

**TESTIMONY OF COLLEEN ABDOULAH
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**BEFORE THE SENATE SUBCOMMITTEE ON ANTITRUST,
COMPETITION POLICY AND CONSUMER RIGHTS**

**THE COMCAST/NBC UNIVERSAL MERGER:
WHAT DOES THE FUTURE HOLD FOR COMPETITION AND CONSUMERS?**

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Chairman Kohl, Ranking Member Hatch, and Members of the Subcommittee, 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 competitive provider of cable television and other broadband-related services operating in Illinois, Indiana, Michigan and Ohio.¹ 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.

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 them. 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, 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, 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.

In our Chicago and Detroit markets, covering approximately 1 million households, as a multi-channel video distributor (MVPD), 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. Equally as important, especially in the context of the proposed combination, WOW! is a major consumer of content from Comcast and NBC Universal. 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

¹ 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.

“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. 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!, many of these providers compete as described above with Comcast and NBC Universal, and all of them are consumers of content from these two entities. So, harms caused by the proposed combination will be felt across the country.

In addressing the proposed combination of Comcast and NBC Universal, I am going to focus on three critical points:

- First, 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. In fact, Comcast and NBC Universal have already admitted that the deal raises competitive concerns and have proffered a series of voluntary, albeit completely inadequate, commitments to address these concerns.²

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.³ Rather, the deal greatly increases horizontal concentration by effectively combining key content assets from the two firms, as well as important distribution assets. This increased market power can then be employed vertically by the combined entity to threaten competing video distributors.

- Second, in fashioning relief to address the anticompetitive harms caused by the proposed combination, we need to learn from and correct the many inadequacies in remedies imposed or accepted by agencies to settle other

² While on their face the Comcast-NBC Universal “commitments” may superficially reflect access to programming (broadcasting and otherwise) concessions, in reality they 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.

³ The vertical integration issues raised by the proposed combination, of course, raise anticompetitive concerns that the FCC and Department of Justice must address.

combinations. Comcast has proven itself particularly adept at weakening or even rendering meaningless any such relief.

- Third, because of the substantial and far-reaching problems posed by the deal, the federal agencies need to proceed deliberately in their review with an eye toward imposing meaningful relief that will remedy the many harms that would be caused by the potential combination. This is especially the case because Comcast and NBC Universal are seeking to combine assets in an attempt to obtain greater market power not only in today's traditional multi-channel video market, but also in the next-generation "over-the-top" Internet video market.

I. 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. Comcast is by far the leader in cable distribution and controls extensive content, including its highly potent regional sports networks (RSNs) and its new video-on-demand offering. It also has developed a TV Everywhere type of service called Fancast XFINITY, tying its cable customers to video services provided on the Internet through its broadband access network. NBC Universal also controls key content distribution assets – both its traditional owned-and-operated stations and the Internet-provided Hulu platform – and an impressive array of content through its movie studio, broadcast network and its many cable channels.

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 against these companies despite having fewer customers and resources. WOW! has no problem with robust competition. However, when your competitor also is a major vendor, supplying video content essential or important for any competitive provider to access, problems 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, Department of Justice, 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 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 Subcommittee general and frequent problems that MVPDs have encountered and currently face when negotiating content deals.⁴ 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. After entering into a distribution deal with a competitive MVPD, a RSN affiliated with a competing incumbent cable operator went back into the local professional sports rights marketplace and outbid an existing rights holder, a local broadcast station, for a package of professional sports games. Then, despite having an existing agreement, the RSN demanded a significant surcharge from the competitive MVPD in exchange for the rights to add these new games to the existing package. To add to the harm, the broadcast outlet that lost the product dramatically increased its demands for retransmission consent fees to compensate, in part, for the loss of revenue associated with the games. The competitive MVPD was faced with a poor choice: try to compete in the marketplace without key sports product, or pay twice, in effect, for the same set of games.
2. In negotiations for retransmission 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 broadband services.
3. A 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.

⁴ 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.

4. 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.

5. 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 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.

6. A MVPD has most recently experienced problems with initiating its own version of Comcast’s Fancast XFINITY TV service because it has been unable to obtain content from Comcast and other content providers with whom Comcast has struck deals. This despite the fact that Comcast claims the content used in its online service is non-exclusive. This highlights the fact that mere promises of non-exclusivity offer very little. An entity can obtain a de facto exclusive by slow-rolling negotiations or by offering the product at unreasonable rates, terms, and conditions. In the end, consumers lose as they face more limited options.

B. 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 vertically to reduce or eliminate competition, in either traditional or Internet-based markets. Let me elaborate.

In a series of rulings over the past five years – one just the other day -- the FCC has determined that sports programming was “non-replicable” or “must have.” In other words, a

video distributor such as WOW! or other ACA members 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. A main driver of the proposed combination is to “lever” these two “must have” and currently competing content anchors and squeeze unaffiliated downstream multi-channel video providers to extract appreciably higher fees.⁵ In the post-combination world Comcast will have so much power that it can create its own economic reality and make one plus one equal five. This makes every distributor 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.

Two examples will help make this point clearly. In Chicago today, WOW! carries 19 networks from Comcast and NBC Universal, including both Comcast’s regional sports network and NBC’s owned-and-operated television station. We negotiate separately with the two firms, and, although it is quite limited because each firm leverages its existing “market power content” to the maximum extent, we have some limited maneuverability regarding the rates, terms and conditions for carriage. Post-combination, even this very limited flexibility evaporates, and we will face a “take-it or leave-it” deal – which, because it contains much increased “market power content,” we must take.

An ongoing battle between Comcast and competing video distributors in California provides more specificity on how Comcast can extract added value when it controls two separate “must have” networks. Historically, Comcast’s regional sports network in the Bay Area carried all local sports teams, and competing video distributors were able to acquire this content, albeit at very high prices. Then, just a short time ago, Comcast removed two of the local teams’ games from the Bay Area network and placed them on a separate regional sports network in Sacramento, which was not previously carried by the other providers. The competing distributors thus were forced to either pay for two networks – although the amount of content from in-market sports teams did not increase and the price for the Bay Area network did not decrease -- or deprive their users of much-in-demand content. This is just one of the many strategies Comcast can employ and expand upon if this proposed combination is approved.

This enhanced market power, of course, poses the major concern 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 U.S. General Accountability Office, have demonstrated that competitors like WOW! provide real competition to incumbent cable providers and tangible benefits for consumers. As I discussed at the outset, WOW! has received an unprecedented

⁵ In their application to transfer control filed last week 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.

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. DirecTV, Dish, Verizon's FiOS, and AT&T U-Verse are all in Comcast's cross-hairs. In fact, with the advent of Internet-delivered video content, the hundreds of ACA members who currently do not compete with Comcast's cable systems 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. Heads, Comcast wins; Tails, Competition and Consumers lose.

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.

II. Traditional Behavioral Remedies are Insufficient to Remedy the Harms that Arise from the Proposed Combination

In fashioning relief to address the harms that would arise if Comcast and NBC Universal were permitted to combine, it is important to review the history of the Congressionally mandated program access requirements and merger-related conditions and understand they are so flawed as to provide ineffective relief. 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. For example, program access remedies contain an enormous loophole that permits entities to justify discriminatory practices by claiming they are based on volume-rated cost differentials, although there is scant evidence of any cost-based rationale. Another loophole permits programming vendors to artificially establish a high market rate, which its affiliated distributor "kicks-back" to the vendor. As for the program access complaint process, there is no prohibition on programmers requiring the distributor to remove the network upon expiration of an agreement while a program access complaint is pending. Further, the costs and time associated with pursuing a complaint are so prohibitive that they are beyond the reach of most small 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. WOW! considered using the arbitration process imposed on Comcast in the Adelphia decision but determined the cost of the process was likely to exceed \$1 million, take one year or longer, and require key personnel to take large amounts of time from their regular jobs. In other words, the costs of using arbitration were going to be close enough to the extra price Comcast was going to charge us in the first place. Instead, we had no choice but to “eat” an enormous rate increase to carry Comcast’s RSN. In effect, the program access process has essentially given us a right without a remedy. It would be a grave error to buy into the contention of Comcast and NBC Universal that these processes constitute a legitimate backstop for anticompetitive harms arising from the deal.

WOW! and the ACA are committed to addressing problems with behavioral relief and devising enhanced measures. For instance, among the many remedies we are considering proposing to the FCC and the Department of Justice that would be necessary to address the potential harms are the following:

- **Non-Discriminatory Rates and Terms.** All Comcast-NBC Universal content (whether broadcast, satellite, terrestrial or online) would be available on a non-discriminatory basis, with rates based on a Most Favored Nation or other benchmark.
- **Prohibitions on Content Tying, Bundling and Similar Practices.** Comcast-NBC Universal would be prevented from tying and bundling its services, from requiring carriage of content on a particular tier or level of service, and from penetration or buy-through requirements that disadvantage one provider compared to another.
- **Program Access Arbitration Reforms.** To resolve any program access complaints, unaffiliated MVPDs should be permitted to elect third party review and, thereafter, binding arbitration in connection with the reasonableness of program access and retransmission consent terms and condition (including those between Comcast and NBC Universal). While the third party review or arbitration is pending, unaffiliated MVPDs would be permitted to continue to carry the programming under the terms and conditions of the existing or expired agreement.

Even with potentially enhanced behavioral remedies, given that the harms from the proposed combination of Comcast-NBC Universal are so severe, the FCC and Department of Justice must seriously consider structural relief, including divestitures of assets that are the cause of the 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.

III. Because of the Substantial and Far-reaching Problems Posed by the Deal, the Federal Communications Commission and the Department of Justice Should Proceed Deliberately

The proposed combination of Comcast and NBC Universal would bring together the leading content distributor and a major content provider with a major television network distributor which creates and controls effectively essential content. As a consequence, the proposed combination raises critical concerns about the anticompetitive effects on a variety of markets and consumers throughout the country. In my testimony, I have briefly discussed harms from increased horizontal concentration of content, enhanced vertical integration of content and distribution, and further horizontal concentration in distribution markets. I also have raised concerns about the harms that would result with the efforts of Comcast and NBC Universal to extend their market power from the traditional communications markets to the Internet. I know that other interested parties, including consumer groups, have raised concerns which include: higher prices for consumers, particularly those in rural areas, fewer programming choices, increased difficulty by unaffiliated content providers to obtain equitable distribution agreements, less competition in local advertising markets, and lost jobs. In light of the magnitude of the proposed combination and its potential to drastically alter the competitive landscape in traditional and new content and distribution markets, the federal agencies need to proceed deliberately to gather, understand, and analyze all relevant data. WOW! and the ACA ask that they be permitted to do their jobs correctly.

IV. 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 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.