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# To the
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# Senate Judiciary Committee

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I believe that Comcast should not be allowed to acquire NBC Universal.

As I said when the Comcast/NBCU transaction was announced, this is the most important media merger since Lucy met Desi. Comcast seeks to combine its huge cable and internet footprint, reaching about 30 % of the nation's homes, with NBCU's gigantic content assets. NBCU has 26 TV stations in the country's largest markets, the NBC network, several of the highest rated cable TV networks and the Universal film library.

## WHY THIS IS SUCH AN IMPORTANT TRANSACTION

At the outset, I want to stress that my opposition to the Comcast/NBCU merger is not based on animus. Brian Roberts is not evil; to the contrary, he is a public spirited, ethical businessman. Even though I have problems with his labor/management practices and his corporate governance structure, I recognize that he is motivated by business considerations and not some sort of design to undermine American democracy.

But the consequences of this deal nonetheless could have precisely that effect.

Concentration of control in the mass media poses unique questions for policymakers and regulators. Unlike any other line of business, media properties raise important questions which go to the very nature of democratic self-governance. Our viewpoints and perspectives on political and social issues are the outgrowth of what we hear and watch. Indeed, it has been clear for some 60 years that antitrust principles overlap with First Amendment doctrine. The seminal case in this regard is *United States v. Associated Press,* where the Supreme Court applied the Sherman Act to newspapers.

Writing for the majority in *Associated Press*, Justice Black held that the First Amendment provided powerful support for applying the Sherman Act because it "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public...." Justice Frankfurter emphasized in his concurring opinion that the case was about a commodity more important than peanuts or potatoes, that it was about who we are as a nation. "A free press," he said, "is indispensable to the workings of our democratic society." For that reason, he wrote, "the incidence of restraints upon the promotion of truth through denial of access to the basis for understanding calls into play considerations very different form comparable restraints in a cooperative enterprise having merely a commercial aspect." *Id.*

A notable example of how this concept has been applied in practice can be found in Judge Greene's treatment of the AT&T consent decree. In imposing restrictions on what was then described as "electronic publishing," he held that both competitive and First Amendment considerations separately supported his action.

Judge Greene made clear that application of these objectives is not delimited to Title III of the Communications Act. "Certainly," he said, "the Court does not here sit to decide on the allocation of broadcast licenses. Yet, like the FCC, it is called upon to make a judgment with respect to the public interest and, like the FCC, it must make that decision with respect to a regulated industry and a regulated company." Thus, he said, it was necessary for him to "take into account the decree's effect on other public policies, such as the First Amendment principle of diversity in

dissemination of information to the American public. Consideration of this policy is especially appropriate because, as the Supreme Court has recognized, with respect to promoting diversity in sources of information, the values underlying the First Amendment coincide with the policy of the antitrust laws." *Id.*

Time precludes extensive discussion, so today I will emphasize just three of the many anti-competitive ways in which Comcast could leverage ownership of NBC content assets to extend its reach in distribution of video programming and Internet services. My focus on national issues does not mean that I am unconcerned about the impact of Comcast's plans on the communities where it will own both TV stations and cable systems. Rather, it means that I know that my friend Mark Cooper is going to address this question extensively in his remarks, with which I wish to associate myself.

## A COMCAST/NBCU COMBINATION WILL HARM INDEPENDENT PROGRAMMERS AND THE PUBLIC

First, I want to address how approval of this merger would increase Comcast's power to squeeze out independent programmers with diverse editorial perspectives.

There are scores of cable networks which have been unable to obtain carriage on Comcast and other cable systems. I'm here, and they are not, because some of these companies have told me that they are afraid of retaliation. Indeed, over the last several years numerous programmers such as NFL Network, WealthTV and the Tennis Channel have unsuccessfully pursued carriage complaints at the FCC. In each case, they argued that Comcast favored its own channels while refusing to carry independent programming on workable terms, if at all. Acquisition of NBC's stable of cable networks will greatly exacerbate the imbalance of power.

If Comcast is permitted to purchase the NBC TV stations and its highly viewed cable networks, Comcast will be able to bundle its programming when it seeks carriage deals with other multichannel video programming distributors ("MVPDs") such as telephone and satellite companies. This enables Comcast to obtain distribution for new and secondary channels which otherwise would never receive such treatment. Each time a Comcast channel is forced into the program menu, there is one less slot for independently owned programming.

The problem is even greater with respect to carriage on Comcast's own cable systems. The existing legal framework already gives Comcast every incentive to favor its own programming over independently produced cable channels. This can include refusal to carry competitors, paying them far less for carriage or placing them on a lesser watched program tier.

After the acquisition, Comcast will have even more cable networks to favor in deciding what to carry on its cable platform. Because it will create incentives for Comcast to make programming decisions based on self-serving financial factors rather than program quality, approval of the merger would mean that the public will get inferior programming. Discrimination of this kind also generates higher prices for all Americans, not just Comcast customers. Since Comcast will be paying itself for program carriage, it can set a higher wholesale price for its programming, so that competing MVPDs will also have to pay higher prices. This, of course, will be passed on to their customers.

There ought to be a law against such abuse. In fact, there is. Section 616 of the Communications Act prohibits cable companies from demanding an equity interest in a programmer or exclusivity rights as a condition for carriage. It also prohibits cable companies from discriminating in favor of their own programming.

Comcast understandably, but unpersuasively, argues that existing laws and regulations sufficiently protect independent programmers and the public. However, in its presentation to the FCC and, I assume, this Subcommittee, Comcast neglects to mention that it has argued that enforcement of Section 616 is unconstitutional, and presumably would renew that claim were Section 616 to be invoked against it in the future.

The rules surely pass constitutional muster. However, they have not worked. The cost of litigating these cases has proven to be prohibitive, and the FCC has adopted almost insuperable legal hurdles for complainants to overcome. Since Section 616 was enacted in 1992, only a handful of complaints have made it past the threshold level. There is no time limit for FCC action, and complaints and appeals often have been stalled at the FCC for months and years. Even when there is FCC action, the reward for success is a lengthy and expensive legal trial with the legal deck stacked in favor of the cable companies.

A case in point is the difference in treatment between the MLB Network and the NFL Network. For more than a decade, the National Football League's NFL Network has fought for carriage on widely viewed cable tiers at fair prices. It has been unable to reach agreements with a number of major cable operators. By contrast, Versus, a competing but far less viewed sports channel owned by Comcast, has been placed on a basic tier. Finally, the NFL filed a Section 616 complaint against Comcast, alleging that Comcast would not place the NFL Network on the same tier that Comcast placed its own sports networks and that it had conditioned its willingness to carry the NFL Network upon receipt of a financial interest in NFL programming. After considerable delay, the FCC finally directed that a hearing be held. Eventually, a year after its complaint was filed, the delay and cost of the hearing forced the NFL to accept a settlement which provided inferior channel placement at a price far below what the NFL had sought. Even the NFL, with its vast resources, couldn't crack the Comcast stranglehold without lawsuits, FCC proceedings, and years of uncertainty before it reached a negotiated settlement which was less than what it wanted.

Major League Baseball learned from the NFL's experience, and took a different tack. When it created the MLB Network it did what the NFL has refused to do, and offered significant ownership interests to the major cable operators, including Comcast. Not surprisingly, from the moment of its launch, the MLB Network has been carried on the basic cable tier.

Plainly, existing law does not provide adequate protection for independent programmers. Acquisition of the NBCU program networks will only make things worse.

## THE PROPOSED MERGER WILL HURT OTHER DISTRIBUTORS AND THE PUBLIC

Combining NBC and Universal content with Comcast's cable and Internet distribution systems will also give the merged company vastly increased power over content distribution markets. Depending on the circumstance, Comcast could choose to withhold its programming or force it upon

competitors at inflated prices. This in turn will increase cable bills and deprive customers of access to programming from diverse sources.

There are countless ways in which Comcast could exercise such leverage. For example, it can condition the sale of important "must have" programming, including that of the NBC and Telemundo TV stations, upon acceptance of undesired, secondary channels which would never receive carriage in a competitive market. Or it could withhold or delay access to the Universal film library from competing MVPDs, or demand vastly inflated licensing fees.

Retransmission consent for NBC Network and Telemundo programming poses an especially important problem. Without Comcast's permission, competing MVPDs would be unable to offer this essential programming. As the recent Fox/Time Warner Cable dispute demonstrated, even the most powerful satellite or cable companies cannot last for a day without major TV network programming. Post-merger, Comcast could decide to pay itself twice the fair value for NBC and Telemundo programming and then turn around and exact the same inflated price from its competitors, who would be forced to pass on the overcharges to their customers. Or, Comcast could tie the carriage of this programming to the carriage, at favorable channel locations, of the least desirable of its cable channels, also at inflated prices.

As with the program carriage problem discussed above, Comcast would assure you that existing law is sufficient to protect against harm. It will point out that the "program access" provision in Section 628 of the Communications Act requires vertically integrated cable operators to share their programming with competitors without discrimination in prices, terms or conditions of sale. Moreover, the Commission has recently closed, in part, the so-called "terrestrial loophole" that has permitted Comcast and other cable companies withhold regional programming, such as the Comcast Sports Network in Philadelphia. Comcast will also cite to regulations issued under Section 325 of the Communications Act, which requires broadcasters to engage in "good faith negotiation" for "retransmission consent."

I doubt that Comcast will also volunteer that it has gone to court to challenge the FCC's basic legal authority to continue enforcing the program access rules.

That aside, there are many reasons why existing law is insufficient to protect Comcast's competitors and their customers. First, even if Comcast doesn't upset them in court, the program access rules expire in two years, and there is no assurance that they will be extended. In any event, the program access regime does not preclude bundling, which is one of the principal anti-competitive mechanisms Comcast is likely to employ. Although Section 628 prohibits discrimination against competitors, this simply means that as long as Comcast overcharges itself, it can overcharge everyone else. In addition, the program access provision does not apply to a large proportion of the content that Comcast is acquiring, such as feature films and other video on demand content. Moreover, Section 628 is a right without a remedy; the FCC's complaint process is so onerous and time consuming that I am unaware of a single program access complaint which has ever been granted. And, no less importantly, the negotiation process is one-sided. There is no "standstill" requirement, so that when a carriage agreement expires, all of the power is in the hands of the programmer.

Retransmission consent rules are even less reliable as a tool for video competitors. The

statutory mandate for "good faith" negotiation does not prohibit price or packaging discrimination; it simply requires a commercially feasible offer. NBC already requires MVPDs to accept bundles of cable programming in order to get the NBC and Telemundo programming; addition of the Comcast distribution magnifies the leverage by several orders of magnitude. The FCC's complaint process offers no effective remedies other than a finding that one party has acted badly. There is no time limit for FCC action, and as with program access, there is no "standstill" provision to maintain some level of parity during negotiations.

## HOW COULD THIS HAPPEN?

One could fairly ask how Congress could have created a system which would permit a single company to operate cable systems, cable TV networks and a stable of owned-and operated TV stations, much less a major TV network? The answer is that Congress never contemplated such a combination. When the program access and retransmission consent provisions were enacted in 1992, the law already prohibited common ownership of a cable system and a local TV station. The local cable/television cross-ownership rule was eliminated a few years ago by judicial action, not legislation. There is very little doubt that Congress would have included much stronger protections if it ever thought that such cross-ownership would ever be permitted.

## COMCAST'S ACQUISITION OF NBCU WOULD JEOPARDIZE DEVELOPMENT OF A FREE AND OPEN INTERNET

Internet technology offers the prospect of creating vibrant and highly competitive markets for video programming. Members of the public can, or will soon be able to, receive high-definition video via the Internet. Comcast has already taken steps to kill off such competition, and acquisition of NBC's content will greatly enhance that campaign.

Comcast has strong reason to keep its customers from migrating to existing and potential Internet-delivered video competitors. Control of NBCU branded content as well as its one-third interest in Hulu would give Comcast a powerful mechanism to retain its video services revenue stream by strangling potential Internet-based competition before it can even get off the ground.

It would be reasonable to expect that the public's reaction to the diminished choice and increased prices resulting from a Comcast/NBC merger would be to seek alternative ways to obtain video content. Indeed, a brave few have decided to "cut the cord" by cancelling their cable TV service and relying on the increasing amount of content available over the Internet. It is becoming ever easier to connect digital TV sets directly to the Internet and employ services like iTunes, Boxee, Roku, and Hulu while relying on free over-the-air television for news and other local programming. Existing online-only video distributors such as Netflix are growing rapidly. There is no technological or business model reason why there won't soon be Internet-delivered "virtual cable" services with a menu offering the popular "linear programming," including the major cable TV networks. Indeed, earlier this week, the *Wall Street Journal* reported that a company called Move Networks plans to offer just such a service.

This is an existential threat to the cable industry. Its answer is "TV Everywhere." Comcast's version, which goes under the unwieldy name of "Fancast XFinity," offers the superficially attractive opportunity for its video and Internet customers to view video over the Internet without extra charge.

The catch, which is a very big catch indeed, is that you must keep your cable TV subscription.

XFinity represents an attempt to kill off potential competition while preserving the cable TV revenue stream indefinitely. XFinity is available only in Comcast regions, as it and other cable operators have continued their longstanding tacit agreement of never competing with each other on price or services. And, while we are told that satellite and telco competitors will soon be allowed to offer Comcast's content, the same opportunity will not be offered to any new online-only TV distributors. Nor is it clear that this content will be made available under the same terms and conditions. By design, XFinity cuts off the flow of programming to disruptive new entrants.

The XFinity offering also threatens existing independent programmers. Comcast has conditioned cable TV carriage on contractual provisions which prevent programmers from selling their content to competing online distributors at least temporarily and, perhaps, permanently.

Last month, MAP joined with Free Press and other public interest groups in issuing a white paper which set forth in detail how the cable industry has colluded to create the"TV Everywhere" model. As the report says,

> Stripped of slick marketing, TV Everywhere consists of agreements among competitors to divide markets, raise prices, exclude new competitors and tie products.

Comcast's acquisition of NBCU's programming vastly increases its leverage to force XFinity upon its customers and to stifle new competitors. All of the program carriage and program access problems that video competitors currently face will be replicated in the Internet space, but there are no similar legal protections. Of particular note in this regard is the fact that NBC has a major ownership interest in Hulu, the leading Internet video service. If it is in Comcast's interest, it can cripple Hulu by withdrawing NBC content from Hulu. Alternatively, Comcast may choose to make the NBC content exclusive to Hulu and withhold it from new Internet-delivered video competitors.

Comcast's control of the vast Universal film library would be another important building block in the effort to stifle new Internet competitors. Comcast can withhold these products from Internet competitors or delay their availability while offering them exclusively on XFinity. For example, it could target DishTV, which competes in the video market. Dish has an Internet delivered video service called Dish Online. By denying Universal's film library to Dish Online, Comcast could drive video customers to itself. If Dish were uncooperative, Comcast could also deny XFinity to Dish in Comcast markets.

Finally, while I hope that the FCC quickly moves to adopt "Network Neutrality" rules to prohibit discrimination in delivery of broadband services, I must point out that, in the absence of such provisions, Comcast can degrade or otherwise discriminate against competitors seeking to deliver Internet video program services to Comcast's Internet customers.

## CONCLUSION

Comcast's proposed acquisition of NBCU is profoundly anti-competitive and will adversely affect the marketplace of ideas as well. I hope the Subcommittee members will join Media Access Project in urging the FCC and the Department of Justice to block it.