

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

**BEFORE THE SENATE COMMITTEE ON  
COMMERCE, SCIENCE & TRANSPORTATION**

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

**MARCH 11, 2010**

Chairman Rockefeller, Ranking Member Hutchison, and Members of the Committee, thank you for inviting me to appear today to testify on the proposed combination of Comcast and NBC Universal. My name is Colleen Abdoulah, President and CEO of WOW!, a terrestrial-based, mid-sized competitive provider of cable television and other broadband-related services operating in Illinois, Indiana, Michigan and Ohio.<sup>1</sup> In those markets, we face some of the most intense competition in the United States, going toe-to-toe with multiple providers of video, Internet, and voice service. We also, by the very nature of our business, are a major consumer of programming on behalf of our subscribers. WOW! negotiates programming deals with some of the largest media conglomerates to secure rights to distribute broadcast stations and cable networks that are essential to our company's viability in the market.

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

**I. Introduction to WOW! and the American Cable Association**

Customers appreciate having a choice of communications providers, and when they choose WOW!, it is because we offer great value at a fair price. Our true differentiation is the customer experience we provide, from the products we offer to how we sell, install, and service our customers. It is for that reason that I am especially proud that *Consumer Reports* just ranked WOW! as the "Number 1" provider of video, Internet, and voice services in the United States, outperforming AT&T, Verizon, Comcast, and satellite providers. In addition, in 2009, we were ranked highest by J.D. Power and Associates for overall customer satisfaction among television, Internet, and residential phone providers in the North Central Region. WOW! has received 10 of these awards in the past five years. These awards are not serendipitous. Since our inception,

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<sup>1</sup> WOW! began operations in March 2000 in the Denver market, and in 2001 it acquired Ameritech's extensive competitive cable television systems in the Midwest. Today, it serves approximately 465,000 customers.

WOW! has been dedicated to caring for and respecting our customers, and it is heartening that in turn our customers appreciate what we do for them.

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

In addition to being a consumer of programming, in our Chicago and Detroit markets, covering approximately 1 million households, WOW! competes directly with Comcast's cable systems. It also competes with both Comcast and NBC's television stations in the local advertising market and now with their Internet distribution platforms. In sum, WOW! has a major vested interest in the federal government's review of the proposed combination to ensure that it neither harm consumers nor a vibrant competitive marketplace.

I am also here on behalf of the American Cable Association (ACA), which represents approximately 900 smaller MVPDs that operate in every state. Just like WOW!, all of these providers are consumers of content controlled by Comcast and NBC Universal, and many of them compete as described above. More specifically, all ACA members purchase national programming from Comcast and NBC Universal; more than 100 purchase programming from Comcast's RSNs; and, more than 20 purchase programming both from a Comcast RSN and a NBC Universal O&O television station in the same market. Moreover, in addition to WOW!, more than 35 ACA members compete directly against Comcast's cable systems, including in West Virginia, California, Maryland, and Washington. So, harms caused by the proposed combination will be felt across the country.

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

In addressing the proposed combination of Comcast and NBC Universal, it is important for the Committee to understand at the outset that Comcast and NBC Universal have already admitted that the deal raises competitive concerns and have proffered a series of voluntary, albeit insufficient, commitments to address these concerns.<sup>3</sup> Of course, Comcast and NBC Universal

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<sup>2</sup> The Federal Communications Commission (FCC) classifies some of this content as "must have" programming, and we know that other content is much in-demand by our customers. In reviewing this proposed combination, it is not critical that content be "non-replicable" or "must have" – only that the content be sufficiently desirable to enable the entity owning or controlling it to possess market power as a result. Moreover, once an entity has "market power content," it can, and many do today, leverage it in a number of ways, many of which are discussed in this testimony. For instance, television network owners with market power today, bundle their low-value content with higher-value networks, which in essence compels WOW! to carry non-consumer requested programming.

<sup>3</sup> While on their face the Comcast-NBC Universal "commitments" may superficially reflect access to programming (broadcasting and otherwise) concessions, in reality they

have greatly understated both the type and extent of harms that would result should this proposed combination be approved by the FCC and the DOJ. Let me summarize our concerns with the transaction:

- First, the harms. This is an unprecedented deal, which, if consummated, would substantially increase the market power of Comcast, threatening consumers and competition in the traditional, and the rapidly evolving Internet, content and distribution arenas. Contrary to the claims of Comcast and NBC Universal, the proposed combination is not a mere vertical integration of Comcast's distribution assets with NBC Universal's programming assets – which by itself would raise competitive concerns.<sup>4</sup> Rather, the deal is also a horizontal combination of key content assets of the two firms, giving Comcast substantially increased market power that it would employ either to withhold content or extract additional fees and impose unreasonable carriage requirements from video distributors across the country. The harm would be especially great for video distributors that compete directly with Comcast's cable systems. The harm also would extend to the evolving online marketplace where Comcast could either withhold content from competitors or impose higher-fees and discriminatory or other unreasonable conditions for carriage. In the end, should this proposed combination be approved, as programming fees ratchet-up and MVPDs are forced to carry low-value networks, consumers across the country will see significant increases in prices to access video programming, both via traditional cable services and online.
- Second, the relief. In fashioning relief to address the anticompetitive harms caused by the proposed combination, it would be a grave error to rely on the current Program Access statute and rules or upon conditions, including arbitration, agreed to in previous mergers with programmers and distributors. Both are riddled with so many loopholes and flaws and are so costly and resource-intensive that they are simply ineffective in remedying access to programming issues, particularly for smaller operators most vulnerable to market power abuses. Rather, the FCC and the DOJ need to develop both robust structural relief, including divestitures, and behavioral relief, including much stronger program access requirements, if the severe harms are to be remedied.

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provide neither material certitude of program access nor assurance of a level playing field with regard to terms and conditions for access. For example, using the same methodology for resolution of discriminatory pricing and terms in future Comcast-NBC Universal retransmission agreements as exists under the FCC's Program Access Rules (which are slated to expire in 2012) is a remedy without a solution given the time and cost of seeking a resolution and discontinuance of program access during the pendency of a complaint.

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

### **III. The Proposed Combination is Unprecedented and Will Greatly Enhance Comcast's Market Power**

I have been in the cable industry for more than 25 years and have tremendous respect for Comcast and Brian Roberts and for NBC Universal and Jeffrey Zucker and their employees. Over the past decade, these gentlemen and their two firms have amassed a series of impressive assets.

Through strategic acquisitions, Comcast has become the country's largest cable operator with 23.8 million subscribers, and the largest residential broadband access provider with 15.7 million customers. In recent years, Comcast also has emerged as a major cable content owner, including its 10 highly powerful Regional Sports Networks, or RSNs – which MVPDs must carry to compete effectively. It also owns such cable networks as the Golf Channel, E! Entertainment Television, Style Network, Versus, and G4. Moreover, it has a robust video-on-demand platform, and has developed a TV Everywhere type of service (Fancast Xfinity TV) where cable programming is streamed over the Internet only for its cable customers.

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

As I indicated at the outset of my testimony, WOW! competes directly with Comcast and NBC Universal, and we have more than held our own in competing against other MVPDs despite having fewer customers and resources. WOW! has no problem with robust competition.

However, when the programmers from whom you purchase content all of sudden acquire substantial additional key programming assets, problems are certain to ensue. Moreover, when your competitor also is a major vendor, supplying video content essential or important for any competitive provider to access, issues constantly arise.

Over the years, WOW!, like most of us in the cable industry, has wrestled with each of these two firms individually to obtain content, and there is little doubt they have used their market power in these negotiations to extract additional value and obtain an advantage in the distribution market. What concerns me and I believe should concern the FCC, DOJ, and you about this proposed combination is that the problems WOW! sees in the current market are surely going to be exacerbated when the two firms come together. Those problems harm the consumer and the overall marketplace in many ways, including by abnormally inflating prices, reducing distributors' ability to tailor program offerings to consumer interests, and ultimately limiting advanced broadband services as distributors are forced to expend bandwidth for services consumers do not want.

## **A. Current (Pre-Combination) Problems Faced by WOW! and Smaller MVPDs in Accessing Content**

To understand the harms that will occur post-combination, it is first essential to understand the anticompetitive acts that occur in the industry today. Because I am forbidden by confidentiality clauses in agreements with Comcast and NBC Universal from disclosing specific terms and conditions, I will describe for the Committee general and frequent problems that MVPDs have encountered and currently face when negotiating content deals.<sup>5</sup> These should provide you with a more complete understanding of why today's system is not as consumer-centric as it could and should be and why, after this combination, consumers and non-vertically integrated competitive providers such as WOW! will be even more disadvantaged. Anticompetitive behavior such as the following regularly occur:

1. In negotiations for retransmission consent agreements, major owned-and-operated television network stations have conditioned any agreement with MVPDs upon carriage of infrequently-viewed networks because it drives their advertising revenues. As a result, the MVPDs were unable to carry networks with greater viewership or niche networks requested by their subscribers, and, because these "extra" networks used valuable bandwidth, the MVPDs were constrained in dedicating increased bandwidth for advanced, higher-speed broadband services.
2. An MVPD attempted to negotiate a carriage agreement with a network that is partially owned by a large content provider. The network refused to grant the MVPD carriage rights for advanced platform content it was thinking about deploying -- HD, VOD, and online. However, the network reserved the right to provide this advanced content on an exclusive basis, or simply at more favorable terms, to larger competing providers operating in the same markets. This would have the effect of making the MVPD's product offerings less competitive with these larger providers, thus limiting consumers' traditional and online choices.
3. Content providers with market power are increasingly demanding "take it or leave it" rate "resets" during contract renewal negotiations, enabling them to automatically pass-through increased content costs. Consumers are harmed by the pass-through of some of these inflated costs; the competing MVPD is harmed when it must absorb the remaining costs, thereby diminishing the resources needed to offer content from smaller providers as well as implement advanced services.
4. Content providers with significant market power sometimes demand a higher penetration of distribution for their video services from smaller operators than they do from larger distributors. If even a relatively small number of new or existing video

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<sup>5</sup> Confidentiality clauses are important to preserve the integrity of the negotiation process and relations between firms. However, government entities are entitled to receive agreements despite these clauses if they issue a subpoena or make a similar demand. WOW! and ACA members intend to cooperate fully with the FCC and the Department of Justice as they review the proposed combination and will respond promptly to all demands for information.

subscribers choose the lower-cost “broadcast basic” tier, the penetration of the higher-cost “expanded basic” tier could fall below the required penetration floor. The only remedy in that case would be to migrate the cable network(s) in question to the Limited Basic tier of service, forcing additional programming cost on those subscribers who may least be able to afford it -- and, in the process, causing the entry-level video offering to become less competitive from a retail pricing perspective than that offered by large competitors who may not have equivalent penetration requirements.

## **B. Horizontal and Vertical Harms to Competition Arising from the Proposed Comcast-NBC Universal Combination**

With the proposed combination, the issue is whether post-combination Comcast is able to use the newly aggregated assets and market power to engage in substantially enhanced anticompetitive activities, including by raising prices significantly, withholding or discriminating in providing access, mandating uneconomic tiering or minimum penetration requirements, or forcing unreasonable tying or bundling arrangements. The readily proven response is that of course it does given the assets that the combined entity will control post-combination and given the current anticompetitive behavior of the two firms.

While couched in terms of synergies and growth opportunities, at its heart, the Comcast-NBC Universal deal is principally driven by the aim to lock up a wider array of key content (a horizontal combination) and use that enhanced power to extract higher prices from purchasers and also to use that power vertically to reduce or eliminate competition, in either traditional or Internet-based markets. Let me elaborate.

### Horizontal Harms

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

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

In a series of rulings over the past five years – one just recently<sup>6</sup> -- the FCC has determined that sports programming was “non-replicable” or “must have.” In other words, a video distributor such as WOW! or another ACA member could not succeed if it could not give customers access to such programming. The Commission has reached a similar conclusion for television network programming, which combines the value of prime-time content with extensive sports content. It also should be noted that a bundle of cable programming, which is how such programming is normally sold, can become similar to “must have” individual programming depending on its overall ratings. A main driver of the proposed combination is to “lever” the market power of these “must have” content anchors – Comcast’s RSNs, NBC’s O&O stations, and NBC’s extensive cable programming networks -- and squeeze unaffiliated downstream multi-channel video providers to extract appreciably higher fees.<sup>7</sup>

In the post-combination world Comcast will have sufficient additional market power that it can create its own economic reality and make one plus one equal five. This makes all distributors in the United States quake as they will be forced to pay more for the content so essential to their businesses. Further, it means that American consumers will pay more as well. This is the antithesis of a pro-competitive deal.

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

WOW!’s concern is not imaginary or merely academic. There are numerous instances of programmers combining or colluding to extract additional rents. The DOJ, for instance, filed a civil antitrust complaint against several broadcasters in a market for engaging in a combination and conspiracy to increase the price of retransmission rights to cable operators. The consent

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<sup>6</sup> *In the Matter of Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, MB Docket No. 07-198 (rel. Jan. 20, 2010) at ¶ 8.

<sup>7</sup> In their application to transfer control filed Jan. 28, 2010 with the FCC, Comcast-NBC Universal contend there is not an issue with regard to RSNs arising from the proposed combination. However, they only arrive at this contention by artificially pigeon-holing RSNs into their own submarket. In this testimony, WOW! has provided one example of how RSNs and local television networks compete directly, which demonstrates the fallacy of Comcast-NBC Universal’s market definition, and other distributors and WOW! can provide additional evidence supporting a conclusion that a more expansive market definition is justified.

decree ending this litigation found that the broadcasters had restrained competition and enjoined them from agreeing to bargain jointly with cable operators.<sup>8</sup>

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

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

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

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

### Vertical Harms

The Comcast-NBC Universal transaction is also a vertical integration of broadcast, cable-programming, and online content with distribution that will result in significant harms to consumers and competition across the country. By adding NBC Universal's vast array of “must have” programming with its own cable distribution assets, Comcast will have increased abilities to raise cable and satellite rates for providers, like WOW!, that rely on access to key content – such as Comcast's Chicago RSN and NBC's “O&O” station in Chicago -- and that are competing directly with Comcast's Chicago cable systems. Numerous studies, including from the U.S. Office of Government Accountability,<sup>10</sup> have demonstrated that competitors like WOW!

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

<sup>9</sup> Comcast's RSN are available in 53 television markets across the country or 38% of all television homes.

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

provide real competition to incumbent cable providers and tangible benefits for consumers. As I discussed at the outset, WOW! has received an unprecedented number of awards for providing an exceptional service experience compared to incumbent providers. However, if WOW! is forced to either forgo access to content or pay supra-competitive prices or face anticompetitive terms and conditions for it, all of this is placed in jeopardy.

Moreover, WOW! is not the only competing video distributor in an extremely vulnerable position. In 69 television markets across the country, Comcast competes against DirecTV, Dish Network, Verizon's FiOS, AT&T U-Verse and more than three dozen small and medium-sized cable and telephone companies retailing video programming. As discussed above, because satellite subscription prices are uniform across the country, Comcast's increased leverage in certain regions of the country will result in increased prices nationwide. When satellite companies raise their prices, this will also reduce competitive pressures on cable companies that compete with satellite companies.

### Harms in the Online Distribution Market

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

With the advent of Internet-delivered video content, the hundreds of ACA members who currently do not compete with Comcast's cable systems may become new targets. Comcast will be able to present them with the simple proposition: if you want your customers to have access to our content, you will now pay supra-competitive prices both to acquire Comcast-NBC Universal's "must have" content for traditional cable customers and to allow your customers to access this content as an Internet-delivered service.

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

Finally, if WOW! must pay the combined Comcast-NBC Universal supra-competitive prices for content or must accept anticompetitive terms and conditions, such as unreasonable tying, tiering, or penetration requirements, it will have little choice but to either raise prices for its customers far above what would occur in competitive markets or limit the content it acquires from other suppliers, including smaller, independent providers. Moreover, WOW! can envision

that the combined entity will make demands much greater than today and that are so onerous that we will have to continue to shrink the bandwidth we would dedicate for advanced services and broadband offerings. This runs directly counter to the federal government's vision of expanding and enhancing next-generation Internet access services for all users.

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

The FCC and DOJ need to fashion relief that addresses both the horizontal and vertical harms caused post-combination. As noted above, the horizontal harms are most substantial and troubling for consumers and competition. The agencies thus must seriously consider structural relief, including divestitures of assets that are the cause of these harms. The great value of structural relief is that it creates the proper, pro-competitive market dynamic and minimizes any regulatory gaming that can occur. WOW! and the ACA were most heartened to see the Department of Justice rely on structural relief (a divestiture) in the recently negotiated Ticketmaster consent decree.

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

The program access statute, passed as part of the 1992 cable legislation, sought to address the market power that large cable operators had acquired and which they used frequently to squeeze programmers not affiliated with them and to refuse to sell (or otherwise discriminate in the sale of) affiliated programming product to competing distributors. The FCC promptly implemented the statute by adopting rules, but it became quickly apparent that there were so many loopholes in the rules that incumbent cable operators and their affiliated programmers could readily avoid them. The following are the major problems with the rules:

- The program access rules place no restriction on quantity discounts. So long as a competing MVPD has fewer subscribers than Comcast cable, Comcast has practically unlimited freedom to charge the MVPD higher programming prices per subscriber than it charges itself. Since the inception of the program access rules in 1992, the ACA is aware of only two instances in which the FCC has ruled in favor of a complaint alleging price discrimination,<sup>11</sup> and none since 1998.

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

- Even with very large MVPDs, Comcast can avoid any constraint on the prices it charges its competitors simply by raising the internal transfer price that it charges itself for programming.
- There are long delays in deciding cases with no automatic right to continued carriage of programming while the case is pending.
- It is uncertain that the program access rules apply to an MVPD seeking to obtain rights for provision of online “TV Everywhere” type services.

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

The FCC sought to tighten these loopholes in subsequent mergers between content providers and distributors, for instance, by permitting complainants to use third-party arbitration or collectively bargain for rights. But, here again, programmers affiliated with larger cable operators quickly found how to beat the system:

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

As a result, the ACA is aware of only one completed arbitration involving its members.<sup>12</sup>

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

## V. Conclusion

The proposed combination of Comcast and NBC Universal places federal decision-makers at a crossroads: Will the agencies have sufficient foresight to adopt the necessary robust relief that will enable them to get ahead of anticompetitive problems caused by the proposed combination, or will they proceed cautiously waiting first to see if prices rise, jobs are lost, and firms go under? If the FCC and Department of Justice ignore or treat lightly the potential harms or provide inadequate relief, the already disturbing trend of big content and distribution mergers

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<sup>12</sup> See, [http://www.multichannel.com/article/131183-Massillon\\_Cable\\_Wins\\_Its\\_Case.php](http://www.multichannel.com/article/131183-Massillon_Cable_Wins_Its_Case.php).

will only accelerate, all riding on the precedent of this deal. As a result, consumer hopes for greater choice will be dashed. On the other hand, if the federal agencies address the grave potential harms with robust relief as described above, incumbent entrepreneurs will expand their businesses and new ones will rush into the market – all to the benefit of American consumers. The consequences of these choices make this proposed combination a “big deal.” WOW! and the ACA look forward to working with the Congress and the agencies as the review proceeds and as the agencies fashion relief to address anticompetitive harms.