"Examining the Comcast-Time Warner Cable Merger and the Impact on Consumers"
Questions for the Record for James L. Bosworth Jr.

<u>Question Submitted by Senator Hatch</u>

During the hearing, Mr. Cohen noted that the issue of "a la carte" programming is complicated and that the result of an a la carte regime could be less choice and higher costs for consumers. In contrast, others argue that a la carte programming would give consumers access to more choices at lower prices. What would be the impact of mandatory a la carte offerings on independent programmers such as Back9Network? In particular, what would a la carte do to the launch and growth of new program services like Back9Network?

<u>Answer</u>: The biggest impediment today to providing consumers access to more choices at lower prices is the consolidation of cable companies in the major television markets. If this merger goes through without sufficient conditions to protect independent programmers, there will be fewer programming options. The new Comcast would be the dominant provider in all 10 of the top 10 markets and would be in 23 of the top 25 markets. New programmers with innovative, quality programming will know that, to be successful long-term, they need Comcast to carry them, and since Comcast is also one of the biggest program suppliers, it has no incentive to allow new, independent programmers to reach its audience.

There is some attractiveness to an a la carte offering, because it allows networks like Back9Network to compete for subscribers based on the quality of its content, and it would mean that Back9Network would be available to all viewers who want to pay a specific fee to watch our programming. Right now, cable subscribers pay for Comcast's Golf Channel whether they watch it or not — and very few of them do. In 2013, the Golf Channel averaged just 110,000 viewers per day, out of the approximately 100 million American households that receive pay television service. We have developed quality programming that we know — based on our market research — will have a significant audience. If that audience had a chance to see our programming, and the opportunity to purchase it at a low price on an a la carte basis, we believe they would do so.

That said, Back9Network is not advocating an a la carte mandate. As you acknowledge, the issue is complicated and we do not necessarily understand the potentially far-reaching implications of that policy change. All we want is the ability to compete and get our programming to consumers where they watch and look for video programming. If consumers had the ability to choose the channels delivered to them, we are confident many of them would choose Back9Network. But as long as Comcast makes that choice for them, Comcast must be held to the highest non-discriminatory standards, to ensure that independent programmers are given a chance to compete.

<u>Question Submitted by Senator Klobuchar</u>

The FCC conditioned its approval of the Comcast-NBC merger on the company agreeing to a prohibition from favoring its own NBC content or discriminating against small, unaffiliated programmers. After three years of proceedings, the Tennis Channel won an FCC decision and appeal that ordered Comcast to take the channel off a little watched digital tier and place it with the other sports channels. Comcast appealed that decision to the D.C. Circuit and it was overturned. Another independent programmer, Bloomberg News, spent millions to enforce the merger conditions to have its channel placed in the channel neighborhood of an NBC-owned rival. In your experience as an independent programmer with content that would compete with an NBC-owned channel, do you believe that Comcast has lived up to its obligations under the NBC Universal merger?

<u>Answer</u>: No, it has not. The Federal Communications Commission conditioned its approval of the Comcast-NBCU transaction on the requirement that Comcast "not discriminate in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection of, or terms or conditions for, carriage, including in decisions regarding tiering and channel placement."[1] The Tennis Channel and Bloomberg proceedings are evidence that Comcast has indeed discriminated based on affiliation. In the Bloomberg News case, the Commission found Comcast had not complied with a condition of the Comcast-NBCU Order by refusing to place Bloomberg Television, a business news channel, in a news neighborhood.[2] The Commission also noted Comcast's increased "incentive and ability to discriminate on the basis of affiliation" after its merger with NBCU.[3]

The real problem is more significant than what is evident in these high profile cases. Truly independent programmers are shut out from serious discussions with Comcast and do not have the time and resources needed to pursue expensive, multi-year legal processes to demonstrate discrimination.

Comcast has shown little interest in having productive discussions with us or evaluating our content with the same standards it uses to launch golf and/or lifestyle networks. Comcast turned us down when we approached them in the fall of 2012. We continued to approach Comcast and provided it with a more-than-fair proposal. We met with them again on April 7, 2014, but we have not had any productive or substantive discussions regarding carriage. We believe Comcast has not given us a fair evaluation, as it promised to do for independent programmers under the conditions of the NBCU merger, and we believe the reason for that is Comcast's ownership of one of our major competitors — the Golf Channel.

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[1] *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees*, 26 FCC Rcd 4238, 4287 (2011) ("*Comcast-NBCU Order*").

[2] *In the Matter of Bloomberg, L.P.,* Memorandum Opinion and Order, MB Docket No. 11-104, at ¶ 22 (Sept. 26, 2013).

[3] *Id.* at ¶ 33.

The fears expressed by the Commission about the power a vertically integrated Comcast would possess have come to fruition. The Commission found the proposed transaction posed a threat to competition because "the combination of Comcast, the nation's largest cable service provider and a producer of its own content, with NBCU, the nation's fourth largest owner of national cable networks, will result in an entity with increased ability and incentive to harm competition in video programming by engaging in foreclosure strategies or other discriminatory actions against unaffiliated video programming networks."[4] The Commission stated that "Comcast's extensive cable distribution network affords it the ability to use its video distribution market position to harm other competing video programming firms and harm competition in video programming."[5]

We have raised $30 million from investors who are committed to our network's mission, management team, and business model. That investment is necessary to produce the high-quality programming that consumers demand. Competition will be thwarted earlier in the process if new programmers need to raise additional funding for lawyers to battle Comcast simply as an entrance fee to compete.

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[4] *Comcast-NBCU Order* at 4284.

[5] *Id.* at 4284-85. The Commission further found that the "transaction also increases Comcast's incentives to discriminate in favor of its affiliated programming [because] [u]pon consummation of the transaction, Comcast will compete with an increased pool of unaffiliated programming vendors offering content that viewers might consider substitutes for its affiliates' programming content and against which it could potentially pursue foreclosure or discrimination strategies in order to favor that content." *Id.* at 4285-86.

<u>Question Submitted by Senator Grassley</u>

Some have argued that free markets and a lack of government regulation have enabled technological innovation and allowed internet services to flourish. Do you believe that imposing new regulations could stifle innovation and inhibit the growth and deployment of broadband services? In your view, should there be more or less government involvement in this industry?

<u>Answer</u>: As a programmer, we do not have the expertise to comment on the broadband industry. We would note, however, that in the video programming industry, we will no longer have a truly free market if this merger goes through. Instead, we will have one company — Comcast — that can favor its own programming over competing programming from independent networks like Back9Network. With Comcast controlling so much of the video market, and with other MVPDs and satellite distributors reluctant to launch new networks, the market is not free. Instead, it is dominated by one company, Comcast, that will have virtual veto power over what new networks get off the ground. This is not fair competition and a free market. It's a stacked deck.

If the Comcast-Time Warner Cable deal is approved, we would ask regulators to impose effective and enforceable conditions to guarantee that Comcast will not discriminate based on affiliation, with a streamlined complaint process, so that Comcast cannot hobble its competition with drawn-out litigation and prohibitive legal fees.

Question Submitted by Senator Lee

In your testimony you argued that, given the bandwidth constraints of satellite and the current valuation of advertising on programs streamed only on the internet, survival of independents like your network depend on carriage by large cable companies like Comcast.

a. Assuming for a moment that this is the case, I'm curious as to whether you believe it is the case that the size of a company like Comcast causes this difficulty or whether it is merely the realities of the market that consumers are not needing or demanding new programming sufficient to justify the existence of additional new content?

Answer: We know there is demand for our programming. Our website is the fastest-growing in the golf industry. We have raised $30 million from investors who believe in our product. We are tapping into a vast market — the $177 billion golf lifestyle market — that is being served by a single channel, the Golf Channel.

If consumers do not want our programming, then we will not succeed. But in the current situation, consumers will not see our programming because Comcast has both the incentive and the ability to prevent us from reaching a sufficient audience to succeed.

It is true that consumers have many cable channel choices, but their cable bills continue to rise astronomically. Consumers deserve more channels for those higher bills, and some of those new channels need to come from truly independent networks that have no affiliation with pay television operators or media network conglomerates. Our production facilities, business model, and programming capabilities address an underserved market, which would increase output for consumers and provide advertisers with more and better options for reaching consumers.

Unfortunately, vertical integration has given Comcast a reason not to carry quality programmers that compete with its own networks unless it has to — and horizontal consolidation in the cable industry has meant that independent programmers have fewer and fewer options for gaining the carriage they need to attract advertisers. We are left, then, in a situation where the choices consumers have are dictated by one company: Comcast.

In addition, though online viewing of content is clearly growing, the simple truth is that the vast majority of viewing by Americans of all ages happens on a traditional television. That is where the eyeballs are, and so that is where the advertising dollars are, and that is where we need to be to compete for advertising dollars and long-term viability. We are well aware of all the attention paid to online video, but the market has not shifted economically yet in a dramatic way, and we see that day as still several years off. In the meantime, a dominant cable company like Comcast will have veto power over new programming.