WRITERS GUILD OF AMERICA, WEST

Testimony of John Wells, President
Writers Guild of America, West
before the
U.S. Senate Commerce Committee
on the matter of
Consumers, Competition, and Consolidation in the Video and Broadband Market

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

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

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

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

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

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

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

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

Comcast, as the largest provider of video services, is in a unique position to determine the fate of cable networks. With the integration of NBCU's cable networks, Comcast has an opportunity to abuse its dominant position to bump other channels out of the most popular tiers in favor of its newly acquired networks. This new media superpower could in effect deny consumers the ability to select channels, through its marketing practices of bundling channels, channel positioning and tier placement. With little transparency in pricing or rate increases, consumers will increasingly be at the mercy of dominant cable and Internet providers, with little or no competition to ensure reasonable access fees.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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