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Federal Communications Commission
Office of the Secretary

November 30, 2010

The Honorable Christine A. Varney
Assistant Attorney General for Antitrust
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Chairman Julius Genachowski
Commissioner Michael J. Copps
Commissioner Robert M. McDowell
Commissioner Mignon Clyburn
Commissioner Meredith Attwell Baker
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

10-56

Dear Assistant Secretary Varney, Chairman Genachowski, and Commissioners:

On November 22, I wrote to ask Assistant Secretary Varney to investigate Comcast Corporation's compliance with federal antitrust laws in light of its recent announcement designating the future positions of 43 separate individuals in the management structure of NBC Universal—a company whose acquisition has yet to be approved by either the Department of Justice or the Federal Communications Commission. Yesterday, it was revealed that Comcast had imposed a new, recurring fee on Level 3 Communications, the company slated to become the primary "backbone" delivery provider for Netflix's online movie streaming. This appears to be in exchange for Comcast simply permitting Netflix and other online video services to stream to Comcast's 17 million Internet service subscribers—who have already paid for Comcast's Internet service.

Regardless of whether these fees are novel to the industry (which historically has opaque commercial arrangements), these practices are highly problematic. These fees will likely raise prices for Netflix and other online video streaming service subscribers. More critically, they threaten the existence of an open Internet and threaten one of Comcast's biggest rivals in the video delivery to the home market. Comcast's flagrant willingness to violate net neutrality and engage in apparently anticompetitive conduct—in the midst of two simultaneous federal merger inquiries, no less—trumpets the need to stop the merger of Comcast and NBC Universal, or at a bare minimum, impose stringent conditions upon it to protect net neutrality and competition in the Internet and media marketplace.

Comcast's actions are an affront to the FCC's Internet Policy principles adopted in 2005 as well as those proposed in October 2009. In 2005, under Chairman Kevin Martin, the FCC endorsed the principle that "consumers are entitled to access the lawful Internet content of their choice." Federal Communications Commission, *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities,* 20 F.C.C.R. 14986, 14988 (2005). In 2009, the FCC proposed an additional, general rule that providers of broadband Internet access service "must treat lawful content, applications, and services in a nondiscriminatory manner." Federal Communications Commission, *In re Preserving the Open Internet and Broadband Industry Practices*, 24 F.C.C.R. 13064, 13104 (2009).

If Comcast can pick and choose which of its competitors can deliver competing content and services to its subscribers—and at what price— consumers will suffer and independent content will decline. Only Comcast will gain. I can think of no more compelling instance in recent memory that justifies the urgent need for the Commission to strengthen, expand, and enforce the open Internet principles it has forcefully set out to date. There is also no more compelling evidence supporting rejection of the proposed merger, or at a minimum, adoption of tough net neutrality conditions upon it.

Comcast's actions also raise serious antitrust concerns that in and of themselves merit investigation by the Department of Justice. The latest FCC survey from 2006 revealed Comcast to be the dominant company in the national market for home purchase of video programming—with nearly a quarter of all subscribers. Federal Communications Commission, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 F.C.C.R. 542, 689, Table B-3 (2009). However, that position has been threatened by the 2007 launch of Netflix's video streaming service, and the proliferation of other online streaming services from Apple TV, Amazon.com, and Hulu, among others. As of 2009, Comcast's video-on-demand service had 23.6 million users who generated an estimated $1 billion in annual revenues. *See* Brian L. Roberts, Chairman & CEO of Comcast, *Letter to Comcast Shareholders* (March 16, 2010), at 4, http://www.comcast.com/2009annualreview/pdf/CMS_Letter_to_shareholders.pdf; Trefis, *Comcast's On-Demand Video Service Worth More than 30x Blockbuster*, Feb. 23, 2010, http://www.trefis.com/articles/11750/comcasts-on-demand-service-worth-more-than-30x-blockbuster/2010-02-23. That same year, Netflix reported 12.3 million users and $1.7 billion in revenue—although only a portion of this amount can be attributed to its online streaming service. Netflix, Inc., Annual Report (Form 10-K), at 26 (Feb. 19, 2010).

Comcast's interest in impairing Netflix is evident to industry observers. In a recent market comparison of Comcast's video-on-demand service to Netflix's DVD rental and online streaming service, the financial firm Trefis (dubbed the "next top stock model" by the *New York Times*) found that "Netflix's pricing is much more attractive than Comcast's," and concluded, in stark terms, that "[c]able providers like Comcast could benefit from a scenario in which Netflix is forced to raise its subscription price." *See* Trefis, *Netflix Fights Comcast for Video Rental Supremacy*, July 5, 2010, https://www.trefis.com/company?article=18269.

This is the first step in that process—and it may violate the letter and spirit of the Sherman Act's prohibition on certain exclusionary unilateral conduct. *See* 15 U.S.C. § 2. Despite its nascent competitors, Comcast may hold a monopolistic share of various regional video delivery to the home markets in its "footprint", that is, in those markets where it is the incumbent cable television provider. In these markets, Comcast may enjoy market shares for pay-TV services estimated to be as high as 70%. *See* Katy Bachman, Opposition to NBCU-Comcast Intensifies, ADWEEK, Aug. 4, 2010, http://www.adweek.com/aw/content_display/news/politics/e3i266ae09ea03f402719e20c828224882e. Given that, Comcast's new fee on Level 3 Communications may constitute willful, anticompetitive maintenance of that monopoly share in violation of the Sherman Act. *See generally Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992). I urge you to investigate this conduct.

More importantly, I urge you to consider seriously blocking this merger, both to protect competition on the Internet and in the media, and to protect the public's interest in preserving a free and open Internet. If this is for some reason impossible, I urge you to impose strict conditions upon the merger to prevent further anticompetitive and Internet "closing" conduct from Comcast. I am enclosing a copy of my submission to the Commission, including the conditions I have proposed, in connection with this merger. I believe that, if necessary, these will go a long way in addressing my concerns.

Thank you for your prompt attention to this matter. I look forward to your response.

Sincerely,

Al Franken
United States Senator

United States Senate
WASHINGTON, DC 20510

June 21, 2010

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW, Room TW-A325
Washington, DC 20554

Re: MB Docket No. 10-56

Dear Commissioner:

I write to express serious and fundamental reservations about Comcast Corporation's proposed acquisition of NBC Universal (NBCU). Approval of this deal as it currently stands poses a grave threat to the public interest, threatening to set off a dangerous trend of further media consolidation, create even higher prices for consumers, and risk job loss in an already fragile economy. Simply stated, the effects of this deal will undermine the Commission's goals of competition, diversity, and localism. Further, the Federal Communication Commission's ("Commission") current regulations and the voluntary "public interest" commitments made by Comcast and NBCU are insufficient to mitigate the public interest harms. I urge the Commission to strictly scrutinize the anti-competitive and anti-consumer effects of this deal, and consider denying approval or, at the very least, imposing much stronger conditions.

I. Public Interest Harms

The public interest statement submitted by Comcast and NBCU asserts that this deal will "bring important public interest benefits to consumers," and "advance the Commission's public policy goals of diversity, localism, competition, and innovation."[1] These claims could not be further from the truth.

A. Competition

Allowing one company to control so much programming and access would reduce the competitiveness of the cable and online markets. If this merger goes through, the company would control about one out of every five television-viewing hours.[2] Comcast would have strong incentives to favor its own programming and raise prices, thereby harming both consumers and competitors.

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[1] *Applications for Consent to the Transfer of Control of Licenses, General Electric Company, Transferor, to Comcast Corporation, Transferee, Applications and Public Interest Statement*, Federal Communications Commission (filed Jan. 28, 2010), at ii (hereinafter "Public Interest Statement").

[2] Yinka Adegoke and Jui Chakravorty, *FCC Conditions on Comcast-NBC Could Hurt Synergy*, REUTERS, Nov. 11, 2009, http://www.reuters.com/article/idUSN1133772320091112 (citing report by Bernstein Research).

Since 1995, the price of expanded basic cable service has grown at three times the rate of inflation.[3] Allowing the nation's largest cable company to obtain a vastly expanded programming portfolio continues this same pattern. As Comcast executives have previously acknowledged, a strong financial incentive exists to favor their own programming.[4] Raising the prices of programming would not harm Comcast, as it would merely be moving money from one pocket to the other. As a result, access to a larger content library will merely encourage Comcast to force its competitors to pay more.[5] With Comcast's acquisition of NBCU's "must have" programming, competitors will be faced with an impossible choice: pay higher prices for content (or for additional, non-desired content), or forego a chance to compete. These higher prices will in turn be passed on to consumers. Notably, Comcast has refused to add any public interest commitment related to the cost of cable service, instead ominously noting that "we must adjust prices to account for our increased costs of doing business."[6] Consumers in Minnesota and around the country will pay the price.

The merger would also have other anti-competitive effects on Comcast competitors, particularly through the use of bundling—where a programmer combines certain "must have" and "high-value" programming with other "low-value" programming that is not strongly desired by local consumers.[7] By bundling larger packages of content, network owners can compel cable providers to pay much higher fees to carry non-consumer-requested programming. This harms smaller competitors, who are forced to pay exorbitant rates for programming they do not want, and also consumers, who are in turn forced to pay higher prices. The merged Comcast–NBCU entity would not only have an enhanced array of programming and thus more programming they want to "bundle," but also significant incentive to do so. The impact would be particularly harmful in rural markets with less cable company competition, like many areas in Minnesota. This problem is also exacerbated by the use of non-disclosure agreements, which prevent local companies from learning about discriminatory pricing.

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[3] *See Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, MM Docket No. 92-266, Report on Cable Industry Prices, 24 FCC Rcd 259, 260, ¶ 2 (MB, 2009) (noting that from 1995 to 2008, the cost of expanded basic cable increased from $22.35 to $49.65, 122.1%, compared with an increase in the Consumer Price Index of 38.4%).

[4] *See* Testimony of Steve Burke, Federal Communications Commission Hearing, *NFL v. Comcast*, April 16, 2009 at 1696-7.

[5] *The Comcast/NBC Universal Merger: What Does the Future Hold for Competition and Consumers: Hearing Before the Subcomm. On Antitrust, Competition Policy and Consumer Rights, S. Comm. on the Judiciary*, 111th Cong. 4 (2010) (statement of Andrew Jay Schwartzman, President and CEO, Media Access Project), available at http://judiciary.senate.gov/pdf/10-02-04%20Schwartzman%20Testimony.pdf ("Although Section 628 prohibits discrimination against competitors, this simply means that as long as Comcast overcharges itself, it can overcharge everyone else.") (hereinafter "Schwartzman Testimony").

[6] *See The Comcast/NBC Universal Merger: What Does the Future Hold for Competition and Consumers: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights, S. Comm. on the Judiciary*, 111th Cong. 1-2 (2010) (response to questions for the record submitted by Sen. Russell Feingold by Brian Roberts) (hereinafter "Roberts Response to Sen. Feingold").

[7] *See, e.g., An Examination of the Proposed Combination of Comcast and NBC Universal: Hearing Before the Subcomm. on Communications, Technology, and the Internet, H. Comm. on Energy and Commerce*, 111th Cong. 1-2 (2010) (statement of Colleen Abdoulah, President and CEO of WOW!) available at http://energycommerce.house.gov/Press_111/20100204/abdoulah_testimony.pdf.

The proposed merger of Comcast and NBCU is particularly concerning because it has both horizontal and vertical elements. First and foremost, this is a vertical merger that gives one company the ability to control both programming and the pipes that carry this programming (see the discussion of diversity and localism, below). If approved, the combined entity would own NBCU's vast suite of programming along with 25% of the cable airwaves. This type of vertical integration allows the entity to avoid the negotiation process for a significant share of programming and for access in many major markets, giving them significant leverage to beat their competitors. For many markets, where Comcast is "the only game in town" or competes mainly against smaller, independent cable providers, this competitive advantage may result in Comcast driving out competitors and providing less choice to consumers. This would also allow Comcast to charge even higher rates to customers.

Yet contrary to the claims of Comcast and NBCU, this merger has several key horizontal components as well. Comcast owns a controlling interest in a number of regional sports networks in major markets that currently compete with NBC Universal Sports & Olympics and the NBC owned-and-operated stations ("O&Os").[8] This merger would eliminate competition in these markets for both advertising and programming and would make it hard for competitor cable companies to exist without carrying either or both of Comcast/NBCU's must-have sports programming. Comcast also owns several local and regional news networks, including The Comcast Network and New England Cable News, which will be included in the merger and compete with the NBCU O&Os in several markets, as well as with NBCU news stations MSNBC and CNBC.[9] This could reduce the amount and diversity of local news in those areas.

The merger also harms competition in the Internet video market. The Internet's rapidly increasing potential as an alternative source of online video content is an extremely positive development for consumers, yet it poses an "existential threat"[10] to cable providers such as Comcast. Currently, the Internet video market is far more open than traditional cable, and less dominated by a few large players. Comcast has recognized the importance of this burgeoning market and designed its Fancast Xfinity service as a vehicle to protect programming behind a paywall. Acquisition of the vast programming riches held by NBCU, including its Universal film library as well as its stakes in Hulu, would allow the new entity to withhold significant programming from its competitors on the Internet. Importantly, the Commission's program access and program carriage rules do not apply in the Internet video market, giving the new entity the legal right to discriminate against its Internet competitors. Notably, Comcast Chairman/CEO Brian Roberts does not support extending the current program carriage rules to the Internet.[11] This refusal highlights the likelihood that Comcast will use its vastly expanded

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[8] *Id.* at 21 (NBCU has a controlling interest in the following regional sports networks: Comcast SportsNet California, Comcast SportsNet Mid-Atlantic, Comcast SportsNet Northwest, Comcast SportsNet New England, Comcast SportsNet (Philadelphia), Comcast Sports Southwest, Comcast Sports Southeast, Comcast SportsNet Bay Area, and Comcast SportsNet Chicago.)

[9] *See* Public Interest Statement *supra* note 1, at 20-21.

[10] Schwartzman Testimony *supra* note 5, at 6.

[11] *See The Comcast/NBC Universal Merger: What Does the Future Hold for Competition and Consumers: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights, S. Comm. on the Judiciary*, 111th Cong. 4 (2010) (response to questions for the record submitted by Sen. Al Franken by Brian Roberts) (hereinafter "Roberts Response to Sen. Franken").

video library from NBCU along with Fancast Xfinity to restrict competitors' access to programming.

Moreover, this merger is far more dangerous in light of the D.C. Circuit's ruling that the Commission does not currently possess the authority to regulate the Internet.[12] I am pleased that the Commission has developed its Third Way proposal as a response to that ruling[13] and look forward to seeing that proposal move forward. Until it does so and the Commission promulgates net neutrality regulations, however, the court's decision means that Comcast is free to use its control of its high speed Internet service to block or impede content that it finds in any way competitive with its own content. This is especially troubling given that the D.C. Circuit case began when Comcast blocked peer-to-peer transactions.[14] Comcast has refused to agree voluntarily to a five-year binding prohibition on favoring Comcast's own programming on Internet video websites.[15]

B. Diversity & Localism

Comcast and NBCU claim that their proposed merger will benefit programming diversity, noting that "the new venture will expand the amount, quality, variety, and availability of content more than either company could on its own, thus promoting the Commission's touchstone goal of diversity."[16] However, this claim misconstrues the meaning and spirit of the Commission's public interest goal of "diversity." The Commission's idea of diversity is one that reflects First Amendment values, as the Supreme Court has stated:

> [A]ssuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment. Indeed, "it has long been a basic tenet of national communications policy that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[17]

By focusing solely on its ability to expand the breadth of its own programming and ignoring the merger's effects on the communication ability of diverse and independent competitors, Comcast and NBCU fundamentally misinterpret the value of diversity in communications. Their myopic focus proves nothing as far as a market-wide, public interest benefit of diversity, and pretends that so long as one provider expands its programming lineup, that the *source* of the information is irrelevant. Viewpoint diversity cannot be achieved without

[12] Comcast Corp. v. F.C.C., No. 08-1291, 2010 WL 1286658 (D.C. Cir. Apr. 6, 2010).
[13] Austin Schlick, A *Third-Way Legal Framework for Addressing the Comcast Dilemma*, FCC Daily Digest, May 6, 2010, http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db0506/DOC-297945A1.pdf.
[14] *See* Peter Svensson, *Comcast Blocks Some Internet Traffic*, ASSOCIATED PRESS, Oct. 19, 2007.
[15] Roberts Response to Sen. Franken, *supra* note 11, at 3.
[16] Public Interest Statement, *supra* note 1, at 36.
[17] Turner Broadcasting System, Inc. v. F.C.C., 512 U.S. 622, 663-64 (1994)

a diversity of voices, and ultimately, programming that all emanates from a single corporation can only express so much in terms of viewpoint.[18]

In reality, this merger poses a grave threat to diversity in media. This large scale combination of platform and programming would only worsen the troubling trend of media consolidation, in which a handful of companies control the vast majority of the nation's broadcast television and cable business. As of 2003, just six companies owned 80 percent of the major television networks then available in more than 16 million homes,[19] and Comcast alone accounts for approximately one quarter of all U.S. cable subscribers.[20] Comcast is the nation's largest cable company and also the largest residential Internet service provider.[21]

Further, this deal harms consumers by further disadvantaging independent programmers, thereby limiting consumer choice in programming. Independent programming is already on the decline; according to an analysis done by the Independent Film and Television Alliance (IFTA), the percentage of independently produced prime-time fiction series on the national networks plunged from over 50% in 1989 to only 5% in 2008.[22] Although Comcast and NBCU claim that this merger will help provide a wider array of programs, it gives one company tremendous control over what is on the air. Moreover, if this merger succeeds, AT&T and Verizon may also decide they have to buy a Hollywood studio in order to compete—which could directly threaten independent programming overall.

My understanding of the impact of media consolidation on independent programming comes from my experience at NBC in the early 1990s. At that time, the Commission was considering whether to repeal the financial interest and syndication rules ("Fin-Syn"), which had limited networks' ability to own a financial stake in their programming. During the review process, which ultimately resulted in repeal of the rules, NBC executives asserted that repeal would not adversely affect the ability of independent producers to place their programming on NBC or cause it to favor its own programming. To the contrary, the NBC President declared, "It is in our self-interest to do everything we can to promote a strong independent production community."[23] By 1992, however, NBC was already the largest supplier of its own programming,[24] and by 2003, more than 75 percent of primetime television was produced by companies owned or controlled by the networks.[25] In 1995, NBC Executive Don Ohlmeyer

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[18] *See, e.g.,* Leonard Hill, The Axis of Access, Remarks at Weidenbaum Center on the Economy, Government, and Public Policy, Washington University in St. Louis Forum: Entertainment Economics: The Movie Industry 6 (Apr. 3, 2003), *available at* http://wc.wustl.edu/arc_events/foru_support/cg/HillSpeech.PDF.
[19] *Id.* at 3.
[20] *See* Amy Schatz & Fawn Johnson, *Court Lifts FCC Limits on Cable Companies*, WALL ST. J., Aug. 29, 2009, *available at* http://online.wsj.com/article/SB125147230997266951.html
[21] Comcast Corp., Corporate Governance, http://www.comcast.com/Corporate/About/Corporateinfo/Corporateinfo.html (last visited June 21, 2010).
[22] *Competition in the Media and Entertainment Distribution Market: Hearing Before the House Judiciary Committee*, 111th Cong. 4 (2010) (statement of Jean Prewitt, President and CEO, Independent Film & Television Alliance), *available at* http://judiciary.house.gov/hearings/pdf/Prewitt100225.pdf (hereinafter "Prewitt Testimony").
[23] Statement of Robert C. Wright, In the Matter of the Evaluation of the Syndication and Financial Interest Rules, MM Docket No. 90-162, En Banc Hearing, December 14, 1990, 2.
[24] Matthew McAllister, *The Financial Interest and Syndication Rules*, MUSEUM OF BROADCAST COMMUNICATIONS, http://www.museum.tv/eotvsection.php?entrycode=financialint.
[25] *See, e.g.,* Hill, *supra* note 18, at 3.

acknowledged the strong financial motivation behind this bias, noting that "[t]en years from now, if you don't have content ownership . . . you won't be in the business—maybe sooner."[26]

He was right. Today, if an independent producer wants to get its show on a network's schedule, it's a routine practice for the network to demand at least part ownership of the show. This is completely contrary to what NBC and the other networks said they would do when they were trying to get Fin-Syn rescinded. My fear is that the Comcast/NBCU merger, especially if it sets off another round of media mergers, could have the same kind of impact as rescinding Fin-Syn. As Jean Prewitt, President and CEO of IFTA, notes, "this merger will give the American public far less choice in programming as more channels and distribution platforms are closed to independent content."[27]

Comcast has already attempted to shut out independent channels. A number of independent companies have filed complaints before the Commission alleging that Comcast violated the program carriage rules.[28] In 2008, the Commission found that the Wealth TV network, the NFL Network, and the Mid-Atlantic Sports Network had established prima facie cases that Comcast had discriminated against them in favor of their own programming by putting its own similar networks on expanded basic cable while subjecting the independents to premium tiers viewed by far less viewers.[29] Additionally, it found that NFL Network had established a prima facie case that Comcast had "required a financial interest in the NFL's programming as a condition for carriage of the NFL Network."[30] Significantly, WealthTV alleged that Alan Dannenbaum, Comcast's Corporate Senior Vice President of Programming, stated that "Comcast will not allow another MTV to be made on Comcast's back without owning it," meaning that "Comcast would not allow a non-affiliated network to become successful without owning it."[31] The consistency of this type of complaint demonstrates that Comcast has already engaged in troubling, discriminatory behavior that would only be encouraged by a greatly expanded in-house programming library.

Additionally, Comcast has recently made comments admitting that it favors its own programming. Comcast Cable President Steve Burke noted that channels owned by Comcast are treated like "siblings" for carriage purposes.[32] Further, in its Public Interest Statement to the Commission, Comcast suggests strong reasons to favor in-house programming in developing its video on-demand offerings and online video content. Specifically, Comcast notes that this merger will allow it to reduce the "'transaction cost' difficulties of negotiating contracts with unaffiliated parties."[33] It concludes there is a "greater incentive" to invest when a distributor has "access on market terms to sufficient content to demonstrate the effectiveness of new

[26] *Show Builders: Three Perspectives on the Changing World of Television*, AD. WEEK, June 12, 1995, at 14.
[27] *See* Prewitt Testimony, *supra* note 22, at 1.
[28] *See* Federal Communications Commission, Memorandum Opinion and Hearing Designation Order, MB Docket No. 08-214, *Herring Broadcasting, Inc. d/b/a WealthTV* v. *Comcast Corp.*, File No. CSR-7907-P, *NFL Enterprises LLC* v. *Comcast Cable Communications, LLC*, File No. CSR-7876-P, T*CR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network* v. *Comcast Corp.*, File No. CSR-8001-P (Oct. 10, 2008).
[29] *Id.* At 23-36, 43.
[30] *Id.* at 29, 36-41.
[31] *Id.* at 24-25.
[32] *See* Testimony of Steve Burke, *supra* note 4, at 1696-7.
[33] Public Interest Statement, *supra* note 1, at 58.

platforms."[34] These statements suggest that a major motivation for this merger *is* to discriminate, and therefore that the merger will harm the diversity of programming not only in traditional broadcast and cable television, but also in various "new media" platforms.

Finally, this merger will have a negative effect on localism. Comcast and NBCU assert that their combination will advance localism by providing "more and better local programming, including local news and information programming."[35] However, this argument is simply an end-run around acknowledging the actual public interest value in localism. As the Supreme Court has emphasized:

> [Localism] seeks to provide "viewers and listeners ... access to locally responsive programming including, but not limited to, local news and public affairs matter" and **to ensure "diversity in what is seen and heard over the airwaves." That policy has long favored local broadcasting,** both as a means to increase coverage of local events **and, insofar as it increases the number of broadcast voices, as an end in itself.**[36]

Allowing this merger to go through as it currently stands would undermine localism, as well as hurt Minnesota citizens, by weakening local broadcasters. Local broadcasters already have a large resource gap when competing with larger conglomerates for advertising revenues. This merger would make local companies dependent on their competitor—Comcast—to obtain "must have" programming. This would threaten local Minnesota companies, who will lose out on advertising revenue while also paying higher prices for programming. Perhaps not surprisingly, then, almost 1000 Minnesotans have written into my office in opposition to the merger. As mentioned earlier, the merger may also reduce the number of local voices simply because, in certain areas in the country, the new entity will own a significant amount of local news programming—Comcast regional and local news programming as well as NBC O&Os.

II. Commission Regulations and Comcast/NBCU Commitments Fail to Mitigate Public Interest Harms

Comcast and NBCU assert that the current Commission regulations, as well as the public interest commitments they have made, will protect the public interest against any harm from the merger.[37] This is simply not the case.

Current Commission program carriage and program access rules are insufficient to prevent discriminatory conduct. Even where the rules themselves are strong, they are significantly weakened by the likelihood of severe procedural delays, the expense of pursuing complaints, unclear legal standards, and weak enforcement. Further, the scope of the rules is too narrow, as they fail to cover important growth areas such as Internet video. Finally, while the voluntary commitments offered by Comcast and NBCU are a step in the right direction, they are far too

[34] *Id.* at 64.
[35] Public Interest Statement, *supra* note 1, at ii.
[36] F.C.C. v. Fox Television Stations, Inc., 129 S.Ct. 1800, 1835 (2009) (emphasis added).
[37] *See* Public Interest Statement, *supra* note 1, at iv-v.

few, too narrow, and too temporary to prevent the damage to the public interest that will result from this transaction should it be approved.

A. Inadequacy of Commission Regulations

The Commission has implemented its program carriage and access rules pursuant to the Section 616 and Section 628 of the Communications Act, respectively.[38] The program carriage rules prevent vertically-integrated Multichannel Video Programming Distributors ("MVPDs") from discriminating in favor of their own programming, and also from demanding an ownership stake in programming in exchange for its carriage. The program access rules forbid vertically-integrated MVPDs from discriminating in prices, terms, or conditions in making their programming available to other MVPDs. While these rules are extremely important, they do not currently provide the tools necessary to prevent discrimination in carriage or access. Importantly, the exclusive contracts provision of the program access rules will sunset in 2012,[39] and Comcast has already attempted to challenge its constitutionality in court.[40] Due to these shortcomings, it is unrealistic to expect these rules to serve as a buffer for the anti-competitive and anti-consumer effects of this merger.

First, the existing program carriage rules and their enforcement structure fail to protect against carriage discrimination. To begin, the cost of pursuing a carriage complaint before the Commission is prohibitive for many smaller content providers, especially given the legal armada they are likely to face from a company like Comcast. Further, this cost is magnified by the extensive delays in Commission proceedings. Currently, the Commission has no deadlines for complaint resolution and only one administrative law judge to hear the complaints. To make matters worse, the rules currently contain no anti-retaliation provisions. Thus, even winning a case in front of the Commission can be detrimental to a company's long-term business success if it needs to work with Comcast in the future. Finally, if a company still wants to pursue a case in front of the Commission, it will have difficulty evaluating its likelihood of success, since there is no consistent definition for what constitutes a prima facie case.[41]

Second, the existing program access rules are also insufficient to protect against Comcast's enhanced incentive to discriminate from the addition of a vast content library. As previously noted, while the rules prohibit discriminatory pricing, they do not prohibit a company from raising its prices across the board. Comcast could raise the prices on its own programming for all MVPDs, forcing others to pay a premium for bundled programming without any additional cost to itself. Additionally, whatever protection the current rules do offer may soon disappear. The current rules will sunset in 2012, and there is no indication that the Commission will attempt to extend the rules, or even if it does, that the extension will be upheld in court.

[38] 47 C.F.R. § 76.1301 et seq. (program carriage rules); 47 C.F.R. § 76.1000 et seq. (program access rules).
[39] 47 C.F.R. § 76.1002(c)(6) ("Sunset provision. The prohibition of exclusive contracts . . . shall cease to be effective on October 5, 2012, unless the Commission finds, during a proceeding to be conducted during the year preceding such date, that said prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.")
[40] *See* Cecilia Kang, *Cable Companies Lose Court Challenge of FCC on Channel Access Rules*, WASH. POST, Mar. 12, 2010, *available at* http://voices.washingtonpost.com/posttech/2010/03/cable_cos_lose_court_challenge.html.
[41] *See generally* David Huston, *Paying the Price for Sports TV: Preventing the Strategic Misuse of the FCC's Carriage Regulations*, 61 Fed. Comm. L. J. 407 (2009).

Additionally, as already mentioned, program carriage and program access rules do not apply to the Internet. An Internet service provider such as Comcast is free to discriminate by delaying or even blocking traffic to the sites of other content providers and speeding up access to its own content, without fear of legal repercussions. To make matters worse, Comcast has already admitted to blocking file-sharing programming on its network,[42] and the Commission does not currently possess the authority to promulgate net neutrality regulations.[43] In other words, even if the program carriage and access rules were effective, the scope of Commission rules prohibiting discrimination is far too narrow.

Thus, Comcast's and NBCU's assurances that the current Commission regulations will protect consumers from any potentially harmful effects from the merger have little merit.

B. Inadequacy of Public Interest Commitments

Finally, as they currently stand, Comcast and NBCU's public interest commitments are insufficient to address the public interest harms this merger will cause. First, and most importantly, these commitments are promises, and are only as trustworthy as the company that asserts them. Comcast, however, has a recent history of dishonest behavior in front of the Commission. In a hearing concerning Comcast's secret blocking of peer-to-peer filing networking application BitTorrent, the Commission noted that Comcast's response to the complaint "raise[d] troubling questions about Comcast's candor during this proceeding."[44] The Commission also noted that "Comcast's first reaction to allegations of discriminatory treatment was not honesty, but at best misdirection and obfuscation."[45] Thus, while I am glad that Comcast and NBCU are making public interest commitments, I cannot treat these commitments as sufficient to protect the public interest.

Second, while the merger and its negative effects are indefinite, Comcast and NBCU's public interest commitments are not. More specifically, some of the most crucial concessions made by Comcast and NBCU are tied to timelines. In Commitments 14 and 15, for example, Comcast agrees to accept the program access rules with respect to high definition feeds, and extend "key components" of the program access rules to retransmission consent negotiations. Both of these commitments, however, are tied to the program access rule, which are set to expire in 2012. Further, the agreement to extend "key components" of the program access rules is itself vague, and provides nothing concerning the particularity of the obligation.

Finally, even the public interest commitments that purport to address diversity and localism provide little in the way of substance. In its Commitment 2, Comcast pledges to "preserve and enrich the output of local news, local public affairs, and other public interest

[42] *See* Comcast Corp., slip op. at 4.
[43] *Id.* at 3 (holding that the FCC does not have the authority to regulate Comcast's network management practices).
[44] Federal Communications Commission, In re Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, File No. EB-08-IH-1518 (Aug. 20, 2008), at 5, n.32.
[45] *Id.* at 32.

programming on NBC O&O stations." This commitment is remarkable is what it does NOT include. Comcast would be able to fulfill this commitment solely through its own carriage, providing little in the way of assurance that diverse and local voices from other sources remain on the air. Further, the commitment to preserve diversity by adding two independent channels a year for three years is largely insignificant, a drop in the bucket considering the vast library of channels Comcast would provide. As Jean Prewitt, President & CEO of IFTA, identified in her testimony, Comcast has not even defined "independent," leaving open the question of what percentage of its content will need to be truly independent.[46]

The public interest commitments made by Comcast and NBCU, while a good first step, fail to address directly the damage to competition, diversity, and localism that would result from this merger.

III. Conditions

I firmly believe that the Comcast/NBCU merger should be rejected. The harms caused by this merger are significant and long lasting. No set of promises or conditions, no matter how well-intentioned, can sufficiently mitigate those harms.

That said, should the Commission decide to let the merger go forward, it should impose long-lasting and substantial conditions on the merger. Merger conditions should last at least five (5) years. At the very minimum, I would suggest the following nine conditions:

1) Comcast/NBCU should make any programming or channel in which it has a financial interest available to any Multichannel Video Programming Distributor ("MVPD") on reasonable and nondiscriminatory terms, whether or not Federal Communications Commission ("Commission") program access rules apply.

2) Comcast/NBCU should not discriminate against non-Comcast/NBC programmers in favor of Comcast/NBCU-owned programming, whether or not Commission program carriage rules apply. I would also like to see the Commission speed up its efforts at reform of the program carriage rules.

3) Comcast/NBCU should make any online programming or channel in which it has a financial interest available to its competitors on the Internet, as if program access rules applied.

4) Comcast/NBCU should be required not to favor its own programming on the Internet, as if net neutrality regulations were in place.

5) An MVPD subscription should not be required to view NBCU/Comcast content on the Internet.

6) The Commission should establish a fixed shot clock for any access or carriage disputes involving Comcast/NBCU, to ensure that the disputes are handled within a reasonable amount of time and to prevent delays.

[46] *See* Prewitt Testimony, at 3.

7) The ability of Comcast/NBCU to bundle its programming when selling it to competitors should be limited, in order to prevent Comcast/NBCU from abusing its market power.

8) So that the Commission and the public can ensure that Comcast/NBCU is abiding by its commitments to increase the amount of local programming, Comcast/NBCU should publicly disclose on a regular basis the amount of local news and public affairs programming aired on each of the owned and operated broadcast stations. As part of this regular disclosure Comcast/NBCU should also identify the amount of independently-produced programming aired on each of its owned and operated broadcast stations, as well as on each cable channel controlled by Comcast/NBCU post-merger.

9) Comcast/NBCU should not be able to use limited distribution agreements to keep content off Internet web sites or distributors. Limited exceptions and modifications to this principle are reasonable as long as the condition truly prevents Comcast/NBCU from abusing its market power in order to keep content off the Internet.

Conclusion

The proposed Comcast/NBCU merger fails to promote competition, diversity or localism, instead wreaking havoc on those very values. I urge the Commission to examine the numerous direct and collateral effects this merger would have on consumers and small and rural cable companies; on people's cable bills; and on the programming they view on TV and on the Internet.

Perhaps most of all, I urge the Commission to consider the precedent this merger would set. Five years from now, we could live in a world in which most Internet Service Providers own Hollywood studios. The question is whether we'd be all be better off for it.

The answer, in my mind, is clear: we would not.

Thank you for your consideration of this matter.

Sincerely,

Al Franken

Al Franken
United States Senator