way toward two or three large companies stifling competition, limiting product innovation, and engineering a never ending stream of price increases.

I look forward to today's witnesses helping us to begin grappling with these questions.

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Mr. SMITH. Thank you, Mr. Chairman. And I appreciate those very generous words.

I think you were surprised that I supported you last night on the House floor, but as you just mentioned, there are times and often times when we do work together, and that is a source of real satisfaction to me, and I think it is good for the Committee, as well. And I thank you for all the courtesies you have extended us on this side.

Mr. Chairman, vigorous unimpeded competition sustains our economy and keeps it strong. It leads to innovative products that keep prices low and better our lives. Today's hearing gives us the opportunity to examine the proposed merger of Comcast and NBC Universal, a combination that would create one of the world's largest entertainment companies.

The combined company would own significant assets in video distribution, video production, movie production, and the emerging world of Internet video programming. However, this proposed merger is not completely typical of the mergers that this Committee and the Department of Justice usually review.

Normally, we look at mergers between head-to-head competitors, such as Delta-Northwest Airlines and XM and Sirius. This hearing is more akin to the Live Nation and Ticketmaster deal that this Committee reviewed almost exactly a year ago.

Both Comcast and NBC Universal own some video production assets. However, the more compelling question is whether a vertically integrated company that has a significant hand in video production and distribution can use its leverage in one area to raise prices in another. In other words, can a combined company use Comcast's significant presence in cable distribution to limit its rival's access to NBC's programming?

Comcast argues—and argues forcefully—that the Federal Communications Commission's carriage rules does prevent it from discriminating against its rivals in such a way. And that, I might add, Mr. Chairman, is a persuasive argument.

Finally, the combined company will still control one of the preeminent news reporting industries in the world, NBC News. I raised this concern in other circumstances, and I continue to worry that media consolidation contributes to the persistent problem of media bias.

All that said, though, Comcast and NBC Universal have made significant commitments in their public interest filing with the SEC and in earlier hearings on Capitol Hill. Those commitments lead me to believe that this merger could, in fact, help consumers.

In addition, past experience, such as the ownership of Time Warner Cable by Time Warner has not led to the dire consequences that some opponents suggested. The fact that Time Warner has now separated itself from Time Warner Cable might cause one to consider whether this is a wise business venture. However, that is less an issue of antitrust law and public policy than it is a question for Comcast shareholders.

Mr. Chairman, I would like to thank our witnesses for being here today. And of course, I look forward to hearing their testimony momentarily. Yield back.

Mr. CONYERS. Thank you very much.

Did any Members on this side of the dais wish to make any opening comments?

Ms. LOFGREN. Mr. Chairman? Mr. Chairman?

Mr. CONYERS. Zoe Lofgren?

Ms. LOFGREN. I will be very quick. First, I want to thank you for holding this hearing. I think it is very important. And there are a multitude of issues presented in the merger. I think we will learn a lot by the discussion today, but a very particular interest to me is the potential or questions or issue, perhaps, is a better, more neutral way to pose it of whether this merger will affect the growth of TV delivery over the Internet and whatever impact this merger could have on the whole net neutrality challenge that faces the country.

And I am hoping that the witnesses will address these issues. And in the interest of hearing from them soon, I will stop now and yield back with great thanks.

Mr. CONYERS. Gregg Harper?

Mr. HARPER. Thank you, Mr. Chairman. I move to strike the last word.

Mr. CONYERS. Gentleman is recognized.

Mr. HARPER. Mr. Ralph Roberts, who is with us today, started the Comcast family in my home state of Mississippi. Mr. Roberts founded American Cable Systems, now Comcast, in 1963 in Tupelo, Mississippi, in an effort to provide content to consumers in a small valley town that could not receive a decent signal from antennas in Memphis, Tennessee.

Mr. Roberts and others involved in launching American Cable Systems took a risk to provide consumers with a much wanted source of entertainment. Comcast is now taking another risk to provide their customers with an even better product.

Over the years, the Roberts family has built their company into a very successful business. Now Comcast is making an effort to expand on the American dream of building a successful company from the ground up by merging with NBC Universal.

My hope is that the merger will receive a thorough and speedy examination and that the Comcast family is successful in their future endeavors to provide quality service to their customers.

With that, Mr. Chairman, I yield back.

Mr. CONYERS. Subcommittee Chairman Hank Johnson?

Mr. JOHNSON. Thank you, Mr. Chairman, for holding this very important hearing today.

The media and entertainment distribution market is continually evolving to meet consumer demand and new technology. Neither Congress nor the Department of Justice should stop progress, but as Chair of the Subcommittee on Courts and Competition Policy, I believe we must ensure that mergers and consolidation in this market do not harm competition.

The specific merger between Comcast and NBC raises important questions about what kind of control the combined entity would have over distribution and programming and whether the new entity could leverage the acquisition to restrict access to NBC programming on the Internet.

I am also concerned about the possibilities that jobs will be lost in the transaction. I understand that Comcast has stated that no jobs will be lost in the merger, but I find it hard to believe that any merger can occur without some job loss.

In addition, with any media consolidation—excuse me—there is also a risk that local voices will be lost. I understand that Comcast has made a commitment in its public interest filing that it intends to preserve and enrich the output of local news, local public affairs, and other public programming on NBC owned by owned and operated stations.

I hope to hear the witnesses today specifically discuss what steps they plan to take to ensure that there will be no impact on journalistic independence of the information that consumers receive. Very important that our airwaves—our public airwaves be filled with factual data for people to make their own conclusions about situations that are occurring, as opposed to just simply a lot of editorial entertainers posing as news people.

I also want to hear the parties to the merger discuss how consumers will have increased access to diverse and independent programming, including sports programming, a matter that is close to the heart of my compatriot, Mr. Cohen.

In particular, I am concerned that Comcast will be able to bundle its regional sports network in Atlanta with NBCU's popular programming to drive up costs for other pay television providers. Such an action would limit access to local sports teams and hurt consumers who will ultimately bear the increased costs.

And with that, Mr. Chairman, I will yield back.

Mr. CONYERS. Thank you.

Adam Schiff?

Mr. SCHIFF. Thank you, Mr. Chairman. And I very much appreciate your scheduling this hearing. I have a great interest in the subject matter, not the least of which between NBC and Universal have been either headquartered in or adjacent to my district ever since I have been to Congress and long before I got there.

So it will greatly affect my constituents. I will be very interested to hear the panel's thoughts in terms of the impact on jobs, and I appreciate the time I have had to discuss the issue with Mr. Zucker, and I understand the vertical nature of the proposed merger and was very pleased to hear that there are no intended job cuts as a result of the merger.

I think that one of the issues I will be interested in exploring—and I don't know that it has been as much on the table as some of the others—is the impact on intellectual property and the protection of intellectual property, another issue of key concern to my constituents and people all around the country.

I think there may be a synergy here that could be very constructive in the sense that NBC has always been concerned about intellectual property, being content creators. The pipeline companies have often had different perspectives, and at times, the content makers and the content deliverers have not always seen the issue eye to eye.

One potential benefit from the merger may be that it brings the pipeline much more into the business of protecting intellectual property because it will have an interest in making sure it protects the content of NBC to a greater degree than perhaps it did as a separate entity. So I will be interested to hear the panel's thoughts of whether that conjecture is right or whether I am completely off the mark.

And so I greatly look forward to the testimony today and appreciate, Mr. Chairman, your putting this distinguished panel together, and yield back the balance of my time.

Mr. CONYERS. We welcome witnesses Andrew Jay Schwartzman, president of Media Access Project, Larry Cohen, president of Communications Workers of America, Dr. Mark Cooper, director of research, Consumer Federation of America, Ms. Jean Prewitt, Independent Film and Television Alliance, Mr. Jeff Zucker, president, CEO, NBC Universal, and our first witness, Mr. Brian Roberts, chairman and CEO of Comcast.

He brings his father with him today. And from the time his father started the company that was referred to by our colleague from Mississippi, it is now a Fortune 100 company, 23 million customers, 100,000 employees, and in addition, our first witness serves as a member of the board of directors of the National Cable and Telecommunications Association.

All statements will be entered into the record.

And, Mr. Roberts, we welcome you this morning.

TESTIMONY OF BRIAN L. ROBERTS, CHAIRMAN AND CEO, COMCAST CORPORATION, PHILADELPHIA, PA

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

As Congressman Harper nicely stated, my father, Ralph, indeed started Comcast almost a half of a century ago with a single small cable system. Together we have been able to build Comcast into a national cable, broadband, and communications company employing over 100,000 people today.

In proposing to combine with NBC Universal, we are taking the next step in our improbable journey. This is indeed an important moment in Comcast's history.

So let me first briefly summarize the transaction. Under our agreement, Comcast will become the majority owner of NBC Universal; and will create a new venture that combines NBCU's broadcast TV, cable programming, movie studio, and theme park businesses with Comcast's limited video programming channels. Comcast will hold 51 percent of the venture and manage it, while 49 percent will remain with GE.

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 deliver the 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 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 systems every year, beginning in 2011.

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

That is why, as has been noted, some on Wall Street did not initially 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 the potential risks. At that time, there was almost no competition to cable, and more than half of all the channels were owned by cable companies, so Congress created program access and program carriage rules to ensure that a company which owns both cable content and distribution cannot treat competitors unfairly.

Those rules have worked in the past and will continue to work. 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 Video On Demand, which our customers have used 14 billion times. And from a standing start 4 years ago, we now give millions of Americans their first real competitive choice of phone provider.

We have also 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 plan to deliver.

Mr. Chairman, we are asking for the opportunity to make one of the great icons of American broadcast 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.

Mr. CONYERS. Thank you.

I want to make sure that everyone knows that Professor Thomas Hazlett is here from George Mason University. He was the chief economist at the FCC in 1991.

Welcome, sir.

We now call on Jeffrey Zucker, president, chief executive officer of NBC, at one time the youngest executive producer of "The Today Show" and ultimately became president of NBC Entertainment and was promoted to his current position in 2007.

Welcome to the hearing, sir.

TESTIMONY OF JEFF ZUCKER, PRESIDENT AND CEO, NBC UNIVERSAL, NEW YORK, NY

Mr. ZUCKER. Thank you, Mr. Chairman.

Mr. Chairman, Members of the Committee, thank you for the opportunity to testify today. As the president and CEO of NBC Universal, I am proud to lead an iconic media company shaped by two great American brands, NBC and Universal, and I am grateful for the opportunity to tell you how the proposed venture between Comcast and General Electric will help NBC Universal thrive and also benefit our employees, the creative community, the goals of diversity, and our ability to meet the demands of 21st century American consumers.

In today's intensely competitive and dynamic media markets, this deal is critical to realizing these benefits. That is what makes me so excited about this deal with Comcast. At a time of tremendous change and fierce competition in the media marketplace, Comcast is committed to invest at NBC Universal and to share its delivery expertise and innovative vision. We need to take advantage of new digital distribution capabilities, On Demand, online, mobile, and beyond, to be a leader in delivering content to consumers where they want it, when they want it, and how they want it.

Comcast's investment in NBCU, married with its history of delivery innovation and technological vision, will help us meet the demands of the 21st-century consumer. In short, two words—investment and innovation—capture the benefits that Comcast will bring to NBCU.

Let me also say a few words about key issues that I know are important to Members of this Committee, first, competition. This is not your father's media market. Less than 40 years ago, three companies enjoyed 90 percent of all television viewing. Today, the world could not be more different.

Each of the five largest media companies in America now only account for between 5 percent and 10 percent of all viewing. And a multitude of smaller competitors actually account for approximately half of all television viewing.

The new NBCU's cable channel business, where we will add Comcast networks, will be ranked fourth by revenue among owners of national cable networks. But that is only part of the picture.

People today choose not only between broadcast and cable television, but also increasing look to the Internet, Xbox, iPhone, PlayStation, and so many other new platforms and technologies for their media choices. There will be more change in our space in the next 5 years than there has been in the last 50.

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

Second, diversity. I have made diversity one of my top five strategic priorities as CEO, and I am proud of our record at NBC Universal. We have an extraordinarily diverse employee population and a diverse executive team, and I see the benefits of this diversity every day.

Third, jobs. Comcast's investment in NBCU means that our workforce will not face the layoffs typical of so many mergers. Moreover, Comcast is committed to our existing labor-management relationships and will honor all of our collective bargaining agreements. I see a brighter future not just for the talented employees at NBCU who produce our high-quality content such as the Olympics we have been so proud to air over the last 2 weeks, but also for other creators, as NBCU invests in more and better programming and spurs our competition to do the same.

Fourth, intellectual property protection. This deal provides an important opportunity to address critical concerns about piracy and digital theft, an issue that this Committee knows all too well.

Fifth, over-the-air broadcasting. Comcast's investment also means that we can reinvigorate the broadcast side of the business. Comcast's commitment to over-the-air broadcasting has been widely underappreciated, but is great news for the American public that we serve. Comcast's commitment to over-the-air broadcasts leads to a more vibrant NBC and Telemundo, for the benefit of our viewers nationwide.

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

I could not be more excited about the future of this company for the NBCU family, including our employees, as well as our audience. The investments in innovation this deal will bring are essential if we are to remain a vigorous competitor in the 21st-century media market and a growing source of high-wage jobs in an economy starved for employment.

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

[The joint prepared statement of Mr. Roberts and Mr. Zucker follows:]

JOINT PREPARED STATEMENT OF BRIAN L. ROBERTS AND JEFF ZUCKER

JOINT WRITTEN TESTIMONY OF

BRIAN L. ROBERTS
CHAIRMAN AND CHIEF EXECUTIVE OFFICER
COMCAST CORPORATION

AND

JEFF ZUCKER
PRESIDENT AND CHIEF EXECUTIVE OFFICER
NBC UNIVERSAL

TO THE
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

HEARING ON
"COMPETITION IN THE MEDIA AND ENTERTAINMENT DISTRIBUTION MARKET"

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BRIAN L. ROBERTS
CHAIRMAN AND CHIEF EXECUTIVE OFFICER
COMCAST CORPORATION

AND

JEFF ZUCKER
PRESIDENT AND CHIEF EXECUTIVE OFFICER
NBC UNIVERSAL

TO THE
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

February 25, 2010

Mr. Chairman, and Members of the Committee, we are pleased to appear before you today to discuss Comcast Corporation's ("Comcast") planned joint venture with General Electric Company ("GE"), under which Comcast will acquire a majority interest in and management of NBC Universal ("NBCU"). As you know, the proposed transaction will combine in a new joint venture the broadcast, cable programming, movie studio, theme park, and online content businesses of NBCU with the cable programming and certain online content businesses of Comcast. This content-focused joint venture will retain the NBCU name.

The new NBCU will benefit consumers and will encourage much-needed investment and innovation in the important media sector.

How will it benefit consumers?

First, the new venture will lead to increased investment in NBCU by putting these important content assets under the control of a company that is focused exclusively on the communication and entertainment industry. This will foster enhanced investment in both content development and delivery, enabling 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. We discuss these specific and verifiable public interest commitments later in this testimony, and a summary is attached.

The new NBCU will advance key policy goals of Congress: diversity, localism, innovation, and competition. With Comcast's demonstrated commitment to investment and innovation in communications, entertainment, and information, the new NBCU will be able to increase the quantity, quality, diversity, and local focus of its content, and accelerate the arrival of the multiplatform, "anytime, anywhere" future of video programming that Americans want. Given the intensely competitive markets in which Comcast and NBCU operate, as well as existing law and regulations, this essentially vertical transaction will benefit consumers and spur competition, and will not present any potential harm in any marketplace.

NBCU, currently majority-owned and controlled by GE, is an American icon – a media, entertainment, and communications company with a storied past and a promising future. At the heart of NBCU's content production is the National Broadcasting Company ("NBC"), the nation's first television broadcast network and home of one of the crown jewels of NBCU, NBC News. NBCU also has two highly regarded cable news networks, CNBC and MSNBC. In addition, NBCU owns Telemundo, the nation's second-largest Spanish-language broadcast network, with substantial Spanish-language production facilities located in the 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. Next week, third parties will own 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 two years, Comcast lost 1.2 million net video subscribers while its competitors continued to add subscribers – DirecTV, Dish Network, AT&T, and Verizon added 7.6 million net video customers over the same time period.

Consumers can also access high-quality video content from myriad other sources. Some households continue to receive their video through over-the-air broadcast signals, which have improved in quality and increased in quantity as a result of the broadcast digital television transition. Millions of households purchase or rent digital video discs ("DVDs") from one of thousands of national, regional, or local retail outlets, including Walmart, Blockbuster, and Hollywood Video, as well as Netflix, MovieCrazy, Café DVD, and others who provide DVDs by mail. High-quality video content also is increasingly available from a rapidly growing number of online sources that include Amazon, Apple TV, Blinkx, Blip.tv, Boxee, Clicker.com, Crackle, Eclectus, Hulu, iReel, iTunes, Netflix, Sezmi, SlashControl, Sling, 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, non-affiliated 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 the 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 three percent of total national cable network advertising and affiliate revenues. While NBCU owns a larger number of networks, those assets account for only about nine percent of overall national cable network advertising and affiliate revenues. 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.

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 prohibited in retransmission consent negotiations from unduly or improperly influencing the NBC and Telemundo stations' decisions about whether to sell their programming, or the terms and conditions of sale, to 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

[1] In October 2007, the FCC released an Order extending for an additional five years the ban on exclusive contracts between vertically integrated programmers and cable operators -- the one portion of the program access rules that Congress had slated to sunset in 2002. On appeal, Cablevision and Comcast 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 the courts that they must take the First Amendment into account when they make, review, or apply the program access rules.

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 three 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 three years of closing the transaction, Comcast has committed to add 1,500 additional programming choices appealing to children and families and 300 additional programming choices from Telemundo and mun2 to its VOD platforms. Comcast also will continue to provide free or at no additional charge the same number of VOD choices that it now provides, and will make available within three 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 three 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.

We have proposed that these commitments be included in any FCC order approving the transaction and become binding on the parties upon completion of the transaction. A summary of the companies' commitments is attached to this 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.

COMCAST/NBCU TRANSACTION
PUBLIC INTEREST COMMITMENTS

Comcast, GE, and NBC Universal take seriously their responsibilities as corporate citizens and share a commitment to operating the proposed venture in a way that serves the pubic interest. To demonstrate their commitment to consumers and to other media partners, the parties have made a set of specific, written commitments as part of their public interest filing with the Federal Communications Commission. Comcast, GE, and NBCU are committed to expanding consumer choice, ensuring the future of over-the-air broadcasting, enhancing programming opportunities, ensuring that today's highly competitive marketplace remains so, and maintaining journalistic independence for NBC's news properties. The parties' commitment to these principles will ensure that consumers are the ultimate beneficiaries of the proposed Comcast/NBCU transaction.

Applicants' Voluntary Public Interest Commitments

Local Programming

Commitment #1. The combined entity remains committed to continuing to provide free over-the-air television through its O&O broadcast stations and through local broadcast affiliates across the nation. As Comcast negotiates and renews agreements with its broadcast affiliates, Comcast will continue its cooperative dialogue with its affiliates toward a business model to sustain free over-the-air service that can be workable in the evolving economic and technological environment.

Commitment #2. Comcast intends to preserve and enrich the output of local news, local public affairs and other public interest programming on NBC O&O stations. Through the use of Comcast's On Demand and On Demand Online platforms, time slots on cable channels, and use of certain windows on the O&O schedules, Comcast believes it can expand the availability of all types of local and public interest programming.

- For three years following the closing of the transaction, NBC's O&O stations will maintain the same amount of local news and information programming that they currently provide.

- NBC's O&O stations collectively will produce an additional 1,000 hours a year of local news and information programming. This additional local content will be made available to consumers using a combination of distribution platforms.

Children's Programming

Commitment #3. Comcast will use its On Demand and On Demand Online platforms and a portion of the NBC O&Os' digital broadcast spectrum to speak to kids. Comcast intends to develop additional opportunities to feature children's content on all available platforms.

- Comcast will add 500 VOD programming choices appealing to children and families to its central VOD storage facilities within 12 months of closing and will add an additional 1,000 such VOD choices (for a total of 1,500 additional VOD choices) within three years of closing. (The majority of Comcast's cable systems will be connected to Comcast's central VOD storage facilities within 12 months of closing and substantially all will be connected within three years of closing.) Comcast will also make these additional choices available online to authenticated subscribers to the extent that Comcast has the requisite online rights.

- For three years following closing, each of NBC's O&O stations will provide one additional hour per week of children's educational and informational programming utilizing one of the station's multicast channels.

Commitment #4. Comcast reaffirms its commitment to provide clear and understandable on-screen TV Ratings information for all covered programming across all networks (broadcast and cable) of the combined company, and to apply the cable industry's best-practice standards for providing on-screen ratings information in terms of size, frequency, and duration.

- NBCU will triple the time that program ratings remain on the air after each commercial break (from 5 seconds to 15 seconds).

- NBCU will make program ratings information more visible to viewers by using a larger format.

Commitment #5. In an effort to constantly improve the tools and information available for parents, Comcast will expand its growing partnership with Common Sense Media ("CSM"), a highly respected organization offering enhanced information to help guide family viewing decisions. Comcast will work to creatively incorporate CSM information it its emerging On Demand and On Demand Online platforms and other advanced platforms, and will look for more opportunities for CSM to work with NBCU.

- Comcast currently gives CSM content prominent placement on its VOD menus. Comcast and the new NBCU will work with CSM to carry across their distribution platforms more extensive programming information and parental tools as they are developed by CSM. Comcast and NBCU will explore cooperative efforts to develop digital literacy and media education programs that will provide parents, teachers, and children with the tools and information to help them become smart, safe, and responsible users of broadband.

- Upon closing and pursuant to a plan to be developed with CSM, Comcast will devote millions of dollars in media distribution resources to support public awareness efforts over the next two years to further CSM's digital literacy campaign. The NBCU transaction will create the opportunity for CSM and Comcast to work with NBCU's broadcast networks, local broadcast stations, and cable networks to provide a targeted and effective public education campaign on digital literacy, targeting underserved areas, those with high concentrations of low-income residents and communities of color, as well as target Latino communities with specifically tailored Spanish-language materials.

Programming for Diverse Audiences

Commitment #6. Comcast intends to expand the availability of over-the-air programming to the Hispanic community utilizing a portion of the digital broadcast spectrum of Telemundo's O&Os (as well as offering it to Telemundo affiliates) to enhance the current programming of Telemundo and mun2.

- Within 12 months of closing the transaction, Telemundo will launch a new Spanish language channel using programming from Telemundo's library that has had limited exposure, to be broadcast by each of the Telemundo O&O stations on one of their multicast channels. The Telemundo network also will make this new channel available to its affiliated broadcast stations on reasonable commercial terms.

Commitment #7. Comcast will use its On Demand and On Demand Online platforms to feature Telemundo programming.

Commitment #8. Comcast intends to continue expanding the availability of mun2 on the Comcast Cable, On Demand, and On Demand Online platforms.

- Comcast will increase the number of VOD choices from Telemundo and mun2 available on its central VOD storage facilities from approximately 35 today, first to 100 choices within 12 months of closing and then to a total of 300 additional choices within three years of closing. Comcast will also make these additional choices available online to its subscribers to the extent that it has the requisite online rights.

Expanded Video On Demand Offerings At No Additional Charge

Commitment #9. Comcast currently provides approximately 15,000 VOD programming choices free or at no additional charge over the course of a month. Comcast commits that it will continue to provide at least that number of VOD choices free or at no additional charge. In addition, within three years of closing the proposed transaction, Comcast will make available over the course of a month an additional 5,000 VOD choices via its central VOD storage facilities for free or at no additional charge.

Commitment #10. NBCU broadcast content of the kind previously made available at a per-episode charge on Comcast's On Demand service and currently made available at no additional charge to the consumer will continue to be made available at no additional charge for the three-year period after closing.

Public, Educational, and Governmental ("PEG") Channels

Commitment #11. With respect to PEG channels, Comcast will not migrate PEG channels to digital delivery on any Comcast cable system until the system has converted to all-digital distribution (i.e. until all analog channels have been eliminated), or until a community otherwise agrees to digital PEG channels, whichever comes first.

Commitment #12. To enhance localism and strengthen educational and governmental access programming, Comcast will also develop a platform to host PEG content On Demand and On Demand Online within three years of closing.

- Comcast will select five locations in its service area to test various approaches to placing PEG content on VOD and online. Comcast will select these locations to ensure geographic, economic and ethnic diversity, with a mix of rural and urban communities, and will consult with community leaders to determine which programming – public, educational and/or governmental – would most benefit local residents by being placed on VOD and online.

- Comcast will file annual reports to inform the Commission of progress on the trial and implementation of this initiative.

Carriage for Independent Programmers

Commitment #13. As Comcast makes rapid advances in video delivery technologies, more channel capacity will become available. So Comcast will commit that, once it has completed its digital migration company-wide (anticipated to be no later than 2011), it will add two new independently-owned and -operated channels to its digital line-up each year for the next three years on customary terms and conditions.

- New channels are channels not currently carried on any Comcast Cable system.

- Independent programmers are entities that are not affiliated with Comcast, NBCU, or any of the top 15 owners of cable networks (measured by revenue).

Expanded Application of the Program Access Rule Protections

Commitment #14. Comcast will commit to voluntarily accept the application of program access rules to the high definition (HD) feeds of any network whose standard definition (SD) feed is subject to the program access rules for as long as the Commission's current program access rules remain in place.

Commitment #15. Comcast will commit to voluntarily extend the key components of the FCC's program access rules to negotiations with MVPDs for retransmission rights to 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.

Mr. CONYERS. Our next witness is Jean Prewitt, who has been a lawyer, senior vice president, general counsel, United International Pictures, foreign distribution affiliate of Paramount, Universal and MGM Studios, and since 2000 has been president and CEO of Independent Film and Television Alliance.

Welcome.

TESTIMONY OF JEAN PREWITT, PRESIDENT AND CEO, INDEPENDENT FILM AND TELEVISION ALLIANCE, LOS ANGELES, CA

Ms. PREWITT. Thank you, Mr. Chairman and Members of the Committee.

In an era of media giants, I am here to speak for the independents. The independents are the workhorses of this industry. They produce 70 percent of the feature films. They account for the vast majority of jobs in that sector. They introduce new talent to the industry, and they are distinguished by the fact that they finance their product from outside the five major studios.

Since 1982, IFTA and its members have produced, distributed and financed more than 63 percent of the Academy Award best pictures. This season's—this year's award season has already honored "The Hurt Locker," "Precious," and "The Last Station," and we expect those honors to continue over the next week.

The issue before us today is whether America will continue to be informed, entertained, and challenged by varied voices. The answer matters. Independent TV series and films have changed how Americans think, how we live, and how we structure our society.

"The Cosby Show" was produced by an independent, and it changed racial attitudes. "Gandhi," "Crash," and "Million Dollar Baby" prompted public discussion of important issues, and they were produced by independents.

This merger must not deny the public access to new messengers and new messages. We know why Comcast and NBC want this merger. Comcast is buying NBC so that it can own more TV shows and more feature films. They look forward to cost savings. They look forward to synergies as they fuel new platforms.

But this will come from the capacity to leverage their own programming across many platforms, from free TV to cable to Video On Demand to the Internet. They avoid the transaction costs, they say, of having to deal with third parties or independents in acquiring that programming.

For the past 15 years, investment decisions and regulatory rulings have thwarted independents' diversity and creativity. Vertical integration has combined studios, broadcast and cable networks into a few conglomerates. A handful of executives now decide how, when and whether programs will reach the public. They are closing the door on diversity, and we must do whatever we can to pry that door open today.

Make no mistake: What is good for Comcast and NBC in this merger isn't good for the American public. The proposed merger will simply create more consolidation. It must not go forward without clear commitments and conditions to protect the public interest in diverse programming and varied voices.

Five major conglomerates now own the national broadcast networks and 24 out of 29 of the top cable channels that feature entertainment programming. These five companies produce over 80 percent of all entertainment programming on primetime and, importantly, on the three major children's networks.

Meanwhile, the percentage of independently produced series on the networks has declined from 50 percent in 1989 to 5 percent in 2008. What has happened? Since 2002, the major outlets for independent programming have been confined to a handful of basic cable channels which buy limited numbers of movies of the week, feature films, and scattered other programming. Many of those channels, from G4 to Syfy to USA, will become part of this new combined company, and that is just today's media.

This merger can also exclude independent programming from Comcast's valuable Video On Demand space and its new proposed Internet offerings. History will repeat itself, and the independents will be shut out of the new emerging platforms in exactly the same way they have now been shut out of broadcast television and cable television.

At this crucial moment, the Committee has the power to raise the questions that will advance American values of diversity, creativity, and freedom of expression. Will Americans enjoy greater diversity of choices and voices? Will the public have access to the next "Cosby" or the next "Mad Men"? Or will our choices be narrowed at a time when new technology should be liberating, not limiting, our sources of information and entertainment?

The answer must be strong conditions placed on this merger to preserve the diversity of voices that we would expect in the American entertainment sector.

Thank you for allowing me to speak for the independents today.

[The prepared statement of Ms. Prewitt follows:]

PREPARED STATEMENT OF JEAN PREWITT

Independent Film & Television Alliance®

Testimony of

Jean Prewitt

President and CEO

Independent Film & Television Alliance

before the

House Judiciary Committee

Regarding

"Competition in the Media and Entertainment Distribution Market"

February 25th, 2010

Mr. Chairman and members of the House Judiciary Committee:

I am President and CEO of the Independent Film and Television Alliance (IFTA). I appreciate the opportunity to testify before you today about the merger of Comcast and NBC Universal and its negative impact on source diversity and distribution of independently produced content.

We know what is good for Comcast and NBC in this merger: the "cost savings" and "synergies", which they define clearly as the ability to self-source programming across their many platforms from free television to cable to video on demand to the internet, avoiding the "transaction costs" involved in acquiring independent content and extending the reach of those channels and the self-sourced content to a wider audience.

But what is good for Comcast and NBC is not good for the American public. This merger is a further step in the extensive drive toward vertical integration in the media industries that has already severely reduced the chances for independently sourced programming to reach the public. If allowed to go forward, the merger will give the American public far less choice in programming as more channels and distribution platforms are closed to independent content. This conflict between a corporate interest and the public interest is at the heart of the larger issue that I would like to discuss today – an issue that cuts to the core of the American values of diversity, creativity and free exchange of ideas.

The Larger Issues at Stake

The issues surrounding this merger are not only a particular concern of IFTA's – the impact of the merger on independently produced creative content in this country -- but are also of utmost concern to the public. The impact of this merger will be felt across the entertainment and communications industries, from motion pictures to cable and broadcast television to the Internet.

The issue is the very future of creative life, cultural expression, and the free exchange of ideas. These questions are fundamental: (1) *whether Americans will continue to have the opportunity to be informed, entertained and challenged by a diversity of ideas*; and (2) *whether independent artists will continue to have access to mass audiences through mainstream distribution outlets* -- or conversely, *whether a handful of corporations – however well-led and intentioned – will be allowed to use control of production and distribution to eliminate original, independent content from the competitive equation.*

In an era of media consolidation and corporate giants, I represent and speak on behalf of the independents. IFTA is the nonprofit trade association for the independent film and television industry representing production and distribution companies worldwide. We represent more than 150 companies engaged in every facet of the industry. Our members include independent production and distribution companies, sales agents, television companies, and institutions engaged in financing films.

By "*independents*," we mean those companies and individuals apart from the six major studios that assume the majority of the financial risk for production of a film or television program. This is not a test that relies on the "spirit" of the production or its budget level to define independence – it reflects only the economics that drive individual entrepreneurs to select a project, assemble financing and move to production and distribution.

Together, IFTA Members produce over 400 feature films and countless hours of programming annually. Over the last six years alone, independent production companies have produced nearly 80% of all feature films. The independent film and television industry is responsible for the creation of nearly 200,000 American jobs annually. Total worldwide export revenues from the independent sector are more than $2.3 billion for 2008.

Independents bring high-quality, diverse and creative programs to the public, enriching and informing the nation's cultural life. Since 1982, IFTA members were involved in the financing, production and US and international distribution for 63% of the Academy Award Winning Best Pictures. These offerings include *Gandhi, Dances with Wolves, Braveheart, Million Dollar Baby, Crash, The Departed, No Country for Old Men,* and *Slum Dog Millionaire.* This year's award season has featured independent films including *The Hurt Locker* and *The Last Station.*

Yes, the content that independents produce is entertainment – not news, talk or public affairs. But other formats such as situation comedies, dramas and documentaries have changed how Americans think about themselves and others.

For instance, *The Cosby Show* was produced by an independent company. In the popular series, a middle class, African American family was presented to a national television audience, *helping to transform racial attitudes.* Similarly, such independently produced films as *Gandhi, Crash* and *Million Dollar Baby* prompted public discussion of issues as varied as pacifism, social divisions, and euthanasia.

Compared to conglomerates, independent producers are more likely to embrace diverse voices, viewpoints and backgrounds. Films such as *Crash, Million Dollar Baby* and even *Lord of the Rings* found no home at the major studios. Public policies should encourage such diversity – not collude in stifling it.

To understand the independent industry, it is critical to understand the role that distribution plays not only in bringing the programming to the public, but also in ensuring that production finance can be assembled. With rare exception, the independents must guarantee that distribution through major channels is available in the United States to secure production financing. As vertical integration has led first television networks, then premium pay channels and family-specialized basic channels to turn away independent programming and to rely on self produced (and in many cases recycled) programs, the ability of producers to generate programming independently has also been eliminated.

For the past 15 years, industry trends have promoted consolidation and uniformity – not independence and diversity. Through the almost unlimited domination and control created by vertical integration between the studios, broadcast and cable networks and, if this merger goes through, the Internet, a small group of executives in the major conglomerates has wielded almost total control to choose how, when and whether films and programs will reach the public. The financial preference by conglomerates for affiliated programming, which they can then replay, re-purpose across their various distribution platforms and remarket to sell countless theme park and concert tickets, all types of merchandising, clothes, cereal, toys, CDs and video games may be good for *their corporate profits* but not so good for the American public who is cheated out of diverse sources of programming regardless of whether a film's or program's topic would make for a theme park ride. The public loses when they are limited to "major conglomerate brands" and cross-promotable programming produced by the gatekeepers -- and are not exposed to the diversity and breadth that independent programmers offer.

This merger of two powerhouses in the entertainment world will only worsen this troubling trend. Yes, Comcast has said that they will add independent channels commencing in 2011. But this assurance does not address the fundamental concerns of independent content providers and the audiences they serve.

Comcast has not clearly outlined its definition of an "independent channel". We do not know what percentage of its content will be truly independent. We do not have binding assurances that budgets for acquiring content will be competitive with those on the major channels. In short, we do not know whether these new channels will simply be a walled and sparsely tended garden.

This much we do know:

There should be independently produced programming across all channels of the merged entity and in meaningful quantities so as to provide real choice and options for the American public and real commercial distribution outlets for independent producers.

This merger should not be approved unless there are strong, enforceable conditions included to ensure that independent program suppliers will have more access to distribution slots on competitive conditions as a result of this merger. We respectfully urge decision-makers to insist on specific and enforceable requirements on the minimum number of program slots that must be filled with independent programming, or a percentage of the overall acquisition and production budget for content that must be allocated to independents. These requirements must operate to expand the number of sources and the diversity of programming offered to the public after the merger rather than allowing any decline.

The Declining Distribution Opportunities for Independent Programming

In the past, public policies encouraged diversity and independence. More recently, government has been largely silent about media consolidation and its negative effects on the American public and independent producers. I am here today to urge that, once again, public policies support source diversity and varied voices in media.

From the 1940s through the early 1990s, the independent production industry flourished as a result of several Justice Department and Federal Communications Commission decisions. For the most part, such decisions barred studios from owning theaters and prohibited them from vertically integrating their production divisions with television distribution and theatrical exhibition.

As a result, independent producers were provided greater access to these markets. This benefited independent companies, who were able to create diverse content, obtain U.S. distribution and maintain profitable businesses (which in turn funded future production). More important, it benefited the American people who had access to high quality, engaging programming.

However, in the mid-1990s, two major developments severely limited the viability of independent producers and distributors:

First, the elimination of the Financial Interest / Syndication Rules ("fin/syn") and removal of the related consent decrees left independent producers and distributors vulnerable; and then the inevitable vertical integration of major studios with the major national broadcast television and thereafter with cable networks occurred effectively closing off to independents the majority of broadcast and cable television distribution.

These two trends eliminated most independent feature films and television programming from broadcast television, including from lucrative primetime viewing hours. The public was left with limited programming because the same five major studio conglomerates that produce their own programming also act as gatekeepers for the majority of U.S. distribution in all media.

Yes, the networks claimed that the expiration of the Financial Interest/ Syndication Rules would create *more* competition. But, once again, this just isn't true.

In fact, the removal of those regulations, which in essence guaranteed a certain level of competition in video programming distribution, has permitted a rapid acceleration of consolidation. This has allowed the major conglomerates to prefer their own programming and their affiliates' programming because in order to maximize their profits it is in their best interest to exercise control over all aspects of the economic life of the program – which translates into the *least amount of competition* in video programming. Without government regulation or oversight, U.S. distribution opportunities for independently produced programming have steadily dwindled and in some program categories have disappeared altogether.

The lack of distribution opportunities today for independent programming is evidenced by some glaring statistics. Five major conglomerates now own the national broadcast networks and 24 out of 30 of the top cable channels that offer fictional programming, which are available to over 85% of U.S. cable households. These same companies produce over 80% of all primetime programming, and control 85% of the primetime television market share. Additionally, during the years 2002 – 2008, nearly 100% of the fictional TV series that met the minimum episode requirements for off-network syndication eligibility were produced by the network / major studio conglomerates.

As the major networks have been allowed greater vertical integration, the percentage of independently produced series on the national broadcast networks have declined from over 50% in 1989 (when there were four national networks) to just 5% (on the now five networks) in 2008. This has resulted in these same broadcast networks airing over 70% of their own programming in syndication on basic and pay cable channels. Based on this staggering result, it is clear that first run television syndication once was a significant market for independent programming. But now this market is gone.

Because of these developments, the independent film and television industry has suffered – and so has Americans' access to diverse sources of entertainment and information.

In 2007 and 2008, only 3% and 5% respectively of the total fictional TV series aired in network primetime viewing hours were independently produced. Such minimal distribution opportunities for pilots or series means that independent series programming is no longer being produced.

From 2002-2008, just 10% of feature films on network TV were from independent producers. Those independent producers seeking distribution for their feature films on network television are just plain out of luck. For a sampling of programming weeks, in 2007, only 1 independent feature film was aired by U.S. networks and during the sample week in 2008 none was aired. In both 2007 and 2008, only 22% of the total network and cable television slots for feature films were occupied by independently produced films.

Children's Programming Has Suffered

Americans want the best for our children. But children's programming has suffered because of increasing vertical integration in the entertainment industry. Today, the public is left with limited sources of children's programming because major studio conglomerates control the primary distribution channels for children's programming and often prefer their own or affiliated programming. This leaves children and their parents with limited perspectives and choices in programming.

In the past, independent producers created a variety of family and child-friendly entertainment and educational programming that continue to shape American culture today. These include *Sesame Street*, *The Muppets* and *Scooby Doo animated series*, just to name a few.

However, in the mid-1990s, the vertical integration of major studios with the major national broadcast television and cable networks severely limited the choices for children's or family programming. This is especially true on commercial broadcast networks, while PBS continues to offer excellent educational programming. Many of the major independent producers of children's programming of the past have been bought out by major studios, e.g., Hanna Barbera to Warner Bros., The Jim Henson Company and Keystone to Disney, and Saban Entertainment to Fox Family, then later to ABC Family. Between 2002 and 2009, family programming by independent producers accounted for only 18% of the programming on the three major children's programming networks- ABC Family, Cartoon Network and the Disney Channel. As noted above, these conglomerates look to fuel merchandise, toys, theme parks and other products aimed at children – potential they only see in programming that is produced internally or for which they control all rights in perpetuity. There is no market here for programming produced independently and offered in competition with the "major store brand" and the public's range of choice has become negligible.

The Consequences of the Merger for Traditional Distribution Platforms

Since the 2002-2003 season, the major opportunities for independent programming have been shifted to a handful of basic cable channels which routinely acquire a pre-defined number of feature length films or movies of the week (usually on a flat fee basis) for each season or are willing to take a limited number of episodes of innovative series. If this merger goes through, many of those channels (ranging from G4 to SyFy to USA Network) will be subsumed in the new combined entity. These channels are currently the only outlets that regularly offer the public access to independently produced, commercial program fare and they sustain a segment of the independent production industry. This merger must not be permitted to go forward without an express requirement that independent program offerings are maintained at or above the current level, at competitive terms and with arms-length negotiation, on these and successor channels.

The Consequences for Internet and New Media Distribution

In today's media world, the Internet and major Video on Demand services are largely a mirror of traditional distribution platforms. The proprietors of the key services are either the conglomerates themselves, offering "catch-up TV" on branded websites. Catch-up TV is merely a code word for reruns as they were commonly known on broadcast television because these sites only repeat what has already aired on the primary cable or broadcast channel (e.g., see http://disney.go.com/videos/#/videos/tvshows/ which replays what has already aired on the Disney Channel). Media conglomerates launch ventures that primarily seek to drive traffic to their sites by offering only programming that has been supported by major theatrical marketing campaigns or television series runs. Therefore, if independently created programming is shut out of network television, it is automatically shut out of commercial Internet distribution opportunities that may follow.

Initiatives such as "TV Everywhere" do not address and indeed further exacerbate the problems of lack of access and competition in video programming since the programming offered on destination sites will be the same programming of the underlying cable service and/or major studio theatrical fare. Comcast has been crystal clear in its filings to the Federal Communications Commission that it does not intend to seek programming outside its own NBC-Universal backlot, thus dispensing with the "transaction costs" inherent in dealing with third parties. It is proceeding with this merger in order to feed its own pipelines with pre-defined and priced content. As one of the nation's major broadband providers and the third largest telephone provider in the country, Comcast is able – and apparently ready and willing – to define a marketplace that is merely a closed system for its own manipulated distribution and maximized profits. This is a step that can deprive the American public of meaningful choices in the content it is offered and that will undermine the ongoing viability of independent production in the new media environment.

It is tempting for those outside the industry to argue that the Internet is an unlimited highway and that delivery to the public is a simple matter of posting programming on line. This is unrealistic in the context of commercially produced, feature length films and high-concept series for the simple reason that the Internet, used merely as free distribution and marketing, provides no realistic model to support future production and wide availability of programming on the Internet discourages distributors in other media from investing in either distribution or production costs. Because of these realities, the Internet at large is not an alternative to the major sites (such as *Hulu.com*) or to cable-delivered Video on Demand or to original distribution on traditional media. These are platforms that support commercial investment – but many, today, lead back to Comcast, NBC Universal or the handful of similarly placed conglomerates.

Conclusion

This merger places at risk the opportunities for diverse, original and independent programming to reach the public through traditional media and the new platforms. It should not be permitted to go forward without conditions that firmly protect access for unaffiliated content providers and the rights of the public to make its own programming choices.

Now, as in the past the American ideals of competition, independence, and diversity must be the watchwords of our nation's public policy. Now, as in the past, Americans deserve the greatest variety of voices in the entertainment they enjoy and the information they receive. Now, as in the past, Congress and the regulatory agencies must make sure that a few media magnates do not determine what the American public can see and hear.

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Mr. CONYERS. Professor Thomas Hazlett, professor of law and economics, George Mason University, chief economist of the Federal Communications Commission, author of the book "Public Policy Toward Cable Television," director of Information Economy Project, an expert on government regulation of the media, and a person of a vast combination of experiences and law and education.

I am pleased that you are here today.

TESTIMONY OF THOMAS W. HAZLETT, PROFESSOR OF LAW AND ECONOMICS, GEORGE MASON UNIVERSITY SCHOOL OF LAW, ARLINGTON, VA

Mr. HAZLETT. Thank you very much, Mr. Chairman, also, somebody who was late to the hearing. And for that, I apologize.

Quickly on the competitive analysis, the merger before the Committee today is primarily a vertical combination where Comcast, a cable operator distributing video programming to millions of household subscribers, is acquiring ownership of additional programming assets. This does not lessen competition in any market, but allows the content distributor to achieve efficiencies by producing complementary products.

There are special cases in which vertical integration can lead to anti-competitive foreclosure, but the evidence indicates that these special circumstances do not apply. Studies of vertical integration in cable generally confirm the baseline analysis. Efficiencies typically result when firms elect to combine programming and distribution.

As an empirical matter, the trend in the sector is away from vertical integration, meaning that operators do not believe they can increase profits via vertical foreclosure. The ownership of cable program networks has sharply declined over the past 2 decades by operators. The spin-off of cable TV systems by Viacom in 1996 and Time Warner in 2008 are key components of this trend.

In video programming, there is a horizontal aspect to the combination. Comcast currently owns some cable network assets, and these will merge with direct rivals owned by General Electric. But the Comcast share is meek combined with NBC Universal program assets that will account for only about 12 percent of total U.S. cable program network revenues.

The good news for consumers and programmers in recent years is that local market competition has, at long last, taken off. Twenty years ago, one local cable TV system dominated multi-channel video program distribution in each franchise area. Today, there are over three competitors per market on average: the local cable operator, two satellite TV rivals, each with a national footprint, and coming up on almost half the country now, a telco TV provider. Nothing in the Comcast-GE deal threatens to disturb this trend.

Finally, a word on just the business strategy. In acquiring additional programming assets, Comcast is actually swimming against the tide. The company is wagering that it can make more productive use of GE's cable and broadcast networks. It does so knowing that its markets are in tumult.

Video products are jumping from platform to platform, not just from cable to satellite, but from television to broadband, from linear channels to On Demand networks, from pay to premium, from TV screens to mobile devices. Some financial analysts appraise Comcast for its bold new enterprise. Many have condemned it. "Didn't they learn anything from the failed AOL-Time Warner merger?" is a fairly popular reaction.

The simple fact is that no one fully understands where today's tide is headed. Cable operators do not know if they need fear Verizon or EchoStar, Google or Apple. Time Warner believes that splitting its cable operations from its program ownership is the best way to prepare for the coming storm. Comcast has come to a much different conclusion. Marks allow these rival strategies to be tested and winning strategies rewarded. I wish Comcast and General Electric shareholders well in their educated guesses.

Thank you.

[The prepared statement of Mr. Hazlett follows:]

PREPARED STATEMENT OF THOMAS W. HAZLETT

Prepared Testimony of Thomas W. Hazlett
Panel on the Comcast-NBCU Venture
U.S. House of Representatives, Judiciary Committee Hearings
Washington, D.C.
February 25, 2010

I. INTRODUCTION

My name is Thomas W. Hazlett. I am a professor of law & economics at George Mason University, where I head the Information Economy Project. I formerly served as Chief Economist of the Federal Communications Commission, and am a columnist for the *Financial Times*. I have written widely on the economics of telecommunications markets and the effect of government regulation in the sector. I am also the author of PUBLIC POLICY TOWARD CABLE TELEVISION, with Matthew L. Spitzer (MIT Press; 1997).

In the proposed transaction being discussed here today, Comcast becomes a 51% owner of Newco, with General Electric receiving 49%. The new venture will combine Comcast's cable TV program networks with NBCU's broadcasting network, cable networks and broadcast TV stations, along with Telemundo's broadcast network and stations. In addition, other assets of NBC, including the Universal Studios theme park, will be contributed to the enterprise.

The transaction is large, but not among the largest mergers historically. The joint venture is estimated to be worth about $28 billion, less than the $34 billion Viacom purchase of CBS in 1999, for example, or the $35 billion Sprint purchase of Nextel in 2005. And the 51% Comcast stake, at about $15 billion, is much less than these and many other corporate transactions.

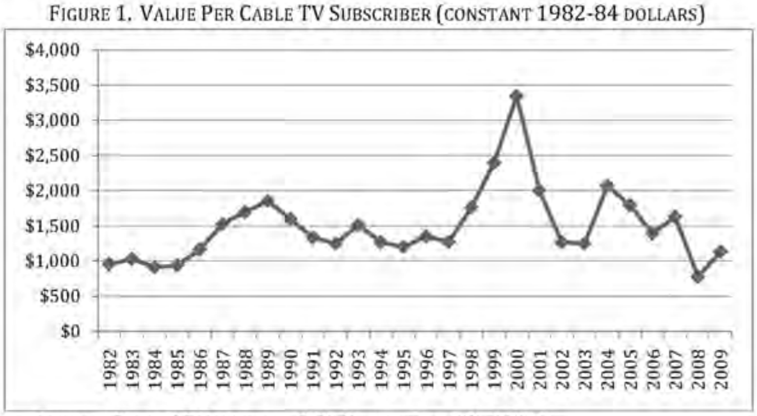
II. COMPETITIVE ANALYSIS

The economic policy question concerns how the deal impacts market competition. On that score, the issues are straightforward. The merger is primarily a vertical combination where Comcast, a cable operator distributing video programming to millions of household subscribers, is acquiring ownership of additional programming assets. This does not lessen competition in any market, but allows the content distributor to achieve efficiencies by producing complementary products.

There are special cases in which vertical integration can lead to anti-competitive foreclosure, but the evidence indicates that these special circumstances do not apply. Studies of vertical integration in cable generally confirm the baseline analysis: efficiencies typically result when firms elect to combine programming and distribution.[1] As an empirical matter, the trend in the sector is away from vertical integration, meaning that operators do not believe that they can increase profits via vertical foreclosure. The ownership of cable program networks has sharply declined over the past two decades; the spin-off of cable TV systems by Viacom (in 1996) and Time Warner (in 2008) are key components of this trend.

In video programming, there is a horizontal aspect to the combination: Comcast currently owns some cable network assets, and those will merge with direct rivals owned currently by General Electric. But the Comcast share is meek; combined with NBC-Universal program assets it will account for only about 12% of total U.S. cable program network revenues. This will yield some economies of scale, or so Comcast hopes, but it hardly moves the needle in terms of the concentration of the industry. The GE-owned cable assets are smaller, in total, than those owned by Disney, Time Warner, and Viacom, and will – with Comcast's assets – remain so.

FIGURE 1. VALUE PER CABLE TV SUBSCRIBER (CONSTANT 1982-84 DOLLARS)



Source: CABLE TV INVESTOR, SNL Kagan (Jan. 25, 2010).

The very good news for consumers (and programmers) in recent years is that local market competition has taken off. Twenty years ago, one local cable TV system dominated multi-channel video program distribution in each franchise area. Today, there are about 3.4 competitors per market: the local cable operator, two satellite

[1] Tasneem Chipty, *Vertical Integration, Market Foreclosure, and Consumer Welfare in the Cable Television Industry*, 91 AMERICAN ECONOMIC REVIEW 428 (Jun. 2001); George S. Ford and John D. Jackson, *Horizontal Concentration and Vertical Integration in the Cable Television Industry*, 12 REVIEW OF INDUSTRIAL ORGANIZATION 501 (Aug. 1997); Austan Goolsbee, *Vertical Integration and the Market for Broadcast and Cable Television Programming*, paper for the Federal Communications Commission (Sept. 5, 2007); Thomas W. Hazlett, *Vertical Integration in Cable Television: The FCC Evidence*, paper submitted to the FCC (Oct. 19, 2007).

TV rivals (each with a national footprint), and – in nearly half the country – a telco TV provider.

Even before thinking about the next generation of broadband video, the market power of incumbent cable systems has been dealt a lethal blow. This is seen in examining market prices for cable TV systems, now selling (in constant dollars) for about what they sold for in 1990. See Figure 1. This is despite the fact that systems now deliver not just video but broadband data and voice, the "triple play," and that they deliver hundreds more channels to subscribers. These modern, two-way, high-capacity digital platforms are substantially more costly to build, meaning that the returns realized by cable system investors are a fraction of what they were a generation ago.[2] This is directly attributable to the outbreak of competitive rivalry. Nothing in the Comcast-GE deal threatens to disturb that trend.

III. A QUESTION OF BUSINESS STRATEGY

In acquiring additional programming assets, Comcast swims against the tide. The company is wagering that it can make more productive use of GE's cable and broadcast networks. It does so knowing that its markets are in tumult. Video products are jumping from platform to platform – not just from cable to satellite, but from television to broadband, from linear channels to on-demand networks, from pay to freemium, from TV screens to mobile devices. Some financial analysts have praised Comcast for its bold new enterprise; many have condemned it. *Didn't they learn anything from the failed AOL-Time Warner merger?* is a fairly popular reaction.

The simple fact is that no one fully understands where today's tide is headed. Cable operators do not know if they need fear Verizon or Echostar, Google or Apple. Time Warner believes that splitting its cable operations from its program ownership is the best way to prepare for the coming storm. Comcast has come to a much different conclusion. Markets allow these rival strategies to be tested and winning strategies rewarded. I wish Comcast and General Electric shareholders well in their educated guesses.

[2] Thomas W. Hazlett & Dennis L. Weisman, *Market Power in U.S. Broadband Services*, George Mason University Law and Economics Research Paper Series 09-69 (Nov. 2009); http://mason.gmu.edu/~thazlett/pubs/Hazlett.Weisman.Broadband.SSRN-id1525568.pdf.

Mr. CONYERS. Dr. Mark Cooper, director of research at the Consumer Federation of America. He has testified before numerous Committees, has written about this, is a fellow at Stanford Law School Center for Internet Society.

We welcome you here.

TESTIMONY OF MARK COOPER, Ph.D., DIRECTOR OF RESEARCH, CONSUMER FEDERATION OF AMERICA, WASHINGTON, DC

Mr. COOPER. Thank you, Mr. Chairman.

In today's written testimony and previous testimony before the House and the Senate, we have demonstrated that this merger is not in the public interest, because it eliminates the competitive rivalry and head-to-head competition between two of the most important participants in a distinct market, the multi-channel video programming market.

Comcast and NBC compete head to head in local distribution of video content in a dozen of the Nation's largest and most important local markets. They compete head to head in the production of video content for multi-channel distribution, with Comcast doing sports and regional news, lined up against NBC Sports and regional news.

They compete head to head in the distribution of video content online. Indeed, NBC is a major partner in Hulu, an Internet-based multi-channel video distribution platform.

In addition to the elimination of this head to head competition, NBC and Comcast, by marrying their content and distribution, pose a threat while vertical leverage that is used to gain advantage in horizontal competition, favoring its own content with access to cable systems that reach one quarter of the market and denying competitive programming access to those cable systems places a very heavy thumb on the scale of competition in the video content market.

Withholding must-have programming from competing distributors undermines competition for eyeballs in local distribution.

The merged entity has an incentive to increase prices and increase the size of the bundle that NBC sells to cable operators, raising consumers' costs. And above all, the marriage of the Nation's largest broadband service provider with one of the Nation's premier video content producers also poses a direct threat to the Internet as a platform for disruptive competition in multi-channel video, a distinct market.

The threat is real, and the danger is imminent. Comcast has already signaled its intention to extend the ugly cable 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 has moved its Olympic coverage behind an Internet pay wall tied to cable subscription.

Geography does not matter on the Internet. There are no franchises, no rights of way, or regulatory impediments, and few, if any, construction costs. The proposal that each cable operator restrict Internet access to cable customers is a blatantly anti-competitive market division scheme that must be stopped. In the cable lexicon, TV everywhere means competition nowhere.

This merger is a competitive nightmare, and the promises made by Comcast that it will behave are useless for two reasons. They do not begin to address the competitive problems across the industry, and they are promises that cannot be trusted.

Any serious discussion of conditions must address all of the major areas of competitive concern, 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, and independent programming, and broadcasts in primetime.

To ensure that conditions are enforceable, the Federal authorities with the oversight over these areas should complete industry-wide proceedings that address the underlying problems before this merger is approved. Many of these proceedings have been pending before the FCC for years. Once the 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 that is embodied in this merger.

Comcast should also agree not to challenge the legality of conditions or render aid and comfort to those who do. The irony is that when they say they will obey the law, they are seeking to overturn those at the FCC and the courts.

Federal authorities must do more than just preserve the current industry structure, which is riddled with anti-competitive and anti-consumer institutions and practices. They should seize this moment to implement the long-overdue reform that will improve the plight of the American video consumer.

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 market will be dealt a severe setback.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Cooper follows:]

PREPARED STATEMENT OF MARK COOPER

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Consumers Union
Nonprofit Publisher of Consumer Reports

CFA Consumer Federation of America

Testimony of

Dr. Mark Cooper
Director of Research
Consumer Federation of America

on behalf of

Consumer Federation of America
Free Press
Consumers Union

before the

U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights

Regarding

"Competition in the Media and Entertainment Distribution Market"

February 25, 2010

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 competitive rivalry between them. For example, in providing complementary services, broadcasters and cable operators argue about the price, channel location and carriage of content. The merger will eliminate this natural rivalry between two of the most important players in the multi-channel video space, a space in which there are only a handful of large players.

These anticompetitive effects of the merger are primarily what antitrust practice refers to as horizontal effects, 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

(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. 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*.[1] Now that NBC is looking to merge with Comcast, the potential elimination of this local competition has been conveniently ignored. But federal authorities cannot and should not ignore the fact that a merger between Comcast and NBC is likely to cause a significant decline in competition in local advertising markets and excessive domination by the merged company. Not only will advertisers lose an important option, but also the merger will be to the detriment of other local broadcasters - particularly smaller, independent ones - who are already facing ad revenue declines in an economic downturn. A stand-alone broadcaster will not be able to offer package deals and volume discounts for advertising across multiple channels the way that Comcast/NBC will be able to do post-merger. That means other local broadcasters will have less money to produce local news and hire staff. To compete, rival broadcasters will have two options: fire staff and reduce production of local news and information; or consolidate in order to compensate for market share lost to the new media mammoth.

(2) This merger removes an independent outlet aud an iudependent source of news and information. These two companies compete in the video programming market, where Comcast's regional sports and news production compete with NBC's local news and sports production. By acquiring NBC, Comcast's incentive to develop new programming would be reduced. Instead of continuing to compete to win audience, it just buys NBC's viewers. Where two important entities were producing programming, there will now be one.

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

(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 anticompetitive acts in the past and by becoming a major programmer it will have a much larger tool to wield against potential competitors. Moreover, Comcast has opposed, and is currently challenging in court, the few rules in place that would prevent it from withholding its programming from competing services. 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." Through its takeover of local NBC broadcast stations, Comcast will also gain special "retransmission consent rights," which allow stations to negotiate fees for cable carriage of broadcast signals. These rights will enable Comcast to leverage control over must-have local programming and larger bundles of cable channels to charge competing cable, telco and satellite TV providers more money for content. Additionally, once Comcast acquires a broadcaster, it will have the means and incentive to raise retransmission rights payments for NBC-owned stations. This will be reinforced by two factors. First, as the owner of NBC, Comcast profits from the retransmission payments it receives and does not lose from the retransmission payments it makes, which are passed through to consumers. Second, Comcast can charge competitors more for local NBC programming, and will be able to exploit asymmetric information. Cable operators do not publish what they pay for retransmission; broadcasters do not publish what they get. Because of Comcast's superior bargaining power, it will ask for more and pay less.

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.

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

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[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.

[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.

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-Sirius). However, in referencing past mergers a defense, supports 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

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[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.*

disastrous for consumers. They eliminated major competitors in the marketplace for wireline broadband service, reversed the outcomes of the pro-competitive 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 importantly, the commitments do not begin to address the anticompetitive effects of the merger. Many of Comcast's commitments amount to little more that a promise to obey the law. Where they go beyond current law, they

[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 Logicfo 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/Doubldày, 2005);
Pitofsky, *op. cit.*; George Cooper, *The Origin of Financial Crises: Central Banks, Credit Bubbles and the Efficiency Market Fallacy* (New York: Vintage, 2008).

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 quickly and effectively 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, anticompetitive 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 the 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.

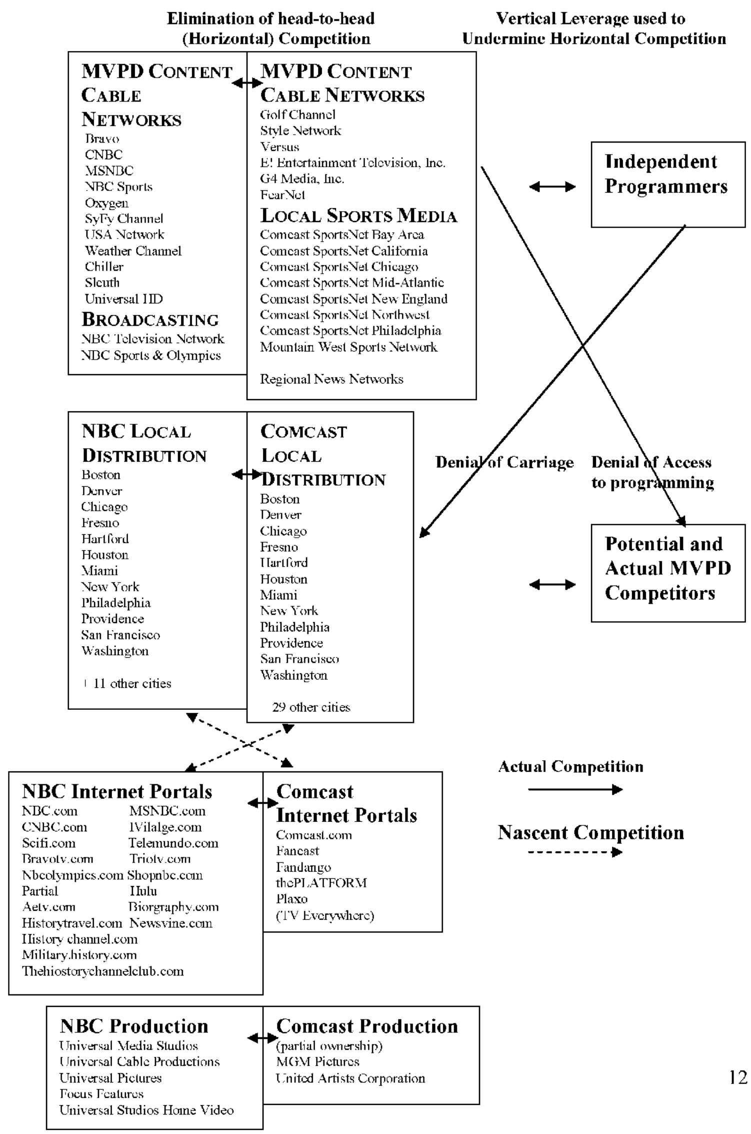
FUNDAMENTAL REFORM IS LONG OVERDUE, FEDERAL AUTHORITIES SHOULD SEIZE THE MOMENT OF THE LARGEST MERGER IN HISTORY TO JUMP START THE REFORM PROCESS

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. 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 anticompetitive 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.

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

Mr. CONYERS. Larry Cohen, president of the Communication Workers of America, has been working in the collective bargaining movement most of his life, started out in Pennsylvania, rose through the ranks of the communication workers, and has been president since 2005.

TESTIMONY OF LARRY COHEN, PRESIDENT, COMMUNICATIONS WORKERS OF AMERICA, WASHINGTON, DC

Mr. COHEN. Thank you, Mr. Chairman.

CWA represents more than 700,000 members, most of whom are network and content providers, including members at Comcast and NBC Universal. So I believe we have a unique perspective on the impact of this transaction on workers and the industry.

My remarks will focus in three areas: first, the impact on jobs; second, how the merger will aggravate, not encourage, current anti-competitive behavior in the television industry; and third, the problems that will result in the emerging Internet video marketplace.

The bottom line? The public must be protected from the significant harms created by a combination of such unprecedented scale. A Comcast-NBC combination will, in fact, lead to the loss of good jobs. In any of these restructurings, there is never a warranty on employment, only promises.

With official unemployment, as the Chairman said, at more than 10 percent nationally, we must evaluate all corporate transactions by assessing the impact on jobs. Comcast-NBC debt will increase by approximately $8 billion after this transaction. And to pay for the debt, the company has two choices: cut jobs or raise cable prices. Either way, consumers and workers lose.

In addition to job loss, the combination will depress labor standards. Unfortunately, Comcast has a terrible track record of aggressive action to eliminate collective bargaining at the companies that it acquires. In 2002, Comcast acquired AT&T Broadband. At the time, CWA represented 5,000 cable employees there. After the transaction was announced, I met with Comcast executives. They told me they would respect the employees' rights to a union voice. And then let's see what a Comcast commitment means.

Soon after they took control of AT&T Broadband, a senior vice president in Oregon announced, "We will wage war to decertify the CWA," and that is what Comcast did. Comcast delayed bargaining for years, denied workers wage and benefit improvements provided to non-union employees, and supported decertification elections. Comcast refused to reach agreement on a first contract in 16 bargaining units that it acquired from AT&T.

In Pittsburgh, Comcast workers were forced to go through four union decertification elections, all supported by management, in 5 years before they finally negotiated a union contract. CWA also represents Comcast employees in Oakland, California, and Detroit. In both locations, Comcast has shifted half the work to non-union, lower-wage, so-called self-employed contractors, reducing secure jobs and benefits in areas hard-hit by unemployment. And where workers try to form a union, Comcast has fired and retaliated against union members.

In contrast, collective bargaining at NBC Universal dates back to the 1930's. Our NABET affiliate represents broadcast technicians at NBC. Although we are currently in difficult negotiations with NBC, the bottom line is NBC workers have a collective voice through their union, a right that Comcast has consistently every time opposed.

Let me now turn to the anti-competitive issues associated with this transaction. There is already too little competition in the video marketplace. As the chart on the screen shows, cable rates have grown at three times the rate of inflation. This merger would provide Comcast-NBC with added incentive and ability to engage in anti-competitive practices that would increase cable rates.

Comcast after the merger would have the ability to bundle its less-desirable channels with must-have NBC programming. Forced bundling will raise other video providers' costs, which translates into higher rates for consumers.

Today, some companies are trying to compete with incumbent cable operators. They are investing significant resources to build their networks. This merger would provide Comcast-NBC with the incentive and ability to raise the prices it charges new entrants for must-have NBC and sports programming, effectively blocking or limiting competition, cutting investment and jobs that accompany those efforts.

In summary, the Comcast-NBC merger's potential to limit growth, investment and jobs is not in the public interest. Federal regulators cannot pass this merger without carefully considering the significant impact the merging companies will have on video competition, choice, and jobs.

Thank you for the opportunity to testify today. I look forward to answering any questions. I ask that my written comments be entered into the record, along with this chart, and we welcome, finally, some dialogue.

[The prepared statement of Mr. Cohen follows:]

PREPARED STATEMENT OF LARRY COHEN

TESTIMONY OF

LARRY COHEN
PRESIDENT
COMMUNICATIONS WORKERS OF AMERICA

Competition in the Media and Entertainment Distribution Market

Before the
U.S. House of Representatives
Committee on the Judiciary

February 25, 2010

Good Morning, Mr. Chairman and Members of the Committee. Thank you for the opportunity to appear before you today. I am Larry Cohen, President of the Communications Workers of America. CWA represents more than 700,000 workers in communications, media, airlines, manufacturing, and the public sector. Specifically, we represent workers at both Comcast and NBC-Universal and can provide a unique perspective on the impact that this proposed merger would have on them and the industry.

The purpose of this hearing is to explore the potential anticompetitive impact of Comcast Corporation's proposed acquisition of NBC Universal. My testimony will focus on three areas: 1) the impact of the Comcast-NBC combination on jobs and the potential erosion of labor standards; 2) the anticompetitive behavior that currently pervades the video distribution and content markets and how that behavior will be exacerbated by this merger; and 3) the potential harms that such a transaction would pose to the emerging Internet video marketplace. At bottom, the public must be protected from the significant harms created by a combination of such unprecedented scale.

I. Impact on Workers

The proposed Comcast acquisition of NBC poses considerable harm to workers. It likely will result in the loss of good jobs, the erosion of employee rights, and undermine living standards in the communications and media industries.

The new venture will be financially weaker the day after the merger. As part of the transaction, NBC debt will increase by approximately $8 billion. As a result, the new entity will be under intense pressure to cut costs and jobs. This is an all too familiar pattern in the media sector. Media companies over-leverage to pay for a merger, and then cut jobs to improve their balance sheets, only to discover that they do not have enough staff to produce quality news and entertainment programming. This in turn leads to a vicious cycle of declining audience share, less revenue, and even more cost-cutting. Absent firm commitments from Comcast and NBC to maintain current employment levels, there is no reason to believe that the Comcast/NBC joint venture will not follow this pattern. With official unemployment now at 10 percent, this is a time to evaluate all corporate transactions through a screen that assesses the impact on jobs. We should not support a corporate deal that would eliminate good jobs.

The communications and media sectors historically have been a source of good jobs for American workers, the result of more than 70 years of collective bargaining. But a Comcast acquisition of NBC would reverse this progress and undermine employment standards for workers in these sectors.

Comcast has adopted a low-road labor policy, one based on the violation of workers' rights. Comcast has a sordid track record of aggressive action to eliminate worker organization at companies that it has acquired.

In 2002, Comcast acquired AT&T Broadband. At the time, CWA represented about 5,000 cable employees there. After the transaction was announced, I met with Comcast executives and they made a commitment to me that they would respect their employees' right to a union voice on the job. Let me tell you what a Comcast commitment means. Soon after Comcast took control of AT&T Broadband, a senior vice president in Oregon announced: "We're going to wage war to decertify the CWA." And that is precisely what Comcast did in multiple locations.

Most of the organized units that Comcast acquired were in the process of negotiating a first contract. Comcast delayed bargaining for years, denied workers wage and benefit improvements provided to non-union employees, and supported decertification elections. Comcast refused to reach agreement on a first contract in 16 of the organized units that it acquired from AT&T.[1]

Comcast has fired and retaliated against workers that try to form a union. Before a union election, Comcast instructs its supervisors to ride along with technicians on the job, to meet

[1] American Rights at Work, *No Bargain: Comcast and the Future of Workers' Rights in Telecommunications,"* 2004 (available at http://www.americanrightsatwork.org/publications/general/no-bargain-comcast-and-the-future-of-workers-rights-in-telecommunication.html).

repeatedly with workers one on one, and to hold mandatory meetings to convey its anti-union message.

CWA today represents Comcast employees in the Pittsburgh area. Comcast workers were forced to go through four union elections there in five years – three of them decertification attempts orchestrated by the company – before they finally won their union voice. Getting a first contract required overcoming further Comcast delaying tactics. Finally, Comcast has recognized that the workers there want a union voice and has negotiated a contract with CWA.

CWA represents Comcast employees in the San Francisco Bay and Detroit metropolitan areas. In both locations, Comcast has shifted about half the work to non-union lower-wage contractors, reducing secure jobs in areas hard-hit by unemployment.

Through these tactics, Comcast has managed to limit union representation to a small percentage of its workforce. Telecommunications has been a source of good jobs in this country, largely a result of more than 70 years of collective bargaining. The telecommunications industry has provided good jobs for women and minorities, with the result, as one economist wrote, that this industry is one of the few that has overcome market-based pay discrimination.[2] But Comcast – which competes directly with unionized telecom companies for voice, video, and broadband service – drags down the industry wage and benefit standards.

In contrast, NBC-Universal has a 70-year history of collective bargaining with multiple unions. To be sure, negotiations often deal with contentious issues, and the National Association of Broadcast Employees and Technicians (NABET) sector of CWA is currently in difficult negotiations with NBC-Universal on a contract covering technicians at the NBC network and stations in Washington, D.C., New York, Chicago, and Los Angeles. The contract expired 11 months ago. We are hopeful that we can resolve the issues that currently divide us. Although

[2] Vicky Lovell, Heidi Hartmann, Jessica Koski, *Making the Right Call: Jobs and Diversity in the Communications and Media Sector*, Washington, D.C.: Institute for Women's Policy Research, 2006 (available at http://www.iwpr.org/pdf/C364.pdf).

these are challenging negotiations, the bottom line is that NBC workers have a collective voice through their union – a right that Comcast has aggressively denied to their employees.

With the merger, an aggressively anti-union Comcast would be in control of labor relations, and an employer that has taken the low-road employment strategy will expand its ability to put downward pressure on living standards throughout the communications and media sectors.

Furthermore, the Comcast acquisition of NBC-Universal from General Electric represents a giant step backward on corporate governance practices. General Electric uses a one-share one-vote rule in shareholder voting. In contrast, Comcast has two classes of stock that gives super-majority voting rights to its CEO, Brian Roberts. Although Mr. Roberts owns only 1.23 percent of Comcast shares, he has 33 percent voting power. The Corporate Library, an independent shareholder research organization, has given Comcast an "F" on corporate governance practices. Comcast's undemocratic corporate governance structure mirrors its anti-democratic labor-management relations as well as its domination of the media marketplace.[3]

II. Anticompetitive Harms to Today's Video Marketplace

The proposed combination of Comcast, the nation's largest video service distributor, and NBC Universal, a leading video content producer, would create a vertically integrated entity with market power to increase cable rates, block competition in the video marketplace, and reduce jobs.

There is already too little competition in the video marketplace, as evidenced by the ever increasing rates that consumers pay year after year. The FCC estimates that from 1995 to 2008, the price of expanded basic service grew at three times the rate of inflation -- from $22.35 to $49.65, an increase of 122.1 percent, compared with an increase in the Consumer Price Index of 38.4 percent over the same period. (*See* chart, attached).[4] This merger would provide

[3] The Corporate Library, Comcast Corporate Governance Report, Feb. 23, 2010.

[4] *In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, Report on Cable Industry Prices, MM Docket No. 92-266 ¶ 2, Chart 1 (2009).

Comcast/NBC with added incentive and ability to engage in anti-competitive practices that would raise cable rates for consumers.

Today, competing video distributors are often forced to purchase large bundles of channels that they and their customers do not want. Following the merger, Comcast will have more premium content and will have the ability to bundle its less desirable cable channels with must-have NBC programming to secure higher rates and more favorable placement of its programming. This forced bundling will raise other video providers' costs, and those added costs translate into higher cable rates for consumers.

This is particularly problematic for small rural operators and new video competitors with a smaller subscriber base. Because Comcast and NBC give bulk discounts, they charge themselves less than they charge small and rural carriers on a per subscriber basis, raising the costs for cable subscription for customers of rural operators and new video entrants.

Today, some companies are trying to compete with incumbent cable operators, investing significant resources to build out their networks and enter the video marketplace. This merger would provide Comcast/NBC with the incentive and ability to block or limit that competition, and block or limit the investment and jobs that accompany those efforts.

As competitors' costs increase, those companies trying to compete will invest less in building out their networks and hire fewer people. As a result of this proposed merger, Comcast/NBCU will have the market power to stifle competitive entry by new video operators. As a result, there will be fewer companies competing to provide traditional cable video services, fewer choices and higher prices for consumers, and lost jobs from these potential competitors.

In the past, Comcast has used its ownership of sports programming in an anti-competitive way. For example, Comcast has prevented DirecTV and Dish Network from accessing its SportsNet Philadelphia channel, which carries the games of Major League Baseball's Phillies, the NBA's Sixers and the NHL's Flyers. (Comcast has a controlling interest in the Sixers and Flyers.) By withholding the games of the three Philadelphia professional sports teams from its rivals, Comcast has had a powerful marketing advantage against satellite TV competitors.

Comcast has faced numerous FCC complaints from programmers for discrimination and anti-competitive behavior. The NFL Network, the Tennis Channel, MASN, a regional sports network, and Wealth TV, an emerging HD programmer, have filed formal FCC complaints against Comcast. These complaints allege that Comcast carried its own programming on favorable terms while refusing to carry independent programming on equal terms – or to carry such programming at all. Should regulators approve the Comcast-NBCU merger, Comcast will have more affiliated content and even more of an incentive to favor its own programming in its carriage decisions.

This may result in Comcast refusing to carry competitors' programming, paying them less for carriage, or placing them on a program tier with fewer viewers. After acquiring NBC programming, Comcast will have even greater incentives to favor its own array of programming, shutting out the independent voices of other programmers, leaving consumers with less quality, choice and diversity in programming. In fact, Comcast Cable's President and COO Steve Burke made remarks during the NFL's program carriage complaint with the FCC that Comcast treats affiliate networks "like siblings as opposed to strangers."

Meanwhile, bringing a carriage access complaint to the FCC is not a meaningful remedy. The complaint process currently lacks any concrete deadlines for FCC action, with many complaints languishing at the Commission for years.

Today, Comcast's regional and local programming networks compete with NBC's owned and operated stations for news and entertainment programming. A merged Comcast/NBCU would have the incentive to merge these operations, reducing quality, diversity, competition, and employment in video programming. Already, NBC has pioneered local news sharing agreements that in effect merge NBC's local news gathering with those of its broadcast competitors. Under these arrangements, NBC and its former competitors jointly determine news assignments and crew assignments, replacing what were once competing news operations with shared news gathering. In New York City, for example, six stations owned by four different owners (including NBC's owned and operated station and its Telemundo station) cooperate in a local news sharing venture.

This merger also threatens to eliminate a current competitor for local advertising. Contrary to Comcast/NBC claims today, Comcast is a major and sometimes even the most significant competitor for local ad dollars in some local advertising markets. In 2006, NBC made this very argument to the Federal Communications Commission. NBC stated that cable's local advertising dollars exceeded the total advertising dollars at NBC local stations, and actually were greater than advertising revenues at the number one ranked station in several markets, including Philadelphia (greater than the ABC station by $26 million) and San Francisco (greater than the Fox station by $70 million).[5] Comcast's local ad share has grown since then. In addition, an independent broadcaster will not be able to offer the volume discounts and package deals for advertising across dozens of channels that the merged entity will be able to do.

This translates into less revenue for competing broadcasters to produce local news and to hire workers. As a result, broadcasters will no doubt be forced to scale back local news production, with negative impact on diversity, competition, and adequate staffing that drive quality news.

In terms of local market share, Comcast's ad penetration is analogous to NBC trying to merge with the number one ranked station in the market, a practice prohibited by the FCC under its dual network rule. That rule permits common ownership of multiple broadcast networks but prohibits a merger of the "top four" networks, i.e., ABC, CBS, Fox, and NBC.

III. Anticompetitive Harms in Emerging Online Video Market

Another area of concern posed by the Comcast-NBC Universal merger is in the developing online video marketplace. New entrants are beginning to offer a number of video streaming services on the Internet and "over the top" services that bring Internet video directly to the television. This premium content that is available online increases the value of broadband subscription to consumers. Thus, the availability and ease of accessing video online is an important means to encourage the deployment and adoption of broadband. And as broadband

[5] NBC Media Ownership Comments, FCC 06-121 (Oct. 2006).

adoption increases, some users are able to choose to "cut the cable cord," canceling their cable subscription and relying on the Internet for television. In fact, the FCC recently concluded that internet video and video devices are an important part of developing a National Broadband Plan.[6]

The Comcast-NBC merger has the potential to bring this to a halt by limiting the ability of over-the-top service providers to provide video. A combined Comcast/NBC could limit consumers' online access to NBC content altogether or charge consumers higher prices to access that content unless they already subscribe to cable services. This is the TV Everywhere model that Comcast and NBC have already begun to deploy, bundling content with cable subscription, thereby forcing internet customers to buy cable packages in order to see content online from NBC.

TV Everywhere is an initiative being pursued by a number of cable companies, but led by Comcast. Under the TV Everywhere model, Comcast video subscribers have access to video content online for free, just as they do today. Online consumers, however, are forced to pay higher rates or restricted from accessing the content at all. For example, that is what is happening with some Olympic coverage from NBC today. In the biggest TV Everywhere trial, NBC restricts access to live streaming and full replay of Olympic events to consumers who can "authenticate" that they are paying cable subscribers.

TV Everywhere creates a mechanism for programmers and content providers to have a "walled garden" of online video content, only available to those who pay their monthly cable subscriptions. In doing so, TV Everywhere denies independent video distributors access to must-have programming, and creates a barrier to entry in the video distribution market for Internet-only video distributors. This extension and protection of the cable business model effectively "cablizes" the Internet as we know it today, thus diminishing innovation, depressing investment in broadband and ultimately eliminating jobs.

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[6] *Comment Sought on Video Device Innovation*, NBP Public Notice #27, GN Docket Nos. 09-47, 09-51, 09-137; CS Docket No. 97-80 (Dec. 21, 2009).

In the end, consumers lose out. TV Everywhere would protect the cable business model by imposing its subscription pricing structure on the Internet. Where customers have traditionally accessed content for free, they would now be forced to pay. Where the internet use to be a source of expanding consumer choice and diversity of programming content, it would be used to protect the current cable incumbents.

A merged Comcast/NBC would have the ability to force this business model on other distributors through their ownership of NBC's content. Today, NBC owns a 30 percent interest in a website called Hulu.com that offers free, advertising-supported streaming video of broadcast and cable television shows and movies. In acquiring NBC, Comcast would secure a substantial interest in Hulu.com, which is the second leading online video provider. As a result, Comcast would play a critical role in the public's ability to continue accessing the Internet's growing video services.

All of the actions I have just described restrict the Internet from developing into a platform for competitive video alternatives. These actions in essence protect the cable-channel business platform at the expense of new video entrants, thereby devaluing the broadband investment of competitive companies. The end result is that companies will invest less in broadband deployment, put less fiber in the ground and hire fewer people.

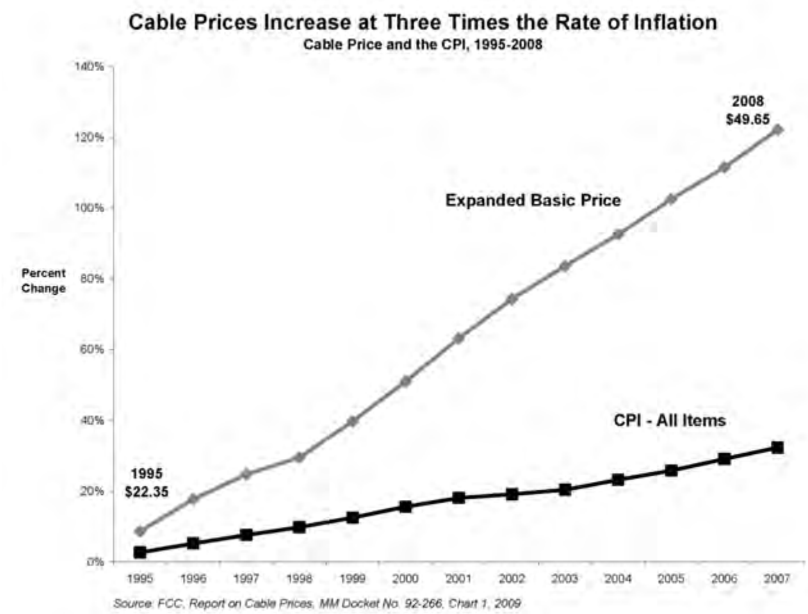
IV. Conclusion

The Comcast/NBC merger's potential to limit growth, investment and jobs is not in the public interest. Given its anticompetitive and anti-consumer effects, federal regulators cannot pass this merger without carefully considering the significant impact the merging companies will have on video competition, choice and jobs. Moreover, federal regulators cannot rely on the voluntary public interest commitments offered by Comcast and NBC Universal alone. The voluntary commitments are: 1) insufficient to address adequately the very real competitive harms; and 2) in many cases, rest on pending actions before federal regulators. As a result, prior to addressing this merger, CWA believes that both the DOJ and the FCC should complete many of the actions that will address some of these issues from a broader industry-wide perspective.

Federal regulators would then have the ability to craft any additional, specific merger conditions that are necessary to further address the potential harms caused by this combination.

Again, I want to thank the Committee for giving me the opportunity to testify today and for Chairman Conyer's leadership on this issue. I look forward to answering any questions that the Members of the Committee may have.

ATTACHMENT


Cable Prices Increase at Three Times the Rate of Inflation
Cable Price and the CPI, 1995-2008
140%
120%
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80%
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Source: FCC, Report on Cable Prices, MM Docket No. 92-266, Chart 1, 2009

CITATIONS OF ONLINE REPORTS

[1] American Rights at Work, *No Bargain: Comcast and the Future of Workers' Rights in Telecommunications,"* 2004 (available at http://www.americanrightsatwork.org/publications/general/no-bargain-comcast-and-the-future-of-workers-rights-in-telecommunication.html)

[2] Vicky Lovell, Heidi Hartmann, Jessica Koski, *Making the Right Call: Jobs and Diversity in the Communications and Media Sector*, Washington, D.C.: Institute for Women's Policy Research, 2006 (available at http://www.iwpr.org/pdf/C364.pdf)

Mr. CONYERS. Andrew Schwartzman, president of Media Access Project, since 1978, he has become a national expert on media issues, is a faculty member at Johns Hopkins University School of Arts and Science, and he has taught courses dealing with media and communications issues for a number of years.

TESTIMONY OF ANDREW JAY SCHWARTZMAN, PRESIDENT AND CEO, MEDIA ACCESS PROJECT, WASHINGTON, DC

Mr. SCHWARTZMAN. Thank you, Mr. Chairman.

This is the most important media merger since Lucy met Desi. Comcast seeks to combine its huge cable and Internet footprint with NBC's content assets.

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

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

Approval of this merger would increase Comcast's power to squeeze out independent programmers with diverse editorial perspectives. There are scores of cable networks which have been unable to obtain carriage on Comcast and other cable systems.

I am here and they are not because some of these companies have told me that they are afraid of retaliation. And acquisition of NBC's stable of cable networks will greatly exacerbate the existing imbalance of power.

If Comcast is permitted to purchase the NBC TV stations and its highly viewed cable networks, Comcast will be able to bundle unwanted programming when it seeks carriage deals with other MVPDs. The problem is even greater with respect to carriage on Comcast-owner cable systems. After the acquisition, Comcast would have many more cable networks to favor. This means higher prices for all Americans, not just Comcast customers.

There ought to be a law against such abuse. And, in fact, there is. Section 616 of the Communications Act is supposed to prohibit cable companies from discriminating in favor of their own programming. While Comcast argues that existing law is sufficient to protect independent programmers, Comcast has suggested, but not quite promised, that it will not renew its efforts to challenge the constitutionality of Section 616 in the future.

However, this does not change a more fundamental fact, which is that the existing statute does not work. Program carriage litigation is prohibitively expensive, and the FCC has adopted almost insuperable legal hurdles for complainants.

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

Although Mr. Roberts has said that Comcast may agree to be bound by program access rules voluntarily, so far he has refused to withdraw Comcast's legal challenge to continuing the rules in effect. That aside, there are many reasons why even the existing rules are insufficient.

First, they expire in 2 years, and there is no assurance they will be extended. In any event, the program access regime does not preclude bundling. Although the law prohibits discrimination against competitors, in this instance, it simply means that as long as Comcast overcharges itself, it can overcharge everyone else.

Re-transmission consent rules are even less reliable as a tool to protect video competitors. Among other things, the statutory mandate for good-faith negotiation does not prohibit price or packaging discrimination. It simply requires a commercially feasible offer.

I note that Mr. Roberts has indicated that Comcast may increase retransmission consent payments for Comcast affiliates. Now, this may or may not be a good thing for the future of broadcast TV, but no one should doubt that the impact of this would be to raise cable rates for everyone.

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

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

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

Comcast's ownership interest in Hulu is especially important here. Comcast can cripple Hulu by withdrawing NBC content or it may choose to make the NBC content exclusive to Hulu and withhold it from new Internet-delivered video competitors. Either way, it is bad for the public.

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

[The prepared statement of Mr. Schwartzman follows:]

PREPARED STATEMENT OF ANDREW JAY SCHWARTZMAN

Testimony of
Andrew Jay Schwartzman
President and CEO
Media Access Project

To the
Committee on the Judiciary
United States House of Representatives

February 25, 2010

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I believe that Comcast should not be allowed to acquire NBC Universal.

As I said when the Comcast/NBCU transaction was announced, this is the most important media merger since Lucy met Desi. Comcast seeks to combine its huge cable and internet footprint, reaching about 30 % of the nation's homes, with NBCU's gigantic content assets. NBCU has 26 TV stations in the country's largest markets, the NBC network, several of the highest rated cable TV networks and the Universal film library.

WHY THIS IS SUCH AN IMPORTANT TRANSACTION

At the outset, I want to stress that my opposition to the Comcast/NBCU merger is not based on animus. Brian Roberts is not evil; to the contrary, he is a public spirited, ethical businessman. Even though I have problems with his labor/management practices and his corporate governance structure, I recognize that he is motivated by business considerations and not some sort of design to undermine American democracy.

But the consequences of this deal nonetheless could have precisely that effect.

Concentration of control in the mass media poses unique questions for policymakers and regulators. Unlike any other line of business, media properties raise important questions which go to the very nature of democratic self-governance. Our viewpoints and perspectives on political and social issues are the outgrowth of what we hear and watch. Indeed, it has been clear for some 60 years that antitrust principles overlap with First Amendment doctrine. The seminal case in this regard is *United States v. Associated Press,* where the Supreme Court applied the Sherman Act to newspapers.

Writing for the majority in *Associated Press*, Justice Black held that the First Amendment provided powerful support for applying the Sherman Act because it "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public...." Justice Frankfurter emphasized in his concurring opinion that the case was about a commodity more important than peanuts or potatoes, that it was about who we are as a nation. "A free press," he said, "is indispensable to the workings of our democratic society." For that reason, he wrote, "the incidence of restraints upon the promotion of truth through denial of access to the basis for understanding calls into play considerations very different form comparable restraints in a cooperative enterprise having merely a commercial aspect."

A notable example of how this concept has been applied in practice can be found in Judge Greene's treatment of the AT&T consent decree. In imposing restrictions on what was then described as "electronic publishing," he held that both competitive and First Amendment considerations separately supported his action.

Judge Greene made clear that application of these objectives is not delimited to Title III of the Communications Act. "Certainly," he said, "the Court does not here sit to decide on the allocation of broadcast licenses. Yet, like the FCC, it is called upon to make a judgment with respect to the public interest and, like the FCC, it must make that decision with respect to a regulated industry and a regulated company." Thus, he said, it was necessary for him to "take into account the decree's effect on other public policies, such as the First Amendment principle of diversity in dissemination of information to the American public. Consideration of this policy is especially appropriate because, as the Supreme Court has recognized, with respect to promoting diversity in sources of information, the values underlying the First Amendment coincide with the policy of the antitrust laws." *Id.*

Time precludes extensive discussion, so today I will emphasize just three of the many anti-competitive ways in which Comcast could leverage ownership of NBC content assets to extend its reach in distribution of video programming and Internet services. My focus on national issues does not mean that I am unconcerned about the impact of Comcast's plans on the communities where it will own both TV stations and cable systems. Rather, it means that I know that my friend Mark Cooper is going to address this question extensively in his remarks, with which I wish to associate myself.

A COMCAST/NBCU COMBINATION WILL HARM INDEPENDENT PROGRAMMERS AND THE PUBLIC

First, I want to address how approval of this merger would increase Comcast's power to squeeze out independent programmers with diverse editorial perspectives.

There are scores of cable networks which have been unable to obtain carriage on Comcast and other cable systems. I'm here, and they are not, because some of these companies have told me that they are afraid of retaliation. Indeed, over the last several years numerous programmers such as NFL Network and WealthTV have unsuccessfully pursued carriage complaints at the FCC. In each case, they argued that Comcast favored its own channels while refusing to carry independent programming on workable terms, if at all. Acquisition of NBC's stable of cable networks will greatly exacerbate the imbalance of power.

If Comcast is permitted to purchase the NBC TV stations and its highly viewed cable networks, Comcast will be able to bundle its programming when it seeks carriage deals with other multichannel video programming distributors ("MVPDs") such as telephone and satellite companies. This enables Comcast to obtain distribution for new and secondary channels which otherwise would never receive such treatment. Each time a Comcast channel is forced into the program menu, there is one less slot for independently owned programming.

The problem is even greater with respect to carriage on Comcast's own cable systems. The existing legal framework already gives Comcast every incentive to favor its own programming over independently produced cable channels. This can include refusal to carry competitors, paying them far less for carriage or placing them on a lesser watched program tier.

After the acquisition, Comcast will have even more cable networks to favor in deciding what to carry on its cable platform. Because it will create incentives for Comcast to make programming decisions based on self-serving financial factors rather than program quality, approval of the merger would mean that the public will get inferior programming. Discrimination of this kind also generates higher prices for all Americans, not just Comcast customers. Since Comcast will be paying itself for program carriage, it can set a higher wholesale price for its programming, so that competing MVPDs will also have to pay higher prices. This, of course, will be passed on to their customers.

There ought to be a law against such abuse. In fact, there is. Section 616 of the Communications Act prohibits cable companies from demanding an equity interest in a programmer or exclusivity rights as a condition for carriage. It also prohibits cable companies from discriminating in favor of their own programming.

Comcast understandably, but unpersuasively, argues that existing laws and regulations sufficiently protect independent programmers and the public. Once those of us in the public interest community called attention to the fact that Comcast has argued that enforcement of Section 616 is unconstitutional, Comcast has suggested, but not quite promised, that it will not pursue such a challenge in the future. However, this does not change a more fundamental fact, which is that the existing statute does not work. The cost of litigating program carriage cases has proven to be prohibitive, and the FCC has adopted almost insuperable legal hurdles for complainants to overcome. Since Section 616 was enacted in 1992, only a handful of complaints have made it past the threshold level. There is no time limit for FCC action, and complaints and appeals often have been stalled at the FCC for months and years. Even when there is FCC action, the reward for success is a lengthy and expensive legal trial with the legal deck stacked in favor of the cable companies.

A case in point is the difference in treatment between the MLB Network and the NFL Network. For more than a decade, the National Football League's NFL Network has fought for carriage on widely viewed cable tiers at fair prices. It has been unable to reach agreements with a number of major cable operators. By contrast, Versus, a competing but far less viewed sports channel owned by Comcast, has been placed on a basic tier. Finally, the NFL filed a Section 616 complaint against Comcast, alleging that Comcast would not place the NFL Network on the same tier that Comcast placed its own sports networks and that it had conditioned its willingness to carry the NFL Network upon receipt of a financial interest in NFL programming. After considerable delay, the FCC finally directed that a hearing be held. Eventually, a year after its complaint was filed, the delay and cost of the hearing forced the NFL to accept a settlement which provided inferior channel placement at a price far below what the NFL had sought. Even the NFL, with its vast resources, couldn't crack the Comcast stranglehold without lawsuits, FCC proceedings, and years of uncertainty before it reached a negotiated settlement which was less than what it wanted.

Major League Baseball learned from the NFL's experience, and took a different tack. When it created the MLB Network it did what the NFL has refused to do, and offered significant ownership interests to the major cable operators, including Comcast. Not surprisingly, from the moment of its launch, the MLB Network has been carried on the basic cable tier.

Plainly, existing law does not provide adequate protection for independent programmers. Acquisition of the NBCU program networks will only make things worse.

THE PROPOSED MERGER WILL HURT OTHER DISTRIBUTORS AND THE PUBLIC

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

There are countless ways in which Comcast could exercise such leverage. For example, it can condition the sale of important "must have" programming, including that of the NBC and Telemundo TV stations, upon acceptance of undesired, secondary channels which would never receive carriage in a competitive market. Or it could withhold or delay access to the Universal film library from competing MVPDs, or demand vastly inflated licensing fees.

As with the program carriage problem discussed above, Comcast would assure you that existing law is sufficient to protect against harm. Indeed, the "program access" provision in Section 628 of the Communications Act requires vertically integrated cable operators to share their programming with competitors without discrimination in prices, terms or conditions of sale. Moreover, the Commission has recently closed, in part, the so-called "terrestrial loophole" that has permitted Comcast and other cable companies withhold regional programming, such as the Comcast Sports Network in Philadelphia.

Comcast has also brought a legal challenge the FCC's legal authority to continue enforcing program access rules' ban on exclusive contracts. Although Mr. Roberts has more recently said that Comcast is willing to consider a promise to adhere to the rules regardless of the outcome of its court case, he has thus far refused to drop the lawsuit.

That aside, there are many reasons why existing law is insufficient to protect Comcast's competitors and their customers. First, even if Comcast doesn't upset them in court, the program access rules expire in two years, and there is no assurance that they will be extended. In any event, the program access regime does not preclude bundling, which is one of the principal anti-competitive mechanisms Comcast is likely to employ. Although Section 628 prohibits discrimination against competitors, this simply means that as long as Comcast overcharges itself, it can overcharge everyone else. In addition, the program access provision does not apply to a large proportion of the content that Comcast is acquiring, such as feature films and other video on demand content. Moreover, Section 628 is a right without a remedy; the FCC's complaint process is so onerous and time consuming that I am unaware of a single program access complaint which has ever been granted. And, no less importantly, the negotiation process is one-sided. There is no "standstill" requirement, so that when a carriage agreement expires, all of the power is in the hands of the programmer.

Retransmission consent for NBC Network and Telemundo programming poses another especially important problem. Without Comcast's permission, competing MVPDs would be unable to offer this essential programming. As the recent Fox/Time Warner Cable dispute demonstrated, even the most powerful satellite or cable companies cannot last for a day without major TV network programming. Post-merger, Comcast could decide to pay itself twice the fair value for NBC and Telemundo programming and then turn around and exact the same inflated price from its competitors, who would be forced to pass on the overcharges to their customers. Or, Comcast could tie the carriage of this programming to the carriage, at favorable channel locations, of the least desirable of its cable channels, also at inflated prices.

Existing retransmission consent rules are an unreliable tool for assisting Comcast's video competitors. Section 325 of the Communications Act supposedly mandates "good faith" negotiation, but it does not prohibit price or packaging discrimination; it simply requires a commercially feasible offer. NBC already requires MVPDs to accept bundles of cable programming in order to get the NBC and Telemundo programming; addition of the Comcast distribution magnifies the leverage by several orders of magnitude. The FCC's complaint process offers no effective remedies other than a finding that one party has acted badly. There is no time limit for FCC action, and as with program access, there is no "standstill" provision to maintain some level of parity during negotiations.

In this connection, I would observe that Mr. Roberts has recently indicated that Comcast may be willing to increase retransmission payments to NBC affiliates. This may or may not be a good thing for the future of broadcast TV, but no one should doubt that the impact of this would be to raise cable rates for everyone. If Comcast pays more for retransmission consent, customary industry contractual arrangements are such that the same higher rates will be applied to affiliates of other networks as well. Mr. Roberts certainly is not going to absorb those costs; they will be passed on to the public in the form of higher rates.

HOW COULD THIS HAPPEN?

One could fairly ask how Congress could have created a system which would permit a single company to operate cable systems, cable TV networks and a stable of owned-and operated TV stations, much less a major TV network? The answer is that Congress never contemplated such a combination. When the program access and retransmission consent provisions were enacted in 1992, the law already prohibited common ownership of a cable system and a local TV station. The local cable/television cross-ownership rule was eliminated a few years ago by judicial action, not legislation. There is very little doubt that Congress would have included much stronger protections if it ever thought that such cross-ownership would ever be permitted.

COMCAST'S ACQUISITION OF NBCU WOULD JEOPARDIZE DEVELOPMENT OF A FREE AND OPEN INTERNET

Internet technology offers the prospect of creating vibrant and highly competitive markets for video programming. Members of the public can, or will soon be able to, receive high-definition video via the Internet. Comcast has already taken steps to kill off such competition, and acquisition of NBC's content will greatly enhance that campaign.

Comcast has strong reason to keep its customers from migrating to existing and potential Internet-delivered video competitors. Control of NBCU branded content as well as its one-third interest in Hulu would give Comcast a powerful mechanism to retain its video services revenue stream by strangling potential Internet-based competition before it can even get off the ground.

It would be reasonable to expect that the public's reaction to the diminished choice and increased prices resulting from a Comcast/NBCU merger would be to seek alternative ways to obtain video content. The possibility that viewers may soon be able to watch Internet-based video on a TV becomes by simply clicking on a remote control, Comcast's business model will be threatened. Indeed, a brave few have already decided to "cut the cord" by cancelling their cable TV service and relying on the increasing amount of content available over the air and on the Internet. It is becoming ever easier to connect digital TV sets directly to the Internet and employ services like iTunes, and Hulu and devices like Boxee and Roku, while relying on free over-the-air television for news and other local programming. Existing online-only video distributors such as Vudu and Netflix are growing rapidly. There is no technological or business model reason why there won't soon be Internet-delivered "virtual cable" services with a menu offering the popular "linear programming," including the major cable TV networks. Indeed, the *Wall Street Journal* recently reported that a company called Move Networks has discussed plans to offer just such a service. (I would be a little more optimistic about the prospects for Move Networks' becoming a competitive offering if Comcast were not a major customer of, and investor in, that company.)

This is an existential threat to the cable industry. Its answer is "TV Everywhere." Comcast's version, which goes under the unwieldy name of "Fancast XFinity," offers the superficially attractive opportunity for its video and Internet customers to view video over the Internet without extra charge. The catch, which is a very big catch indeed, is that you must keep your cable TV subscription.

XFinity represents an attempt to kill off potential competition while preserving the cable TV revenue stream indefinitely. XFinity is available only in Comcast regions, as it and other cable operators have continued their longstanding tacit agreement of never competing with each other on price or services. And, while we are told that satellite and telco competitors will soon be allowed to offer Comcast's content, the same opportunity will not be offered to any new online-only TV distributors. Nor is it clear that this content will be made available under the same terms and conditions. By design, XFinity cuts off the flow of programming to disruptive new entrants.

The XFinity offering also threatens existing independent programmers. Comcast has conditioned cable TV carriage on contractual provisions which prevent programmers from selling their content to competing online distributors at least temporarily and, perhaps, permanently.

Last month, MAP joined with Free Press and other public interest groups in issuing a white paper which set forth in detail how the cable industry has colluded to create the "TV Everywhere" model. As the report says,

> Stripped of slick marketing, TV Everywhere consists of agreements among competitors to divide markets, raise prices, exclude new competitors and tie products.

Comcast's acquisition of NBCU's programming vastly increases its leverage to force XFinity upon its customers and to stifle new competitors. All of the program carriage and program access problems that video competitors currently face will be replicated in the Internet space, but there are no similar legal protections. Of particular note in this regard is the fact that NBC has a major ownership interest in Hulu, the leading Internet video service. If it is in Comcast's interest, it can cripple Hulu by withdrawing NBC content from Hulu. Alternatively, Comcast may choose to make the NBC content exclusive to Hulu and withhold it from new Internet-delivered video competitors.

Comcast's control of the vast Universal film library would be another important building block in the effort to stifle new Internet competitors. Comcast can withhold these products from Internet competitors or delay their availability while offering them exclusively on XFinity. For example, it could target DishTV, which competes in the video market. Dish has an Internet delivered video service called Dish Online. By denying Universal's film library to Dish Online, Comcast could drive video customers to itself. If Dish were uncooperative, Comcast could also deny XFinity to Dish in Comcast markets.

Finally, while I hope that the FCC quickly moves to adopt "Network Neutrality" rules to prohibit discrimination in delivery of broadband services, I must point out that, in the absence of such provisions, Comcast can degrade or otherwise discriminate against competitors seeking to deliver Internet video program services to Comcast's Internet customers.

CONCLUSION

Comcast's proposed acquisition of NBCU is profoundly anti-competitive and will adversely affect the marketplace of ideas as well. I hope the Committee members will join Media Access Project in urging the FCC and the Department of Justice to block it.

Mr. CONYERS. Marc Morial was a state senator in Louisiana. He then became mayor of the city of New Orleans. He has taught constitutional law as a professor at Xavier University. He is now the president and CEO of the National Urban League. And we welcome him to this hearing.

TESTIMONY OF MARC H. MORIAL, PRESIDENT AND CEO, NATIONAL URBAN LEAGUE, NEW YORK, NY

Mr. MORIAL. Thank you. Thank you very much, Chairman Conyers and Members of the Committee. It is indeed an honor, Chairman Conyers, to be before your Committee. Thank you for your leadership.

I represent the National Urban League. We are this year celebrating 100 years of continuous existence. We serve 2 million people a year through 100 affiliate chapters from coast to coast. That includes operations in 36 states and the District of Columbia, from Anchorage, Alaska, all the way to Miami, Florida, and I am proud to be here today, and thank you very much.

A couple of points that I would like to make at the outset. First, GE is selling its interest in NBC Universal so that it can devote its investments and energies to its core business, period. That being the case, I would like to see NBC Universal in a joint venture with, one, an American company, two, a company with a proven track record in an understanding of the television business, and, three, a company that has demonstrated a track record on diversity issues and in working with diversity organizations, like the one I lead.

That being the case, the National Urban League has not taken a formal position on this transaction. And we are withholding any formal position pending discussions with senior management relating to diversity programming, employment issues, and other very important things related to our mission.

But I do believe that Comcast should be entitled to great respect in this process based on its past actions with respect to the diversity community. They have a demonstrated commitment to measures relating to diversity. That includes in the areas of employment and programming, and I would cite its proactive investment in TV One.

Also, Comcast has made commitments about new and independent programming opportunities for its new joint venture. We will urge that this new joint venture include new opportunities in the area of diversity programming.

For the record, Comcast has been an important corporate partner to the Urban League. They have forged local partnerships with many of our chapters. They work with us in Philadelphia on a job-training program for cable installers. They have a national partnership with us designed to raise the awareness of us, including supporting our State of Black America report, which is our annual report to the President, this Congress, and the people of this Nation.

NBC Universal has also made important strides in its commitment to diversity and inclusion. We have worked with the senior leaders to increase the voices of color in commentary roles on NBC, MSNBC, CNBC—now, in all of these areas, a foundation has been laid, but there is much, much more in the area of diversity that needs to be done.

So we look forward to our discussions regarding how this new joint venture will continue and strengthen its commitment to diversity. And when we talk about diversity today, Mr. Chairman, we are talking about diversity in the areas of employment, including the most senior levels of the new joint venture. Diversity in procurement, the opportunity for businesses of color to do business with the new venture. Diversity in governance, which are those boards, those management committees that oversee the operation of the joint venture. Diversity in philanthropy, which involves the community engagement that the joint venture would have with all communities that represent the great tapestry of the United States of America. And diversity in programming, because diversity in programming is enhanced not simply by access, but also access to capital, and a commitment to finance the kind of programming that we need to give communities that have been left out an opportunity for their great contributions to this Nation to be seen, to be heard, and to be artistically expressed.

We also believe that in the event that any local broadcast licenses are spun off as a result of this merger—this transaction, I should say, that minority businesses should have a fair and equal opportunity to acquire these assets.

We believe—and it is our goal in the discussions that we will have with NBC Universal and Comcast—to set a standard for this new venture to be a first-class company when it comes to diversity. That is our aim. That is our goal. That is what our conversations will be all about. And we will be engaging in discussions with their senior leadership on these areas of concern.

So I want to thank the Committee, certainly, for its consideration. I appreciate the opportunity to testify today. Thank you so much.

[The prepared statement of Mr. Morial follows:]

PREPARED STATEMENT OF MARC H. MORIAL

STATEMENT OF MARC H. MORIAL, PRESIDENT & CEO

NATIONAL URBAN LEAGUE

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

There are a several points that I would like to make at the outset.

First, GE is selling its interest in NBCU so that it can devote its investments and energies to its core businesses. Period.

This being the case, I would like to see NBCU in a joint venture with 1) an American company, 2) a company with a proven track record in and understanding of the television business and 3) a company that has a strong and proven track record on diversity issues and in working with diversity organizations such as the National Urban League.

The National Urban League has taken no formal position on this transition yet; we are withholding formal endorsement pending discussions with senior management relating to diversity programming, employment, and other issues at NBCU.

But we do think that Comcast should be entitled to great respect in this process based on its past actions with the diversity community.

Comcast has demonstrated a commitment to measures relating to diversity – whether employment or programming related. Evaluations of its employment practices have been positive and it has pro-actively invested in diversity programming such as TV One.

Impressively, Comcast has also made commitments about new and independent programming opportunities for its NBCU joint venture. We have every belief and hope that these new opportunities will include diversity programming.

Comcast has also been an important corporate partner to the Urban League, having forged local partnerships with many of our chapters throughout the country. In its home city of Philadelphia, Comcast engaged with our local Urban League affiliate chapter to create a job training program for cable installers.

Nationally, Comcast entered into a national partnership agreement with NUL just over two years ago designed to raise awareness of Urban League programs. Comcast has supported this effort through the production and airing of Urban League public service announcements, production of a "State of Black America" show to compliment NUL's annual report to the President, and support for our "Conversation with Leaders" program.

NBCU has also made important strides in its commitment to diversity and inclusion. Its senior leaders have also worked closely with the National Urban League to increase the voices of color in commentary roles on matters of public policy on NBC, MSNBC, CNBC and TheGrio. An important foundation has been laid, but much more must be done.

We therefore look forward to our discussions with Comcast regarding how the new joint venture will continue and strengthen its commitment to diversity in the areas of employment, including its most senior executive levels, procurement, governance, philanthropy and programming. Assuring that each of these issues is adequately addressed is clearly in the public interest of the people of the United States. We also believe that in the event that any local broadcast licenses are spun off, that Minority Businesses should have a fair and equal opportunity to acquire these assets.

Based on our existing working relationships I am confident that both Comcast and NBC Universal will continue to be first class 21st century companies and I look forward to hearing more from the senior leadership on our areas of concern. Thank for you having me here today and I look forward to your questions.

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Mr. CONYERS. Howard Berman, senior Member of Judiciary Committee, Chairman of Foreign Affairs?

Mr. BERMAN. Thank you very much, Mr. Chairman, and I apologize to you and to the witnesses because we are chairing a hearing now with the Secretary of State, and I did not get a chance to hear your testimony, but I have copies of it, and I intend to read it, other than Mr. Morial, who I did get to hear now.

This proposed—this possible joint venture has two appeals to me. One, a more general proposition that things which get the distribution side of content to understand the needs of content providers to protect their creativity would be a welcomed outcome. So as a general proposition, I am—that intrigues me, and I think it is an important consideration.

Secondly, Universal Studios, a key part of this process, is located in my district. It is on the board with Adam's district, but it is—at least for another year-and-a-half—still in my district. And it is a major source of—it is a major employer.

And not only Universal Studios, there are all kinds of other companies whose existence and well-being is related to the strength of Universal Studios as a—in other words, for this, this is a jobs issue for me in a very real sense.

So my first question is, there are labor agreements and jobs at Universal Studios. I am curious if Mr. Roberts or Mr. Zucker could address that issue.

I would also—let me ask my question now, as well. Commitment number 12 in this proposal, which promises that once the NBC Universal completes its company-wide digital migration, it will add two independently owned and operated channels to its digital lineup each year for the next 3 years on customary terms and conditions.

I have seen what has happened since the repeal of the financial interest syndication rules. While I want a thriving Universal Studios, I want it based on the investment and the creativity of their work. I don't want situations which further add limitations to the ability of independent productions to have access to distributors.

And I am wondering, with the addition of these new channels, how is this going to affect the opportunity independent producers may not have had? How do they—how do independent film and television fit into this joint venture beyond commitment number 12?

Mr. ROBERTS. Okay, thank you. Let me start and attempt to address both those issues and then pass to Mr. Zucker, if I may.

It goes to the main motive of, why do we want to do this transaction as Comcast? It is to build and to reinvest into Universal, NBC, and the great entertainment properties they have, in some cases what they have been in the past and what we hope they can be in the future.

And I think General Electric will take the proceeds, as we mentioned, and more likely than not, invest in their core business, which is, as they have said publicly, infrastructure and things all over the world.

For Comcast, this is a once-in-a-lifetime opportunity, I believe, to help transform our company. So the motive is not to come in and have significant—or any— job reductions, but rather to really try to figure out where the consumer's going; and how to restore some of the greatness to NBC and Universal, to continue to invest in the cable channels and the creativity that has been there and is there today with networks like USA, CNBC, Syfy, and Bravo.

And I think our channels are not of the same stature. The Entertainment and Style networks are terrific channels not ranked currently, as of 2009, in the top 30. And a number of NBC-Universal's are ranked. So we really think this is an opportunity to become one of the better content producers all over the world and to really take from your district the great creativity and extend it to new platforms and new innovation.

So our commitment absolutely is to invest in local television, broadcast television, cable television, filmed entertainment, the theme parks. None of those businesses is Comcast really a major provider today. There is not the overlap that a number of—in the statements that some mergers would have, if GE was selling to another one of the major media companies, they would have a movie studio, they would have a broadcast network, they might have a theme park or another entertainment channel like USA or a news channel. Comcast does not have any of those types of assets on a national basis.

So I would feel very comfortable saying that the goal here and the motivations are to build and to innovate.

Jeff?

Mr. ZUCKER. Congressman, I would add that the last couple of years have been difficult, especially on the broadcasting side, for everybody. I look at what is going on at some of our peers, unfortunately, just this week announcing significant job reductions in their news divisions. And we take no glee in any of that.

The fact is, with this commitment to broadcasting, with this commitment to investment, I actually feel better about the future of NBC and NBC Universal than I have in a long time and am gratified by the fact that this is not about synergies and anything of that sort. And so I—I take comfort in that and hope you see that, as well.

Broadcasting has been under tremendous duress in recent years, as other forms of media, like newspapers and radio have, and our peers are going through it right now. This commitment to—this commitment to broadcasting and the jobs that come with that is something that gives me good comfort.

Mr. BERMAN. Talk for a moment about the access of independent productions to the programming networks.

Mr. ROBERTS. So there are two sides, I believe, of that question. First is, as a cable company, six out of every seven channels that Comcast carries in our cable systems after the merger or the joint venture will be non-owned by Comcast. We have made a commitment that we would add two independent channels each year for the next 3 years starting next year.

And as to how we relate to the independent production community, today we don't make movies, so we have no preference between a movie we would make or a movie that is independently made that we might want to distribute. We do carry the Sundance Channel and the Independent Film Channel.

The philosophy of Comcast, just since my dad's founding of the company, to go back to 1963 in Tupelo, Mississippi, Comcast couldn't get the television signal from Memphis, which was CBS. And the philosophy has been to give consumers more choice. Choice sells.

And ever since we rebuilt our systems from 10 channels to 30 channels, the question was, how are you going to fill the 30 channels? When you go to 100 channels? To 500 channels. Now we have in some markets 15,000 choices On Demand any time you want them, and last year, we laid out a vision for where I would like to see the company go. We call it Project Infinity.

Any piece of content that a consumer wants to get, they should be able to access and leave it to the content company to figure out what the business model is, whether that is advertising-supported, subscription, or Pay-Per-View, and what device it is on.

And so our technological vision is to continue to give more and more choices, which absolutely will include as many—whoever and wherever that content wants to be made by.

Jeff?

Mr. ZUCKER. I would add, on the independent programming side, on—as far as our cable networks go already, I think we have demonstrated our willingness to show that third parties own 67 percent of the programming on the USA cable network in primetime and 83 percent of the programming on the Syfy primetime line-up.

With regard to NBC and the NBC television network, the fact is, we need the best programming wherever it comes from, certainly today more than ever, and the fact is, we have dramatically increased our commitment to try to find new programs from non-NBC affiliated sources. This year, we are developing somewhere close to 20 new programs for NBC, and we have doubled the number this year that have come from non-NBC-related sources.

So the fact is, with regard to NBC, I don't think this has any impact on our willingness to find programs from—the best programs from wherever they come from.

Mr. BERMAN. Thank you, Mr. Chairman.

Mr. CONYERS. Chairman Prewitt, your comments?

Ms. PREWITT. The fact that this will have no impact on the current business dealings with the independents actually fills me with fear. With all due respect, the statistics we have just heard about unaffiliated programming does not distinguish between programming provided by independents and provided by other conglomerates.

And I would draw your attention and happy to provide you with a copy of an L.A. Times article from May citing the decline in truly independent series that were picked up this year. I believe the NBC statistics were of five new series. Four were from NBC, and one was from Sony. That is not, from our perspective, independent programming, although Sony is in a funny posture here, since they don't own a network.

You know, our experience in general is that the broadcast networks are now wholly unavailable to truly independent programming, unless you are producing reality series, some of which will make their way through.

These high statistics, even stripped of the other conglomerates on cable, are because cable has become where you push the independents. And that has had two results. In addition to limiting access overall, it also shifts what people produce.

And in 2002 and 2003, when our member companies were told by every major children's outlet, both on broadcast and cable, that they would no longer buy independent, they ceased to produce that programming. Common sense says you don't invest if there is no marketplace.

And so what you do is programming not only being limited in terms of access, it shifts in terms of subject matter, it shifts away from the type of programming, in many cases, that we would all like to encourage.

Two new channels on a cable system out of 500 sounds to me like slim pickings. And it is particularly slim pickings in a marketplace where, as we have heard, it is very difficult for anyone to support those channels. It is very difficult to acquire the acquisition budget to bring onboard quality product.

Ultimately, what happens with many of those channels is they just recycle, and what we are now seeing across the board is consistent recycling from the five major conglomerates. And I think what the true independents are looking for is a chance to compete in the same arena as the conglomerate programming, not to be told over and over again—and this has happened consistently since 2000—that channel after channel will no longer look at programming that comes from outside the system.

And this merger can only aggravate that situation. There is a history here which sets the stage and a merger which then threatens to carry it to the next level. And I would certainly call people's attention specifically to the plans for how TV Everywhere will be built, which are—you know, at least in the FCC filing, are very clear that that will be NBC Universal content, that dealing with third parties is very pesky and creates a lot of overhead.

And what you can see over and over again is the same economic pressures driving toward a preference for content, which you control across multiple platforms, and that does not create opportunity. And I think this Committee should speak out very strongly both to the regulatory agencies and to the merging parties that, out of all these commitments, interestingly enough, not one addresses this problem.

Thank you.

Mr. CONYERS. Dr. Cooper?

Mr. COOPER. Mr. Berman, yes, let me address the historical point. And you have raised it. Jean has referred to it.

You simply cannot replace the dynamic of an independent sector to produce diverse programming—we have heard a great deal about it—with a commitment to a couple channels buried someplace in 500. And Jean mentioned "The Cosby Show," but that is only the tip of the iceberg. "All in the Family," "Chico and the Man," "Sanford and Son," "Cagney and Lacey," "Roseanne," "The Golden Girls," all of those were independent shows during a period when the networks were required to buy independent shows.

It was those shows that ended the "Ozzie and Harriet" view of America. It showed if it is black and brown, old and young, rich and poor. That is the kind of dynamic diversity you get when you have independent programmers who can gain access.

And it was clearly—and I did a study of this several years ago. It was the loss of that diversity, the decline in quality that came with vertical integration, that undermined broadcast TV. The decline in quality came first.

And so the notion that a couple of commitments to do some programming, a little bit, a teeny bit, will solve the problem of the production that meets the diverse needs of America is simply contrary to historical fact. Vertical integration undermines diversity and quality.

Mr. BERMAN. But that was a totally foreseeable consequence of repeal of the regulations in place.

Mr. COOPER. If you look back at the history, there were promises made to Congress that, oh, we won't eliminate the independents. They were gone instantaneously, because you make more money buying internally, rerunning lower quality shows, because you have already incurred the production cost, than buying higher quality shows.

But what happens when you rerun that stuff and repurpose it is you lose your audience. You miss the notion that you have to produce high-quality content and buy it from the best independent you can. For 15 years, that hasn't worked.

Now, you hear some suggestions that the industry is discovering the error of its ways. It is convenient at the moment of a massive vertical merger that they suddenly discover that the integration model is wrong. It failed, and you should not allow it to rear its ugly head again.

Mr. CONYERS. Andrew Schwartzman?

Mr. SCHWARTZMAN. I don't have a lot to add to that, Mr. Chairman. I would just point out that the question before the Committee is the acquisition of NBC Universal by Comcast. And whatever kinds of commitments that Mr. Zucker is making with respect to increasing his use of independent programming will be unchanged by that acquisition.

And, second, as Dr. Cooper said, the commitment to add a few independent channels is of no significant consequence. First of all, it is very specifically limited to digital systems, and not all Comcast systems are yet digital. But, second, two channels in a year without any commitments with respect to tiering make that a very questionable—simply of questionable utility.

Mr. CONYERS. Larry Cohen?

Mr. COHEN. I would just comment on the jobs question two ways. We look at jobs internally, and I actually talk quite a bit about that within the combined company. We often get—always get in these mergers and restructurings commitments that there is no warranty and then jobs are cut. How do you pay for the $8 billion in debt? They cut jobs, and they continue to raise rates. We already have rates raising three times the rate of inflation.

But externally is even more important. As a participant in a jobs summit, I was cheered to see management, labor, academics, governments saying we are going to put a jobs filter on every key governmental decision, and there is no question that this merger goes through. There is a disadvantage to the other types of companies, and it will shrink investment, and that will cut jobs.

Because of what they call bulk pricing, any new entrants and communities have to pay much more for content than they do. And that bulk pricing shrinks up investment, because the pipe companies—it is incredibly expensive to bring fiber to the home, although it is happening in all the rest of the world, and so what happens is—TV product to sell at a decent price, they don't invest, it is already shrinking.

It is absolutely not true that we are going to have robust competition. It is shrinking now. They are cutting down on that investment in this country. And so it has a disastrous effect on jobs, particularly externally. And internally, to be honest, we are going to say again: Where's the warranty? Where's the warranty against using freelancers instead of employees and contractors instead of employees?

And, you know, there isn't any warranty. We get one story before the merger and a different one after.

Mr. CONYERS. Ranking Member Larry Smith?

Mr. SMITH. Thank you, Mr. Chairman.

Mr. CONYERS. Lamar Smith.

Mr. SMITH. First of all, Mr. Roberts and Mr. Zucker, if I were you, I would take Mr. Schwartzman's concession that at least you are not trying to undermine America's democracy and run with it. That may be the most you are going to get.

Mr. Roberts, let me direct my first question to you. NBC Universal, of course, is primarily a programming and content company. Your Comcast is primarily cable. Would you speak a little further on where you see the overlap of the two companies and how this proposed merger would impact that overlap?

Mr. ROBERTS. Thank you. In Ms. Prewitt's testimony, she mentioned that there are five companies that have 24 of the top 29—I am not sure if those stats are right or not—of the channels, 80 percent of the entertainment content. I don't believe Comcast owns a broadcast network. I don't believe Comcast owns any of those assets.

So the conversation that we were just listening to about independent voice or whatever, the fact is, that is broadcasters talking with the folks who make the programming for the NBC network, which Mr. Zucker is obviously expert on. Comcast does not have a relationship with some of her members, like Lions Gate or the Weinstein company. We have had other partnerships and distributed their content outside of that on our cable system, on our On Demand platform.

So I believe what this merger is about is a big risk on our part. Broadcast television has changed tremendously in the last 20 years. And so has the technology by which consumers consume entertainment, information, and news, not just television.

And so are we. As we heard, other companies have chosen to not want to be in one company, because there aren't significant obvious synergies. We are making a bet that we can accelerate this transformation for the consumer, so we touch together places like On Demand.

When I talk to my customers, their number-one complaint with our On Demand service, which has been wildly popular—13 billion orders of On Demand shows just in Comcast in the last few years, more than all of iTunes in the United States put together, half-an-hour average—their main complaint is, why can't I get more movie choices on that On Demand?

Well, Universal has 4,000 movies in its library. And they have 3,000 shows from television in their library. Now, I can't promise sitting here today—how to bring that together to get it to On Demand faster, but we are certainly going to try real hard.

Mr. SMITH. Thank you, Mr. Roberts. Mr. Roberts, you mentioned that television has been changing dramatically.

And, Mr. Zucker, I wanted to ask you what you thought about the future of television. Do you see it being the more traditional television? Do you see television being more online? And where do you see the proposed new entity fitting into that vision of the future of television?

Mr. ZUCKER. Well, as I mentioned before, I think there is going to continue to be more change in our space in the next 5 years than we have had in the last 50. I think that the digital revolution, the technological revolution that Mr. Roberts was just talking about is going to continue to change the way we all consume television, the way we all consume information, the way we learn about things, the way we watch everything that we have been used to.

So I think that, over the next 5 years, we will all continue to watch TV. We will gather around a television and, you know, learn news, watch sporting events, watch entertainment programs, but we will also have the ability to do that in many other ways.

So I think television will still be there, but I think that—I think the innovation that we have all come to see will also allow us to enjoy all of those things in other ways.

I think that what is great about this merger is that there will be investment from Comcast that will produce even more content. And at the end of the day, that television that we are talking about or however we consume it, it all comes back to great content and great news-gathering and great sporting events. And without investment, none of that is possible.

I also would add that this commitment to broadcasting and to the NBC television network and to Telemundo on the Hispanic side cannot be underappreciated. We don't live in a world that was 15 years ago, when three networks had 90 percent of all viewing. We live in a very different world where there were very different rules back then.

The choices and the explosion of outlets is so different. And so the commitment to actually keep NBC and Telemundo strong is incredibly important today.

Mr. SMITH. Okay. Thank you, Mr. Zucker.

Mr. Roberts, let me address my last question to you again, and that is that, as you know better than I, the protection of intellectual property is essential not only to a lot of American companies, but, quite frankly, to a prosperous economy in our country, as well.

We have a real problem today with the theft of copyrighted programming. And we oftentimes look at ISPs and others to educate their consumers and to try to crack down on that kind of theft and that kind of piracy. What has Comcast done and what do you propose to do to try to reduce that type of intellectual property threat?

Mr. ROBERTS. I think this—the entire ecosystem—that is the creative community in this country—depends on that question. And while we have seen an explosion in the connectivity side, which has principally been our business—originally television, now broadband—having license-secured, not pirated content is the essence of that ecosystem for both sides of the business.

By now making—on our way toward a $30 billion investment in content, which is what has been reported the potential value of this transaction is—that kind of order of magnitude. It is only 51 percent in the first stage, but over time, we intend to try to buy GE out 100 percent.

We have redoubled our commitment to figuring out how to work between the two parts, the delivery, and what consumers want with their broadband connections. So we will be—through NBC Universal—involved with MPAA, and we will be involved with all the other organizations, not just the NCTA.

So I sit here today—I don't have the answer, but I think we have a huge motivation and one of the benefits, as was stated, in this transaction is that we have that motivation by Mr. Berman to help figure this out. And I pledge to you to personally engage and try to not just educate our consumers, but use whatever technology gets developed to help make sure it remains not pirated.

Mr. SMITH. I appreciate that commitment. Now, Mr. Chairman, I know you like to treat both sides equally, so I would like to yield my remaining 10 minutes to—2 minutes, if I may, to Mr. Harper, the gentleman from Mississippi, who I know has to leave for another commitment and is already late in doing so, but I would like to give him at least a couple of minutes if we could.

Mr. HARPER. Thank you, Mr. Chairman and Mr. Smith.

Mr. Roberts, I would like to ask you a couple of questions, if I could. I have heard some concerns, worries from an organization representing some local, you know, small cable companies that are in my district in Mississippi. And, of course, they are concerned that this proposed merger will give Comcast significantly more market power in negotiations, particularly with regard to the regional sports networks.

And I would like to know what your thoughts are on how that merger will affect those small cable companies that have those concerns.

Mr. ROBERTS. I think there are—on a number of issues that we have heard previously discussed and on that specific issue—I don't believe this transaction affects that issue. We are not doing this transaction to go and somehow change the dynamic between a regional sports network or anyone else—any of the other properties that NBC may have and small, rural operators, whether they are broadcasters or cablers.

There are teams that we carry on our regional sports channels that don't get affected by—I don't believe by any—NBC is not in the regional sports business. So if there is a property in the South, Comcast Sports South, that property will remain the same as it is before the deal.

Mr. HARPER. Okay. And if we look at the role—and I know Comcast is taking it serious—on protecting parental concerns on content as it might affect children, this new entity that is proposed, will there be any changes there? Or how should we look for that to be dealt with?

Mr. ROBERTS. Well, we have made a number of commitments. One is for children—more children's programming, both on television and On Demand. An issue that I feel good about where cable has taken the technology and where we will take it in the future is to make it easier for parental controls in your living room to work and to have more sophistication in those parental controls so parents are able to filter those shows, those channels, and with more granularity and more choices of ways to do that.

And, you know, a huge opportunity and one that we take very responsibly, as well as the news area, is independence and trying to take the wonderful brand credibility that NBC has, both with children and with news, and extend that throughout the company.

Mr. HARPER. Thank you, Mr. Roberts.

And with that, Mr. Chairman, I yield back my time.

Mr. SMITH. I will yield back. Thanks, Mr. Chairman.

Mr. CONYERS. Jerry Nadler?

Mr. NADLER. Thank you, Mr. Chairman.

Dr. Cooper, first, I must correct the record. You quote the eminent Professor Epstein, who is, of course, one of the great professors in the Chicago School of Economics, but you say he is at the University of Chicago. He is no longer there. He is now at NYU in my district, so I just wanted to mention that. This is a great——

Mr. COOPER. And he hasn't changed his beliefs, as far as I know.

Mr. NADLER. He has not changed his beliefs. And, in fact, my son is one of his research assistants now. But I am not of the Chicago School of Economics, nor is my son.

In any event, let me ask you the following. You say that Professor Epstein ignores the mountains of evidence that there are numerous clearly defined markets in which Comcast and NBC compete head to head. Now, we have been told that this is essentially a vertical integration and the problem is whatever problems there may be associated with that. This is not essentially a horizontal combination. And you are saying that this is completely not true.

Could you elaborate on that for a moment? What is the extent, if at all—what is the extent of horizontal competition that would be eliminated by this merger?

Mr. COOPER. Well, as I identify in my testimony, there are a dozen local markets in which they compete. Comcast is a distributor, and NBC owns a TV station. They see themselves as competitors. NBC has filed testimony at the FCC which outlined the head-to-head competition in local advertising, for instance. Absolutely.

They gave me two examples where if you do the math of the concentration ratios that the antitrust people do, it is a horrible merger. There are a dozen markets where they compete head to head. They clearly compete for sports eyeballs. Comcast is the regional sports giant; NBC is an icon of sports programming. They compete in news. Comcast is a regional news giant; NBC is an icon of news. That is in the content space.

They now compete vigorously on the Internet. They both have portals. NBC invested in a multi-channel video programming alternative. So they clearly compete there. That is undeniable.

The vertical element that affects the horizontal market is also important, because now you give NBC programming guaranteed access to a quarter of the eyeballs in the country. That is the distribution married to content. NBC no longer has to negotiate for carriage across 100 percent of the cable eyeballs. They only have to negotiate for 25 percent. They are in a much stronger bargaining position.

Mr. NADLER. Twenty-five or for seventy-five?

Mr. COOPER. Seventy-five, that is right. They have guaranteed 25 percent, so they only have to negotiate for 75 percent. That improves their bargaining position.

They have a bigger bundle. Now NBC content is married to Comcast content, so the bundle gets bigger. So all those—that is vertical leverage that can be used to beat the other guys.

Mr. NADLER. Thank you. Does Mr. Zucker or Mr. Roberts want to comment on this?

Mr. ZUCKER. I would just point out a few things, which is that, even if there is competition in certain local markets between the NBC stations and the Comcast cable affiliates, there are still seven non-NBCU-related broadcast stations in each one of those markets. The fact is that——

Mr. NADLER. Seven each or seven combined?

Mr. ZUCKER. Seven, in each of those markets. So the competitive nature that exists in each one of those markets remains incredibly vibrant and healthy. And given—you know, given the competitive nature of each one of those stations, it will continue to be very strong.

Mr. NADLER. Dr. Cooper?

Mr. COOPER. If you do the math on the local advertising revenues that NBC put in the record at the FCC, the merger violates the Department of Justice and Federal Trade Commission guidelines by a mile.

Mr. NADLER. On that horizontal competition?

Mr. COOPER. On that horizontal competition. The standard is that, if the post-merger market is above 1,800—again, these are numbers——

Mr. NADLER. Eighteen hundred what?

Mr. COOPER. Eighteen hundred in the HHI. This is an index that they use. If the merger raises by 50 points in a highly concentrated market, it is supposed to be considered a severe threat to competition. This merger raises it by 800 points, 16 times the threshold.

Mr. NADLER. Thank you.

Ms. Prewitt—did I get that right? Yes. Ms. Prewitt, you testified that industry trends have promoted consolidation in uniformity and that it is going to become impossible for independents to get their programming placed. And you also testified that, in fact, many of the major distributors have already said they don't want to use independent programming at all.

Can you tell us how this merger specifically will worsen that situation?

Ms. PREWITT. Well, we are looking at two aspects, one of which are the traditional platforms and then the new platforms that will either be developed or at a nascent level today. With respect to the traditional platforms, quite frankly, there simply is no commitment to even maintain the marginal level of independent acquisitions that exist today.

Most independent product is on this handful of basic cable channels. We see nothing in the 16 or 17 commitments that say that

that will remain untampered once the acquisition goes forward. And there is new revenue to fuel more production.

Mr. NADLER. But you are saying that it doesn't if that does not change, since they have already ruled it out?

Ms. PREWITT. We don't know if it changes or not.

Mr. NADLER. No, no, but if it doesn't change, it doesn't matter, because they have already taken you, is what you are saying.

Ms. PREWITT. Yes, that——

Mr. NADLER. So what you are really saying is that this merger might make it worse at the margins, but the major damage has already been done?

Ms. PREWITT. Exactly. There are some limited outlets today. We would like those preserved. There is no promise here to preserve them.

But the other issue, I think, is the new and emerging outlets. Video On Demand is a vibrant marketplace or developing into a vibrant marketplace that begins to take up some of the slack of the former DVD revenue stream. When you can't get on television, you go to DVD.

You would like to be able to go to video On Demand. Again, no real commitments here to open the doors to that system to a wide range of independent programming. TV Everywhere, Hulu, things of that nature, as our members go to those platforms, what they are increasingly told is, until the revenue model is at least clear, we are not interested in taking programming that hasn't been previously seen on nationwide TV, that has not been supported by a worldwide marketing campaign. We can't support anything with marketing. We really only want programming that comes with its own audience.

And so that, combined with the statements at least in the FCC filing that TV Everywhere—one of the big advantages now is going to be that you can use only Universal content.

Mr. NADLER. One of the advantages now or one of the advantages to be of TV Everywhere?

Ms. PREWITT. With the merger. One of the advantages of the merger is touted as not having to go outside and fight with third parties to get content commitments because we can build—they can build TV Everywhere up to a substantial level, really relying only on the NBC Universal vault, and that becomes a red flag as to where does that go and how does this impact all of the new platforms?

Mr. NADLER. So, in other words—and I am going to ask Mr. Roberts to comment on all this in a moment—so in other words, just to distill or summarize what you are saying, is that already the major distribution networks simply won't look at independent products, and there are some marginal that will. This merger won't make that worse in that respect, because it is already done, but it is not going to improve it in any way.

And, second, the ability to go to DVD and other new things will be worsened by this merger, because one of the points of the merger is that NBC will be—not NBC—Comcast will be able to use the existing internal archives and, therefore, won't need independent programming. Is that what you are saying?

Ms. PREWITT. I am saying that we hope the existing situation won't get worse, have no promise it won't be.

Mr. NADLER. Right.

Ms. PREWITT. And——

Mr. NADLER. But I have got the second half right?

Ms. PREWITT [continuing]. The new platforms will be. Yes.

Mr. NADLER. Okay. Mr. Roberts?

Mr. ROBERTS. Okay, thank you. As I think you have been pointing out, some of this doesn't relate to the merger. Some are industry issues. And I think to the extent that folks think the industry doesn't have lots of diversity of voices, you know, then it is an industry conversation not related to the merger.

Mr. NADLER. Well, let me ask you this. I mean, do you think it is accurate what we have heard this morning, that the major distribution companies such as Comcast and others essentially have shut their doors to independents?

Mr. ROBERTS. No, definitely not the case. In fact, in one of the examples of On Demand, you know, that is where so many people have been watching movies. We have had an easier time with some of the independents getting the movies, because they are smaller movies, they don't have as many box office issues, and issues with DVD sales, and so they are quicker to put it On Demand and have a direct relationship with the consumer. So some of the——

Mr. NADLER. Is that true just of movies or of documentaries and——

Mr. ROBERTS. Documentary channels. Quite to the contrary of that least for Comcast cable. We are looking, and part of Project Infinity is to have as many relationships as we can. When we first launched On Demand, we weren't able to get broadcast television or really near-first-run movies. I think the Wall Street Journal wrote a piece about why On Demand isn't worth all the billions of dollars that are being invested in it because it is interactive television and it does not necessarily have the best content.

And, in fact, it was Discovery Channel's content and many others that really got it going, and then eventually HBO and smaller studios, larger studios, MGM—now we have 15,000 shows On Demand. We hope to go to 50,000, 100,000——

Mr. NADLER. And the second statement, the second contention, which is that—I am trying to remember what the second one was now——

Mr. ROBERTS. About shows on the actual network itself, what is—well, TV Everywhere, we are trying to say if—to make a relationship for the consumer that they can get—we know consumers want to get many products—many shows on the Internet or on their computer and on the wireless devices and everywhere else—and we are trying to create a licensed, secured, you know, not pirated model with the content companies. And we would be happy to sit down and figure out how to get more content on our On Demand and on our online platform, and that is by no means not in our business interest.

And I think that is the overarching question where I strongly disagree with what Dr. Cooper said. And just for the record, if you want us to submit the economic theory, and perhaps the other economists on the panel may have a differing opinion, we would be glad to do so. We don't agree with some of the statements he made.

We are driven because it is such a competitive business. We need the best shows or people switch to DirecTV or Dish Network or Verizon FiOS or AT&T U-verse or RCN. This business is so different than it has ever been before, and each one of these negotiations involve lots of money. They are not simple. But at the end of the day, we are trying to give the consumer access to as much content on as many different tiers as possible.

We now have 15 different levels of service here in the Washington market, so different consumers can pick what products they do and don't want. And I think that policy will continue as we operate this new company.

Mr. ISSA. Mr. Chairman, point of parliamentary inquiry? Mr. Chairman, so for planning purposes for the Members, will we continue to have a 15-minute per side or longer? I would just like to know how long it is going to be. It has been far beyond 10 minutes so far.

Mr. CONYERS. Yes, but this is of such significance that I have extended the 5-minute rule.

Mr. ISSA. I have no problem, Mr. Chairman. For planning purposes, I just wanted to know if there would be a predictable time per side so that I could plan my day and all of us could.

Mr. CONYERS. I only wish I could give you assurances that would meet your demanding requirements.

Mr. ISSA. Thank you, Mr. Chairman. All of ours. Thank you, Chairman.

Mr. NADLER. Mr. Chairman, in the interest of brevity, then, let me ask Mr. Roberts two questions at once and that will be it. One, which you got into sort of by mentioning the competitiveness, if the business is so competitive, why are cable prices increasing at three times the rate of inflation?

And, secondly, how would you respond to someone who said, "Well, given what we have heard from others, we should not approve the merger because we don't want to subject the workers at NBC to the less than tender mercies of the labor relations pattern that we have seen at Comcast."

Mr. ROBERTS. Well, the first question is, I think the value and the quality of the delivery of what is cable TV has changed over the last 20 years. We have many more channels, better quality channels, high-definition channels. We are——

Mr. NADLER. So you are saying that the value—that it is not a fair—it is not fair to look at—you are getting more for the price, and therefore, you have to do a different calculation?

Mr. ROBERTS. And we do have more competitors. In fact, DirecTV has a higher charge than Comcast cable.

Mr. NADLER. So you have to do a different calculation. That is too simplistic.

Mr. ROBERTS. That is correct.

Mr. NADLER. Has anybody been able to come up with a proper calculation that would show us?

Mr. ROBERTS. You know, you can do it per channel. You can do it different levels of service. I will be happy to submit some responses to that, if you would like.

Mr. NADLER. Okay.

Mr. ROBERTS. The second question on labor, you know, again, I am very proud of Comcast's record, disappointed with the testimony, but I would, you know, understand that at times there may be different points of views from different constituencies. But we have built a company from scratch with over 100,000 employees. We have one of the highest employee satisfaction rates. We are pro-employee——

Mr. NADLER. Let me just ask you this. I wouldn't be at all surprised to hear a labor leader come in and say, "Oh, the employer's terrible." But to hear an employee come in and say, "You have got two employers, one is great and the other's terrible." Why?

Mr. ROBERTS. Well, cable distribution, cable operations, the industry has traditionally not had very many union employees, less than, I think, 2 percent industry-wide, and Comcast is not an outlier one way or the other. We are kind of in the norm.

The programmed television production part of the company's cable channel, Comcast has 13 percent to 14 percent unions in our cable programming business and, I think, enjoys good relations there. And so one of our commitments upfront is we hope to continue the good relations with the guilds and with the unions that NBC Universal has. We reached out to a number of those organizations.

I think that deep at its essence there is a view that Comcast is genuine in investing and improving NBC Universal's quality and quantity of content and that that is going to be good for those guilds and those unions, better than the predecessor/owner which has many other alternatives to put the capital to use all over the world. We are only in the entertainment, distribution, and telecommunications businesses, and I think our intention is not to buy it to slow it down, but to try to expand it and grow it.

Mr. NADLER. Thank you. I yield back.

Mr. CONYERS. Just before I recognize Bob Goodlatte, Dr. Cooper?

Mr. COOPER. Well, I just want to point out that, until Comcast sells programming on a per-channel basis, the per-channel number is baloney. He sells bundles, and that is what the bundle has been doing. The per-channel stuff is meaningless because he won't sell it to the public on a per-channel basis.

Mr. CONYERS. Bob Goodlatte?

Mr. GOODLATTE. Well, thank you, Mr. Chairman. And I want to follow up on some of the comments of Mr. Berman and Mr. Smith regarding copyright protection. I have long said that the ISP and distribution community and the content community need each other to work to resolve their differences in the private sector. And so, as Mr. Berman said, this is going to be a good test of that.

This proposed merger would be an interesting combination of these two interests and would add rich content to Comcast's portfolio. If this merger is approved, I expect that Comcast will begin to appreciate even more the benefits of copyright protection.

In 1998, I was charged by your predecessor, Chairman Hyde, with conducting the negotiations that ultimately drafted the—and ultimately drafted the ISP provisions of the Digital Millennium Copyright Act. One important provision requires that, in order to receive the immunity of the law, Internet service providers must adopt and reasonably implement a policy that provides for termination in appropriate circumstances of subscribers who are repeat infringers.

This has been in the news in some countries and some locales of late, and I am wondering, Mr. Roberts, does Comcast have such a plan in place? And what other specific steps can we expect Comcast to do to combat copyright infringement post this merger?

Mr. ROBERTS. I would like to get it exactly right on the specifics. And if I may, I would like to say that I would like to submit something on what our policy is on repeat infringers. I know that we absolutely contact repeat infringers and notify them.

On your general point, as I said earlier, before this deal, but this deal absolutely accelerates, because the technology is enabling more piracy. So even when that act was passed, you couldn't download a movie or a television show in less than 10 hours. And now technology has sped that up, or whatever the specific would have been.

So the issue is becoming more urgent, and it is becoming more real and more threatening. And we have seen in other industries on how disruptive piracy can be, like music and others, and so we have engaged all over the country locally and nationally with different organizations to be addressing that. And I, again, say that I think you are right that one of the benefits of this union is it puts us squarely in an opportunity role to get to those specifics and improve where we are today to make them more binding on the party that is trying to pirate that content.

Mr. GOODLATTE. Well, this is a fast-moving area of technology, as you know even better than I do, both in terms of the efforts that you and Mr. Zucker and others take to protect content, but also the technology to pirate that content. And so when the Digital Millennium Copyright Act was adopted by the Congress, I think there was the expectation on a lot of people, including myself, that there would be the use of technology, the use of business arrangements and so on to promote the protection and expansion of content.

And it is worked out somewhat, but those industries that have not stayed ahead of the curve have suffered more than others who have attempted to do so, so it is a—your answer is a very important one to me and to many others.

Mr. ROBERTS. If I might, I think you are totally right that it is critical, and so many parts of the supply chain depend on staying ahead with that technology. I think we are on the——

Mr. GOODLATTE. And offering business plans that consumers will respect. I mean, now, who would have thought when we wrote the DMCA that Apple would be the world's largest purveyor of music? But, indeed, they are, because they came up with a business model that worked very well for consumers.

Mr. ROBERTS. They made it consumer friendly and many other great things. And one of—that brings up a critical point. And some of the conversations we have been having is to make this—whatever the next technological solution is, to have it apply to as many platforms as possible so that it doesn't become a competitive differentiator between providers so that you can pirate more easily over here and you can't over there. And that is why it is so critical, your involvement and others, to keep these industry-wide organizations there.

I think we, again, look forward now to being able to be a significant member of the content community's voice in those matters, not just the ISP's voice.

Mr. GOODLATTE. Do you think that the future of television is online or will traditional television continue to be the primary way that viewers receive content?

Mr. ROBERTS. I wish I had a perfect crystal ball. So what I—my answer and how I believe we should operate Comcast is to not try to guess and guess wrong to that question. So I have been saying for years, well before this merger, that I think video over the Internet is more friend than anything else. There is an opportunity if you start with the consumer and work backwards, I think you run a good company.

And if there is change that has to happen, so be it. Try to do the best you can to make it legal change, and come up with business models that can work to make that change work for consumers, as well as your stakeholders.

I think that history would suggest—radio is a vibrant business in this country all these years later, but it has had many changes. What has made the cable industry such an exciting industry and why we have been able to add as many jobs as we have had and make the tens of billions of dollars of capital spending—we spent $5 billion in capital in 2009 alone is making these big, large bets.

So we are betting right now on a technology called wideband. We are already beyond broadband, in a 50 to 100 megabits per second service, so that if that is where the consumer wants to consume, we will be the best provider, just as we believe we have been the best provider of the last 40 years in changing television.

Mr. GOODLATTE. Thank you. Let me ask Mr. Zucker, representing a rural and small city district that relies more on over-the-air broadcast television than most districts, I am very concerned about fostering local broadcast programming, especially local news and information.

And I have heard that network affiliates have some concerns about the merger, including the fear that NBC will move its most popular programming from broadcast television to cable, which would decrease viewers and revenues and thus could severely impact the ability of these local stations to deliver local news and information. Fully a third of my constituents—probably more than that—are not able to connect to a cable system.

So what assurances can you give me that local programming, including that of NBC affiliates, will remain robust if this merger's approved?

Mr. ZUCKER. Well, the fact is that what—the best thing for our programs on the NBC television network is to reach the widest audience. That is how we can recoup the greatest advertising revenue that is required for investments in programs like "Nightly News" and "The Today Show" and "Saturday Night Live" and those kinds of programs. So it is in our interest to make sure that they remain strong and vibrant on the NBC television network.

Mr. GOODLATTE. And I have heard some of Mr. Roberts' comments in response to Ms. Prewitt's concerns, which I think are very interesting and they are important, with regard to independent production of television content. What is your view of that? Where do you think that is going? How do you respond to her? And what kind of assurances can you give us that that kind of independent production, which provides a competitive environment in the industry, is going to continue?

Mr. ZUCKER. I think you have to take a step back and realize that, as I think about NBC, we are looking for the best programming wherever it comes from. We need the best programming. We need to do better at NBC.

What much of this is about is the financial investment that is required in bringing that programming to air. And when you consider that 80 percent of all programs fail, there is a tremendous financial burden that we take on by investing in those programs. So we want the best programs wherever they come from, whoever they come from.

With regard to the financial investment, you know, we have shouldered much of that responsibility. And to the degree that others are able to shoulder some of that responsibility, we continue to be open to that, as well.

As I pointed out, at NBC, we are now producing 20 new programs for next year. More than a third of those come from programmers who are not affiliated with NBC or NBC Universal.

Mr. GOODLATTE. Thank you.

Thank you, Mr. Chairman.

Mr. CONYERS. You are welcome.

Feeling better, Ms. Prewitt?

Ms. PREWITT. Well, not exactly, but I am fascinated. I mean, I think that it is important to understand in some of these conversations that independent programs may well find their way on some of these outlets.

They do not find their way because independents are able to go through the door and negotiate to get them placed. They find their way because they have separately been picked up by a studio and they come into a studio output deal. In the case of TV Everywhere and some of the online offerings, in general, our members have been told that their libraries are simply not big enough for it to be worth the transaction cost to negotiate with them.

But if they will go sell their programming to someone else, thereby losing a big percentage of the transaction value, that programming can then migrate and come in with a larger package.

So I think that it is—you know, no one is saying that some program doesn't—some programming doesn't make it, like the salmon swimming downstream. But the terms on which they are able to do that are disadvantageous. They are disadvantageous to further investment in production.

And it is not an open environment in which you negotiate what is best. You negotiate essentially what is best four or five levels downstream and then take your chances as programming moves forward in a package.

But actually, I am very gratified by Mr. Roberts' comments that they are more than happy to talk to us about TV Everywhere. But overall, to quote Ronald Reagan, trust, but verify. We would like to see something coming out of this that is actually, if not bankable, at least independently verifiable. Thank you.

Mr. CONYERS. Zoe Lofgren? Oh, she is not here.

Sheila Jackson Lee?

Ms. JACKSON LEE. Thank you very much, Mr. Chairman.

Let me, first of all, acknowledge, some friends from Houston wanted me to ensure that their constituent, Comcast, was aware of their interests in their, if you will, viewing of this proceeding. And so I wanted to put their names on the record, Representative Sylvester Turner, chairman of the Texas Black Legislators, who engages with Comcast locally, and the Greater Houston Partnership's Jeff Moseley.

So I just want you to know that individuals that you work with in Houston are well aware of your good civic works, and we thank you.

I believe the quote that I think will go down in history of Mr. Schwartzman should probably be noted as one of the good ones. This is the greatest media merger since Lucy and Desi, certainly speaks volumes to how much of a magnitude this is.

And I am going to try and pose questions with the idea that I think it is crucially important that all of the oversight entities, including this Committee, stay intimately involved. I, frankly, believe this should not be the last hearing. I think Ms. Prewitt has made a point about trust and verify, and the opportunity for discussion here, Mr. Zuckerman and Mr. Roberts, I think has been very good. It has been good for you, and it has certainly been good for us, to be educated about this process.

But I would like to be able to see, as the negotiations go forward, as the Department of Justice has its review, that this Committee, Mr. Chairman, have the opportunity to have maybe one or two more hearings, because I think the oversight is going to be key.

I would like to start with Mr. Cohen. And as I do that, I would like all of you to be thinking about the opportunities that we have and the elements that have been mentioned, I think, in Mr. Morial's comments. Where is the diversity in programming, contracts, and jobs? Where's the diversity?

Clearly, in my office, I made it very clear that we have a phrase in our community that one of the more segregated places in America on Sunday are sometimes the places of faith. But the next is the Sunday morning talk shows. It is almost like there is a dearth of expertise and relevance to Members of Congress who have a perspective, who happen to be Hispanic or African-American or other, and certainly in the anchoring, it is the same perspective. And we certainly welcome that, but there is an absence of diversity broadly speaking.

Let me pointedly go to Mr. Cohen, if he can capture the passion—and thank you for all the work that your workers and members do—but tell us what you would need for a fix. What do you believe you will be seeing across the board? And what would be the necessary fix for trust and verify on this proposed merger?

Mr. COHEN. Thank you for that opportunity and for all you do.

Well, I mean, we really have three concerns. On the jobs front internally and the rights of employees internally, the problem is that one thing can be said before, and then the realities are different after. And there are no warranties in this system.

And I don't want to take up minutes here on the list of these restructurings, but particularly the one that we talked about in 2002—and in my testimony, I mentioned the difference between before and after and the horrible results from employees' point of view—the difference between the tolerance at AT&T broadband and the realities at Comcast that continue to this day.

And I don't think it is true at all that the labor relations practices are the same or similar to others in this industry. I beg to differ. I would welcome dialogue. We have had no dialogue to this point on this merger, none.

But the norm in this industry is far different. Seventy-five percent of workers actually have bargaining rights in this industry. And if we are going to define the industry by the old standard, the sort of cowboy period of cable, that is fine. But this merger is supposed to be about the new world.

And in the new world, the labor relations here are dragging, dragging, dragging standards down, turning people into contractors and freelancers, eliminating benefits, health care and pension benefits, and they have an effect on all the millions of workers in the industry. And, again, we would welcome dialogue. There has been none.

I think that the other is the external. And as I try to point out, so what happens is that the bigger consequences of this merger, the bundling vertically of content and pipes or network, disadvantage investment. So whether it is Houston or anywhere else, it lessens the likelihood that the so-called competitors, be they telecom or satellite, continue to invest, because they must pay more based on the pricing system for the content. And without the content, they can't recoup their investment.

And so this is known in the industry as bulk pricing. They have fewer eyeballs. Therefore, they got a higher price per eyeball. That can be true of a small operator in a rural place. It is particularly true of even large operators who have been investing billions of dollars, and we now see it drying up, whether that is FiOS or whether that is Verizon FiOS or U-verse.

And part of that is the way in which they have to purchase video and then, secondly, the wall that is up on the Internet, try to watch the Olympics, if you are not a cable subscriber. You are getting a preview of what the new world is. We don't think that is a good world.

We think the Internet world and the cable world or the television world should be separate. And the wall that is built shouldn't be a wall between. Here is the deal if you are a cable subscriber, and here is the wall if you are not.

Ms. JACKSON LEE. Thank you very much.

Let me just go directly to Mr. Roberts and to Mr. Zuckerman. And if they would—Mr. Zucker, excuse me—if they would ask questions, sort of respond. Mr. Cohen has made a point. He happens to be representing a large constituent and has the responsibility of protection of those individuals.

I think that, when we talk about growing America, the idea that there would be some quality and value to this merger is not one that we should ignore. I would extend an invitation to both Mr. Roberts and Mr. Zucker to meet with all of us. We need to engage over a period of time on the details of this.

So let me ask both of you, would you engage with Mr. Cohen— Mr. Roberts, can you meet with Mr. Cohen?

Mr. ROBERTS. Well, I am happy to myself, if you think that is best, or our company, whose experts——

Ms. JACKSON LEE. Yes, I think it is best if you would meet with Mr. Cohen. Would you do that?

Mr. ROBERTS. Yes.

Ms. JACKSON LEE. Can you do that in the very near future?

Mr. ROBERTS. Absolutely.

Ms. JACKSON LEE. Thank you.

Mr. Zucker, can you meet with Mr. Cohen?

Mr. ZUCKER. Yes. Yes.

Ms. JACKSON LEE. All right. Mr. Cohen, you can establish outreach, and hopefully we will create that opportunity.

Mr. COHEN. Thank you.

Ms. JACKSON LEE. Let me go straight to this idea that Ms. Prewitt has made a point about, that if you come together right now, for example, Comcast is a gate-keeper of sorts, and we enjoy listening and looking at cable, the excitement that it provides, but it is a gatekeeper on programs that will be carried on its cable systems.

It appears that virtually no program service was added to any cable system in recent years unless a cable system operator had a financial interest in the service. For example, you have some minority cable stations that you own a large interest in.

So the question happens to be, is that the only way that you can access now this new entity that will have Comcast operating and NBC Universal merged in? Will the only way that you access is that you own it? Will there be no opportunity—which goes back to my broad point—diversity in programming, diversity in contracts, and diversity in employment?

Would you both answer that question? Because, Mr. Zucker, you will be merged in. Your programming content will come in, but what happens to access for others?

Mr. ROBERTS. If I might begin—and then Mr. Zucker—that would be against the law if we made our decisions based on ownership, and we do not do that. We have had many independent channels that we have added to our carriage line-up, and I will be happy to get you a list of those in Houston and elsewhere over the last several years.

Six out of every seven channels that we carry—and I think the vast majority of the new ones that we have launched we do not have any economic interest in, so hopefully that answers the question.

Jeff?

Ms. JACKSON LEE. Mr. Zucker?

Mr. ZUCKER. I would tell you that I believe this actually—this deal will enhance the commitment to diversity in programming, specifically Comcast is committed to expanding over-the-air programming to the Hispanic community in particular, using Telemundo's digital spectrum, and committed to launching a new channel to expanding programming on Telemundo's cable network, mun2, On Demand programming with regard to that. So I actually think this will enhance diverse programming.

Ms. JACKSON LEE. I am glad you brought that up. And, again, this is trust and verify. We can't have all this confirmed just by this testimony that you are giving.

But you will be holding—Mr. Roberts, Comcast will be holding Telemundo and NBC. It is to your advantage that if others wanted to carry portions of NBC Universal and Telemundo that you could block them by charging exorbitant fees. Do you intend to do that?

Mr. ROBERTS. No, we do not.

Ms. JACKSON LEE. And how is that going to be characterized, by contract, by policy, by affirmation, or——

Mr. ROBERTS. There are a number of ways. Start with the fact that we have an existing business, so whether it is one of their cable channels or Telemundo or NBC, there is, in my opinion, the second-largest customer is satellite company, the third-largest customer is a satellite company. It is in our interest to have their support.

If they choose not to carry these channels, the channels radically are less valuable to the advertiser, to the content producer. The entire system depends on that and with so many channels, I don't think it changes that incentive.

As has been pointed out, we are about 24 percent of distribution. We have gone backwards the last 2 years, continued—lost 200,000 customers because of all this heightened competition. We need to carry the best programming, and we think, as a content company, we need to get that programming carried.

Now, the FCC has a next level. Any company can go and bring a carriage dispute or an access dispute to the FCC, as has been mentioned previously in the hearing. So there are 20 years of experience, and there is also the existing business that we would be buying, and they already have contracts. And then in addition to that, any new dealings, there is this overall FCC, where folks have been able to bring a complaint.

Ms. JACKSON LEE. Let me put these two questions to you and close up. I would like to know whether you would commit to adding two independent mergers per year.

I want Ms. Prewitt to tell this Committee what she wants us to do with respect to our vital—most vital role with respect to the independents.

And Mr. Zucker and Mr. Roberts, you have yet not commented on my diversity question in programming, in contracts, and employment. And so I need you to answer that. And you might pointedly look to your most famous Sunday morning talk show on its, if you will, guest list for the past decade, and you might reflect on that.

Mr. Roberts?

Mr. ROBERTS. I will begin by saying, diversity of——

Ms. JACKSON LEE. Employment.

Mr. ROBERTS [continuing]. Of employment and in programming——

Ms. JACKSON LEE. Contracts and programming, sir.

Mr. ROBERTS. And as well as our minority supplier diversity——

Ms. JACKSON LEE. Yes, and if we can get that coming back to us in the Committee in writing—you are going to say it now, but if you can give us that in writing, that would be helpful.

Mr. ROBERTS. I will do so. I will just say that they have been externally recognized repeatedly, our diversity efforts, top 50 organizations for multicultural business opportunities by diversitybusiness.com for 5 consecutive years, 50 out front of diversity leadership by Diversity MBA magazine 4 years in a row, Diversity Elite 60, and top 60 companies for Hispanics.

So I think we have a good record. I appreciate the opportunity to submit that to you.

Secondly, we have committed, will commit that for—starting in 2011, for 3 years, we would add two independent channels per year.

Mr. Zucker?

Ms. JACKSON LEE. We appreciate that. And we will talk further about that. I know you can't go into more details. Thank you.

Mr. Zucker?

Mr. ZUCKER. Yes, with regard to diversity, I would just like to let you know that I have been in my role for 3 years. I made diversity one of my key five strategic goals. One of the first things that I did was appoint a chief diversity officer reporting directly to me. Paula Madison is here with us today.

The numbers which we will send to you, I have them today, but we will put them in writing, have increased in almost every way that you can judge them, and I am proud of that.

With regard to your specific—I know that you are specifically interested in the guest list on "Meet the Press" over the last decade, and I would suggest to you that you are correct and that we need to do a better job there.

One of the moves that we have made in the last year is that the person who now has responsibility for "Meet the Press" in an executive oversight is Mark Whitaker, who is an African-American who I would like to make sure that——

Ms. JACKSON LEE. I would be delighted.

Mr. ZUCKER [continuing]. Make sure that you see soon. His responsibility as the Washington bureau chief of NBC News includes "Meet the Press," so it is obviously an area of focus for him and for us, and I would tell you that I agree with your premise.

Ms. JACKSON LEE. Ms. Prewitt, quickly?

Ms. PREWITT. Thank you. First of all, I would like to comment on the two-channel commitment, that I see diversity as a two-sided issue. There is the issue of bringing diverse programming that appeals to different cultures and different constituencies to the air, but there is also the question of—which can be done through an isolated channel, and that lets people cut their teeth. It gets that programming forward.

But there is also the question of bringing those messages to the wider community. And my argument has always been that you want people to see programming made by individuals not like themselves. That is where debate happens, and that is what we are trying to accomplish.

And so we would look at a commitment that was not just to two channels, but to a minimum number of slots across all the platforms, or a percentage of overall acquisition budgets, which I gather will grow as a result of this merger, to fuel programming which can compete and find a place across network television, the more prestigious cable channels, as well as to help bring new talent into any new channels that are created.

Ms. JACKSON LEE. And have you met with Mr. Roberts and Mr. Zucker?

Ms. PREWITT. No, we had previously written to studio heads to request meetings but received no answer from their offices.

Ms. JACKSON LEE. Well, they are sitting right next to you, and I know they have been very gracious——

Ms. PREWITT. And we will follow up. Thank you.

Ms. JACKSON LEE. And, Mr. Roberts and Mr. Zucker, can we have that meeting go forward, as well?

Mr. ROBERTS. I am not aware of any communication to us. Did you write to Comcast?

Ms. JACKSON LEE. I am sorry. Would you be willing to have a meeting go forward?

Mr. ROBERTS. I offered that before the panel started and am happy to do so.

Ms. JACKSON LEE. Mr. Zucker?

Mr. ZUCKER. Yes, ma'am.

Ms. JACKSON LEE. I think, Mr. Chairman, you have been very kind. I do restate that I think that we need to—there are gentleman that I was not able to inquire, but I heard their testimony, will be reading it closely, but I believe this is so important and so massive that we should have the opportunity to address this question again as it moves forward to the various executive agencies.

I thank the Chairman, and I yield back.

Mr. CONYERS. Howard Coble?

Mr. COBLE. Thank you, Mr. Chairman.

I apologize to you and the panel. I have been bouncing between two different hearings today. And, folks, I promised the Chairman I would be 5 minutes, so you all help me along with that.

Today's testimony, when I have been here, has questioned current laws and regulations regarding program carriage and access. Let me address that with a question. Mr. Roberts and to Mr. Zucker, what is Comcast and NBC's experience been with these regulations at FCC?

Mr. ROBERTS. It has, I think, been an environment that has allowed us as a distributor to also invest in content. It has allowed other third-parties, when they are concerned about their own business dealings, to go to a third party. And I think generally the rules have fostered an environment where we have seen an explosion of channels, explosion of choices, and allowed us to make investments at the same time.

Mr. COBLE. Mr. Zucker, do you concur?

Mr. ZUCKER. Yes, sir.

Mr. COBLE. Thank you. Gentlemen, how has this merger—strike that. How would this merger affect third parties, such as small rural providers that seek to carry this content? And how do you envision negotiating with these providers?

Now, I am told that the gentleman from Mississippi asked that question. Do you or Mr. Zucker want to extend on your answer? If not, I will examine your questions.

Mr. ROBERTS. I would stay with the answers given. Basically, I don't think the merger has any direct implications to that, because the relationships that existed will continue to exist. Part of why it is a vertical deal is our two companies are in different parts of this business. And I think it doesn't change anything.

Mr. COBLE. I thank you, sir.

Now, Dr. Cooper, I would be interested in your thoughts to that same question, because you seem to contend that this transaction would probably reduce choice and competition in local markets. Now, specifically, Dr. Cooper, do you believe this will be a problem in all areas or only in those areas where NBC owns and controls a station?

Mr. COOPER. In my testimony, I make it clear that joining a dominant distributor to a major content producer provides vertical leverage that will affect all markets, both the content market and the distribution markets in which one or the other of the entities owns properties.

Mr. COBLE. Thank you, sir. And in conclusion, Professor Hazlett, let me put this question to you, if I may. Do you have a position on whether this deal may present antitrust concerns, in particular geographic markets, A?

And, B, in particular, I am thinking of circumstances where Comcast owns a regional sports network and NBC owns and operates a broadcast station. Does this present, in your opinion, any competition problems from your perspective?

Mr. HAZLETT. No, I don't think it does. There are issues about access to programming that predate the merger and are ongoing, will be of interest after the merger, but the merger itself does not increase market power in any given market where that is an issue.

Mr. COBLE. Thank you all again for being here. Mr. Chairman, thank you. And do I get credit for 5 minutes?

Mr. CONYERS. As always.

Mr. COBLE. With your cooperation. Thank you, Mr. Chairman.

Mr. CONYERS. Maxine Waters?

Ms. WATERS. Thank you very much, Mr. Chairman. This hearing has certainly been informational and educational, and I have learned a lot just listening to the questions and the answers over the last half-hour so that I have been sitting here. And I think I understand very well what has been stated about the desire to go forward with this merger and what does it mean to each of the companies.

But I also understand from those who are opposed to this merger, who have questions about this merger why they have those questions.

There are several areas of interest. The first for me has to do with diversity. And I have been listening to the commitments to diversity, but when I look at the boards of directors of both Comcast and NBC, I have questions.

For example, is it possible, Mr. Roberts, that there are no women on the board of directors of Comcast?

Mr. ROBERTS. No, that is not true. Dr. Judith Rodin of the Rockefeller Foundation is on the board.

Ms. WATERS. How many people do you—how many directors do you have?

Mr. ROBERTS. Like 12, I believe.

Ms. WATERS. I noted 11. That is on the Internet.

Mr. ROBERTS. Let me——

Ms. WATERS. Did she just come on?

Mr. ROBERTS. No.

Ms. WATERS. Is it a recent—why would her name not appear on the Internet on your board of directors?

Mr. ROBERTS. I believe it does. If it doesn't, I will check that today. She has been on the board for more than 5 years and has been on the board ever since the AT&T broadband merger.

Ms. WATERS. Okay. So you have 12 directors, you have one woman, and one African-American, Mr. Bacon?

Mr. ROBERTS. We have Mr. Bacon on the board. That is correct.

Ms. WATERS. And any Latinos or Latinas?

Mr. ROBERTS. We do not, I think, at this time, but the governance committee of the board has stated that increasing the diversity on the board is one of its top priorities and that is an area that we would like to improve, as well as additional diversity on the board.

Ms. WATERS. I think that is very important, because when you are judged about your sincerity about diversity, it really starts at the top. And when you look at the board of directors of any organization, it tells you a lot about who they are and what they are trying to do.

Let's take a look at NBC. We are very pleased about Paula Madison. She is kind of a twofer. She is a woman, and she is Black, and she is connected to the community, and we are very appreciative for being able to talk openly and candidly with her about our concerns.

And I guess you have one other woman, Lynn Calpeter. Is that correct? Or do you have another woman?

Mr. ZUCKER. Within our executive—within the top executive ranks at NBC Universal, other than Paula, our CFO, Lynn Calpeter, is female.

Ms. WATERS. I just want to deal with the board first before we go to the other offices.

Mr. ZUCKER. On the board of NBC Universal.

Ms. WATERS. With the board.

Mr. ZUCKER. Yes, ma'am.

Ms. WATERS. So you have Paula Madison, one woman, one Black. Any other women? Any other Blacks?

Mr. ZUCKER. Lynn Calpeter, Bonnie Hammer also—Bonnie Hammer, who is the president of USA and Syfy, is also on the board of NBC Universal. I believe there is——

Ms. WATERS. Bonnie Hammer?

Mr. ZUCKER. Bonnie Hammer.

Ms. WATERS. Not listed on the Internet. You have 19 members on the board or 20?

Mr. ZUCKER. I don't think that is the board of NBC Universal.

Ms. WATERS. Oh, it is not?

Mr. ZUCKER. Yes, I think you may be looking—I am not sure what you are looking at.

Ms. WATERS. I am looking at the board where Jay Ireland, Jeff Zucker, Michael Bass, Lynn Calpeter, Steve Capus, Marc Chini, Rick Cotton, Dick Ebersol, John Eck, Jeff Gaspin, Allison Gollust, Mark Hoffman, Paula Madison, Salil Mehta, Ron Meyer, Richard Pilot, Cory Shields, Peter Smith and John Wallace. Is that not the NBC Universal board?

Mr. ZUCKER. Those are the executive—I think that would be the executives of NBC Universal, the top executives of NBC Universal.

Ms. WATERS. Paula Madison is on the board though, right?

Mr. ZUCKER. She is one of the top executives of NBC Universal.

Ms. WATERS. But she is on the board?

VOICE. They don't have a board.

Ms. WATERS. Is she on the board?

Mr. ZUCKER. That is the directors' board, yes, yes.

Ms. WATERS. So is there something different than what I just read that is the board of directors? Or is it one and the same, your top executives make up the board, plus others? How does it work?

Mr. ZUCKER. NBC Universal is not a public company, so we have a—so we have a legal entity that lists all the top executives, which I think is what you are reading from.

Ms. WATERS. I see. Okay.

Mr. ZUCKER. So we are not a public board, and I think that is——

Ms. WATERS. So this basically is the make-up of the top executives who kind of serve in a board capacity, but not legally constructed as a board?

Mr. ZUCKER. That is an accurate way to look at it. Yes, ma'am.

Ms. WATERS. So you have two women, is that right, or three women? How may in this 19 that I have counted? Or is it just Paula by herself?

Mr. ZUCKER. Well, I think it is—Paula Madison is on there. I think Lynn Calpeter is on there. I think Bonnie Hammer is on there. I think Allison Gollust is on there.

Ms. WATERS. I don't see Bonnie—what is her title?

Mr. ZUCKER. Bonnie Hammer is the president of USA and Syfy networks.

Ms. WATERS. And are there any more African-Americans on the board, in this executive make-up?

Mr. ZUCKER. In that executive make-up, no.

Ms. WATERS. Okay. Any Latinos?

Mr. ZUCKER. On that board, no.

Ms. WATERS. Okay. So you have got some work to do, too, right?

Mr. ZUCKER. As I said before, this has been one of my key strategic priorities that I put in place when I came into this role 3 years ago. I feel we have made progress. There is no question that there is more progress to be made.

Ms. WATERS. Let's talk a little bit about programming. And I don't know what I am referring to in terms of this season or next season, but I am told that there is no Black programming, you have no more Black programming. Is that correct?

Mr. ZUCKER. Are you talking about NBC right now?

Ms. WATERS. Yes.

Mr. ZUCKER. Yes, on NBC? There is not a program on NBC that has an African-American-central theme to it, that is correct.

Ms. WATERS. Why not?

Mr. ZUCKER. I think we are always looking to—you know, diversity is incredibly important in all of our casting and in all of our themes. We are looking for programming that covers that—you know, that covers both the diverse casting and diverse programming.

With regard to African-Americans, we haven't found that program at this time. As was referenced, obviously, we have been—we were at the forefront of that, when you go way back into the history of NBC, when you go into the more recent history of NBC.

Ms. WATERS. That was then, and now is now.

Mr. ZUCKER. Yes, today we don't have that program on the air.

Ms. WATERS. So, Ms. Prewitt, do you think that they could get some help from individual filmmakers to help them with a little diversity so that they would not be sitting here in 2010 with no Black programming?

Ms. PREWITT. I think they could absolutely get some help. And the day they say, "Go," I will have members who are prepared to start filling those slots.

Ms. WATERS. But he just said, "Go." He is looking. He really wants to.

Ms. PREWITT. Indeed. Indeed. Well, I will pick up the phone and call my board meeting, which is convening now, to tell them to get started.

Thank you.

Ms. WATERS. And so, Ms. Prewitt, are we talking about them working with independent developers to—independent filmmakers to help develop new shows? How do they get this done? He has forgotten how to do it.

Ms. PREWITT. There are two issues.

Ms. WATERS. They used to do it a long time ago——

Ms. PREWITT. Well, they used to do it. And one looming issue here is, who at the end of the day owns that show? There are a number of people who may well be prepared to come in and work with the network and have been invited to work with the network and then turn the ownership of that show over to the network.

The independents with whom we work wish to retain the rights to their shows. They want to be in control of where those shows are exploited after the initial network or cable run.

So on that basis, people are perfectly happy to work with the network, but the network has to be prepared to sit on its hands as they try to grab all worldwide Internet rights or things of that nature.

And if you look back in the—you know, the early days, what we think of as the great days, the Bill Cosby days, what you will find there is that that programming traveled worldwide because the back-end rights were left with the creator. And that is part of what we think the process is of forcing the creator to take risk, along with the network, to really define programming that matters. And on that basis, there certainly is a wide community that would be happy to work with them.

Thank you.

Ms. WATERS. Let me ask what I guess is a business question. Is there some assumption that Black programming is not profitable? Is that why you don't have it?

Mr. ZUCKER. Not at all.

Ms. WATERS. Well, if it is profitable, don't you want to make money?

Mr. ZUCKER. Yes, we do.

Ms. WATERS. Well, how could you not pursue those efforts that would help to make you profitable, more profitable? Tyler Perry does very well with Black stage, Black screen, and we just love it. We love seeing ourselves on television and in the movies.

And I think that it would be credible to argue that Black viewers deserve the kind of content that they feel good about and that they are watching television and should have access to this kind of programming. I don't understand why you don't pursue it and why you don't do it.

Mr. ZUCKER. When I mentioned before that diversity was one of my key strategic priorities for the company, we didn't make diversity a strategic priority for the company just because—only because it was the right thing to do. We also made it a strategic priority because it is good business, as well. And so I agree with what you are saying.

The fact is, we need the best programs we can find, no matter who is the lead characters in them. The fact is, we haven't done a very good job of finding programs at NBC recently, and so that is on us. We need the best programs wherever they come from, whoever stars in them, whatever their themes are, and we need to continue to do that.

Ms. WATERS. Well, I know that you are pretty, you know, important in this country—I mean, in this company, but do you know Bill Duke and others who are producers of good Black programming?

Mr. ZUCKER. Well, I have—I am not involved in taking those pitches and, obviously, hearing those ideas, but I can assure you that we have increased our funding for diverse scripts and diverse ideas dramatically, especially with the help of Paula in recent years, the amount of attention that is paid to this.

The amount of resources that are attendant to looking for diverse themes, diverse programs and diverse scripts has magnified dramatically in the last 2 years.

Ms. WATERS. But it has not resulted in Black programming. You don't have any.

Mr. ZUCKER. It doesn't necessarily happen immediately, and I think what we have done and what I am proud of is the fact that we are attuned to it, the fact that we are putting money where our mouths are, and we are looking for that. Whether we have had success yet or not, which we—as you have pointed out, we don't have any of those programs on the air today. We are——

Ms. WATERS. How long do you think it will take?

Mr. ZUCKER. I wouldn't want to put a timeline on it. We are looking for the best programs no matter where they come from, and we have added dramatic resources to help us find those.

Ms. WATERS. How do you determine whether or not it is a good program? Do you have a committee that reviews——

Mr. ZUCKER. Well, there is a team, obviously, that picks the programs. And diversity, including diverse casting and themes, is a significant part of what they are looking——

Ms. WATERS. So you have a team of diverse people that includes African-Americans and Latinos and women that review these products that are submitted to you? Is that how it works?

Mr. ZUCKER. Yes, ma'am.

Ms. WATERS. And what are the Blacks on your team saying about the inability to find Black programming? What do they say, if you have some who actually look at this stuff?

Mr. ZUCKER. Yes, we do.

Ms. WATERS. What do they say, "not good enough"?

Mr. ZUCKER. I think we haven't found that program yet.

Ms. WATERS. Well, let me just say that it is very difficult to accept that you cannot find the kind of program that I am talking about. And it is unacceptable to say that you don't know—you have no goals. You don't know when it could happen. It may happen. It may not happen. I don't think that Black viewers would like to hear that kind of an answer.

And I think you can do better. And it is not all on Paula Madison. It is good to be able to, you know, deflect when you are getting this kind of question, and I am not doing it to be in a "gotcha" moment. I am doing it because I am trying to be as open and honest as I can be about your Black viewers.

Many of us are searching, looking for Black programming and having to enjoy shows that are very old, that is repeated, because we can't find any new programming that reflects us. And we think that is very important, if you are committed to diversity.

And I think that all of the ethnic groups who are viewers and who are watching television—otherwise, we don't have a dog in this kind of fight. I don't know why we should care whether or not you are successful if we are not represented. I just don't know why we should be concerned.

First of all, you have got a diversity problem, you have got a labor problem, and you have got an ownership problem. There is no ownership in this merger by anybody of color, any minorities. Labor's not happy with what you are doing. We think we are going to lose jobs.

So I just don't—I just don't know why I should be supportive of your merger. I don't know what it does for the people, some of the people that I represent, et cetera, et cetera.

So I want to kind of just make that—put that on your radar screen so that you will actually realize some success in the area that you are working so hard in. And if you need additional help, I will just call all my friends that I know in the industry. And I will get Bill Duke and all the producers that I know, and I will set up a meeting with you to make sure you have reviewed their products, that they have been submitted, take a look at your review committee that is supposed to be diverse, and see if we can't get this done.

Thank you very much, Mr. Chairman. I yield back the balance of my time.

Mr. CONYERS. We have a vote on. We will be in recess for this one vote which has been on. That was the second bell that rang. And we will resume shortly. Thank you.

[Recess.]

Mr. CONYERS. The Committee will come to order. Chair recognizes Dan Lungren.

Mr. LUNGREN. Thank you very much, Mr. Chairman.

And I thank the witnesses for being here. As you can see, we split our duties in a day, and I have been on the floor and other things, so I haven't heard all the testimony. I think I have the gist of it, but I would like to ask a few questions.

I thought it was interesting, and I think it is a serious discussion on diversity. I am almost tempted to ask about diversity of opinion, but that would suggest that I think that networks are biased, and I wouldn't suggest that at all.

I do want to make sure that, no matter what you do, I can still watch Notre Dame football on NBC. That is my particular parochial interest here.

Let me ask this. I come from the general Sacramento area. It has been highly competitive. And one of the reasons I know that is we have changed who we use. I have had AT&T. I have had cable. I have had satellite. I have tried all of them.

And, frankly, my wife and I do it depending on what the best offer is at the time. And whether—I mean, we do it on service and we do it on content and we do it on price. I think we are like everybody else.

We have AT&T. We have Frontier. We have SureWest. We have Comcast, et cetera.

And I believe the competition has been healthy, as I have seen it and we utilized it. Frankly, I have seen services improved over time. And we try and figure out who has got the best service at the particular time, and we go with them, so we are not one of your loyal customers, I guess is what I would say.

But I am undecided about the facts that are being presented here, so I would like to ask a couple of questions, and this would be both to Mr. Roberts and Mr. Zucker, and anybody else could comment after they do. And I would like to know how we would assure that the costs for programming that you now control and own would not increase arbitrarily for yourselves and contractually with your competitors.

Because when you merge, as you would merge, there could be a human tendency to benefit yourself, your closest person. And how do I know that it would not in turn increase the prices for customers across the board?

Mr. ROBERTS. Well, thank you. And first of all, I am sorry that we have lost your business and we will work to get it back. But I think it demonstrates the dynamic nature of the business and the ever-changing nature of the competitiveness. And I think that is a real live example of what the marketplace is all about. Every day, we have got to wake up and have a better product than we had yesterday.

First of all, it is not crystal clear that in the past, as this Committee and others have looked at whether it was News Corp., Direct TV, or Time Warner and Time Warner Cable, that other businesses didn't come to the conclusion that there is no benefit to even being in the same company. And what has been mentioned in previous testimony is that many investors are skeptical that there are benefits.

So I don't think one of those theoretical benefits is to go out and raise prices artificially for your own channels. The market is just too competitive. There are too many choices. And we need the distribution—since we are 24 percent of the country, 76 percent you need. And there is a robust market.

There is also—NBC today is not under the program access rules. But because we are vertically integrating, their content would now fall under more rules than it has previously, so it is hard to see what you are describing as a theoretical happen.

And other companies, whether it is News Corp. or Time Warner, we didn't see that kind of behavior, either. In fact, so much of it they ultimately didn't even think they wanted to stay in both businesses.

Mr. LUNGREN. Let me follow up on that. Would Comcast-NBC tie various content packages to their own cable or Internet services, which could then thereby impact customer choice and create higher costs and unfair competition for customers and their competitors?

Mr. ROBERTS. I am not sure I follow all the strains of that question. I just want to make sure I appropriately answer——

Mr. LUNGREN. Well, I am talking about, you know, kind of bundling the services. I mean, you are sort of one—you are two companies now. You are one company afterwards, essentially. Would that have you—NBC give a better benefit in this situation to others that might be viewing—seeking that content?

Mr. ROBERTS. So there are two sides. There is Comcast the cable company, six out of every channels, as I stated earlier, we do not have any financial interest in after the merger. So there is plenty of opportunity.

And, more importantly, as you pointed out, as a customer, to decide based on whether you choose to subscribe to us, whether or not we have the best channels available. So I think there is three, four, five competitors per market and increasing competition all the time from other forms of entertainment.

As far as channels getting carriage, the other side of that question, again, there are opportunities for us to carry their content and content to get carried by NBC and others. We have been discussing that all day. There are program access rules, program carriage rules. There has been an explosion of choice to the consumer.

And I don't believe this deal changes that because we are really in different parts of the business——

Mr. LUNGREN. Okay, well, let me ask this. The customer, me, my wife, what does it mean to me? I mean, what am I going to see? Are you telling me there is going to be no difference whatsoever or I am going to be so pleased with this merger that I am going to say, "Why didn't you do it before, because it has given me so much more benefit"? I mean, what is going to be in my district for my constituents—what difference are they going to see?

Mr. ROBERTS. Great question. I think first thing is, we hope to improve the quality of NBC's programming, okay? We will make this—this is the signature piece of our content. And our investment strategy and our management expertise will solely be focused on improving the quality.

Mr. LUNGREN. Well, my alma mater is trying to help you, because we have a new football coach, so we hope that——

Mr. ROBERTS. And we thank you for that. And——

Mr. LUNGREN [continuing]. The product on the field will be better in the coming years.

Mr. ROBERTS. Second is accelerating the technology that your customers are going to be able to use to get more content on more devices faster. We are convinced at Comcast that there is a technological moment in time, explosion of choice with the digitization of these industries, and they are changing all over the world.

And our company for 40 years has just been a cable company. We then invested in broadband, and that changed our company. We invested in phone, and that changed our company. And we think investing in content will continue to change our company and make it a better company with innovating faster, more creativity for our consumers than we are if we just stay doing what we are doing.

Mr. LUNGREN. Mr. Zucker, if I am someone who enjoys NBC, watches it, I get it through the system I get now, what is going to be the impact on me from the standpoint of NBC?

Mr. ZUCKER. Yes, I think that I would echo some of the comments that Mr. Roberts made. I think, first of all, Comcast's willingness to invest in NBC is good for NBC and should lead to greater opportunities for independent programmers and for your consumers who hopefully will be able to watch more and hopefully even better programming. So I think that——

Mr. LUNGREN. Well, it is a capital infusion question.

Mr. ZUCKER. So that—well, the capital infusion I think will be—will be very helpful to us. I think, as Mr. Roberts said, the fact that the ability to provide that content anytime, anywhere will also be a benefit to the consumers and your constituents.

And I think—I would not underestimate this commitment to the broadcast model so that the station in Sacramento, the NBC affiliate there, KCRA, which is a fantastic affiliate—we are very proud of our relationship with them. The fact that free, over-the-air broadcasting will remain vibrant and strong, which has been under a lot of duress in recent years, I think is a very important thing to happen here.

Mr. LUNGREN. Well, that brings up another area of concern that has been at least expressed to me by some of the affiliates. Are they—are they in a weakened position now as a result of this?

And the reason I say that is this. When I was in Congress in the 1980's, we had the explosion from telephones, the breakup of AT&T. No one could truly forecast what was going to happen. And here we were in Congress trying to pass laws, and technology outstripped us every single time.

So when I look at what we do, whether it is overseeing a merger, whether it is new legislation, it is, can we anticipate what the possibilities of technology are so that the laws that we pass and the decisions we make will be appropriate not just today, but 5 years down the line?

One of the things that I noted when we had the big snowstorm here and when we had the big storms back home, you know, you turn to your local television station or your radio station—in most cases now television, because they have more news—to learn about what the weather is, to learn about where the problems are.

It is nice to get the national. It is nice to get other kinds of things. But, man, they do serve a real public purpose and public service. How do we make sure that they are not disadvantaged by your larger market power, so to speak? I mean, you are a bigger gorilla than after this merger than you are now.

And how can I be assured that the—the affiliates are not going to be disadvantaged by that, and to the extent that then it would have negative economic effects on them such they may be forced to cut back on their commitment to newsrooms, cut back on their commitment to keep people apprised of what is happening in their area?

Mr. ROBERTS. Well, I will weigh in, if I might, and then Mr. Zucker may want to—he has the relationship today with the affiliates. We have made several upfront commitments.

Probably the first, most important commitment is doing the deal itself. This begins with GE deciding to sell NBC. And one could think, where might that have gone? One answer is the 20 percent owner is Vivendi. Perhaps Vivendi would have bought the other 100 percent. Perhaps it would have been another media company that would have said, I already own a broadcast system or I already own other things, a studio that NBC owns.

We are making a commitment that, as has been pointed out, is not universally guaranteed success. This is a very, you know, big gamble, I believe, hopefully wise, hopefully at the right moment in time.

GE has, you know, said that they aren't happy that NBC's in fourth place, but they have other investment opportunities to invest in other businesses all over the world, in infrastructure and other things. For Comcast, the opportunity to try to restore NBC and its cable networks and to continue to grow them and invest isn't lip service. It is the mission. Why else would you buy it? Many other companies chose to pass, I am sure, on wanting to get into some of these businesses today.

So we are making a bet on the U.S. economy turning around. We are making a bet that advertisers and car companies are going to come back to advertising, that the future is brighter than the present. And I think we are—you know, we are confident and excited about that, but it starts with the essence of your question, which is, you wouldn't do that if you weren't really willing to make an investment in growth and in future and in job creation that we are coming out of this cycle.

It doesn't have to be this month, but it has to be at some point or probably the trend that has happened in the past, where some of these businesses have declined will now turn around.

Mr. LUNGREN. Yes, sir.

Mr. SCHWARTZMAN. Thank you, Mr. Lungren. I have three very brief points I would like to make in response. First of all, Mr. Roberts has introduced a red herring here, because Vivendi—and Mr. Morial made the same point, that he was concerned that NBC go to an American company. The suggestion that Vivendi might buy NBC is just wrong, because as a matter of law, the Communications Act prohibits the operation of broadcast licensees by aliens, so that is just a complete red herring and an effort to suggest a threat that doesn't really exist.

Second, Mr. Roberts talks about program access and program carriage rules in several occasions and saying, even suggesting that they have been beneficial to Comcast operations. It has challenged the legality of both the program access and program carriage rules, and we have asked Comcast to withdraw its legal challenge to the program access rules. And thus far, it has refused to do so.

To the extent that he said they might comply anyway voluntarily, that is not very reassuring, and that assumes that those rules are sufficient in the first place. And as I said in my prepared testimony, we think those rules aren't sufficient.

The third point is that the continuing legality of those rules—of the program access rules, they only run for 2 more years. And Mr. Roberts is not committing to comply with them beyond then.

Mr. LUNGREN. Dr. Cooper?

Mr. COOPER. Mr. Lungren, so you are concerned about predictions about what is going to happen to your constituents. And I think when you allow a company that represents a quarter of the market to give guaranteed access to programming—now NBC and Comcast argue about the price of the programming, they argue about the channel location, they argue about the bundle size.

You take that argument away, and now they have a commonality of interests, so they certainly have a commonality of interest on bigger bundles. Comcast now has a proprietary interest in pushing NBC programming in big bundles. They will certainly continue their policy of not allowing you to buy channels on a single basis, but now they own a bunch of programming which they really want to keep in the bundle, and they are going to put it in the bundle. So they will continue their bundling activities.

Second of all, they will try to tie Internet distribution to cable distribution. That is their TV Everywhere model. They want to preserve that cable subscription and prevent other cable operators and other people from selling Internet-only service.

And those two things are a big deal to your constituents. They really could use true choice on a channel-by-channel basis. They really could use the Internet as a platform that breaks their market power. And when you combine one of the top four programmers and look at the popular programming—not the 500, look at the top 30—that is where NBC has specialized, along with a handful of others.

You take that dominant programming, must-have programming, marry it to regional must-have programming, add it to a quarter of the market guarantee. Every company in America would love to have a guaranteed quarter of the market. That gives them a lot more bargaining power when they deal with everyone else. This will raise your price and reduce your choices, especially if it entails the Internet.

Mr. SCHWARTZMAN. I have one more thing. It is about Notre Dame, so if I might get a second bite at the apple——

Mr. LUNGREN. Only if it is positive.

Mr. SCHWARTZMAN. Well, it is a concern. NBC is restricting online availability of the Olympics to cable subscribers. If you want to watch online—the Olympics online, you must authenticate that you are already a cable subscriber. Once Comcast acquires NBC, they may put the Notre Dame programming so it is only available online to Comcast subscribers.

So that is the kind of concern that we have when you migrate this stuff to the Internet.

Mr. LUNGREN. Dr. Cooper, you brought something up that has been a question of mine. It comes out of my just individual experience, and that is, the difficulty in buying a la carte. I used to have one—I wanted the Western Channel. I happen to love to watch old Westerns. And you could only get it bundled with something else.

When I came to Congress and my salary went down, my wife said, "You are going to suffer along with the family, so we are not going to have the Western Channel anymore." Came home one day, tried to turn on one of those things, it wasn't there.

And that has bedeviled me, why it has been so difficult for a la carte pricing?

Mr. COOPER. Well, the cable industry will give you all manner of economic explanation about the recovery of costs, but the interesting thing is that you don't have those costs on the Internet. You don't have to build systems. You don't—there is no geography on the Internet, and that is what really gets our attention at this effort to require a cable subscription or an MVPD subscription in order to view Internet content.

That means that the company that sells me my cable subscription is, in fact, preserving its business relationship to me. And if I cut that relationship, I don't have any way to view this programming on the Internet.

So the key here is that their control over the market, their bundling—they have been able to impose the bundle. And we have tried for years to find a variety of ways to break that bundle. I have testified before a variety of Committees in Congress.

It is a question of the exercise of market power. And here you have a moment where the Internet comes along. NBC has invested in a competed alternative distribution system. They need to kill that threat off, because on the Internet, you do tend to buy individual channels.

Someone mentioned the iTunes model. You buy individual songs on iTunes, a perfect model for selling digital content. So this is the key moment, to stop the practice from physical space. That you have noticed. They didn't give you true choice. And prevent them from undermining choice in cyberspace.

Mr. LUNGREN. Thank you, Mr. Chairman.

Mr. CONYERS. Steve Cohen?

Mr. COHEN OF TENNESSEE. Thank you, Mr. Chairman, once again, proving all things comes to those who wait.

First of all, this has been very enlightening. Mr. Zucker, I have seen you on television, particularly with the Conan-Leno world, which is, no, not your favorite moment, but now I know who Bob Costas has been doing an impression of all these years. You sound a lot like Bob Costas, or he sounds a lot like you.

Mr. Harper started his remarks talking about Mr. Roberts and his father's company starting in Tupelo, Mississippi, and I found it interesting to hear that the reason you started it is because the folks there couldn't get their antennas to pick up Memphis. I don't think that is why Elvis and his family left Tupelo and went to Memphis, but there are lots of reasons to do it, and I want you all always to remember that Memphis is responsible for everything.

Elvis and Memphis. Before there was Elvis, there was nothing. That is what John Lennon said. Before there was Memphis, there wasn't any Comcast. Remember that.

I concur with some of the remarks made by my colleagues, Sheila Jackson Lee and Maxine Waters, about diversity and minority representation on the station. But I am correct, Mr. Zucker, does not Harold Ford, Jr., who is a Tennessee Nine and my predecessor in this position, appear quite frequently on NBC?

Mr. ZUCKER. He does quite frequently.

Mr. COHEN OF TENNESSEE. And is that kind of unique among the networks for an African-American to be that frequent on the networks?

Mr. ZUCKER. Well, I think we are actually quite proud of our—the diversity that we have on our news and cable news program. And I think Mr. Ford is the latest example of that, and I think we have done quite a good job there.

Mr. COHEN OF TENNESSEE. It is a good—the district brings those type of people forward. Was Al Roker one of the first African-American weather people on the networks?

Mr. ZUCKER. Yes, I——

Mr. COHEN OF TENNESSEE. Or the first?

Mr. ZUCKER. If he wasn't the first, he was the first with such a prominent role as he has played on "The Today Show." I think our history of diversity in our news programs has been quite strong. My first job at NBC was actually as the writer-researcher for Bob Costas, and I think that is where I may have picked this up.

But after that, my next job was at "The Today Show," where Bryant Gumbel played a huge role in turning "The Today Show" into the most-watched morning show in America. And it was joined by Al Roker not there long after. And today, Mr. Roker continues to play a huge role. Lester Holt is the anchor of weekend "Nightly News" on NBC News.

As you have pointed out, Mr. Ford plays a prominent role on analysis on our news programs. So we are quite proud of the job that we have done with regard to that.

Mr. COHEN OF TENNESSEE. And I was going to bring up Bryant Gumbel. I appreciate your mentioning, but I was really in another vein with Al Roker. My next movement was to be the band leaders.

And I remember Skitch Henderson and Doc Severinsen, and, of course, we all know Paul Schaffer, who does so much Warren Zevon to keep David Letterman entertained, and I appreciate that.

Mr. ZUCKER. I am not familiar with that program.

Mr. COHEN OF TENNESSEE. You should be.

Mr. ZUCKER. I am.

Mr. COHEN OF TENNESSEE. But was Kevin Eubanks the first band leader on a nighttime show that was African-American?

Mr. ZUCKER. Yes, sir. Yes, sir.

Mr. COHEN OF TENNESSEE. And if you notice, there is a theme there with Al Roker and Kevin Eubanks, follicly challenged individuals. I support that.

Mr. ZUCKER. And I am supportive of that, as well. That is their—that is their claim to fame, exactly.

I think that all of these things point out that obviously, as I said before, diversity has been an incredibly important part of what we have tried to do at NBC, NBC Universal, NBC News, and I think we have done a good job.

It will never be perfect, but we have done a good job, and I am quite proud of the record that we have shown both in news and entertainment.

Mr. COHEN OF TENNESSEE. If my memory is correct—and I am not a student of broadcast journalism or executives and networks—but I think David Sarnoff was known as being a pretty good fellow and doing things to see that there was diversity and being against discrimination.

I don't remember Mr. Paley so well. I think he was thought of as a pretty nice fellow. And I don't know who ABC had, I think, at Disney. I don't know who they had. But Mr. Sarnoff was a leader. And he might have been the leader. So your network does have some roots.

Mr. ZUCKER. We are very proud of the record that we have had, especially with regard to African-Americans in prominent roles, in first roles, dating back to the advent of television. And I think that that is a position that we continue to believe very strongly in. And I think you see that every day on the NBC television network.

Mr. COHEN OF TENNESSEE. Now, I know you have never heard of that guy, Letterman, and he has got his Top Ten lists, and you mentioned you got a top five list. You hadn't quite got the Top Ten yet.

You have mentioned diversity. What are the other four issues on your top five list?

Mr. ZUCKER. Yes, the strategic priorities that I have laid out for the company are, first and foremost, great content, whether that is in television, film, local, at our theme parks having great rides, having great content, because this entire conversation that we are having, none of it matters if you don't have great content.

Digital and the transformation to digital in this new world that we live in is another priority. International growth is another priority for us. Making sure that we move from an analog cost structure to one that anticipates the new digital world and all the changes that that brings along is fourth. And then diversity would be the fifth.

Mr. COHEN OF TENNESSEE. Is there any reason for any of the local folks to be concerned that you will take the local stations off of broadcast?

Mr. ZUCKER. Comcast has made a clear commitment—I think it is number one on their list of commitments that they have put forward with regard to this merger—that there is a commitment to free, over-the-air broadcasting.

That commitment should not be underappreciated in this day and age when broadcasting models are the single source, ad-supported model is under a lot of stress. And so keeping NBC and Telemundo strong, vibrant and over-the-air should give comfort to all of those local affiliates.

Mr. COHEN OF TENNESSEE. Mr. Roberts, I asked you yesterday—and I just want to understand the issue—the Comcast is the provider in Memphis, Tennessee.

Mr. ROBERTS. That is correct.

Mr. COHEN OF TENNESSEE. And many of my constituents of my persuasion were upset that MSNBC was taken out of the free tier. Is there a manner where constituents in my district can get MSNBC in the free area now? Or would there be—will there be one in the future?

Mr. ROBERTS. Yes to both. When you say free, I think you mean the first level——

Mr. COHEN OF TENNESSEE. Basic.

Mr. ROBERTS [continuing]. Expanded basic. And—we are going through the same—we are going through the same kind of transition that the whole broadcasting industry went through with conversion to digital. And as Jeff just said, that is a way for us to reclaim bandwidth and then have more high-definition, faster Internet, more On Demand choices.

So we are taking certain analog channels and rebroadcasting them in digital. Any customer that wants that service for no additional charge can get the device to convert you to digital. Eventually down the road, they will all be digital, and we are just in that transition period, and we need to advertise that better, and we want to work with your office to make that more understood.

Mr. COHEN OF TENNESSEE. Thank you very much, sir. I yield the balance of my time.

Mr. CONYERS. Darrell Issa?

Mr. ISSA. Thank you, Mr. Chairman.

Mr. Zucker, just to finish off on a couple of questions that my colleague from Tennessee began, NBC has led in a lot of areas, but I have it on good authority that "Make Room for Daddy," featuring the first prominent Lebanese-American——

Mr. COHEN OF TENNESSEE. Buried in Memphis.

Mr. ISSA [continuing]. Who is buried in Memphis and for whose hospital you had better take good care of there—began on ABC. NBC did not avail itself. He had to go to CBS. "MASH" with Jamie Farr, CBS. It wasn't until "Monk" that you got into the game.

Now, I am not going to ask you to explain why it took you so long to outreach to Lebanese-Americans or why we still feel that we are very underrepresented. We will move on to just a few other questions.

Dr. Cooper, I have the honor of being a Member of Congress on this Committee and not being an attorney and being just a lowly businessman. So whenever I try to understand antitrust and the considerations, I always try to say, okay, relevant market, you know, what blocks entry, what are the barriers and so on.

So maybe you can help me with a couple of items. If there were unlimited content out there available either for free or free when attached to some advertising, if there were unlimited bandwidth—let's just say we discovered the terahertz bandwidth and you could have all the broadcast in the world—if the cable companies through breakthroughs in cable or fiber were able to have 1,000-fold more bandwidth, and if any pricing scheme was always a cost-plus, a pass-through with some minimal add-on by providers, whether they be over-the-air, a cellular event, FiOS, whoever, if that were all in place, do you have any objections to this merger.

Mr. COOPER. The hypothetical you have given me—and I have been an expert witness for 30 years, and the first lesson you do is make sure you actually don't accept the hypothetical—if that were true, we would live in a wonderful place, but none of that is true.

Mr. ISSA. Okay. Well, let me go through this again, though. And actually, I will go to Mr. Roberts, because he is enjoying this too much on the end of the table there. What is your bandwidth today for being able to broadcast, let's just say, low-def level, you know, 480, in number of channels versus what was it, let's say, 20 years ago? Just give me a round number, if you know it.

Mr. ROBERTS. Probably has gone in 20 years from 150 megahertz, which would be, say, 30 channels to 860 today. And then when you multiply the digitization that occurs within that bandwidth, which is 10 to 20 times, you can begin to get the range of the outcome.

Mr. ISSA. So essentially we have gone from 30 to 1,000 potential channels before you get into basically an On Demand or a system in which you push out more channels, but deliver them from a server locally, which is——

Mr. ROBERTS. The only thing that would not get you to 1,000 was that we then devoted, let's say, 100 into high-def, and high-def took two and three times the capacity, where—you started with low-def——

Mr. ISSA. Having help pay for the model station and all that work when I was at the Electronic Industries Alliance, trust me. We are acutely aware that that was a tradeoff. So we did go for quality, not quantity in that case.

Mr. ROBERTS. We also had On Demand, to your point.

Mr. ISSA. Right. So if we look at it as sort of the old standard, we have gone from 30 to 1,000. And if we go to an all On Demand, then it is virtually infinity, because you can push down 1,000 things to various sub-areas or 100,000 things and then they can be divided up to each individual TV.

And if you eliminated all your cable and you only had your broadband, you could essentially have an unlimited amount of channels delivered through that system, only limited by how many the last mile would achieve, with today's predictable technologies. Is that true?

Mr. ROBERTS. I think there is a theoretical that you could somehow get to that scenario, I think so.

Mr. ISSA. Okay. Dr. Cooper, I will go back to you, because although I can't guarantee you that the cellular network will roll out on that model, they could. I can't guarantee you that FiOS and others can roll out on that model, but they could. I can guarantee you we are not in the near future going to find enough bandwidth over-the-air generally in a non-cellular way, so we will eliminate that part of it.

So if you recognize that we are increasing bandwidth at an incredible way, assuming now only that Mr. Roberts' company and companies like it are not prohibited from any way impeding others getting on to that digital highway and delivering content if I want it, do you see why we are leading toward a question of, if not now, is it foreseeable that in the future good content will have no limit to being able to get to me, should I choose to want it, even if Mr. Roberts, through his selection of channels, chooses not to have me, let's just say because I want 25 million, to let his channel have it and he doesn't want to pay it, but I can still send it on a subscription basis through the Internet.

Does that affect your thinking at all?

Mr. COOPER. Well, here's where your hypothetical has bumped into the antitrust laws. Of course, the antitrust laws are not "it could be," but "what is" and "when will it be?" And if in the relevant timeframe—and we tend to use a couple years—it won't be. It isn't today—we know that—and it won't be within the relevant timeframe, then antitrust looks at the market as it actually is, not the hypothetical market, first answer.

Mr. ISSA. Okay. Give me only two answers, because I am a very simple guy. Remember, I am not an attorney.

Mr. COOPER. Second answer is that TV Everywhere is an effort to prevent that from happening. So essentially what that deal says to the public is it says, look, you have to subscribe to cable or another MVPD in order to get Internet content. And the effort here—the two biggest guys have made the deal—the effort here is to signal to the rest of the industry that the gentleman's agreement that has existed in physical space—let's be clear: Comcast has never chosen to compete in physical space with a neighboring cable operator. It has never overbuilt someone.

It could have—at least since the 1996 act, it could have entered someone else's service territory to compete. It might claim there are difficulties, construction costs, et cetera, in——

Mr. ISSA. I would only ask that you not apply that to the District of Columbia, where my own scheduler had multiple choices and chose to go from one cable provider to another within her apartment complex and is so delighted to have left the unnamed other company.

Mr. COOPER. Well, but that company never has. They have chosen not to compete. They have occasionally been the target of competitors who would come in here and——

Mr. ISSA. Actually, they were the winner in that particular one. That is why I didn't name the one that she left.

Mr. COOPER. And the guy who is in bankruptcy will explain to you why denial of access to programming helped put him there. So in cyberspace, however, there are—those impediments don't exist.

Mr. ISSA. Okay, well, let——

Mr. COOPER. Now they have made this deal, to require me to get Internet content to subscribe to a cable operator. That is a market division scheme. That is an antitrust——

Mr. ISSA. Okay, and a given. Mr. Zucker, I am now going to concentrate the rest of the time on you, because, first of all, I have got a lot of time with broadcast and not all of it was good, so I want to try to enjoy my time here today asking you some questions.

You currently have the ability to send how many broadcast channels if you choose to go to your lowest resolution today with your new spectrum in the markets where you have some?

Mr. ZUCKER. Three.

Mr. ISSA. Do you anticipate being able to potentially go further with the existing spectrum in any time in the future?

Mr. ZUCKER. In each local market you are talking about?

Mr. ISSA. Yes, sir.

Mr. ZUCKER. Yes. That is about what we will——

Mr. ISSA. At 720, you can do three.

Mr. ZUCKER. Yes, exactly, so that is about it.

Mr. ISSA. You want to give me that old fuzzy stuff, you can do a lot more, but it is 720p.

Mr. ZUCKER. Well, high-def and all of that, I mean——

Mr. ISSA. Right.

Mr. ZUCKER. Yes, so——

Mr. ISSA. Or as I like to say, having come from the industry, higher but not what I call high. But at that point, you have three. How many channels does NBC currently produce—obviously, not broadcast—but all forms, how many channels do you believe you own, how many network, sub-networks?

Mr. ZUCKER. You know, more than 20.

Mr. ISSA. More than 20. So broadcast is really a relatively small amount of your model now, compared to what it once was.

Mr. ZUCKER. Completely. Broadcasting accounts for less than 10 percent of our operating program. The name of the company is NBC Universal, but NBC accounts for a minimal part of our revenue and profit.

Mr. ISSA. So although Dr. Cooper is talking not about you as a content entity, because the truth is, Mr. Roberts has the ability to start content and build it to create studios. He can do all of that. There is no barrier for him choosing to do it. And with what he is paying for you, it would be less expensive to do that, but that is a business decision.

You could, for all practical purposes, walk away from every transmission capability, all your bandwidth, and simply take your content, walk out one day, and deliver it to cable or DirecTV or anybody and you would still have what percentage of your revenue, not knowing bottom line, but what percentage of your revenue, if you cease to be a broadcaster in the old system?

Mr. ZUCKER. Well, probably more, because it would continue to be a majority.

Mr. ISSA. Okay, so trying to understand the market that we are being asked to, we have been modeling here today—and the Chairman's been very generous with everyone having an opportunity to try to model it—we have been modeling some old models. You know, we are sort of thinking that the Peacock, before it was in color and then when it was first in color and then when people fooled around with it for a long time trying to figure out how it was going to look, but, in fact, what we are really talking about is a broad content designer, producer, licenser, enabler who, in fact, is more and more looking for places to go, including cable, all cable providers, DirecTV, and the Internet, right?

Mr. ZUCKER. Well, I think this is the most salient point of the entire day, which is that much of what we have been talking about here, whether it is old Simpson rules or casting of television shows or access to have your programming out there, the world is incredibly different today, and it is more different today than it was 2 or 3 years ago.

And to apply the old rules when 30 years ago three networks owned 90 percent of all television viewing and to think that that is the way it is today, we live in a multicultural society. That is why the programming, the casting of our TV programs today is multicultural. It is not all one ethnicity. It is why the idea that there are barriers to access of where programmers can bring their material and it is to just one of the networks is looking at the world 20 years ago.

The world is incredibly different. And to apply the models that were in vogue 20, 30 years ago doesn't work today.

Mr. ISSA. So let me just briefly summarize. You make a lot more money not broadcasting. You are a content creator looking for distribution, looking for every distribution, including through all cable networks. You live or die based on whether or not, in some way, shape or form, somebody's going to pay for your content. A chunk of your content is advertiser attached, although sometimes not.

Your competitors or everybody who is creating content, all of you have a Web presence, more all the time. All of you, in fact, are perfectly willing to have a model in which your subscriber is a direct customer through some transport which is ubiquitous. See, if I was a lawyer, I would be able to see that more clearly.

The fact is that, whether I get it on my cell phone, I get it through my cable provider, I get it through a fiber optic link somewhere else, or, quite candidly, anywhere I go, I simply log in and it is there for me on the Internet the way Sirius-XM is both broadcast from satellite and available on any Internet connection, that is who you are.

Mr. Roberts has made a decision to make an acquisition because he thinks it is a good combination, but he is in an odd situation. Everyone else who is like you—if I understand correctly—is able to do all the same things you do, and he either now or likely throughout all of our actions is not going to be able to prohibit your competitors from jumping on to his backbone, even if he owns you, and at least, at a minimum, delivering content directly to my PC, which is a media center that goes to all my TVs.

Did I misunderstand any of that?

Mr. ZUCKER. I think you got it exactly right.

Mr. ISSA. Mr. Chairman, hopefully for both of our deliberation, that will add to our small body of knowledge. Thank you, and I yield back.

Mr. CONYERS. Judge Hank Johnson?

Mr. JOHNSON. Thank you. It is hard to follow a mind like Darrell Issa's. And then, I must admit, during my prior career, I was an attorney. And so I feel like I have been set up here to seem like attorneys throughout the country look either good or bad. And so——

Mr. ISSA. If the gentleman would yield, it is my inferiority complex. I hope you didn't take it in any other way, Hank.

Mr. JOHNSON. No, I did not. Now I am worried about my inferiority complex.

But I do understand that our regulatory environment, including antitrust regulation, has to be flexible enough to allow for ingenuity and innovation. Before I proceed, I will share this.

Back around 1993, 1994, 1995, in that era, in that time period, I was faced with a cold slap in the face, a harsh reality set upon me. It was during—it was around September, whenever the football season started. And I turned on channel six, CBS in Atlanta. They say you could get two, channel two was NBC, channel four was ABC, channel six was CBS.

I turn on CBS, channel six, and, you know, because the football game is on, and it was not CBS anymore. It was FOX. And I tried to find CBS somewhere around and had to go up to channel—I still don't know what channel—where CBS is now on the channel.

And since then, we have had so much change coming at us, it is almost like now I don't even get upset about it. I just try to adapt to it. And I certainly want our business or our regulatory system to be able to do that same thing, adapt to current realities which are changing on a daily, if not moment-by-moment basis.

I guess at some point in the future there will be like a watch that could plug in to. You can get the time. You can your news. You can get your content on that watch. And you can even take a phone call on it. And then you can—when you need to add something up, go to the calculator that is already there on your watch.

And so the content being delivered in forms that—or in ways that we can only dream of now, but others are working on that stuff, and they are working not just in America, but they are working in China, they are working in India, because, right now, we don't really share much international programming, but, you know, with all of the migration going on and the fact that we are living in a world of global economy and a global world, we can't assume that content will remain limited to that which is produced in America.

So, you know, I am looking toward the future without knowing how it will actually go in this industry, as well as other industries. And that is a cause for concern for some, and it is also a cause for curiosity from others. And those with the curiosity will be the ones to come up with new ways of doing things differently than we have done them in the past.

And then as far as cost goes, I don't know—even a haircut—I forget how much I used to pay for a haircut, but now, you know, I see haircuts being offered for $20 bucks. And, Mr. Zucker, I am sure you don't have to really——

Mr. ZUCKER. I was not aware of the current prices of haircuts. [Laughter.]

Mr. JOHNSON. But I say all that to say that, you know, I am open to this vertical merger. I do associate myself with remarks that have been made and questions asked earlier about diversity, but even things like that, I see so much potential for change, I see dynamic—I see the dynamic nature of this business, and I see Black entrepreneurs offering African-American-based or-themed content, as well as non-African-American-themed content, and just competing on a level playing field.

And that is why what Mr. Morial has stated is so important in terms of diversity in the ranks of companies from the boardroom all the way down to where you started, Mr. Zucker, at NBC and below. But you had a very humble beginning. And so I believe in this country, and I believe that we can make a lot happen with just a little something, just like Mr. Roberts, your dad, Mr. Roberts, 1963, Tupelo, Mississippi.

I imagine—I don't know anything about your dad, other than what he has accomplished, but I don't know whether or not he was a lawyer or whether or not he was a businessman, whether or not he was a local broadcaster, or—but I imagine that down in Tupelo, Mississippi, in 1993, that, you know, I imagine him being on the town square with an office or just talking with some friends about the football game getting ready to come on, and it is on CBS, and we can't catch it here. And we are going to drive to Memphis to pick it up for whatever. I don't know what was happening.

But on a hot summer afternoon in Memphis, with all of the sand twirling, and folks just knocking around, somebody came up with an idea and, boom, executed the idea, and now it has blown up into 100,000-person or 100,000-employee company, that is a great American success story. And for America to compete in the future in this global environment, we are going to have to continue to produce the same humble people, small beginning, and they have the opportunity to do what has been done with Comcast, which is to turn it then over to the next generation for further expansion.

And at some point, it would become too big, and it will start to just fall over due to its own weight. And then there will be some person who is there to pick up the pieces, some company that is there to pick up the pieces or to step over the carcass or the dying company, step over it and take over with a new operation, new attitude, new means of conveying the same kind of info and distributing it, maybe breaking that whole process up again. I don't know what is going to happen in the future, but I do think there is a lot of things that can be left to future circumstances, especially in this particular industry.

It is not subject to being—should not be subject to being overregulated so as to stunt the ingenuity and the innovation that we need in order to keep this country as the top of the pecking order from an economic standpoint.

But I will ask this question, Mr. Roberts. Mr. Cohen has issued what I would consider to be a scathing indictment, and the allegations of the indictment are that Comcast has made promises in the past. The past promises including a 2002, I believe, negotiation with labor, insofar as whether or not labor would oppose or support a merger effort by Comcast.

And during those negotiations, it is alleged in the indictment, Comcast made certain representations like it has done on its commitments. And one of those was that the unions then representing the acquisition target would be left in place. They would not be—they would be—status quo would be left insofar as that relationship and the new company.

And I know that you were not at the helm of this great company at that time, but would you care to offer a response to the comments that were made by Mr. Cohen? Or would you prefer to take the Fifth Amendment so that you can talk to your lawyer before you respond to the question?

Mr. ROBERTS. Well, first of all, no Fifth Amendment. But I probably should consult with my lawyer. You can be my lawyer, because I thought to be—what you described as what makes America so great I could not imagine articulating any better.

It is exactly how Comcast began. It is an idea to dream—to answer your question, my dad's not a lawyer. He was an entrepreneur, is an entrepreneur, and has tried many different ventures, and one day was fortunate enough to get out of the belt business and to get into cable TV. And I would not be probably sitting here today if we were doing a belt deal, but rather in something as vibrant and as important as communications and entertainment.

So I take my responsibilities very seriously, but I always say thank you to my father for the wisdom of seeing the greatest trend that could happen, and change and not being afraid of it, but rather embracing it. And I think that same spirit, as you look at where we are at today, he feels as bullish about this opportunity as I do.

It is not without its risks. You are right. I hope everything until you got to the carcass and somebody stepping over us, but that is a very real risk for any company as they get larger. And we have got to keep the culture—and part of that culture is how you treat your employees.

So I want to, first of all, just state for the record that we don't believe and I don't believe that there are any commitments that we have made that we have not kept at the time of that acquisition. But let's look forward, not backwards.

We are making commitments today. We made commitments in the Adelphia deal to invest in a bankrupt company, and those communities all have seen an upgrade since that time.

We are making commitments in this deal that do involve labor commitments, and we are endeavoring to reach out to the principal areas where there is organized labor and to have a new beginning. And that is all I think you can do as you start out.

It is nice to hear that NBC has enjoyed good relations, and we certainly want to do that which we can to maintain and improve on that.

And, finally, I think the key to any enterprise is attracting those people who say, "This is where I want to work. If I am creative, if I am a technologist, and if I am not necessarily in the company, I want to start my own company, I want to work with this company, whether you are an independent company or a new kid in a garage inventing that next dream that you have talked about."

And for me to do my job really well is we have to foster an inclusive, open culture and to try to build on the things that my father started that I think I have helped continue that has put Comcast in a position to be before you today.

Mr. JOHNSON. Thank you. I have one last question. Mr. Roberts and Mr. Zucker, recently Americans have been glued to NBCU channels watching the Olympics in Vancouver. However, just this past July, Comcast and the United States Olympic Committee tried to launch a cable TV network devoted to the Olympics that would launch after these current Olympics.

Now, I understand that that effort has been dropped in the face of objections from the International Olympic Committee. And I think they are planning on doing much the same thing. And it seems to me that this was an area where Comcast and NBCU were going to directly compete.

Can you explain to us why this example does not show that, absent this merger, Comcast and NBCU would be actively competing for programming?

Mr. ROBERTS. Well, the example you cite is complicated, because this was the United States Olympic Committee's initiative, and they came to seek carriage for a channel they wanted to start, and then they have since, as you have described, suspended that initiative.

More broadly speaking, it is very competitive—anyone, whether it is that group or a content company, a producer, sporting event, there are multiple parties who get the opportunity to bid. That particular example, what NBC does today, is broadcast the Olympics. That particular channel was not going to broadcast the Olympics, but rather events from the sporting community sort of during the intervening 4 years, and to try to build up those sports locally and communities where there is not an opportunity traditionally to see those sports, because they are not necessarily popular except during the Olympics.

So it actually wasn't trying to supplant NBC's broadcast of the Olympics, I don't believe. That was never stated to us. It was actually going to be everything but the Olympics, but everything about the Olympic sports.

But in general, my answer is, we don't—events that NBC makes, shows that they make, like "The Office" or theme park rides or movies. Those are not things that Comcast does today. And so I think there is very little, if almost no overlap, and I think we have shown that in our statement and believe that.

Mr. JOHNSON. Mr. Zucker?

Mr. ZUCKER. I would concur with what Mr. Roberts said. I mean, the idea of that channel that had been proposed was not competitive with what our broadcasts were.

And I think that is similar to what Mr. Roberts said, is that I think one of the great things about this coming together is that we really are in different businesses. And so I think this is complementary, and that is why I think it is so beneficial.

Mr. JOHNSON. All right. Well, I thank you all for your patience and for submitting to our questions. And mercifully, I will yield back, but not before letting the Chairman know that I really appreciate his—this is a complicated area. And it has profound ramifications. And so I appreciate the Chairman being able to see that and give us time to build on certain themes and ask certain questions in excess of the 5 minutes that we normally limit ourselves to.

Thank you.

Mr. CONYERS. Judge Louie Gohmert?

Mr. GOHMERT. Thank you, Mr. Chairman. There have been so many nice things said that I will skip right through all of those and go right to my question. With the intellects I have got here in front of me on the witness panel, I need to address my question mainly to Mr. Roberts and Mr. Zucker.

You know, believe it or not, I have a district in which I have got Democrats who are friends. And they like to see a channel not only where they can watch the Olympics, but where they can find something favorable being said about the majority in the House and Senate. And NBC helps fill that need. And so—— [Laughter.]

So, anyway, you have a combination of NBC and Comcast. And in my northeast part of my district, you have got potential Comcast competition. And the other cable providers, you know, they would like to provide NBC to fill that need that is out there.

So how is it that there doesn't end up being some conflict when other cable providers want to compete with Comcast, and yet Comcast would be in a position to say, "We own NBC. You want and need NBC. We have got quite a bargaining position with the conflict we have." How do you resolve that?

Mr. ZUCKER. Yes, well, thank you for your comments, by the way. I think the answer to that is there are actually laws in place dating back to the 1992 act which would preclude Comcast from withholding NBC and our channels from their competitors and——

Mr. GOHMERT. Well, it could never be done overtly, but if a conflict is there, I mean, just like in Washington, you know, there are things people aren't supposed to do here. And lo and behold, they have enough pressure and power and significant position that they can get things done that perhaps overtly they are not supposed to. So how do you deal with that?

Mr. ROBERTS. You know, I guess there is any—you can always imagine scenarios of bad behavior. You are not going away. Government is not going away. That has not been our history. We have been in the content business for more than a decade. We have built a successful content company, albeit small.

Other content and distributors have been in businesses together. News Corp. owned DirecTV.

Mr. GOHMERT. I mean, this is not a new question.

Mr. ROBERTS. It is not a new question. And history has shown that the market is so competitive that you can't just artificially change the price and imagine that the whole market is going to follow behind. There are too many channels. There is too much visibility. There is too much contention. There are too many independent distributors and too many independent programmers that we wouldn't be involved with. We are probably 10 percent to 12 percent of the TV audience, so 90 percent, 80 percent——

Mr. GOHMERT. Yes, but you understand, when you get in a very rural area, there is just not much competition. And that is why, you know, the relationships are so important.

Mr. ROBERTS. Well, when Congress in 1992 to help address that issue created the satellite industry, so that every home in America would have at least three choices for their content, with DirecTV and Dish, and then in many cases now the phone company, and in some cases an overbuild company, such as RCN, it is a very different marketplace.

But even back then, it recognized that, okay, let's—if you want to be in the distribution business and the content business, you have to agree to comply with this program access law, program carriage law. Back then, about 55 percent of the channels were owned by distributors. Today, that number is like 15 percent.

And the trend, as has been pointed out during this hearing, is to go the other direction. So we are actually not doing this. The motivation for this transaction is not to do that kind of behavior. That is not where we are going to win or lose.

The motivation is, we think that with—now that there are more distributors and there are new technologies coming, if you can keep it licensed—one of the discussions has been piracy—then I think you are going to see creation of value in content here and around the world.

We also think GE wanted to sell, had lost some motivation to invest and we also have an economy that we believe is hopefully past the bottom. So there are certain fundamental bets that we are making, and it is not universally agreed that those are the right judgments, but I hope they are, that we are going to see these businesses grow, the economy grow, and that we are going to have a new dimension to our company that we haven't had the last 40 years.

Mr. GOHMERT. Giving an answer like that to a question that I ask tells me you really ought to be up here, anybody that can dance that effectively. But it sounds like, seriously, that what you are saying is, well, with the laws and, you know, with the competition, it sounds like it falls back on Committees in Congress that need to do a far better job of oversight than we did when Republicans were in the majority, to make sure that the—that the temptation to perhaps maneuver and use position doesn't occur.

But I can tell you, from having been a judge for a decade, the longer you are in a position where you can take advantage of the position, the more temptations arise.

I never ruled—I never exacted a grudge against attorneys who had screwed me around before I became one, but the longer you are in that position, as Judge Poe had verified, the longer you are there, the more you see opportunities. You just even have to be more and more diligent not to give into temptation.

And although I am dealing with people, I am sure we would be very ethical and use great propriety, the longer you are in a position that actually could be maneuvered and manipulated, somebody will come along and the temptation gets great.

So that is my concern. Thank you for your patience in handling it and your adeptness in dancing around it. And I will look forward to—and, by the way, as I think you know, I mean, any time you have additional information, additional things you can point out, we welcome those, as I am not being facetious.

We really want to make sure things stay fair, and that would apply to any competitor of yours trying to misuse a position. We want fairness, and that is what we ought to be about.

And, Mr. Chairman, I appreciate the time.

Mr. CONYERS. Judge Charles Gonzalez?

Mr. GONZALEZ. Thank you very much, Mr. Chairman.

And I have to respond to my fellow Texan when he said oversight when the Republicans were in the majority. I would have hoped for that, and we have a lot of evidence that probably did not happen, but let's not get partisan here.

Let me start off by framing my questions with some background in the way that I look at this. This is a particular merger——

Mr. GOHMERT. Will the gentleman yield? Because I want to make sure you didn't—I was actually being self-effacing by honestly saying I would hope we would have better oversight than we did when we were in the majority.

Mr. GONZALEZ. Well, let me—I misunderstood you——

Mr. GOHMERT. Because that was my point. We didn't do adequate oversight.

Mr. GONZALEZ. I apologize, because I agree with you 100 percent. That is bipartisanship.

Mr. GOHMERT. We didn't—yes, we did not do adequate oversight, and so we are in agreement on that. Thank you.

Mr. GONZALEZ. I have got to play that on YouTube. But two things. We have the merger, which is the instant case, and we go case by case, and it is important. But it is very limited to its circumstances.

My concern—and you could say, look, that is not what we are here for today—but I do believe that the rest of the witnesses or most of the other witnesses are here for that, beyond the immediate proposition or merger.

But I am looking at it systematically and how it could affect—and what it sets in motion if people attempt to maybe mimic these particular mergers on two different, and that is, I understand, in the instant case, we have to make very, very careful and be very vigilant that what might be a legitimate business opportunity is really not an unfair advantage or is anti-competitive. And we are going to deal with that.

But going beyond that, when I talk about public policy, there are two areas—and I am going to direct my questions to Mr. Roberts and Mr. Zucker—the first one is going to be the use of the public airwaves for broadcasting, what we refer to as really true free TV, and some people may say, "Well, Charlie, that is noble of you, because you are thinking of what people can get free over the airwaves." That is part of my motivation.

The other is this. I really believe this. This Committee and the entire Congress, the entire Federal Government, the only say that we really have over what goes on out there as far as broadcasting on the quality of the broadcasting, on decency, on localism, in my view, is really tied to the use of the public airwaves.

Once you take that or once you diminish it, you diminish the ability of Members of Congress to represent their constituents, the American public on what they may desire. Now, I understand that they express all sorts of choices and when they select to go with cable or what, whatever, but I think that is an important distinction.

The other is broadband build-out, and what does it mean in this particular instance, and if we continue down the road that we are going? So the question to Mr. Roberts and the question to Mr. Zucker—and this is a hypothetical, but unlike Dr. Cooper, I think you are going to have to accept the hypothetical. And the reason for it is, either it is going to happen or it is not going to happen, and I am talking about the merger.

So I am going to read you from today's Post. Federal Communications Commission Chairman Julius Genachowski said Wednesday that the agency will recommend to Congress that 500 megahertz of spectrum be freed up to meet the growing needs of mobile broadband users.

Much of the spectrum is expected to come from broadcast airwaves and would be auctioned for commercial use. But broadcasters that own these airwaves reacted with skepticism, saying they need the spectrum to develop new business models such as mobile digital television and to serve millions of customers who still get news and entertainment through free, over-the-air broadcasting.

Genachowski said in a speech at the New American Foundation that the spectrum would be culled from broadcasters on a voluntary basis. Broadcasters would get a cut of the auction proceeds.

So the question is this: Pre-merger, you remain as you are. It is the nature of your enterprise, everything that goes along with it, remains as it is. There is no merger. How do you view this? Are you ready to be culled and volunteered?

And then post-merger, the merger does go through, I want to see how under both scenarios your decision, your interest is affected in any way.

So, Mr. Roberts, without the merger, do you really care about this?

Mr. ROBERTS. Without the merger, we don't own any of that spectrum, so I don't have a position, or it is not our spectrum to speak for.

Mr. GONZALEZ. All right. Mr. Zucker?

Mr. ZUCKER. We, obviously, respect the goal of further broadband deployment in this country, so I would say that we are in agreement with that. We also believe that the spectrum that we currently have is important, and we think that the goal of the FCC to get that further broadband deployment—we shouldn't be looking to the broadcast spectrum at this point in order to facilitate that.

You know, there is still a considerable portion of this country that relies upon that spectrum to receive the over-the-air broadcasts, and so I think that we respect both goals, we respect the goals of the FCC in the broadband deployment, but we don't know that the broadcast spectrum is the way to get there.

Mr. GONZALEZ. Okay, post-merger, you are now merged. Mr. Roberts, do you have an opinion on what the chairman of the FCC's proposing?

Mr. ROBERTS. You know, I haven't seen today's story, I have to say, so, if I might, I think that I am not sure what the merger would do. I think the goal—and we are working with the FCC right now ourselves on his "100 Squared" initiative, how to get——

Mr. GONZALEZ. But would you now have a dog in that fight?

Mr. ROBERTS. Yes. So I think we would say that we would like to be treated as all the other broadcasters, whatever that resolution is. We would love to be a participant in that conversation.

We are very much in broadband today. We helped create broadband in the United States through something called DOCSIS cable modems. And it is a great business opportunity, in my opinion, to speed up for the consumer broadband adoption. And it is why we spent $1 billion on the next DOCSIS, called DOCSIS 3.0.

So I don't specifically—not a wireless expert on broadcast wireless. I don't know if there is other spectrum that would be available to be auctioned first. But I think that is a place where we have got to get smarter and got to have a point of view when a deal does close—hopefully if it closes—and we would like to participate in, whether it is an association of broadcasters or however best that communication takes place.

Mr. GONZALEZ. Now, Mr. Zucker, post merger—and I am just assuming that this is your——

Mr. ZUCKER. Yes, I think our opinion from our perspective—you know, that is the position that we have held. But I think you have to remember that all broadcast spectrum amounts to less than 200 megahertz. And you can't get to the 500 megahertz that is needed even if you killed broadcasting, which we don't think you should do.

So we support the overall concept. I think this is just a question of how you get there.

Mr. GONZALEZ. Is that interest diminished whatsoever by the fact you are now merged, which someone that is more into cable and providing the Internet—and I understand about the different platforms and trying to get what—you know, on your telephone via Internet and so on.

But what I am talking about is, because of the merger, you guys are going to be facing Sophie choices every once in a while? And I am just wondering, what will be the impact on over-the-air broadcasting, which I have said is the only nexus for our involvement, and secondly, building out broadband?

Mr. ROBERTS. So I think that the merger is actually not the relevant trigger to get this conversation—this is a very relevant conversation with or without the merger. As you have pointed out, there are two scenarios.

And that is because what is happening in wireless is nothing short of a revolution and an explosion of choices. And, you know, there are two predominant large companies that, whether you buy an iPhone or you get other mobile broadband that are not named Comcast, we are not today a wireless voice provider, and we are an investor in a company called Clearwire, trying to build a new fourth-generation wireless network.

So we very much are hoping that there are going to be more and more wireless choices in the future, because it is a great part of what our consumers want to do, take the products out of their home and travel with them here and around the world, and multiple users, and they all want to do different things at the same time.

Mr. GONZALEZ. And now are you going to have content interests, also?

Mr. ROBERTS. So one of our goals is to help, how can we accelerate that vision? Because that is what consumers want. I don't think we have that type of choice. We are spending as fast as we can build broadband capacity. We have got more wideband offered in residential homes in America than all the phone companies combined and, I believe, all the other cable companies, something called DOCSIS 3.0, which is over 50 megabits per second. The capability to do that, that is a forward-looking bet.

Mr. GONZALEZ. No, and I understand what you do. We started off by saying voice-over-Internet protocol and all that and what you can do. I mean, I understand that. But what I am just saying is that you are not going to be the same. You are going to have other considerations.

And somewhere along the way, you have to make decisions that obviously you wouldn't have made if you didn't have the interest that you are going to be acquiring as a result of the NBC Universal assets.

And I am just wondering what that really has in store for us down the road when it does come out to build out. And I am talking about broadband build-out. I am not just talking about fiber optic and such and what goes into—I am talking about broadband all the way, the wireless and so on.

When it comes to content, do you have such an advantage? What happens to the interest of NBC at some point? You know, what—if they diminish the importance of their broadcaster character—and I think that is incredible important, because it is so different from what you have in the way of cable, and I know NBC has cable and so on programming.

The last question I have is simply going to be on competition. Now we are going to come back to the specific issue before us. How would this merged entity have any advantages as to other providers that may not have the access to the content that you are going to have, Mr. Roberts?

Mr. ROBERTS. As I stated previously, we have today a carriage relationship with NBC and its channels, and six out of every seven channels that we carry are not owned by NBC. And I don't believe that our relationship with NBC is any different than the other major companies, based on the other distributors they have in the market or the other content companies who they compete with.

So I actually think we are going into relatively a new space with, as you have pointed out, new opportunities and new dilemmas. And we are excited by that. We think that we can use that new business to change the nature, the types of people that work at the company to accelerate our growth, but I don't think it really changes the competitive dynamic for us, because we are about 10 percent of the programming market, and the other 90 percent, they have to put out great shows and they have to be on our competitors' platforms, or their 10 percent is going to go down.

Mr. GONZALEZ. And so whatever your advantage that is gained from this, it doesn't rise to the level of what would be an unfair advantage or anti-competitive?

Mr. ROBERTS. That is correct.

Mr. GONZALEZ. I mean, that is what you are telling me?

Mr. ROBERTS. That is correct.

Mr. GONZALEZ. Mr. Zucker, anything you want to add?

Mr. ZUCKER. No, I would add—the only thing I would add is that it is in our interest to make sure that our programs are as widely distributed and seen by as many people as possible. So that is the way that we will recoup the tremendous investment that we make in entertainment, news and sports. And so from our perspective, we want to make sure that our programs are as widely distributed as possible.

Mr. GONZALEZ. And I want to thank the witnesses. And I know I have gone long, and I apologize to my colleagues here real quick, but I do want to give Dr. Cooper a few seconds, if you want to comment on any of the responses to the questions.

Mr. COOPER. Well, the most interesting thing in—I am not sure it was this question or the previous question, but earlier in the testimony, Mr. Roberts said that the Xbox competes with Comcast. He then said that Comcast regional sports network does not compete with NBC Sports.

That doesn't make any sense. These two people sell products that compete with each other. And that is a fundamental observation.

It seems to me that you also said that the nexus for this Committee is spectrum. Actually, if this were the Commerce Committee, that would be the nexus. But in this Committee, it is the Sherman Act and the Clayton Act.

And the analysis that you have to do is look at the products and see if they compete. The most recent study from Nielsen says that 98 percent of the TV viewed in America is viewed over the traditional delivery mechanism, cable, satellite and broadcast.

So this notion that the Internet had radically changed the marketplace is simply wrong. Now, it could, and that is why NBC invested in Hulu. And it is that competitive threat that going forward we really have to preserve.

Mr. GONZALEZ. Thank you very much.

I yield back. Thank you, Mr. Chairman.

Mr. CONYERS. Judge Ted Poe?

Mr. POE. Thank you, Mr. Chairman. I feel like the Lone Ranger down here. You know, it seems like it has all been said, but not everybody has said it, so it is my turn.

And I wish Judge Gohmert was here, because he kept saying, as my friend, Judge Poe, knows about being on the bench too long, you could be influenced, so I served 22 years on the bench, twice as long as Mr. Gohmert, so I think he was offending me when he made that comment.

I am a big believer in television. I mean, I am so old, I remember our first black-and-white TV. My kids don't even understand that there was such a critter. They don't.

And, you know, but I don't watch TV much. If it is not on the History Channel or the Discovery Channel or American Movie Classics, I am probably not watching it.

But as a judge, I was the first judge in Texas criminal courts to allow an entire criminal trial to be televised on live TV, introduced legislation to let the nine Supremes down there have their Supreme Court open to the public so we can see what they are doing. We will see if that ever gets anyplace, Mr. Chairman, within this Committee.

But I am a believer in competition. Competition makes for better products, and the consumer generally wins on competition. That is my philosophy, across the board, sort of a free-market guy.

And when you don't see competition, you see problems. And there are a lot of anecdotal issues that we could talk about. But to just give you one—and not picking on Comcast, but just give you: Comcast is the only folks in town in part of my district. If you want to watch television, you are on Comcast, or you have to have rabbit ears.

And tomorrow, one of my constituents will have in the last 18 months the 77th visit by Comcast to come out and try to fix the cable problem. They can't get satellite, because they are on the wrong side of the—you know, of the sun. And they work from their home. And so they have got to have Internet, and they have got to have TV service, and that is the only way they can get it. So Comcast has no competitor with this constituent.

Anyway, so I believe that we ought to promote this, the competition. And I am concerned—I hadn't made up my mind on this legislation. I am still open-minded about it. But the concept of being able to deliver the service and have the content of the service controlled by the same folks concerns me a great deal.

So my question to you—and this is my only question, Mr. Chairman—to each of you, including the three silent ones for the last hour, do you believe that this deal will promote competition where the consumer will eventually win out?

Mr. Roberts?

Mr. ROBERTS. I appreciate that, and I am sorry about that customer. And if I might, I would like to see why there have been so many visits. That is not how we like to do business.

Mr. POE. Well, they have been out there that many times——

Mr. ROBERTS. Well, that may be true, but that is not acceptable. I believe this is pro-competitive, because we are going to innovate as a company, we are going to make better programming for NBC and Universal. We are going to try to accelerate how it is used by technology.

The consumer's time—what I am referring to and what is being competed with from the Internet and from Xbox and from iPhones and from television. And as you pointed out, not everybody watches TV like they have in the past, and the world is changing at a breathtaking speed.

So we are at a crossroads in time. And our company is wanting to invest in advertisers, having more ways to reach their message than ever before. Again, it has been said, oh, this will reduce the way for advertisers. I don't believe that. I believe you have a company, one of the great brands and assets in America in history of television, NBC, and it is now in fourth place, and it is not what it once was.

So it is not a risk-free decision on our part to want to come in and try to make it much greater, invest in it, and I think that that is all about competition, because they have more competitors than they have ever had as the technology has changed, and I think that there are more technologies coming that we can't envision. As Jeff has said, in the next 5, 10 years, there will be more change again.

And I think this is building America and sold all over the world, and we are looking forward to trying to transform our company with that kind of innovation.

Mr. ZUCKER. I believe it is a fiercely competitive world, and this doesn't change that at all. The fact is, with this combination of assets, we will still reach less than 11 percent of all television viewing on a daily basis, so vibrant competition is really the hallmark of what we do in our business.

On the Internet, where there is so much attention, programming on the Internet is even more competitive. The fact is, today, NBC

Universal has 1.6 percent of all viewing on the Internet. With this, we would move to 2.2 percent.

So no one, in fact, has more than 5 percent, other than Google. So I think that the competitive dynamic remains fiercely alive even with this.

Ms. PREWITT. I think we believe that this merger creates and bolsters the power of two gatekeepers who determine what content will actually flow through the major pipelines that come to the consumer's home. We think that conditions that protect competition both at the NBC level and at the Comcast level can make that problem come right.

And if the merger is properly conditioned, we would hope to share in their vision of a vibrant distribution infrastructure within the United States. But without those conditions, what we see is a vision in which no one else can be a part, except these two companies. Thank you.

Mr. COOPER. In my testimony, I identified three areas where it directly reduces horizontal or head-to-head competition, local TV markets, multi-channel video content market, and the Internet, where they both distribute content.

I also identified two areas where vertical leverage can be used to undermine horizontal competition. That is in program access and cable carriage. And they identify a sixth factor, which is the illegal tie and the market division scheme between cable and Internet. For those reasons, I believe it will significantly reduce competition.

Mr. POE. Thank you, Dr. Cooper.

Mr. COHEN. Yes, I would echo that. My frame here was, most consumers are also workers. And the consequences about employment both internally and the combined companies, huge employers, and also externally, in terms of the competition and investment.

And we believe that as it is structured now, it would impede investment and investment particularly in high-speed connections, fiber connections to the house, like in your district, at least the parts of it that are rural. It won't encourage that competition because of what we earlier discussed, bulk pricing that is bundled up when a potential competitor decides, do we invest or not?

I would agree with Mr. Roberts that their own investment in DOCSIS 3.0 is a positive and that we all need to encourage investment in high-speed connections to houses across this country, and we need to look at the impact of these kinds of decisions not only on competition, which is at the core here, but also in terms of investment and jobs and where the U.S. is in the global economy.

And it is in that realm that we believe that this bundling vertical integration of content and the pipe or the network will impede that investment and that that investment by others is already slowing dramatically.

Mr. SCHWARTZMAN. In my written testimony, I explained why I believe existing law is insufficient to address the anti-competitive consequences of this transaction with respect to availability in the video programming market and how it increases costs to competing satellite and cable providers, increases their programming costs in an anti-competitive way.

But I would like to focus my remarks here on what has not been to my mind sufficiently discussed during the course of today's hearing, and that is the impact on the nascent Internet distribution markets, TV Everywhere model, which Comcast employs.

The entrepreneurs that Mr. Johnson was asking about, the wireless providers that Mr. Gonzalez was asking about, new forms of competition, new programmers who want to reach their customers by the Internet face barriers by having a system advanced by Comcast that locks in the existing video subscription model and would make it impossible for somebody using the Clearwire system that Mr. Roberts talked about to deliver video programming unless they were also a video subscriber to Comcast.

It is a geographic tie-in, because Comcast will not offer its TV service outside of Comcast's franchised cable television areas, even though from a technological standpoint, it can offer it throughout the United States. And it is a profoundly anti-democratic model, which would allow Comcast in the absence of network neutrality regulation to take the entrepreneurs that Mr. Johnson was asking about and charge them more for Internet access to upload than a large competitor or the NBC content which was competing with this new entrepreneur.

So for all these reasons, I believe that the proposed transaction is profoundly anti-competitive, will leverage existing anti-competitive conditions in cable to a far greater extent. Thank you.

Mr. POE. Thank you, all of you, for being here so long.

Thank you for your patience, Mr. Chairman. I yield back the remainder of my time.

Mr. CONYERS. I am very pleased now to call our last witness, who has been very constant with this Committee on a number of subjects, Luis Gutierrez of Illinois.

Mr. GUTIERREZ. Thank you, Mr. Chairman.

Well, you have had a long day here, so I will try to keep it brief. I want to say, first of all, that I had a wonderful meeting yesterday, Mr. Zucker, with Paula Madison and other people from your group, your attorney and others, your general counsel. I think it was a very productive meeting, and so I thank them. I know some of them are here. It was a productive meeting, and we got a lot of things discussed there.

I want to say that I did fly out with my wife out on the 1st of February to be at the L.A. Federation of Labor. And I had to tell you, Mr. Cohen, you inspired me that day. Thank you so much for your commitment to the rights of working men and women.

I was there for your entire presentation and those of your—obviously, of your membership. And I will tell you, I came back and told them, "Let's get that card check," which is, I think, the best and most viable way we can help you as companies such as NBC and GE and others merge or continue to grow and expand in America.

And I say that because, although I heard Mr. Roberts say he is going to keep the spirit of the union contracts and union spirit at NBC, when NBC bought Telemundo, the on-air personnel were not allowed immediately to gain the same access to the same union that the NBC staff did.

And it was a long wait and a long struggle, I have to say, but we had to discuss with them, especially the contracts of many of the on-air, because they were brought in from different countries, and so they had immigration issues. They didn't use any of those issues, but we have to make sure they didn't.

And in the end, the workers voted by one vote. But I just never knew, since there were 21 people employed and 21 had signed saying they wanted a union—I didn't know what we needed an election for. But even after the election, we won, and it just shows the spirit.

So I want to thank you. Keep up—and I know we have our work to do here in the Congress of the United States.

I want to say to Mr. Roberts and Mr. Zucker, so I have two daughters. I have Mita. She is 30, grandson, Lucito. And I have Jessica, who is a senior in college, graduating this year. I imagine you guys, if you don't have daughters, you have wives, you have mothers, you have sisters.

And so I bring this issue up to you because—and I discussed this yesterday with the folks from NBC, and I want to bring it up again to both of you. And that is the treatment of women particularly on Telemundo, what could only be described as one of the most misogynist portrayals of women that is on TV.

I do not believe that you would allow on NBC or any program created by Comcast to have the same depiction of women on NBC as you do on Telemundo, whether it is in your regular broadcasting or on your news cycle.

There is a great and huge problem in the Latino community, one of which is the relationship between men and women. We can say it is an ageless problem. But it is a particular problem of violence which exists in our community.

And part of it is the correlation of power between men and women and how men and women are viewed and looked at. I remember, as I grew up, watching "Leave it to Beaver," "Father Knows Best." I wanted my father to be like them. Although I had a great dad, unfortunately, that is what TV taught me, right?

You know, I didn't like my coarse hair. You know, I wanted to be like them, because that is what TV taught me. It taught me that what I looked like and what I represented and what I was wasn't of great value. It wasn't portrayed on TV as anything of value. I never saw it. So I wanted to be, in spite of all of the things about immigrants and not wanting to be American, I wanted to be nothing more than American. And TV taught me I wasn't.

So I want to go back to the issue of women. And I just want to say to you, take a moment—Mr. Zucker and Mr. Roberts—take a moment. You are going to buy NBC. You should know about Telemundo. You should know. And I am particular—and let me tell you, there are a lot of great people on the newscasts there that do a lot of great work.

But I am going to tell you something: Something has to be done fundamentally about the program specifically as it relates to women. It does not help a community advance forward when one of their major avenues of information is viewed.

And don't only look at it. Look at the newscasts and compare the newscasts on MSNBC, the newscasts on NBC, portray how women are dressed, how they are viewed, the desks they sit behind. Just portray them in their complete context and then see how they are seen on NBC.

There would be outrage in this country if you were to take the same and portray it on—it just wouldn't happen in this country. I don't believe it would, not on all the news, not on all the news, but on some of it.

And there is enough of it to say—I just came back. There was a study. I just came back from spending some time with my mom in Puerto Rico, and I just got back last week, and there was a study that was issued. Even in Puerto Rico, 10th country in the world of men killing women, of husbands killing wives, 10th country in the world, 4 million people.

Now, that is nothing to be proud of. We are 10th in the whole world? I am not trying to say TV is the only thing, but, you know, it is part of the vicious cycle that we have, and it is a powerful component for changing how people view the world.

I came back on that airplane, coming back, and I watched the program not on NBC, and it was amazing. Here was this senator running for President whose brother was gay, and he was engaging his fiancee whose brother was gay, and they were returning to the veteran that came back from Iraq, right? And how these two gay men were portrayed in that series I think does a lot for ending bigotry and hatefulness in how people view one another. And I think TV and how people are portrayed is very, very powerful.

I don't think that you would—that it would be allowable if you were to take women and substitute them for Black people, substitute them for Jews, substitute them for any other group, that it would be acceptable for Telemundo to do that.

And secondly, look at how it is you look at the gay community on your Spanish-language network, both in terms of the jokes, in terms of the nuances, things that, I tell you, you know, I don't believe would be acceptable in a broader range, because I think I know where America is going and where the programming is going, in terms of this country.

So I would ask both of you to just speak to that issue a moment and to—look, just to say, yes, Luis, tell you what, I am going to take a look at it, as a dad, as a father, as a son, I am going to take a look at it and, as a human being and as a man with power, to kind of change that equation. I guess that is what I would like both of you to speak to.

Mr. ZUCKER. So, Congressman, Paula Madison, Rick Cotton filled me on your conversation yesterday, and they were grateful to hear from you on that, and I would echo the same today, which is that I appreciate your comments. We are very proud of Telemundo, but I will give you my word here today that I will go back to the executive team at Telemundo, which includes some very prominent women in that executive team, and I will discuss it with the executive team to make sure that your comments are passed along.

Mr. GUTIERREZ. Yes, and take the powerful women at NBC and let them help the powerful women at Telemundo get together and have that kind of power, you know, that they already have within the corporate structure and convey that to them, if you will.

Mr. Roberts?

Mr. ROBERTS. I am pleased to hear what he just said. I will do the same. I will go back, as you suggested, and watch——

Mr. GUTIERREZ. Watch it.

Mr. ROBERTS. Yes.

Mr. GUTIERREZ. Watch it. But watch—tell them to put together—and you will see what I mean, and you will say, “Maybe Luis has something here.” And if you watch it day in and day out, you are really, really going to have a sense.

Let me go to Mr. Roberts. So you have about 100,000 employees. And I understand about 8 percent of them are Latino, is that correct? That is the information that I have been given.

Mr. ROBERTS. I don’t have that stat—okay.

Mr. GUTIERREZ. And it is from your folks. So Latinos constitute about 15 to 16 and ever growing part of the population. So why is there such a disconnect between the number of Latinos employed at Comcast, a company which much to—we have heard from our friends from Texas from the rural area, it is the only cable company—and one which I have sent lots of checks to over the year, I assure you, to Comcast, you can go check, always on time. You know, direct payment makes for a good payment, because my bank—they are very good at sending you the money on the appropriate date you demand it.

So as a customer and somebody who has a many, many year relationship with Comcast, why not? Why not? We have got a large urban city like Chicago, L.A. It is easy, and they are easy to find. And if you can’t find them, I will tell you something. You call together your public relations folk, go to any one of those schools, they are going to show up for jobs at Comcast.

So why such a disconnect between—and I assure you that if you were to take their proportion—I am using general population. That is 16 percent of the general population. If I were to take the kinds of jobs that exist at Comcast—that is, the people that drive the cars and the—you will see we are even higher participation rate. And that spectrum or that portion of the job of the economy, we are even greater in that area. So why such a disconnect?

Mr. ROBERTS. First of all, let me go back and look at that specific number. I am not familiar that—I hope that is the right number. And if it is not, I will write to you or come visit.

Mr. GUTIERREZ. Well, come visit, but I would like to talk to you about it, because, you know, Comcast has a huge presence in Chicago. Through the agreement it has through the city of Chicago, it is my cable company. I don’t have a choice. They made an agreement with the city of Chicago. And if I live where I live, Comcast is my provider.

Mr. ROBERTS. We have been making a lot—I agree. There is no disagreement. I mean, we want our employees and our channels to represent our customers, and that is great business. I am pleased—I don’t know if you were here earlier when I said that——

Mr. GUTIERREZ. I was.

Mr. ROBERTS [continuing]. Top 60 companies Hispanics, you know, for 4 years—5 years in a row by Hispanic Business magazine, we have been recognized. We have our Web site in Spanish. We have all sorts of more programming. As we are going from analog to digital, a lot of our initiative, are to both English-speaking and Spanish-speaking programming and to broaden——

Mr. GUTIERREZ. And, Mr. Roberts, you have great people in Chicago. I mean, there is a—you have a Latino population of workers there that are wonderful. I call upon them all the time. Wonderful workers, they show up early, they stay late. They would be a credit to the company.

Mr. ROBERTS [continuing]. Accelerate that.

Mr. GUTIERREZ. It is just you hire insufficient numbers of them in relationship to our purchasing power. I mean, I am not asking you to give us something for nothing. I don't know how many Latinos purchase Comcast, right, how many of your viewers, but I would—I believe, understanding a little bit of my community and having grown up and never, you know, gone to college, and I didn't move from the neighborhood, I stayed in the same neighborhood, right, having that connection and that nexus to that community a lot.

Because I will tell you something, I can't figure out a person in my neighborhood that I visit that doesn't have a Comcast box. So I can only assume and extrapolate from that that you are doing very, very, very well in the Latino community.

So all I am saying is, yes, look at the numbers. If you find that they are correct and that they are insufficient, then tell me, because I know there is going to be a grand meeting, right, for everybody to get together and kind of say, you know, how are we going to all get along and sing, you know, "Kumbaya" together.

But, listen, seriously, 8 percent, 16 percent. It is only half. It is even greater if you look at that particular sector of the labor force. You are going to find it is very disproportionate. There should be a reason why it is happening, and then it terms of other numbers.

And I will say one other thing. I know what, you know, Hispanic magazine and others, and the Chamber of Commerce and others, have to say about you. I am sure they are right, and I am sure they had good reason for extolling those virtues of Comcast. But you have 13 members of your board of directors. You couldn't find one Gonzalez, Rodriguez, Martinez, of any competence, of any significance to be on the board of directors of Comcast in the year 2010? Why not? Why isn't there one?

Mr. ROBERTS. There is not a good answer to that. And as I said earlier, it is a major priority for our board, and I hope not to be before you again where we don't have an answer to that.

Mr. GUTIERREZ. And it shouldn't be. And, look—and it is not only just finding somebody, because you will find somebody, but finding somebody who is going to go and challenge, who is going to go and challenge and make sure that you become a stronger, more vibrant company.

It is my opinion that in America, the companies that are going to move forward, that are going to advance, that are going to prosper are those that have a connection to the communities that they serve. And the connection to the communities that they serve are going to come through the people on the front lines that speak to that community.

You will not know how angry it makes people feel that when they call somebody on the phone and they go, you know, for

English press one, and then they go, "Para espanol, oprima el dos." I mean, it sounds like my Spanish teacher, you know, from freshman year.

You know, we want our people speaking our language to our people, not others doing that, because what you are saying is that you couldn't find anyone from our community, but someone who went to college and was smart enough to take Spanish as a second language and put them on.

That is going to be very critical and very important, I think, to your success. So if I were given—which is what I am doing—given you—hire them. It is going to be good for the bottom line. In the end, you are going to be richer and make more money and be more profitable because they are going to bring you ideas and they are going to bring you energy that you do not receive because of our life experience.

It is going to happen. So don't have it, and don't do like—let me see. I will give you an example. Don't do like my friends at Verizon. They put a Latino on their board from Puerto Rico, and Verizon shut down its operation in Puerto Rico. I was like, how could this be? So it is not the fact of simply having one, but having one that is going—that has a stake, that has an interest to carry forward.

Thank you all very much. I know you have had a long day here. Thank you so much for listening.

Mr. ROBERTS. Thank you.

Mr. CONYERS. Our last witness, Judy Chu.

Ms. CHU. Congratulations on your stamina. Well, I did want to take this time to ask about a few issues. One is on the retransmission issue.

We are seeing an increasing number of instances in which retransmission, consent negotiations are breaking down, leaving consumers at risk of losing access to broadcast television service. Even when these negotiations are resolved without an actual disruption of service, the uncertainty is certainly disruptive to consumers, in terms of what finally happens.

For instance, when FOX threatened to pull their premium content during the holidays, people, of course, would have missed the Super Bowl. And as a result, there would not have been that content to certain cable providers.

With your merger, you would be at an advantage over other providers in terms of being able to negotiate and to not have this disruption in service. In your view, is there a need to adopt reforms to the transmission consent process established by Congress in order to protect consumers?

Mr. ROBERTS. I think the first point that you made, where FOX and Time Warner, was very high-profile, and some of the points you have made, we have traditionally also made, which is, this is very compelling content, like the Super Bowl, and is this the right process?

I think any review of that should be across the entire industry, because no matter what happens with this situation, there are several other networks at 80 percent, 90 percent of the viewing, 75 percent of the distributors. There is going to be this conversation of retransmission consent. This has been a longstanding set of changes in the marketplace.

What I believe is that by now, we will still be 80 percent a cable company in terms of cash flow after this transaction, approximately 20 percent a content company. I think it allows us to have a role, to help come up with constructive solutions of how—for the industry, how should this get resolved in the future?

There is no easy answer. I think it would have been before you or would have happened at the FCC already. And I think it is an ongoing conversation.

At some level, the cable companies now view us as a broadcaster. The broadcasters view us as a cable company. So in some respects, those conversations still have to take place without us, but we may have an opportunity to play a unique role.

One of the things to your other—I believe inside your question is specifically with NBC, will we treat others in a way that would create some harm potentially? So one of the first conditions we made after saying we continue to want to broadcast and will commit to broadcast NBC free over the airwaves is to have the program access rules, which heretofore have not applied to retransmission consent negotiations, apply to retransmission consent negotiations.

So another distributor like DirecTV knows they are going to have the same access to NBC that they do to CNBC in the future with the FCC having a role, if there is a problem there.

But I think, more importantly, frankly, is, what about all the other negotiations in the industry? And it may well be something that you are hearing more and more about because the stakes are so large.

Ms. CHU. Okay. Then I wanted to follow up on some of the questions that were about piracy. I do represent a district in L.A. County, and I have spent a lot of time talking to folks in my district and in Los Angeles to folks in Los Angeles during the recent congressional district about this issue.

And I learned that, in 2005, piracy costs the city of Los Angeles about 106,000 jobs, with wages of $5.1 billion, so this is an extremely serious issue.

So I wanted to ask about the balance, about the balance between making sure that there is the protection of intellectual property rights, which we certainly hope that you can do, but also, balancing that with net neutrality and the open Internet. How do you balance the two?

Mr. ROBERTS. Well, I think that we—again, it is a little bit like retransmission. These are tough issues. Earlier, we were talking about how fast the technology is changing, both for the pirates and for the capabilities for the consumer to take advantage of these technology changes in a legal way.

And one of the real opportunities for this new company is to play a leadership role in trying to crack down on the piracy to keep the model legitimate, because so many parts of the ecosystem depend on that, and the statistics you have cited just for California are stunning. And over the world, it magnifies many, many times.

So heretofore, we have been looking at it as solely a distributor, and now we have made a large investment in content, so it accelerates our desire to find good technological solutions.

One of the other points is that people try not to use this as a competitive advantage, where some networks you can get pirated content, and other networks are policing and enforcing in a way that reduces that likelihood and that you are criticized for that behavior.

So industry-wide solutions are, in my opinion—again, this merger does nothing but to help foster our desire to try to help play a role in those industry-wide solutions.

Ms. CHU. And how about the issue of maintaining net neutrality?

Mr. ROBERTS. Well, you know, net neutrality means different things to different people. We have always been for an open Internet and a free Internet. We helped invent broadband in this country with cable modems and DOCSIS. And we have invested billions of dollars. And as I said, we are now moving on to DOCSIS 3.0 and even faster Internet.

There has been very few allegations—it is a very vocal community. When somebody does something that somebody's upset about, it gets a lot of attention very quickly and tends to change behavior quickly. And the FCC, again, industry-wide—I don't think this merger, frankly, affects Comcast's behavior as a cable company, as it affects its broadband. NBC doesn't deliver ISP services.

So the question is, as the FCC reviews net neutrality, we are an active participant. It is a very open and fair process, very transparent that Chairman Genachowski has been having. And, you know, we are involved. We may have a difference of opinions as to what the definition, where it should start and stop.

But, frankly, it is critical to our future to have broadband continue to grow and be successful, and consumers have to feel comfortable both with their provider and with their access to information from the Internet. And I think, so far, it is the engine of a lot of growth, and I hope it will be so in the future.

Ms. CHU. Okay. And then, finally, there has been some reference to Hulu. I just wanted to know, what is your relationship with Hulu? And do you see them as a competitor? Do you share content with them? And how do you see that relationship changing with the merger?

Mr. ROBERTS. NBC Universal owns 32 percent non-controlling interest in Hulu. There are other companies, FOX, Disney, Providence Equity that own the balance, I guess, in addition to management.

I don't view us competing with Hulu. They are an ad-supported service today. There is so much explosionit is such a nascent market. There is a lot of experimentation, innovation happening on video with the 'net. What is the business of Hulu and others who provide it? Comcast today, about 40 percent of our video views of professional content come from Hulu, so we are distributing. People can access Hulu through our portal.

We are about 3 percent of Hulu's views, so we are a very small part of Hulu's eco-world. And together, NBC and Comcast are about 2.5 percent of professional video content.

Google, YouTube, over 50 percent of the 30 billion video views, Apple, Netflix, it is a nascent market. And many people are trying to figure out how to participate, how to grow, how to find things that consumers want and a great business model.

So personally, it is an exciting new area. We don't come in with any agenda other than to help try to make it grow. And, you know, something we will learn about once we are together, but I have never actually met the people at Hulu. I have talked to them on the telephone, but looking forward to learning about their business.

Ms. CHU. Okay, thank you.

Mr. CONYERS. This has been a very important hearing. We will leave the record open for any of the witnesses that may want to submit any additional comments or supplementary statements. I particularly thank my staff for working for many weeks on pulling this together. There will undoubtedly be future public discussions about this matter.

And I thank all of you very much for your honest and thoughtful contributions.

The Committee stands adjourned.

[Whereupon, at 3:11 p.m., the Committee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

DISH NETWORK

February 25, 2010

Hon. John Conyers, Chairman
Hon. Lamar Smith, Ranking Member
U.S. House Judiciary Committee
2138 Rayburn House Office Building
Washington, D.C. 20515

Re: Comcast and NBC Universal Merger

Dear Chairman and Ranking Member:

DISH Network would like to thank you for holding a hearing that examines the impact of the proposed $30 billion merger between Comcast and NBC Universal. Merging together the largest cable company, a massive broadband infrastructure, and a content conglomerate should cause alarm. It will result in a giant with brute strength capable of crippling competition and causing injury to consumers.

Going down this perilous road endangers competition in the video distribution marketplace. But that's not all. Broadband will be as important to our lives in the future as electricity is today. Education, healthcare, energy management, home security and countless other applications are moving to the Internet. Such a behemoth will touch almost every aspect of our lives.

The stakes are too high to allow a Comcast-NBCU merger to proceed as the applicants propose. Once a merger is complete, there is no "second chance" to get it right. If the government allows this merger to proceed, it must be only after meaningful, tough conditions are firmly in place.

Tough Conditions

Comcast's proposed merger conditions provide no real comfort. Indeed, Comcast failed to include even a single network neutrality principle in its list of proposed conditions. Comcast should not be permitted to squeeze out the competition by consolidating its market power across industries. Direct Broadcast Satellite providers, for example, offer stand-alone video service. Thus, their subscribers must obtain broadband connections from companies like Comcast. Video distribution companies are increasingly combining traditional video services with Internet-delivered video on demand ("VOD") that can be delivered to consumers via broadband. The public good requires an open and non-discriminatory broadband pipe to ensure that vibrant competition remains in the video marketplace and that consumer choice does not suffer.

Given this incestuous relationship, the potential for anti-consumer, discriminatory behavior in a Comcast-NBCU merger abounds. Incredibly, Comcast believes that it was appropriate for it to covertly block certain Bit-Torrent use over its network with no notice to consumers. That conduct is but a small sample of what Comcast is capable of doing in the future. For example, Comcast could price its bundled services in such a way that stand-alone providers could not compete. Likewise, Comcast would have the incentive to prioritize its own NBC content or service offerings, like VOD or Fancast XFINITY TV, over VOD services sent through Comcast's "pipe" to a DISH Network subscriber. To protect against this type of harm, Comcast, at a minimum, should be required:

- **To refrain from discriminating against any competitive services when content is delivered over its broadband network;**
- **To provide broadband at wholesale rates to other service providers that want to offer a competitive bundle of services; and**
- **To offer to consumers a stand-alone, low-cost broadband service with robust bandwidth.**

In addition to broadband-related conditions, protections are needed to ensure that Comcast will no longer be able to combine content and distribution in a way that stymies competition. One need look no farther than the city of Philadelphia where Comcast is headquartered to see that when it owns the local sports team, arena, sports network, and cable system, it will go to remarkable lengths to deny its competitors, like DISH Network, access to "must have" programming. Therefore, instead of the symbolic gestures proposed by Comcast, the merged company should, at minimum, be:

- **Prevented from evading program access rules by delivering affiliated content (including broadcast channels) to consumers through alternative means such as IP networks;**
- **Required to submit to mandatory "baseball-style" arbitration with interim carriage if negotiations over affiliated content break down, so that consumers can continue to watch their favorite shows; and**
- **Required to offer all affiliated content to its competitors on a stand-alone basis, and not be allowed to tie any of its programming together.**

DISH Network is the third largest pay-TV provider in the U.S., and arguably the last major independent distributor unaffiliated with any flagship content providers. DISH Network has experienced first-hand Comcast's tactics for thwarting competition through denying competitors must-have programming. Comcast should not be permitted to combine its current power in the traditional video and residential broadband markets with NBC-Universal's content, and leverage that position into the emerging broadband video and applications markets. If the door is left open for mischief, consumers, competition, and the vibrancy of American media will suffer.

Very Truly Yours,

/s/ R. Stanton Dodge

R. Stanton Dodge
Executive Vice President & General Counsel

The Free State Foundation

A Free Market Think Tank For Maryland...Because Ideas Matter

Perspectives from FSF Scholars
February 12, 2010
Vol. 5, No. 4

The Comcast and NBCU Merger:
The Upside Down Analysis of Dr. Mark Cooper

by

Richard A. Epstein*

I have just had the opportunity to read the statement that Dr. Mark Cooper, the Director of Research for the Consumer Federation of America, has prepared in opposition to the proposed combination of Comcast and NBC Universal. Normally the detached analysis has to wait to see the affirmative case for a merger to bless it. But in this stance, Dr. Cooper has achieved a rare feat. The evidence that he presents against this proposed merger suffices to explain emphatically why it ought to be approved.

As a matter of basic theory, any merger evaluation should depend on an accurate appraisal of its relative costs and benefits. Under the traditional analysis of a merger, the pro side consists of the efficiency gains that are obtained from the integration of the facilities of the two firms. The negative side, in turn, consists of the increase in market concentration to the extent that it allows the new firm to raise its prices above the competitive level. As a matter of basic theory, this risk may materialize in horizontal mergers, but rarely will appear in vertical ones, which involve the integration of two facilities or services at different levels in the chain of production.

Dr. Cooper's analysis does not engage in this elementary form of analysis. The words "efficiency" and "benefit" do not appear anywhere in the analysis, so that the implicit baseline for his dubious judgment is that any cost of the merger is in and of itself to require its rejection by the applicable public authorities.

This omission is curious beyond belief. The first question to ask about this merger is whether it should be treated as horizontal or vertical. To be sure, there are some horizontal components to the merger, which could be met by a partial divestiture in some local markets if the concentration levels are thought to move too high. But the vast bulk of this transaction lies on the vertical side of the line, which involve the linkage of a transmission company — Comcast — with a content company—NBC Universal.

Dr. Cooper acknowledges this point when he notes the "complementary" nature of the assets of the two firms. To most people in the field, the merger of two complements in effect is one of the reasons why vertical mergers are viewed generally with favor why horizontal mergers are not. Thus in patent pools, for example, the antitrust law encourages the pooling of complements, because of the way in which such pooling lowers transaction costs and eliminates some of the substantial social losses associated with the "double marginalization" problem, which produces substantial resources when two successive links in the chain of production that enjoy some monopoly power interact with each other.

Dr. Cooper has the rare skill to turn an economic virtue into a social vice. He writes that the two companies have in their respective roles of distributor and content provider, "a competitive rivalry. For example, in providing complementary services, broadcasters and cable operators argue about the price, channel location and carriage of content." Argue? What his odd choice of words shows us is that he has no explanation as to why the reduction in transaction costs should count as a social loss, when in fact it allows the provision of more services at lower prices. The gains from vertical integration are treated as though they create a social loss, which is even more mysterious because he does not bother to establish that either firm has any level of monopoly power to begin with.

He then fortifies this analysis with one kind of alarmist prediction that makes sense only to those who are convinced that both companies will commit hari-kari after their linking up their fortunes. Thus he thinks that Comcast will carry only NBC content, which NBC will in turn only supply to Comcast. But why would either company wish to make its network weaker than it need be, by entering into actions of exclusion that hurt itself as much as any outsider? If the purchase of outside content allows Comcast to satisfy its customers' tastes, it will go for it. If selling content to other service providers allows NBC to gain more revenues, all the better. Both points are especially true for Comcast which does not have nationwide penetration in the cable market.

These antitrust arguments are then dead losers. Nor are they improved by the other ad hoc diversionary arguments that are just beside the point. For antitrust purposes, what possible difference could it make that Mr. Cooper claims Comcast has raised its rates every year? If it can do so without the merger, why think that the merger will make matters worse? And why harp on the point that Comcast has blocked Internet access to a competitive supplier of video material? If Comcast violated a law or regulation, then that "conduct" offense should be punished. But it is irrational to think that any particular past sin has some outsized role to play in the assessment of a proposed forward-looking merger.

It is even worse to claim that letting go workers after merger should count against the merger, when the entire purpose of antitrust law is to allow firms to produce more with less. Perhaps some workers will be let go. Or perhaps some additional services will be provided. But until letting go workers becomes some kind of public offense, the point is a mindless diversion unless the antitrust law become a back-handed way to introduce civil service requirements through the back door.

So the question remains why anyone should think that the identification of these efficiency gains should count as an objection to this merger? Dr. Cooper's magic bullet on this point is that we are not dealing with two companies that "sell widgets." We are dealing with companies that are dealing with speech and public discourse.

True enough, but the last thing that any analyst should do is botch the antitrust analysis in any field that is as important as speech. Instead, the question is to ask why this combination might affect the market in speech. Here two points are relevant. The first is that the political speech market has never been healthier, because the coming of age of the web introduces more political content and lower cost of access than ever before. Entertainers may experience serious grief with the web because they are trying to sell content that is easily pirated. But political commentators are intent upon giving away content for free in the hope that every reader will forward a particular story to his or her entire list. *Puhleeze forward*!!

NBC surely must be hit hard in the content department like every other established news service. It may not be a failing company, but it is surely one that is buffeted by the winds of change. If it thinks that this alliance will stop the bleeding, it should be given the running room to make the business judgment that might salvage or expand its operations.

The situation is in reality exactly the opposite of what Dr. Cooper's topsy-turvy analysis predicts. Efficiency is even more important when first amendment issues are at stake than when they are not. He is not able to perform a minor intellectual miracle of having an upside down antitrust analysis saved by topsy-turvy First Amendment analysis. His errors don't cancel each other out. They cumulate.

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* Richard A. Epstein is the James Parker Hall Distinguished Service Professor of Law, The University of Chicago, The Peter and Kirsten Bedford Senior Fellow, The Hoover Institution, and a visiting professor at New York University Law School. He is also a Distinguished Adjunct Senior Scholar at the Free State Foundation and a member of FSF's Board of Academic Advisors.

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Perspectives from FSF Scholars
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The Dogmatic Posture of a Consumer Advocate: A Second Response to Mark Cooper

by

Richard A. Epstein*

In a previous Perspectives published by the Free State Foundation, I took to task the shoddy reasoning in Dr. Mark Cooper's statement in opposition to the Comcast-NBC Universal merger. In that piece, I explained that nothing he had said in opposition to that merger gave the slightest reason to think that the linkage of these two firms would cause any systematic harm to the overall telecommunications and entertainment industry, to its video segment, or to the larger economy as a whole. The explicit test I used in making that judgment was social welfare, which is equal to the sum of consumer and producer surplus generated by the transaction.

In recent testimony submitted to the United States Senate Commerce Committee, Dr. Cooper has responded to my comments as part of his ongoing opposition to the proposed merger on behalf of the Consumer Federation of America, the Consumers Union and Free Press. His criticisms are both general and specific. He first attacks the general approach to antitrust law of the Chicago School, of which I am a proud part. He then goes into some particulars of this transaction in order to support his own conclusion. Let me take his general points first and then turn to the particulars of this merger.

Efficiency and Restraint. Mr. Cooper (who has no visible qualifications in antitrust law) believes that the Chicago School represents an unflinching ideological commitment to the position that mergers produce efficiencies, even as they generate serious horizontal and vertical restrictions which are harmful to consumer welfare. He accuses me, and others like me, of harboring deep "ideological" commitments that stand in the way of clear analysis. He pays no attention at all to his own ideological blinders.

In launching this indiscriminate broadside, he is surely right that I did not speak about the specific efficiencies of this particular merger, as my purpose was to point out the economic weaknesses in his own arguments, none of which he responds to in detail. He makes similar mistakes in this recent testimony. Any sound economic theory shows that Dr. Cooper is surely wrong in denying, without any empirical evidence of his own, the existence of economic efficiencies unless they can be demonstrated in concrete ecouomic fashion.

To see why, assume that under the proper definitions of the geographical and product market, there are some restrictive effects to many mergers, perhaps even to this oue. The question is what does this indicate about the potential economic gains to these transactions. Here there are three possibilities. The first is that the merger would be so clunky that it would introduce extra layers of bureaucracy that disrupt sensible patterns of production. The second is that there are no organizational changes of note so that the efficiency remains the same. The third is that there are efficiencies that come from the merger which are evident to the insiders, even if they are not easily identifiable to outsiders like Mr. Cooper who know nothing about the internal operations of the new firm or its component parts.

The question is which of these three possibilities is the most likely to occur when the merger takes place. We can easily dismiss the first of them in virtually all cases, because any merger that created a firm with known inefficiencies would be surely less competitive than the two firms that it replaced. It is highly doubtful that the contraction of the industry, moreover, would allow it to regain through the exercise of market power the profits that it lost from its poor operations. The far more likely outcome is that other firms in the industry — for no one suggests that this merger would result in a 100 percent market control over any industry — would be able to take advantage of the high cost structure of a newly beached whale. Or that uew eutrants would help finish the job. It does not take empirical evidence to reach this conclusion. It ouly takes a rudimentary appreciation of basic economic theory. High-cost mergers are not planned in advance, even though they do arise in practice when business calculations go awry.

The secoud possibility — that all things should be expected to stay the same — can be dismissed with equal confidence. With respect to its internal operations, the merger of two large organizations will surely present some difficulties in the integration of different cultures, a point which is not likely to be lost on the parties to the merger. But at the same time, the decision to go forward with the synergy suggests that it would be wholly irrational to abandon any effort to eliminate duplication, streamline supply chains, combine research and advertisement facilities, engage in cross promotions, and open up new joiut ventures that neither party could undertake itself. It follows therefore that the conventional model that evaluates mergers by asking about a trade-off between its efficiency properties aud its restrictive implications is the correct trade-off.

It is not just a Chicago School artifact. It is also the standard view within the economic profession, which accordingly concentrates on this third possibility, ignoring all others. It is therefore intellectually irresponsible for Mr. Cooper to insist that the Chicago School just "waves a magic efficiency wand. . ." As should be evident, this derisive sentence could only be written by someone who has not tried to understand what the Chicago approach is about from the inside.

False Analogies. Being totally devoid of all theory, Mr. Cooper then seeks to bolster his general denunciations of my previous Perspectives piece by citing at great length a number of studies that have pointed out the flaws of a "free market" approach to financial regulation. But what he fails to do is to connect up that an analysis of market failure in other markets to the instant transaction. Thus in footnote 20, he makes the correct point that the great mistake of financial deregulation in the first decade of this century was its uncritical acceptance of a view (championed by Robert Rubin and Lawrence Summers, as well as Alan Greenspan) that counterparty scrutiny eliminated all need for government regulation of these transactions.

That criticism is in fact correct, and its most persuasive explanation comes from the souud applicatiou of the baukiug principles of the Chicago School. One problem with financial markets is that they dealt in newly created instruments that had a higher variability in value than traditional analysis suggested. Accordingly, the stress tests that are normally used to evaluate the soundness of financial arrangements understand the volatility of the financial deals, and hence the risk of widespread bankruptcy. Given the close interconnections between the parties and the rapid velocity of financial transactions, the counterparties bear only part of the overall social loss, which in turn suggests that their joint precautions will be insufficient to withstand the beating that they will take in times of stress. The result is that some form of regulation may well make sense. One sensible first step is retaiuing some overall reserve requirements.

It also bears mention that the financial markets were distorted by multiple *government* policies whose combined effect aggravated the risks of these voluntary transactions. First, the underlying mortgage securities were often mispriced, in part because of the active role that Faunie Mae aud Freddie Mac played as a buyer and guarantor of these instruments. Second, the cheap money policies of the Federal Reserve resulted in a run-up in prices of the complemeutary goods, the real estate. Third, all players operating iu these markets couuted ou an implicit federal guarantee that they would be bailed out from any economic failure, which in turn induced them to take high-risk, heads-I-win-tails-you-lose gambles, which ended in disaster. Fourth, imposing mark-to-market rules created the real risk of downward cascades that spread risk far further than should have been the case.

It has been said that free market advocates are supposed to believe in the privatization of gains and the socialization of losses. Nothing could be further from the truth. It is the height of government irresponsibility to create incentive structures that operate in this fashion. Whatever guarantees are given should be for a price that reflects the underlying risk, and, like ordinary private guarantees, contain explicit covenants on how banks and other fiuancial institutions should operate iu order to control agaiust these risks. The intellectual bliuduess of Mr. Cooper iu understanding the difference between financial and entertainment markets condemns his work to the lower levels of Dante's inferno.

Mr. Cooper shows a similar want of understanding about the ill-fated mergers under the Telecommunications Act of 1996. This statute was ballyhooed as introducing competition into the telecommunication industry, but it did nothing of the sort. Telecommunications is a network industry in which classical "wheat farm" textbook competitive solutions are not possible. The proponents of the 1996 Act oversold its supposed competitive effects because they ignored the simple fact that even after the statute was put into place the FCC and the state commissions had to figure out how to forge the appropriate integration of services of multiple carriers. Rejecting the old AT&T model of an end-to-end monopoly subject to regulation on matters of rates and access does not decide what should be put in its place.

The great disaster under the Telecommunications Act was again a *government* failure in the design of that new system. The 1996 Act allowed for either interconnection or for the purchase of "unbundled network elements" as the mode of integratiou. The FCC pushed the second approach at the expense of the first. In so doing it mispriced all the elemeuts which led to excessive subsidization of new entrants and a litigation nightmare that lasted for about a decade. Many of the mergers that took place were driven by the desire to settle the unending litigation under the 1996 Act and to correct the bad guess of Judge Harold Greene that telecommunications was best organized with AT&T as a long lines carrier and the Regional Bell Companies as local exchange carriers to be treated as regulated local monopolists. Had the bill been passed five years later, it would have been clear that the so-called "last mile" monopoly of the incumbents had largely been overtaken by technology, and the Act would have assumed, hopefully, a very different form. But however these complications play out, it is again blinding economic ignorance to confuse the proposed Comcast-NBCU merger with the unfortunate escapades of the 1990s. The technology in telecommunications has so advanced that the prospect of single firm monopoly has been blunted by the multiple pathways into the home and office.

The Comcast NBC Universal Merger in Context. Mr. Cooper's fundamental misperceptions about how markets work leads him to make counterproductive proposals for the evaluation of this merger. Desirous of some - any - grand vision of how the telecommunications and entertainment industry should look, he bravely insists that the government ought to undertake "complete industry-wide proceedings" to resolve all underlying problems and to determine the proper institutional structure for the video industry insofar as it relates to both content and carriage. This recommendation is subject two fatal flaws. The first is that it presupposes that anyone could conduct a study on this fast-moving and complex industry that could be completed before some new technological or business model innovation rendered it obsolete. Yet that result would be ideal for Mr. Cooper because in the interim he could stymie this merger on procedural grounds without presenting any persuasive evidence that the merger is anticompetitive.

On this score, he surely disagreed with the glowing appraisal of the merger offered by Comcast and NBC-Universal. But he should find it more difficult to disagree with the assessment of the Congressional Research Service's February 2, 2010 report, authored by Charles B. Goldfarb, "The Proposed Comcast-NBC Universal Combination: How It Might Affect the Video Market," which is the antithesis of Mr. Cooper's jeremiad about this merger. Mr. Goldfarb's account of the video industry notes that there is "so much uncertainty" associated with the future development of the video market as to render it impossible to make any sound predictions of the industry's direction. More concretely, he properly tends to downplay the risks of vertical exclusion that Mr. Cooper trumpets in his report. Thus the CRS acknowledges that in "some unique circumstances" a distributor might be willing to pay a huge premium to foreclose distribution of certain content through other channels. But, in practice, this result is likely to be most uncommon, and if it does occur some narrow conduct rule that is directed to this risk of foreclosure is surely a far better way to deal with this problem than the total nullification of the merger. As a matter of general theory, Mr. Cooper shows no awareness of the critical role that tailoring limited remedies can play in an intelligent antitrust policy.

It should come as no surprise that the deep conceptual confusions in Mr. Cooper's recent presentation sheds no light on the empirical evidence that surrounds this merger. In his extended remarks he chides me for a fact-free presentation in my earlier paper. That criticism is largely beside the point because my purpose there was to discredit his own attack on the merger, not to mount a first-line defense of the transaction. His most recent broadside against the merger, however, does purport to be comprehensive. Yet it offers no detailed analysis, by name, of any particular geographical or product market that might induce someone to reject the merger. That omission is inexcusable in his case because his response wholly ignores the detailed presentation Comcast and NBC Universal have offered the FCC for their merger, which does mention a large number of competitors who compete in different ways for various segments of the video market. These major players include video rental operations like Wal-Mart, Blockbuster, Hollywood Video and Net Flix. It includes over-the-air satellite firms like EchoStar and DirecTV and online companies like Amazon, BlinkX, Clicker.com, Veoh, and the like, many of which I have never heard of. And of course there are content standbys like Walt Disney and Time Warner to contend with, plus many small players in this space.

It would be presumptuous of any academic to speak about the movements that are likely to take place in this industry. The principle of comparative advantage counsels against that foolhardy undertaking. But it is critical to note the clear implications of the constant level of new entry and new innovation throughout this sector. All of these devices are imperfect substitutes for each other, just as Skype is an imperfect substitute for cell phones, which in turn are an imperfect substitute for land lines and so on. What is clear, however, is that technological innovation always expands the boundaries of the relevant market, which thereby undercuts any claim of market dominance or monopolization by any player, big or small. Mr. Cooper offers vague speculation of unambiguous movements in price and quality without a shred of evidence as to how these trends will play out over the life of this proposed merger or any other.

It may well be that this merger will crater like the Time Warner/AOL deal. But that is not an antitrust concern, but a sober reminder that bigger is not always better, and that even sophisticated business parties can make mistakes in gauging the gains from trade and the future direction of markets. But it is precisely because all mergers face economic pressures of self-correction that we should regulate them with a light hand. The cumbersome Soviet-style review process that Mr. Cooper advocates does no good for the consumers who he purports to represent. It only shows how far out of touch he is with the basics of antitrust theory as they relate to the particulars of the telecommunication market.

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* Richard A. Epstein is the James Parker Hall Distinguished Service Professor of Law, The University of Chicago, The Peter and Kirsten Bedford Senior Fellow, The Hoover Institution, and a visiting professor at New York University Law School. He is also a Distinguished Adjunct Senior Scholar at the Free State Foundation and a member of FSF's Board of Academic Advisors.

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March 9, 2010

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

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

Dear Senators Rockefeller and Hutchison,

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

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

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

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

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

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

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

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

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

Sincerely,

Charles Segars
Chief Executive Officer
Ovation

CC: The Honorable John Kerry
The Honorable John Ensign

OUTDOOR CHANNEL

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

March 10, 2010

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

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

Dear Chairman Rockefeller and Ranking Member Hutchison:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

Roger L. Werner
President & Chief Executive Officer
Outdoor Channel

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

REELZ

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March 10, 2010

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

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

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

Dear Chairman Rockefeller and Ranking Member Hutchison:

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

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

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

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

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

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

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

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

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 & CEO

Written Testimony

Sports Fans Coalition

before the

U.S. House Judiciary Committee

Thursday, February 25, 2010

Chairman Conyers, Ranking Member Smith, and Members of the Judiciary Committee:

Sports Fans Coalition thanks you for inviting us to submit written testimony for the record of today's hearing. The proposed Comcast-NBC/Universal merger poses significant issues to American sports fans, some of the most passionate consumers of media anywhere in the world.

Sports Fans Coalition is a non-profit advocacy group with a single mission: to give the American sports fan a seat at the table whenever public policy impacting sports is being made. We have a bi-partisan board of directors, including a Republican former Bush White House official, and a Democratic former Clinton White House official. Our board also includes a sports writer, a public interest advocate, and a former CEO. Our members are sports fans from around the United States. But we all have one thing in common: we love sports and think that fans should be better represented before the government.

Both Comcast, through its Regional Sports Networks, and NBC-Universal, through its NBC Sports network programming and the owned-and-operated broadcast televisions stations in markets around the U.S., hold important sports programming rights. The relevant question in this proposed merger for sports fans is: will sports, particularly local sports events, be more or less available to fans after the merger closes?

Sports Fans Coalition believes that the proposed merger risks leaving more fans shut out from watching their home teams' games. Congress, the Department of Justice ("DOJ"), and the Federal Communications Commission ("FCC") need only look to Comcast's current practices to get a preview of what is to come.

IMPORTANCE OF SPORTS PROGRAMMING

Sports programming is uniquely important content. First, unlike drama or comedy programming, the viewer helped pay to create the programming. Public resources often are used to build local arenas (see infra, "Oregon"). Public laws often contain significant waivers or special privileges for professional sports leagues, such as the anti-trust exemption granted under the Sports Broadcasting Act of 1961. 15 U.S.C. 1291-1295. The fans, taxpayers, and citizens of the U.S. literally help to underwrite sports programming and therefore deserve to receive an appropriate return on their investment. Being able to watch their home town teams play in the stadiums and arenas fans helped finance would be a good start.

Second, it is widely accepted that sports programming is "must-have" content for any multichannel video programming distributor ("MVPD") that wishes to compete against the incumbent cable operator, which often holds an attributable interest in local sports networks, arenas, or teams. As FCC Chairman Julius Genachowski said in his statement accompanying the FCC's recent program access order, "[l]ocking up a much-loved local sports franchise could be game, set, match for cable competition. Consumers who want to switch video providers shouldn't have to give up their favorite team in the process." *In Re: Program Access Rules*, First Report and Order, FCC 10-17, MB Doc. No. 07-198 (January 20, 2010). When local sports programming is not widely available in a market, fans suffer in two ways: by getting shut out from watching the games they helped to finance, and by suffering from a lack of meaningful competition between pay-TV providers.

Third, unlike scripted drama, comedy, or reality programming, which has evergreen value to viewers and can be downloaded via the Internet or cached on a DVR for later viewing, sports programming must be distributed live, and usually in high-definition, to be a compelling product. While more and more sporting events are distributed via the Internet, often by the leagues themselves, the large-screen (i.e., "living room") display typically requires a traditional cable or satellite feed. Sports fans should not be asked to settle for a time-delayed, small-screen, inferior alternative to viewing the games they rightly expect to be available on their expensive home television set.

Comcast and NBC-Universal control key sports programming in multiple markets. For example, in Washington, D.C., Comcast owns the Regional Sports Network (Mid-Atlantic Sports Network) as well as the local incumbent cable system. NBC-Universal owns WRC-TV, the network owned-and-operated NBC affiliate. This means that a local sports fan in Washington, D.C. after the merger would be highly dependent on the merged entity for his or her local sports viewing, whether a Redskins game televised on WRC (assuming NBC had acquired the rights from the NFL), a Wizards game televised on MASN, or either team playing a nationally televised game on NBC Sports.

Would the merged entity make such games available to all local sports fans, regardless of whether that fan subscribes to Comcast? If past is prologue, the answer seems to be, no.

PHILADELPHIA

Consider this blog post by a Sports Fans Coalition member in Philadelphia, where Comcast owns not only the local cable system and the Regional Sports Network, but also professional sports teams and venues:

> "I'm a student at the University of Pennsylvania, a lifelong Philadelphia area resident, and a die-hard Phillies fan. In Philadelphia, Comcast is the biggest company around, and their [network], Comcast SportsNet, carries most Phillies games on TV.

> This wasn't a problem when I lived at home, since we had Comcast. However, since moving to Penn's campus, neither the school cable provider nor the cable provider I've used since I've lived off campus has CSN (I don't get Comcast because it is far too expensive for my college student budget).
>
> This is because Comcast refuses to allow most other cable providers to carry the network, basically holding Phillies, Sixers, and Flyers fans hostage (Comcast owns large chunks of the Sixers and Flyers, so guess what channel has the rights to their games).
>
> My sophomore year, I lived on the 14^{th} story of a building. My windows faced south, and I could see the entire sports complex from my bedroom. I saw the fireworks go off before the game, the Citizen's Bank Park Bell ring after a Phillies homer, and could hear the crowd when the window was open
>
> But could I watch the game from my room? Not on television."
>
> --Sports Fans Coalition member blog post (http://www.sportsfanscoalition.org/2009/12/i-can-see-the-stadium-but-i-cant-see-the-game)

It is important to note that this sports fan cannot watch his home town baseball team playing a home game because, he says, he *cannot afford* a subscription to Comcast cable on his student's budget. Make no mistake: local sports exclusives discriminate against people who cannot afford to pay the ransom requested by the rights holder. Fans, and competition, suffer.

PORTLAND

In Portland, Oregon, the Comcast Regional Sports Network secured a ten-year exclusive distribution agreement from the Portland Trail Blazers, the only professional sports team in Oregon. Comcast still fails to widely distribute the Trail Blazers' home games to fans throughout the State.

In 2007, the Trail Blazers apparently entered into a ten-year deal with Comcast, worth about $120 million, to carry Trail Blazers games on Comcast SportsNet. At the time, fans in Oregon were told that they eventually would be able to view their home games regardless of who provided their TV.

Oregon sports fans rightfully expected to be able to watch their Trail Blazers playing home games in Portland. After all, the fans helped pay for the arena. Press accounts state that the City of Portland contributed $34.5 million to help build the Rose Garden.

Today, however, almost three years after the Comcast/Blazers deal, only Comcast cable subscribers and a few subscribers to small cable systems can watch every game the Blazers play at home. This year, for example, of the over 80 home games, 60 will be available only to subscribers who get Comcast Sports Net.

So, if a Trail Blazers fan lives in a neighborhood that is served by Charter cable, she cannot watch her Trail Blazers playing a home game. If a fan lives in a rural area where the only pay-TV providers are DISH Network or DIRECTV, he cannot watch his Trail Blazers playing a home game.

At the invitation of State legislative officials, Sports Fans Coalition Board Member Brad Blakeman testified yesterday before the Oregon State Legislature on this matter. We will continue to represent fans there as they try to secure the ability to watch their home town team play.

SOLUTION

The Department of Justice and Federal Communications Commission should ban any local sports exclusive distribution arrangements by Comcast, NBC-Universal, or their affiliated companies. It is local sporting events where the fan has the greatest stake. The fan helped to finance the local stadium. The local sports rights are fundamental to adequate competition from non-incumbent MVPDs. And the past behavior of Comcast reveals a behavioral tendency to withhold key programming rights from competitors, a problem that only would be exacerbated by the combination of Comcast, its existing sports programmers, teams, and venues, with NBC Sports, NBC local television stations, and Telemundo.

Comcast has been known to bring up DIRECTV's NFL Sunday Ticket as an example of a sports exclusive that somehow justifies Comcast's behavior in Philadelphia and elsewhere.

Not so. In Philadelphia or Oregon, local fans are not able to watch, from the comfort of their own home, their home-town team playing home games. Sunday Ticket is for out-of-market games. It has nothing to do with watching your home town team playing home games. Sports Fans Coalition believes that local fans should be able to watch their local team play its home games, regardless of how a fan gets his or her TV.

We look forward to working with the House Judiciary Committee on behalf of American sports fans to make sure that fans get some fair play in the ongoing merger proceeding and thereafter.