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**Hearing on "Competition, Consumers, and the Proposed Comcast-NBC Merger"**

**Before the U.S. Senate Committee on Commerce, Science, and Transportation**

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

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

One of the most striking aspects of the proposed transaction is how clean the combination of Comcast and NBC Universal would be in this regard. The transaction does not create any new compliance issues,[1] and as I will discuss in greater detail later in my testimony, conventional

[1] NBC Universal and its parent company, General Electric, are addressing two minor, preexisting compliance issues. Applications and Public Interest Statement by Comcast Corp. General Electric Co., and NBC Universal, Inc., at 73-75 (filed Jan. 28, 2010), *Applications for Consent to the Transfer of Control of Licenses, General Electric Co., Transferor, to Comcast Corp., Transferee* (MB Dkt No. 10-56). NBC's acquisition of Telemundo gave it control of three television stations in the Los Angeles market. Because the Los Angeles broadcast television market is home to more independent ownership groups than any city in the nation and because forced sales reduce the value of stations and artificially limit the range of potential buyers, the FCC ruled that it was

antitrust analysis indicates that the relevant markets are structured in a way that makes it unlikely that the merger will harm consumers.

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

Commissioners of the Federal Communications Commission (FCC) and commentators have long criticized the use of merger conditions as a mechanism for making policy.[2] Traditional notice-and-comment rulemaking promotes public participation. By their nature, merger conditions restrict conduct permitted by the existing rules (otherwise the restriction

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in the public interest to grant NBC a temporary waiver of its duopoly rule. *Telemundo Communications Group, Inc. Transferor, and TN Acquisition Corp., Transferee,* Memorandum Opinion and Order, 17 F.C.C.R. 6968-79 ¶¶ 46-53 (2002). In addition, the bankruptcy of American Community Newspapers caused debt owned by General Electric to be converted into nonvoting equity, which under the FCC's rules turned General Electric into a partial owner of two small community newspapers in Fort Worth, Texas, whose communities of service fall within the contour of one of its television stations. Given the involuntary nature of such changes, FCC policy usually accords parties subject to such a change in status a reasonable time to come into compliance with these rules. The Public Interest Statement reaffirmed the merging parties' commitment to resolving these issues in a reasonable time frame.

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

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

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

would be imposed by general regulation rather than by the order clearing the merger). The problem is that they are imposed outside of the normal regulatory processes, and even when orders clearing the merger are subject to notice and comment, the resolution of the issues is more likely to be driven by the issues raised by a particular transaction and less likely to yield a clear statement of agency policy.

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

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

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

## THE STANDARD FRAMEWORK FOR ANALYZING THE CONSUMER IMPACT OF MERGERS

The standard framework for evaluating the consumer impact of any merger is enshrined in the *Merger Guidelines* jointly promulgated by the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice.[5] Recent studies conducted by Federal Trade Commission and the Justice Department reveal that actual enforcement policy is even more permissive.[6] The thresholds contained in the *Merger Guidelines* should thus be considered a safe harbor within which parties should not expect to be challenged. Conversely, the fact that a merger may exceed the relevant thresholds by a small amount should not be regarded as inherently problematic.

The *Merger Guidelines* draw a distinction between *horizontal mergers* and *vertical mergers*. A merger is horizontal if it is between two firms that sell products that substitute for one another. In short, consumers are likely to buy one or the other, but not both, which makes the firms selling these products direct competitors. A merger is vertical if it is between firms that

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

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

5 First promulgated in 1968, the portion of the guidelines governing horizontal mergers was last revised in 1997. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (revised Apr. 8, 1997), *available at* http://www.justice.gov/atr/public/guidelines/hmg.pdf [hereinafter HORIZONTAL MERGER GUIDELINES]. That revision left in place the existing guidelines governing nonhorizontal (including vertical) mergers, which were last revised in 1984. U.S. DEP'T OF JUSTICE, MERGER GUIDELINES (revised June 14, 1984), *available at* http://www.justice.gov/atr/public/guidelines/2614.pdf [hereinafter NON-HORIZONTAL MERGER GUIDELINES].

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

sell products that complement one another, in that they are consumed together. In these cases, the fact that consumers typically have to buy both products if they are to enjoy them means that these parties to a vertical merger do not compete directly with one another.

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

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

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

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

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

through broadcast television stations owned and operated by NBC or through cable operators owned by Comcast.

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

## HORIZONTAL INTEGRATION IN THE MARKET FOR RETAIL VIDEO DISTRIBUTION

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

The analytical framework laid out in the *Merger Guidelines* turns on a measure of concentration known as the Herfindhal-Hirschman Index (HHI), which measures the degree of market concentration by ranking it on a scale from 0 to 10000.[8] Markets with HHIs below 1000 are considered unconcentrated. Markets with HHIs between 1000 and 1800 are considered moderately concentrated. Markets with HHIs above 1800 are considered highly concentrated. The degree of market concentration in turn determines the degree of antitrust scrutiny:

[8] According to the *Merger Guidelines*, HHI is calculated by summing the squares of the individual market shares of all the participants. For example, a market consisting of four firms with market shares of 30%, 30%, 20% and 20% has an HHI of $30^2 + 30^2 + 20^2 + 20^2 = 2600$. HORIZONTAL MERGER GUIDELINES, *supra* note 5, § 1.5, at 15 & n.17.

**Figure 1: HHI Thresholds Under the Merger Guidelines**

| Post-Merger HHI | Increase in HHI Caused by Merger | Outcome |
|---|---|---|
| Less than 1000 | N/a | Approved w/o further analysis |
| 1000-1800 | Less than 100 | Approved w/o further analysis |
| 1000-1800 | More than 100 | Further analysis required |
| More than 1800 | Less than 50 | Approved w/o further analysis |
| More than 1800 | More than 50 | Further analysis required |
| More than 1800 | More than 100 | Presumed anticompetitive |

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

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

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

MVPDs participate in multiple markets. First, they serve household subscribers, who consume video programming. Second, they sell advertising. Third, they obtain programs from

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

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

various programming sources.  The geographic scope of these markets differs substantially.  The first two markets are local in scope.  The third is national.

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

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

| Company | Subscribers | Share | HHI |
|---|---|---|---|
| Comcast | 23,891,000 | 23.3% | 541 |
| DirecTV | 18,304,999 | 17.8% | 317 |
| DISH Network | 13,610,000 | 13.2% | 176 |
| Time Warner Cable | 13,048,000 | 12.7% | 161 |
| Cox | 5,316,055 | 5.2% | 27 |
| Charter | 4,929,900 | 4.8% | 23 |
| Cablevision | 3,093,000 | 3.0% | 9 |
| Verizon FiOS | 2,515,551 | 2.4% | 6 |
| Bright House | 2,301,320 | 2.2% | 5 |
| AT&T U-verse | 1,585,470 | 1.5% | 2 |
| Other | 14,139,493 | 13.8% | 5 |
| | | | |
| Total | 102,734,788 | 100.0% | 1272 |

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

I calculate that as of the end of 2009, the HHI in the national MVPD market was 1272. This represents a drop of 75 points from the year before.  This implies that the national market for MVPDs is moderately competitive.  Moreover, because NBC Universal does not control any MVPD assets, the post-merger increase in HHI is zero.  Thus, under the approach described in the *Merger Guidelines*, which represents the starting point for all antitrust analyses, the Comcast-NBC Universal merger is unlikely to have any adverse effect on consumers.  Under the *Merger Guidelines*, policymakers may thus set aside without any further analysis any concerns about the impact on horizontal concentration in the national market in which MVPDs bargain with sources of television programming.

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

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

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[11] 47 U.S.C. § 543(*l*)(1)(B) & (D).

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

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

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

Because NBC Universal does not possess any MVPD properties, the proposed merger would neither increase nor decrease concentration in the MVPD market. As a result, the merger would have no horizontal effects on the 89% of U.S. households that depend on an MVPD for their television service.[14] Although many subscribers complain about cable prices, these subscribers are also receiving significantly larger numbers of channels. Empirical studies indicate that when adjusted for the number of channels, rate regulation caused quality-adjusted cable rates to rise, while deregulation caused quality-adjusted cable rates to fall.[15] Although I am certain that these consumers could wish for more options and more competition, the evidence suggests that the market is already quite competitive and becoming more so.

At the same time, Comcast possesses no broadcast television stations. The proposed merger will thus have no effect on the remaining 11% of U.S. households that rely solely on over-the-air service for the television needs. An analysis of the number of over-the-air channels available in these markets suggests that the broadcast-only portions of these markets remain relatively competitive. Moreover, where competition is lacking, it is the result of the FCC's

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

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

spectrum allocation properties and would remain whether or not the merger is allowed to proceed.

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

| Market | Total Channels | Channels Owned by NBC |
|---|---|---|
| Chicago | 40 | 5 |
| San Francisco | 31 | 3 |
| Washington | 32 | 3 |
| Miami | 27 | 4 |
| Philadelphia | 30 | 2 |
| Hartford-New Haven | 21 | 1 |

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

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

Equally importantly, the FCC once imposed a rule preventing a single entity from owning both a cable operator and a television station in the same market. The court reviewing this rule

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

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

concluded that it was inconsistent with the FCC's statutory obligations and ordered the FCC to vacate it.[18] The FCC subsequently did so and appears to have abandoned all efforts to reinstate it.[19]

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

That said, the decisions ruling that broadcasting and MVPDs constitute distinct product markets antedated the digital television transition. As I have noted in my previous work, digital broadcasters have the option to use their channels to transmit multiple streams of standard-definition television.[21] The result is a dramatic increase in the number of channels available. For example, Los Angeles residents can now receive nearly 70 over-the-air television stations. News reports indicate that the increase is so dramatic that some viewers are considering dropping their

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

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

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

[21] Yoo, *supra* note 16, at 213.

MVPD service and instead simply relying on broadcasting.[22] Including broadcasters and MVPDs in the same product market would radically deconcentrate the market for local television distribution and make them more competitive.

But perhaps the most dramatic development of recent years is the emergence of the Internet as an important means for distributing video programming, demonstrated most forcefully by the growing importance of properties such as YouTube and Hulu. The proliferation of new last-mile broadband technologies has made determining the level of horizontal concentration in the market for high speed data more difficult.

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

| Company | Subscribers | Share | HHI |
|---|---|---|---|
| Comcast | 15,684,000 | 21.4% | 459 |
| AT&T | 15,638,000 | 21.4% | 456 |
| Verizon | 9,174,000 | 12.5% | 157 |
| Time Warner Cable | 9,167,000 | 12.5% | 157 |
| Cox | 4,150,000 | 5.7% | 32 |
| Charter | 3,010,100 | 4.1% | 17 |
| Qwest | 2,951,000 | 4.0% | 16 |
| Cablevision | 2,522,000 | 3.4% | 12 |
| CenturyLink | 2,189,000 | 3.0% | 9 |
| Bright House | 1,441,384 | 2.0% | 4 |
| Other | 7,310,768 | 10.0% | 7 |
| | | | |
| Total | 73,237,252 | 100.0% | 1325 |

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

The calculation is further complicated by the advent of wireless broadband technologies. The most recent data reported by the FCC indicate that wireless broadband has already captured

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

nearly 25% of the market for high-speed lines (defined as connections providing 200 kbps in at least one direction) and nearly 17% of the market for advanced service lines (defined as connections providing 200 kbps in both directions).[23] Because the market for wireless broadband services are even more competitive than the market for wireline broadband services, the addition of wireless broadband services would probably deconcentrate the market still further and make it even more price competitive.

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

## HORIZONTAL INTEGRATION IN THE MARKET FOR TELEVISION NETWORKS

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

It is obvious that NBC Universal is a significant player in the market for television networks. If one considers only cable networks (and ignores broadcast networks) and measures market share in terms of total industry revenue, NBC Universal, led by USA Network, SyFy,

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

CNBC, and Bravo, has earned an 8.8% share of the market revenue, good for 4th place among all cable programmers. Comcast in comparison is a relatively minor provider of cable programming. Its highest ranked channel is E! Entertainment Television, which checks in as the 34th-highest grossing channel.[24] Altogether, Comcast's cable programming properties account for only 3.3% of overall market revenues. The combined company would control only 12.1% of the market, which would leave the merged company in 4th place among cable programming companies. Most importantly, post-merger HHIs would only be 1202, and the merger would lead to an increase of only 58 points. Under the thresholds provided by the *Merger Guidelines*, regulatory authorities should conclude without further analysis that the horizontal impact of this merger on the market for television networks will not adversely affect consumers.

**Figure 5: HHI in the Market for National Cable Networks as Measured by Total Revenue (as of April 2009)**

| Company | Revenue (millions) | Pre-Merger Share | HHI | Post-Merger Share | HHI |
|---|---|---|---|---|---|
| Walt Disney | $9,388 | 20.6% | 426 | 20.6% | 426 |
| Time Warner Inc. | $8,471 | 18.6% | 347 | 18.6% | 347 |
| Viacom | $5,528 | 12.2% | 148 | 12.2% | 148 |
| NBC Universal | $4,003 | 8.8% | 77 | 12.1% | 147 |
| News Corp. (Fox) | $3,260 | 7.2% | 51 | 7.2% | 51 |
| A&E Networks | $2,504 | 5.5% | 30 | 5.5% | 30 |
| Discovery | $1,944 | 4.3% | 18 | 4.3% | 18 |
| Comcast | $1,505 | 3.3% | 11 | N/a | N/a |
| Liberty Media | $1,371 | 3.0% | 9 | 3.0% | 9 |
| Scripps | $1,251 | 2.7% | 8 | 2.7% | 8 |
| Other | $6,265 | 13.8% | 19 | 13.8% | 19 |
| | | | | | |
| Total | $45,491 | 100.0% | 1144 | 100.0% | 1202 |

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

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

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

**Figure 6: HHI in the Market for National Cable Networks as Measured by Primetime Nielsen Ratings (Full-Year Average for 2009)**

| Owner | Nielsen Rating | Pre-Merger Share | HHI | Post-Merger Share | HHI |
|---|---|---|---|---|---|
| Viacom | 7.0 | 19.9% | 396 | 19.9% | 396 |
| Time Warner Inc. | 6.0 | 17.1% | 291 | 17.1% | 291 |
| Walt Disney | 4.6 | 13.1% | 171 | 13.1% | 171 |
| NBC Universal | 4.0 | 11.5% | 132 | 13.9% | 192 |
| A&E Networks | 3.0 | 8.5% | 72 | 8.5% | 72 |
| News Corp. (Fox) | 2.7 | 7.5% | 57 | 7.5% | 57 |
| Discovery | 2.2 | 6.2% | 38 | 6.2% | 38 |
| Scripps | 1.5 | 4.4% | 19 | 4.4% | 19 |
| Cablevision | 0.9 | 2.4% | 6 | 2.4% | 6 |
| Comcast | 0.8 | 2.4% | 6 | N/a | N/a |
| Other | 2.5 | 7.1% | 7 | 7.1% | 8 |
| | | | | | |
| Total | 35.1 | 100.0% | 1194 | 100.0% | 1249 |

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

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

**Figure 7: HHI in the Market for All National Television Networks as Measured by Total Revenue (as of April 2009)**

| Company | Revenue (millions) | Pre-Merger Share | HHI | Post-Merger Share | HHI |
|---|---|---|---|---|---|
| Walt Disney | $12,638 | 20.7% | 428 | 20.7% | 428 |
| Time Warner Inc. | $8,766 | 14.3% | 206 | 14.3% | 206 |
| General Electric | $8,260 | 13.5% | 183 | 16.0% | 255 |
| News Corp. (Fox) | $5,724 | 9.4% | 88 | 9.4% | 88 |
| CBS Corp. | $5,546 | 9.1% | 82 | 9.1% | 82 |
| Viacom | $5,528 | 9.0% | 82 | 9.0% | 82 |
| A&E Networks | $2,504 | 4.1% | 17 | 4.1% | 17 |
| Discovery | $1,944 | 3.2% | 10 | 3.2% | 10 |
| Comcast | $1,505 | 2.5% | 6 | N/a | N/a |
| Liberty Media | $1,371 | 2.2% | 5 | 2.2% | 5 |
| Other | $7,328 | 12.0% | 13 | 12.0% | 13 |
| | | | | | |
| Total | $61,114 | 100.0% | 1119 | 100.0% | 1186 |

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

The same is true if one includes both broadcast and cable networks and measure market share in terms of primetime Nielsen rating. The post-merger HHI is 1114, and the merger would lead to an increase of only 42 points. Similar results hold if one uses total day Nielsen ratings instead of primetime ratings.

**Figure 8: HHI in the Market for All National Television Networks as Measured by Primetime Nielsen Ratings (Full-Year Average for 2009)**

| Company | Nielsen Rating | Pre-Merger Share | HHI | Post-Merger Share | HHI |
|---|---|---|---|---|---|
| Walt Disney | 8.8 | 15.0% | 225 | 15.0% | 225 |
| NBC Universal | 8.7 | 14.7% | 217 | 16.2% | 261 |
| News Corp. (Fox) | 8.0 | 13.6% | 184 | 13.6% | 184 |
| Viacom | 7.0 | 11.9% | 141 | 11.9% | 141 |
| Time Warner Inc. | 6.5 | 11.0% | 121 | 11.0% | 121 |
| CBS Corp. | 6.3 | 10.8% | 116 | 10.8% | 116 |
| A&E Networks | 3.0 | 5.1% | 26 | 5.1% | 26 |
| Univision | 2.2 | 3.7% | 14 | 3.7% | 14 |
| Discovery | 2.2 | 3.7% | 13 | 3.7% | 13 |
| Scripps | 1.5 | 2.6% | 7 | 2.6% | 7 |
| Cablevision | 0.9 | 1.4% | 2 | 1.4% | 2 |
| Comcast | 0.8 | 1.4% | 2 | N/a | N/a |
| Other | 3.0 | 5.1% | 4 | 5.1% | 4 |
| | | | | | |
| Total | 58.8 | 100.0% | 1072 | 100.0% | 1114 |

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

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

[25] comScore, Media Metrix Report, Nov. 2009, *available at* http://www.comscore.com.

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

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

## VERTICAL INTEGRATION BETWEEN THE MARKET FOR TELEVISION NETWORKS AND THE MARKET FOR RETAIL VIDEO DISTRIBUTION

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

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

First, the firm must have market power in one market (typically called the primary market). Without market power in the primary market, the merging firm would have nothing to use as leverage over the other market. Market power in the primary market is assessed according to HHI. Because, as noted earlier, vertical mergers raise fewer anticompetitive concerns than horizontal mergers, the guidelines indicate that antitrust authorities are unlikely to challenge a vertical merger unless HHI in the primary market exceeds 1800.[27]

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

Third, even if these structural preconditions are met, the *Merger Guidelines* recognize that the presence of offsetting efficiencies might nonetheless justify permitting a merger to go

[26] *See* Yoo, *supra* note 16, at 187-205 (tracing the longstanding debate between the Chicago and post-Chicago schools of antitrust law and economics).
[27] NON-HORIZONTAL MERGER GUIDELINES, *supra* note 5, § 4.213, at 28.
[28] *Id.* § 4.212, at 27-28.

forward even when the market is structured in such a manner as to raise the possibility that the merger might have some anticompetitive effects.[29]

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

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

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

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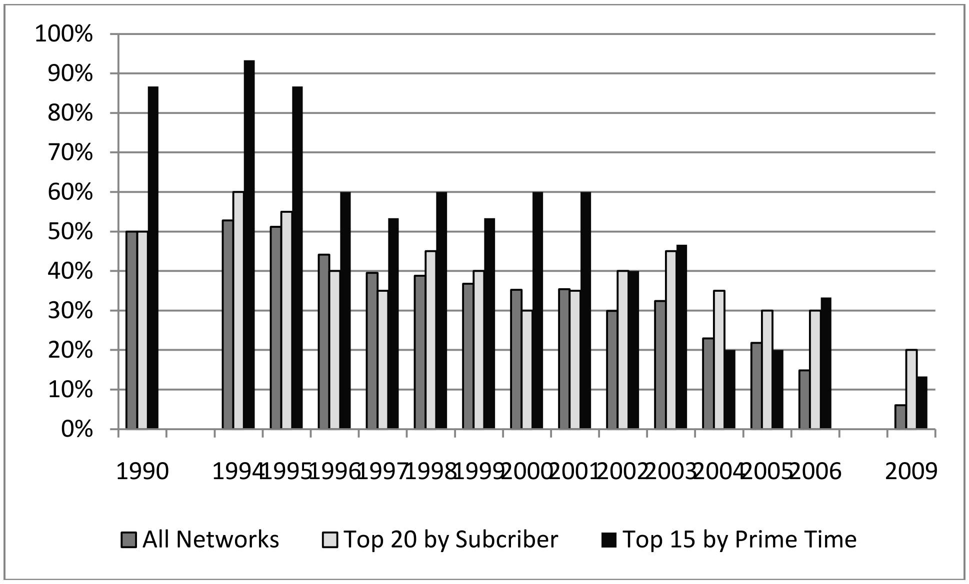
[29] *Id.* § 4.24, at 30.

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

**Figure 9: Vertical Integration Between Cable Networks and MVPDs**




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

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

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

Another survey published in the *Handbook of Antitrust Economics* similarly reviewed twenty-three published empirical studies of vertical restraints. Despite the relatively small sample size, the authors found the empirical evidence to be "quite striking," "surprisingly consistent," "consistent and convincing," and even "compelling." As a general matter, "privately imposed vertical restraints benefit consumers or at least do not harm them," while government mandates or prohibitions of vertical restraints "systematically reduce consumer welfare or at least do not improve it." Together "[t]he evidence . . . supports the conclusion that in these markets, manufacturer and consumer interests are apt to be aligned, while interference in the market [by the government] is accomplished at the expense of consumers (and of course manufacturers)." The authors conclude that "the empirical evidence suggests that in fact a relaxed antitrust attitude towards [vertical] restraints may well be warranted."[32]

In the absence of structural considerations that make it likely that the proposed merger will harm consumers and in light of the strong empirical evidence that vertical integration

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[31] James C. Cooper et al., *Vertical Antitrust Policy as a Problem of Inference*, 23 INT'L J. INDUS. ORG. 639, 648, 658, 662 (2005).

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

typically does not harm and often benefits consumers, there seems little justification for imposing additional conditions on this merger.

## CONCLUSION

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

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

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