U.S. Senate Committee on the Judiciary,
Subcommittee on Antitrust, Competition Policy, and Consumer Rights
Hearing on "The Comcast/NBC Universal Merger: What Does the Future Hold for Competition and Consumers?"

March 15, 2010

Responses to questions for the record submitted by Senator Arlen Specter

1. **Some confusion seemed to arise at the hearing regarding Comcast's position on the FCC's program access rules and on the FCC's program carriage rules. Please set forth Comcast's position.**

I welcome the opportunity to clarify our position.

Let me begin by drawing the distinction between the concepts of "program access" and "program carriage." Both are FCC rules resulting from provisions in the Cable Television Consumer Protection and Competition Act of 1992. Essentially, the *program access* rules govern the process by which a satellite-delivered network that is affiliated with a cable operator *sells* its programming to competing multichannel video programming distributors ("MVPDs"). The *program carriage* rules, on the other hand, govern the process by which a cable operator *buys* programming from unaffiliated programmers.

Program access rules, which can be found in Section 628 of the Communications Act of 1934, generally require that cable operators afford competing MVPDs non-discriminatory access to satellite-delivered cable-affiliated programming. Specifically, the rules include: (1) a prohibition against exclusive contracts between cable-affiliated programming networks and any cable operator (a provision which Congress set to sunset in 2002, but which the FCC has extended); (2) a prohibition against cable operators unreasonably influencing (or attempting to influence) whether an affiliated networks sells (or on what terms it sells) its programming to an unaffiliated MVPD; and (3) a prohibition against unreasonable discrimination in the prices, terms, and conditions of carriage arrangements with unaffiliated MVPDs.

By contrast, the program carriage rules, which can be found in Section 616 of the Communications Act of 1934, generally require that MVPDs act fairly in selecting the programming they assemble in packages for sale to consumers. The program carriage rules provide that: (1) MVPDs may not require an equity interest in a programmer as a condition of carriage; (2) MVPDs may not coerce unaffiliated programmers to provide (or punish unaffiliated programmers for not providing) exclusive rights as a condition of carriage; and (3) MVPDs may not unreasonably restrain the ability of unaffiliated programmers to compete fairly by discriminating on the basis of affiliation in the selection, terms, or conditions for carriage.

Comcast conducts its business in full accordance with these rules. As the owner (or partial owner) of various national and regional networks, in a marketplace with hundreds of national networks and scores of regional networks, and in which consumers in any given geographical area can obtain multichannel video services from three, four, or sometimes five strong competitors, Comcast has strong incentives to secure widespread distribution for its programming, including through distribution on MVPDs that compete directly with Comcast Cable. If DirecTV, Dish Network, phone companies and others across the country do not distribute the networks we own, we cannot maximize the revenue necessary to produce high-quality programming that consumers will want to watch. As an MVPD competing directly with DirecTV, Dish Network, Verizon, AT&T, and various other companies, Comcast Cable has powerful incentives to make available to its customers the programming they want, the vast majority of which necessarily comes from unaffiliated sources. In a competitive marketplace, we need to offer our customers attractive packages of programming at attractive prices, and this inevitably requires that we carry scores of unaffiliated networks. If DirecTV and Dish Network – and Verizon and AT&T – are offering networks that our customers want but we refuse to carry, we will lose valuable customers to them. That's why the vast majority of the networks we carry are unaffiliated and, even post-transaction, approximately six of every seven channels we carry will be unaffiliated. Thus, intense competition provides a powerful discipline against anticompetitive behavior in both the buying and the selling of programming.

Comcast has not challenged the validity of either the program access or program carriage rules; we have challenged only the extension of the exclusivity ban for reasons I describe below. To be sure, because of the dramatic increases in competition – in programming and in distribution – that have occurred since 1992, the need for program access and program carriage regulations has been dramatically reduced, if not eliminated altogether. Nonetheless, the rules remain available as a backstop, and parties who believe they have been treated unfairly have available to them a complaint process at the FCC through which claims of violations can be adjudicated. Though certain parties have alleged at various times that Comcast has violated the program access and program carriage rules, Comcast has never been found in violation of any of these regulations.

Comcast has asserted, and properly so, that any FCC program access or program carriage rulemakings and adjudications must be conducted in accordance with law, and with due regard for the constitutional interests that are at stake. Contrary to the claims of some parties, Comcast has not asserted that the program carriage or program access rules are unconstitutional. While we haven't mounted a constitutional challenge to the validity of the program access or program carriage statute or rules, we have invoked constitutional considerations as factors that need to be considered in making and applying rules under both program access and program carriage.

The Supreme Court determined long ago that cable operators are entitled to First Amendment protections. "There can be no disagreement on an initial premise: *Cable programmers and cable operators* engage in and transmit speech, and they *are entitled to the protection of the speech and press provisions of the First Amendment. . . . [T]he rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation,* whatever its validity in the cases elaborating it, *does not apply in the context of cable regulation.*" *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 636-37 (1994) (emphasis added). Rules that tell us what video programming we must carry or must sell inevitably implicate our First Amendment rights. We have reminded the FCC and the courts that they must take the First Amendment into account when they make, review, or apply program access and program carriage rules, especially when FCC fact-finders are making content-specific findings about the relative quality of, or similarities between, programming networks. That is not a "challenge" to the rules on "Constitutional grounds." It is simply a reminder that there is a First Amendment, and that it applies to cable operators.

We were recently criticized for invoking a constitutional argument in a program carriage complaint proceeding, but we stand by the position that we took. We did *not* challenge the validity of the program carriage rules. We did *not* argue that the program carriage statute was constitutionally invalid. We *did* say that congressional intent, FCC precedent, marketplace developments, and constitutional considerations all dictate that the FCC construe the program carriage rules narrowly and "exercise extreme caution before interfering with any carriage decision, including the specific tier on which a network is carried by an MVPD, the price that will be paid, and the other terms and conditions of carriage."

Our main point was that the FCC needed to think long and hard about substituting its judgment for that of a cable operator regarding whether a particular network should be carried, how much the cable operator should pay for the network, where it should be tiered, etc. We reminded the FCC of the vast changes that had occurred in the marketplace since 1992 and that the Supreme Court had recognized that cable operators are entitled to First Amendment protections of speech and of the press. These are not arguments against the program carriage rules and are not an attempt to prevent a complainant from bringing and trying to prove its case. All we were saying was that, in the unlikely event that a violation were proven, the FCC in fashioning a remedy would need to account for the fact that cable operators have full First Amendment protections of speech and of the press. And just as a newspaper or even a broadcaster cannot lawfully be ordered to publish an article or air a show that it doesn't want to, the FCC in a program carriage order would need to formulate a remedy for any adjudicated violation that takes account of constitutional constraints.

Bear in mind that claims about program carriage violations have historically been quite rare. The best explanation for the recent spate of cases is regulatory gamesmanship. Despite all kinds of reckless allegations by a small handful of networks, not one complaint has been ruled to be meritorious. In the cases that went the furthest, WealthTV's four complaints against four separate cable companies, the FCC's Chief Administrative Law Judge ruled that each of the defendants acted reasonably and that their accuser had "failed completely" to prove a violation of the rules. He specifically found that the evidence presented by the accuser was "unreliable" and that the accuser's witnesses were "not credible."

Finally, some have questioned why Comcast appealed a program access rulemaking order. That appeal involved an FCC decision, issued in 2007, to extend for an additional five years the ban on exclusive contracts between vertically integrated programmers and cable operators – the one portion of the program access rules that Congress had slated to sunset in 2002. On appeal, Cablevision and Comcast argued that the FCC applied an incorrect standard governing the circumstances under which the FCC may prevent the exclusivity rule from sunsetting automatically; and that the FCC was required to let the rule sunset, or at least narrow it. Comcast was motivated in large part by the inequity of applying an anti-exclusivity rule to cable, while our satellite competitors are able to use exclusive programming contracts against us. Contrary to the claims of some outside parties, Comcast did not challenge all of the features of the program access rules in this litigation nor assert that the exclusivity ban, or any other portion of the program access rules, is unconstitutional.

We believe in the position that we took before the court, and we hoped the court would agree with us that competition has obviated the need for this rule. Nonetheless, on February 4, I testified that we are willing to discuss with the FCC making the program access rules binding on us in connection with approval of the transaction, even if the D.C. Circuit overturned the FCC's extension of the exclusivity prohibition.

In any event, on March 12, the D.C. Circuit upheld the FCC's order in a 2-1 vote. This decision, which we will not appeal, would appear to put this issue to rest.