June 21, 2010

Via Electronic Filing

Marlene H. Dortch
Federal Communications Commission
Office of the Secretary
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal. Inc. for Consent to Assign Licenses or Transfer Control of Licensees, MB Docket No. 10-56

Dear Ms. Dortch:

Enclosed please find the Comments of the American Antitrust Institute in the above-mentioned proceeding.

Sincerely,

Diana L. Moss

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Before the
Federal Communications Commission
Washington, D.C.

In the Matter of	**(**	
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Applications of Comcast Corporation	**(**	**MB Docket No. 10-56**
General Electric Company and NBC	**(**	
Universal, Inc.	**(**	
	(	
Consent to Assign Licenses or	**(**	
Transfer Control of Licensees	**(**	

Comments of the
American Antitrust Institute

The American Antitrust Institute (AAI) appreciates the opportunity to comment in the above-mentioned matter before the Federal Communications Commission (FCC). The AAI's comments pertain to the competitive implications of the proposed transaction. These considerations are an essential part of the FCC's assessment under Sections 214(a) and 310(d) of the Communications Act and Section 2 of the Cable Landing License Act.[1] Under the statute, the FCC must determine whether approval of the Applicants' proposed transaction would serve the public interest, convenience, and necessity.

[1] 47 U.S.C. §§ 35, 214(a), 310(d).

I. The Proposed Transaction

On December 3, 2009, Comcast and GE (parent of NBCU) agreed to pool assets in a joint venture (JV) valued at about $30 billion.[2] Under the JV, GE will have a 49 percent ownership share and Comcast will have a 51 percent share, with certain rights to buy out GE's share in the future. Comcast will contribute to the JV its cable networks, 10 regional sports networks, and digital media properties (Fandango and Daily Candy). Comcast's cable systems and several internet sites involved in the aggregation and marketing of content, including Fancast and Hulu, will not be contributed to the JV. NBCU will contribute its cable networks, filmed entertainment, televised entertainment, and theme parks. The JV is therefore, at least on paper, a pooling of content-related assets.

II. Structure of the AAI's Comments

The AAI is an independent Washington D.C.-based non-profit education, research, and advocacy organization. Our mission is to increase the role of competition, ensure that competition works in the interests of consumers, and challenge abuses of concentrated economic power in the American and world economies. The AAI has offered legal and economic analysis and opinion on mergers, antitrust issues, and competition policy involving the communications industries. This includes, among other cases: *Verizon/MCI*, *AT&T/Bellsouth*, *AT&T/SBC*, and *Trinko*.[3] More generally, the AAI

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[2] *Comcast and GE to Create Leading Entertainment Company*, Comcast (December 3, 2009), at 1. Available http://files.shareholder.com/downloads/CMCSA/928665591x0x336642/8627242a-6cc5-4885-8261-c139a0db6352/CMCSA_News_2009_12_3_General_Releases.pdf.

[3] The AAI's comments have been reviewed by several members of the AAI Advisory Board and approved by the AAI Board of Directors. For more information on the AAI and its positions on telecommunications, media, and network industries issues, please see www.antitrustinstitute.org. The principal author of these

has offered policy guidance on telephony, broadband, media diversity, and the importance of merger control in nascent and developing markets.[4]

The AAI's comments are divided into several sections. Section III summarizes our findings and recommendations. Section IV discusses the importance of merger review involving media consolidation. Section V explains why the JV should be expected to jointly maximize its profits with other NBCU and Comcast businesses not contributed to the JV. Section VI describes how the JV will increase Comcast/NBCU's control over two major content and distribution "systems" or "platforms"--cable television (i.e., multichannel video programming distribution (MVPD)) and cable modem high-speed internet (HSI).[5] Section VII explains how the JV will enhance Comcast/NBCU's incentive to strategically control the development of two major media platforms, to the potential detriment of competition and consumers. Section VIII discusses how the JV will eliminate vertical competition between content and MVPD and HIS distribution. Section IX urges rejection of the proposed transaction. Short of that, the AAI proposes remedies that would, at a minimum, be required to ameliorate the competitive and consumer concerns raised by the JV.

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comments is Diana Moss, Vice President and Senior Fellow of the AAI. She thanks AAI Research Fellows Dai Gunn Jei and Irit Dolgan for their research assistance.

[4] See, e.g., *Diversity in the Media*, in THE NEXT ANTITRUST AGENDA, American Antitrust Institute (October 2008). Available http://www.antitrustinstitute.org/archives/files/Media%20Chapter%20from%20%20AAI%20Transition%20Report_100520082052.pdf. See also Randy Stutz and Richard Brunell, *Analysis of the FTC's Decision not to Block Google's Acquisition of AdMob*, American Antitrust Institute (June 7, 2010). Available http://www.antitrustinstitute.org/archives/files/google-admob%20white%20paper_060720101348.pdf.

[5] A multi-video programming distributor (MVPD) is an entity such as a cable operator or direct broadcast satellite (DBS) that makes multiple channels of video programming available for purchase by subscribers or customers.

III. Summary of Findings

The AAI encourages the Commission to consider the full complement of competitive issues raised by the JV. The AAI's comments will not directly address the Applicants' vertical foreclosure analysis because of limited access to information in their public filings. In their analyses, the Applicants examine—and deem unprofitable--two foreclosure scenarios using the FCC's model whereby NBCU would withhold from rivals: (1) retransmission rights to NBC's broadcast station signals[6] and (2) long-form professional quality video content.[7] However, there are other competitive issues raised by the JV that are ignored by standard vertical foreclosure analysis performed by the Applicants. These include how the JV will: (1) increase Comcast's and NBCU's incentives to strategically control the development of the content/MVPD and content/HIS platforms and (2) eliminate vertical competition between content and MVPD and HSI distribution.

The foregoing questions should be central to the FCC's inquiry into the competitive effects of the transaction. These problems reveal that the proposed JV is rooted fundamentally in the enhancement of market power and the potential to execute anticompetitive strategies. Namely, the JV is designed to shelter Comcast and

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[6] Mark Israel and Michael L. Katz, *Application of the Commission Staff Model of Vertical Foreclosure to the Proposed Comcast-NBCU Transaction*, in the Matter of Applications of Comcast Corporation General Electric Company, and NBC Universal Inc. for the Consent for Transfer of Control Licenses, MB Docket No. 10-56 (February 26, 2010), at 2.

[7] Mark Israel and Michael L. Katz, *The Comcast/NBCU Transactions and Online Video Distribution*, in the Matter of Applications of Comcast Corporation General Electric Company, and NBC Universal Inc. for the Consent for Transfer of Control Licenses, MB Docket No. 10-56 (May 4, 2010), at 2. This analysis assumes that distribution of via HSI would be viewed by consumers as a substitute for cable television. In this foreclosure scenario, NBCU would lose revenues from denying rival online MVPDs its programming but which would not be made up by subscribers switching to Comcast and compounded by the loss of subscribers to Comcast's HSI services.

NBCU businesses from competition *and* to control how competition develops between the content/MVPD and content/HSI platforms. NBCU and Comcast have thus failed to satisfy their burden of showing how the JV improves diversity, increases competition, or is otherwise in the public interest.

In brief, the AAI's comments conclude that:

- **Review of media mergers should be particularly stringent.** Excessive media concentration not only may raise prices to consumers and adverstisers above competitive levels, but *also* threaten the public's access to important information or viewpoints.

- **The JV will not maximize profits in isolation, but rather jointly with the rest of Comcast's and NBCU's businesses.** There are no valid arguments for why the JV should be evaluated in isolation, as urged by the Applicants. Rather, profit-maximization incentives, Comcast's majority ownership of the JV, and primary motivation for the JV to create content/distribution platforms all point to why joint profit maximization is likely.

- **After the transaction, Comcast and NBCU will have more control over two large media content/distribution platforms.** Through horizontal consolidation, the JV creates an entity with a significantly larger presence in the content markets. By virtue of the JV's linkages with Comcast's two content delivery modalities (MVPD and HSI), Comcast/NBCU will have more control over two major media content/distribution systems after the transaction.

- **Applicants' focus on vertical foreclosure analysis overlooks important competitive issues.** By focusing narrowly on vertical foreclosure analysis, Applicants ignore other important competitive issues, failing to satisfy their burden of showing that the transaction is in the public interest.

- **The JV will enhance Comcast/NBCU's incentive to strategically control the development of two major media platforms.** Such control would affect the development, pace of innovation, accessibility, and positioning of the platforms relative to each other. Comcast/NBCU has the ability to strategically affect how consumers access content *within and across* platforms, and has already used it.

- **The JV will eliminate vertical rivalry between content and distribution.** Eliminating the hard bargaining between content providers (e.g., NBCU) and distributors is an anticompetitive effect of the JV. But the Applicants' primary efficiency rationale for the JV—i.e., the elimination of negotiating friction

between content producers and distribution—is a small step away and should therefore be discounted as a pro-competitive effect of the transaction.

- **The FCC should deny the transaction and, short of that, consider remedies to guard against potential adverse effects.** Possible remedies include divestiture of online content aggregation and marketing assets such as Hulu and Fancast, establishment of firewalls between the JV and the rest of Comcast, and prohibitions on current and possible Comcast practices that control how consumers access and utilize the content/MVPD and content/HSI systems.

IV. Review of Media Mergers Should be Particularly Stringent

Two concerns traditionally have been raised about large media enterprises. First, media giants may raise prices to consumers and advertisers above competitive levels. This concern about corporate market power cuts across all industries. The second concern is media-specific: namely, society's political and cultural health "is fostered by numerous, independent media," and excessive media concentration may threaten the public's access to important information or viewpoints.[8] As the Supreme Court has long recognized, the risk of market failure in the marketplace of ideas has greater implications than for ordinary wares. Justice Frankfurter's concurring opinion in *Associated Press* brings home this point:

> [While a commercial enterprise, AP] has a relation to the public interest unlike that of any other enterprise pursued for profit. A free press is indispensable to the workings of our democratic society. The business of the press, and therefore the business of the Associated Press, is the promotion of truth regarding public matters by furnishing the basis for an understanding of them. Truth and understanding are not wares like peanuts or potatoes. And so, the incidence of restraints upon the promotion of truth through denial of access to the basis for understanding calls into play considerations very different from

[8] William B. Shew and Irwin M. Stelzer, *A Policy Framework for the Media Industries*, in MARKETS AND THE MEDIA: COMPETITION, REGULATION AND THE INTERESTS OF CONSUMERS 109, 111 (M.E. Beesley ed., 1996); Maurice E. Stucke and Allen P. Grunes, *Toward a Better Competition Policy for the Media: The Challenge of Developing Antitrust Policies That Support the Media Sector's Unique Role in Our Democracy*, 42 CONNECTICUT LAW REVIEW 101 (2009). Available http://ssrn.com/abstract=1330681.

comparable restraints in a cooperative enterprise having merely a commercial aspect.[9]

One risk in evaluating a media merger is that the reviewing agency erroneously predicts that the merger is unlikely to be anticompetitive. This risk is known as a false negative. False negatives in reviewing media mergers can have significant repercussions to our marketplace of ideas and democracy. Consequently the FCC in evaluating the current joint venture must be sensitive to the risks of false negatives, and the policy safeguards to mitigate them. The first safeguard applies generally to all mergers. Section 7 of the Clayton Act seeks to mitigate the risks of false negatives generally through an incipiency standard, which is to prohibit mergers, the effect of which "may be substantially to lessen competition, or to tend to crease a monopoly."[10] The incipiency standard mandates increased stringency. Thus the outcome for merger review should differ from the outcome of evaluating antitrust restraints under the Sherman Act, i.e., a lower probability of harm should suffice under the former.

While uncertainty and errors of both over-enforcement and under-enforcement are inevitable, enforcers and the courts should respect Congress's desires and err on the side of strict enforcement. This includes looking further into the future for possible

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[9] Associated Press v. United States, 326 U.S. 1, 27–28 (1945).

[10] "Section 7 of the Clayton Act was intended to arrest the anticompetitive effects of market power in their incipiency. The core question is whether a merger may substantially lessen competition, and necessarily requires a prediction of the merger's impact on competition, present and future. . . . The section can deal only with probabilities, not with certainties. . . . And there is certainly no requirement that the anticompetitive power manifest itself in anticompetitive action before § 7 can be called into play. If the enforcement of § 7 turned on the existence of actual anticompetitive practices, the congressional policy of thwarting such practices in their incipiency would be frustrated." FTC v. Procter & Gamble Co., 386 U.S. 568, 577 (1967); *see also* Robert H. Lande, *Resurrecting Incipiency: From Von's Grocery to Consumer Choice*, 68 ANTITRUST L. J. 875 (2001). Available http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1134815.

harms from mergers, and a greater likelihood of blocking mergers that are likely to cause or exacerbate an industry trend towards concentration or to spark a merger wave in the industry. This incipiency standard is especially important in the media industry. If such concentration is not checked in its incipiency, Congress noted, then more intrusive and undesirable governmental regulation may be required—which would be especially undesirable to the media industry.

A second safeguard to mitigate the risks of false negatives in media mergers is structural. Both the federal antitrust agencies and the FCC evaluate the merger's impact on editorial competition. Congress in the 1950 Celler-Kefauver amendments to the Clayton Act considered the concerns of media mergers to our democracy. Overall, the dominant themes pervading Congress's consideration of the amendments were the perception of a "rising tide of economic concentration in the American economy"[11] and the belief "that increased economic concentration might threaten other fundamental values of a non-economic nature."[12] Significantly, Congress debated the marketplace of ideas, specifically the loss of editorial competition resulting from newspaper mergers[13]

A third safeguard to mitigate the risk of false negatives is the recognition that vertical mergers in the media industry pose a greater likelihood of anticompetitive effects. The Supreme Court and Congress recognized that cable operators are different from distributors in other vertical arrangements. For example, in the *Turner* case, the concern was that cable companies' monopoly power over bottlenecks put them in a

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[11] Brown Shoe Co. v. United States, 370 U.S. 294, 315 (1962).

[12] 4 EARL W. KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 3611 (1978).

[13] House Debate, 81st Cong., 1st Sess., Aug. 15, 1949, reprinted in 4 Kintner, *supra* note 6, at 3481.

unique position to control the dissemination of ideas.[14] Thus Congress, the federal courts, and the agencies have noted the dangers when a company that dominates the transmission of media merges with a content provider. Some examples are (1) Judge Greene's concerns in the AT&T case[15]; (2) the Congressional concerns underlying the 1992 Cable Act[16]; (3) the FTC's concerns in the consent decree involving Time Warner's acquisition of Turner Broadcasting System[17]; and (4) the FTC's concerns in the AOL/Time Warner merger.[18]

Even with the above safeguards, Congress nonetheless recognized the significant risk of false negatives in media mergers. Thus to further mitigate the risks of false negatives in media mergers that fall within the FCC's jurisdiction, the burden of proof is different.[19] Although the FCC can review certain transactions under section 7 of the Clayton Act, the FCC more often reviews media mergers under its public interest authority. To mitigate the risks of false negatives in the media industry, the *merging*

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[14] Turner Broadcasting Sys. v. FCC, 512 U.S. 622 (1994); Turner Broad. Sys. v. FCC, 520 U.S. 180 (1997)).

[15] Stucke and Grunes, *supra* note 8, at 269-70 (noting how the district court was concerned that after the consent decree, AT&T could use its market power in the long distance network to stifle the marketplace of ideas via the electronic publishing industry, which in the early 1980s, was still in a fragile state of experimentation and growth).

[16] A cable operator has an incentive to favor its affiliated programmers. But a cable operator also has an incentive to offer an attractive package of programs to its subscribers. When these two incentives are in conflict, "the operator may, as a rational profit-maximizer, compromise the consumers' interests." Time Warner Entm't v. United States, 211 F.3d 1313, 1322 (D.C. Cir. 2000).

[17] Time Warner Inc., Turner Broad. Sys., Inc., Tele-Communications, Inc., and Liberty Media Corp., Dkt. No. C-3709 (Feb. 3, 1997).

[18] *See Analysis of Proposed Consent Order to Aid Public Comment*, America Online, Inc., and Time Warner Inc., Docket No. C-3989. Available http://www.ftc.gov/os/2000/12/aolanalysis.pdf.

[19] Lawrence M. Frankel, *The Flawed Institutional Design of U.S. Merger Review: Stacking the Deck Against Enforcement*, 159 UTAH L. REV. (2008), at 199-204.

parties must affirmatively show that the merger is in the public interest.[20] NBCU and Comcast must therefore demonstrate that their JV is not likely to reduce competition.

V. The JV Will Maximize Profits Jointly with the Rest of Comcast's and NBCU's Businesses

The parties state that the JV has incentives to only maximize the profits of the JV. As such, if the JV were to deliberately sacrifice profits to benefit Comcast's affiliated cable systems, its executives would violate their fiduciary responsibilities.[21] The AAI submits that in evaluating competitive issues associated with the transaction, this narrow view should be rejected. Basic economic incentives, Applicants' stated motivation for the JV, and the proposed structure of the JV all point to why it should be analyzed as a joint profit-maximizer with NBCU's and Comcast's affiliated businesses.

First, profit-maximization for the JV cannot accurately be considered in a vacuum. That calculation, if performed in isolation, is to maximize profits relating to the JV's content businesses alone where advertising revenue is critically important. But there would be no demand for content without distribution and, similarly, no demand for distribution without content. Under the compartmentalized profit-maximization scenario advanced by the Applicants, the JV would therefore be a valueless proposition. Moreover, Comcast would risk the loss of profits if it did not consider the JV in its overall profit-maximization calculus. Because it is unrealistic to consider the JV as an independent profit-maximizing entity, it must be considered in the context of *all* of Comcast's and NBCU's businesses.

[20] *Id*., at 201.
[21] *Supra* note 7, at 74-75.

Second, Comcast's majority (51 percent) interest in the JV reinforces the ability of Comcast to control the JV to further the objectives of a fully-integrated Comcast/NBCU. Moreover, it is not clear if the JV's new directors will come from anywhere but Comcast and NBCU (GE).[22] If creating a fiduciary duty to the JV were sufficient to ensure that the managers of the JV only maximized the profits of the joint venture, then the ongoing anticompetitive risks of most JVs (which are typically organized as partnerships) would be minimal. However, the independence of a JV for competition purposes is generally measured by the degree of control exercised by the parents, not the legal duties of the managers.[23]

Third, the parties themselves argue that the transaction will create benefits around content *and* distribution. As discussed later, for example, the parties cite to the elimination of negotiating friction between content producers and MVPD and HSI distribution as the primary efficiency generated by the JV. They go on to state that "The development of improved online video offerings can thus be expected to stimulate the demand for Internet access services, especially broadband services."[24] Comcast's investor documents reiterate this point when asserting that the JV "[a]ccelerates innovation and new models for content delivery and distribution."[25]

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[22] *Supra* note 2, at 2. The release states that Comcast will nominate three directors and GE will nominate two.

[23] See Federal Trade Comm'n and U.S. Dept. of Justice, Antitrust Guidelines for Collaborations Among Competitors § 3.34(d) (2000) ("collaboration is less likely to compete independently as participants gain greater control over the collaboration's … competitively significant decisions").

[24] *Supra* note 7, at 3-4.

[25] *Creating a Premier Media and Entertainment Company*, Comcast (December 3, 2009), at 4. http://www.comcast.com/nbcutransaction/pdfs/Investor_Presentation_Comcast-NBCU_FINAL%20-%20No%20Notes.pdf.

The JV will be inextricably linked with the economic interests of Comcast's and NBCU's businesses that are not contributed to the JV. By failing to consider that the JV will jointly maximize profits with NBUC's and Comcast's other businesses, the Applicants have not borne the burden of showing that the JV is in the public interest because they ignore how the transaction affects Comcast/NBCU's ability and/or incentive to adversely affect competition and consumers.

VI. The JV Will Increase Comcast/NBCU's Control of Two Major Media Content/Distribution Platforms or Systems

The JV will be part of a system of complementary markets in what is aptly termed a media content and distribution platform. These markets include: (1) the production of content; (2) aggregation and marketing of content for consumption online and via MVPD; and (3) distribution of content via cable television MVPD and cable modem HSI. After the JV, Comcast and NBCU—both dominant entities--will control a larger portfolio of highly valuable content than either party did separately. The parties clearly recognize this effect when they state that the JV will achieve "scale" for Comcast's cable channels.[26] The expanded volume and scope of content under the JV increases Comcast/NBCU's control over both the content/MVPD and content/HSI platforms. This pre- to post-JV change is analogous to a combination utility that distributes both natural gas and electricity to consumers, owns coal reserves, and that enters into a JV arrangement with a natural gas pipeline in the same geographic market. The post-transaction entity would therefore control two large platforms for producing

[26] *Id.*, at 23.

and delivering energy to consumers—a transaction that would undoubtedly raise the level of regulatory and antitrust scrutiny.

It is important to recognize the magnitude of Comcast/NBCU in a post-JV media world. For example, many of NBCU's and Comcast's cable networks and channels are highly profitable and reside in the top segment of ratings and subscribership.[27] Comcast owns several cable channels, including E, Golf Channel, Style, G4, Versus, and Sprout. Comcast also owns 10 regional sports networks that carry programming in regions such as Chicago, New York, and Philadelphia. NBCU owns significant content assets, including the 84 year-old broadcast television network NBC and numerous cable networks, including: MSNBC, USA Network, TNT, tbs, SyFy, Bravo, and Oxygen.[28] Post-JV, Comcast/NBCU will move from fourth to third largest owner of national cable networks.[29] NBCU and Comcast are also involved in the aggregation and marketing of professional-quality video content via the internet. This includes Comcast's Fancast and Hulu, in which NBCU has a 32 percent ownership share.[30] Hulu is the second largest online distributor of content after Google sites, while Fancast attracts about one fourth the volume of visits as does Hulu.[31] Rival online content aggregation and marketing sites include Boxee, Crackle, Netflix, and Sling.

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[27] *Id.*, at 26-29.
[28] *Id.*, at 15.
[29] *Applications and Public Interest Statement*, *Description of Transactions, Public Interest Showing, and Related Demonstrations,* MB Docket No. 10-56 (January 28, 2010), at 92. The JV will essentially be tied for third place with Viacom in the national cable owner rankings.
[30] News Corp. and Disney are the other major partial owners.
[31] *comScore Releases April 2010 U.S. Online Video Rankings*, comScore (June 1, 2010). Available http://www.prnewswire.com/news-releases/comscore-releases-april-2010-us-online-video-rankings-95335004.html. Alex Patriquin, *May Online Video Market Share*, Compete (June 26, 2008). Available http://blog.compete.com/2008/06/26/online-video-market-share-may-hulu-fancast-google-movies/.

On the distribution side, Comcast is the largest MVPD provider in the U.S. with about 25 percent of subscribers nationally.[32] Comcast is also the largest national provider of HSI services in the U.S., with about 40 percent of subscribers based on cable modem only, and about 22 percent of subscribers based on cable modem and DSL together at the end of 2008.[33] However, the parties themselves state that MVPD and HSI markets should be defined around local geographic regions such as major metropolitan areas.[34] While the AAI does not have access to share statistics for local MVPD and HSI markets in the U.S., in many of the 40[35] major regional markets in which Comcast operates, it is likely to face less competition and its market share (and market power) is likely much greater.

It is well-known that local MVPD markets are highly concentrated because of the limited number of technologies available and licensing requirements.[36] In HSI, Comcast asserts that it faces increasing competition from alternative technologies such as DSL and increasingly from fiber and wireless networks.[37] But FCC data on the percentage of census tracts with residential fixed high-speed connections highlight the concentrated

[32] *Supra* note 29, at 3. Another source estimates Comcast's U.S. market share of MVPD based on number of subscribers at the end of 2008 to be 22 percent.
[33] *Supra* note 29, at 124-125. *See Broadband Internet Statistics Tracking the Growth of Broadband Internet Usage*, (updated March 11th, 2009). Available http://www.high-speed-internet-access-guide.com/articles/broadband-statistics-for-2008.html. Comcast tied AT&T for first place in market share based on cable modem and DSL together.
[34] *Supra* note 29, at 84 and 88.
[35] *Form 10-K for the Period Ending December 31, 2009*, Comcast Corp. (February 23, 2010), at 22.
[36] For further discussion, see e.g., Richard J. Gilbert and James Ratliff, *Sky Wars: The Attempted Merger of Echo Star and DirecTV*, Case 4 in THE ANTITRUST REVOLUTION (4th ed.), Oxford University Press (John E. Kwoka, Jr. and Lawrence J. White, eds. 2004).
[37] *Supra* note 29, at 125.

nature of local HSI markets.[38] Almost 80 percent of localities have no more than two providers of aDSL service. Almost 80 percent of localities have only one provider of cable modem service.

Other technologies touted as rapidly challenging the market position of cable modem and aDSL service, however, have not yet made a strong showing in the market. These include sDSL, FTTP,[39] satellite, fixed wireless (e.g., hotspots), and broadband over powerline, where 96 percent, 87 percent, 45 percent, 87 percent, and 100 percent of census tracts, respectively, have *no* provider.[40] Finally, barriers to entry in the HSI and MVPD delivery modalities are high (and getting higher) because of burgeoning demand for bandwidth. However, there are only a few large suppliers (of which Comcast is one in a tight oligopoly) and entry involves enormous sunk costs.

VII. The JV Will Enhance Comcast/NBCU's Incentive to Strategically Control the Development of Two Major Media Platforms

The parties argue that content delivered via HSI is complementary to the services delivered via MVPD and broadcast television.[41] In other words, consumers use the content/HSI platform as a supplement to programming consumed via the content/MVPD platform (e.g., to catch up on missed episodes). But consumers do not, according to the Applicants, view content/MVPD and content/HSI as substitutes for

[38] *High-Speed Services for Internet Access: Status as of December 31, 2008*, Federal Communications Commission, Industry Analysis and Technology Division Wireline Competition Bureau (February 2010), at 33. Available http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296239A1.pdf.
[39] FTTP is fiber optic cable that replaces the last-mile copper local loop for telecommunications. "aDSL" is asymmetric digital subscriber line, as compared to "sDSL" or symmetric digital subscriber line. Both are technologies that allow more data to be sent over existing copper telephone lines. Download speeds are faster than upload speeds for aDSL. Upload and download speeds are almost the same for sDSL.
[40] *Supra* note 38, at 33.
[41] *Supra* note 7, at 2.

each other. It is clear that this distinction could change, as consumers increasingly view content/HSI as a substitute for content/MVPD. If and when this occurs is not particularly material to an analysis of competition. What matters is that the JV, with control over a larger cache of valuable content and two major distribution channels to the consumer, will have an enhanced incentive to strategically control how the two platforms develop.

With greater post-JV incentives to strategically control the development of the content/MVPD and content/HSI platforms (coupled with the pre-existing ability do so), the risk is that Comcast and NBCU will pre-determine the parameters of competition. These adverse effects could include forestalling inter-system rivalry. In effect, this is a foreclosure story but of *competing platforms*, not rivals within particular levels in a system. Other adverse effects of strategic control could include erecting barriers to new platform rivals and triggering other mergers to create platforms to compete with a dominant Comcast/NBCU. Absent the JV, competitive forces would play a larger role in determining the development, pace of innovation, accessibility, quality, positioning, and viability of the content/MVPD platform relative to the content/HSI platform.

A. *Intra*-System Versus *Inter*-System Competition

A system or platform is a collection of related or complementary markets, across horizontal and/or vertical market dimensions that provide sufficient utility such that consumers need not purchase additional complements outside the system.[42] Full integration often defines the structure of a platform, but contractual relationships linking suppliers within the system are also present. A key feature of systems is the

[42] *See, e.g.,* Michael L. Katz and Carl Shapiro, *Systems Competition and Network Effect*, 8 JOURNAL OF ECONOMIC PERSPECTIVES 93, (1994).

degree to which they are "open" or "closed." In relatively open platforms, rivalry is observed at one or more levels within the platform. Access is the defining feature of an open system, through interconnection, interoperability, or licensing of key patented technologies.[43] In an open system, therefore, "intra-system" competition is the governing concept and vertical foreclosure analysis is important, since the focus is on how rivals may be locked out of any *given level* in a system. Program access rules and retransmission rights are good examples of requirements that promote or protect intra-system competition.

A closed system does not feature rivalry at any level. Closed systems may emerge from a number of strategies. First, engineering design may not allow for interoperable components. Second, firms may also create a proprietary platform, i.e., refusing to license technology needed by rivals to gain access to certain levels. Third, strategic consolidation may build dominance at one or more levels in the system, which also increases barriers to entry. If vertical foreclosure is successful in such cases, there is little room for intra-system competition and therefore a closed system almost always results.[44] In the case of a closed system, consumers benefit only if there is robust inter-system competition, i.e., the emergence of competing systems that deliver similar products and value. We note that vertical foreclosure does *not* address the inter-platform competition issues raised by how the JV enhances Comcast/NBCU's control over two major content/distribution systems.

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[43] *See, e.g.,* Joseph Farrell, Hunter K. Monroe, and Garth Saloner, *The Vertical Organization of Industry: Systems Competition Versus Component Competition*, 7 JOURNAL OF ECONOMICS & MANAGEMENT STRATEGY 143 (1998).

[44] *See, e.g.,* Jeffrey Church and Neil Gandal, *Platform Competition in Telecommunications*, Centre for Economic Policy Research, Discussion Paper No. 4659 (October 2004).

Remedies in recent antitrust enforcement actions highlight the fact that the agencies recognize the importance of systems competition issues, although they have not been explicit in this recognition. For example, the Department of Justice's (DOJ's) recent consent decree in the Ticketmaster/Live Nation merger included a remedy that was arguably designed to create a viable, rival platform to the newly merged firm. The remedy centered on the ability of rivals to license the merged firm's proprietary ticketing software, together with the divestiture of ticketing assets.[45] In the 2007 merger of agricultural biotechnology giant Monsanto and cotton seed Delta and PineLand, the DOJ required Monsanto to remove provisions in its licensees that restricted access to critical technology.[46] Together with the divesture of seed assets, these requirements created a rival cotton platform that was expected to compete with the newly-merged Monsanto/Delta and PineLand.

B. Mechanisms for Influencing How Consumers Access and Utilize Content/MVPD and Content/HSI Platforms

There are two ways in which Comcast/NBC could influence how consumers' access and utilize the content/MVPD and content/HSI platforms. One mechanism involves consumers' ability to consume content *across* platforms. For example, Comcast's TV Anywhere concept, Fancast Xfinity TV, provides access to content via the internet but it also requires a subscription to Comcast's cable television services.[47] This

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[45] *See* U.S. v. Ticketmaster Entertainment, Inc. and Live Nation, Inc. Proposed Final Judgment, Case: 1-10-cv-00139 (January 25, 2010). Available http://www.justice.gov/atr/cases/f254500/254558.htm.

[46] *See* U.S. v. Monsanto Company and Delta and Pine Land Company, Proposed Final Judgment, Case: 1:07-cv-00992 (May 31, 2007). Available http://www.justice.gov/atr/cases/f223600/223679.htm).

[47] *Comcast Opens Fancast Xfinity TV*, Wall Street Journal Blogs (Digits) (December 15, 2009). Available http://blogs.wsj.com/digits/2009/12/15/comcast-opens-fancast-xfinity-tv/. The service is only available to Comcast customers who receive both TV and Internet service through Comcast.

arrangement appears designed to prop up Comcast's cable television subscribership, or to promote Comcast's experiments in other services such as video-on-demand and DVD day and date of release.[48] It also reveals the underlying concern that content/HSI could well become a substitute for content/MVPD. Well-publicized fears over consumer "cord-cutting" (i.e., the dropping of MVPD subscriptions in favor of HSI) punctuate this observation.

Another mechanism for controlling consumer behavior across platforms is bundling. For example, post-JV, Comcast's double or triple-play packages that bundle cable television, HSI, and voice-over telephony could become more restrictive. The bundles, which make it attractive for consumers to one-stop shop, could now include penalties for dropping MVPD or HSI services from the bundle. Under either of these scenarios, Comcast/NBCU can control how the content/HSI platform develops relative to content/MVPD.

A second way Comcast/NBC could influence how consumers' access and utilize platforms is to control how consumers access content *within* either the content/MVPD or content/HSI platforms. For example, Comcast/NBCU can regulate how consumers access content. As more and varied format content becomes available online, we might see more use of tiered pricing for different levels of HSI access. However, Comcast/NBCU could impose supracompetitive prices on subscribers that desire higher

[48] Basic cable penetration fell from about 62 percent subscribers per households passed in 2003 to about 58 percent in mid-2006. Federal Communications Commission, *Thirteenth Annual Report*, In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 06-189 (January 16, 2009), at 14.

usage and bandwith. It may also be the case that Comcast/NBCU will have stronger incentives post-JV to block access to content, presumably under the guise of addressing network management issues. It is particularly important to note that contrary to Comcast's assertions, it does have the ability to block access to content.

For example, Comcast states in its online video foreclosure study that it "has never blocked its HSI subscribers' access to lawful content, and the proposed transaction will not provide it with any incentive to alter its consistent and long-standing practice."[49] However, in 2007, several subscribers to Comcast's high-speed Internet service discovered that the company was interfering with their use of peer-to-peer networking applications. In a subsequent challenge at the FCC, the Commission found that Comcast had "significantly impeded consumers' ability to access the content and use the applications of their choice."[50] This conduct is at the heart of the network neutrality debate that is well-known to the FCC.[51]

VII. The JV Will Eliminate Vertical Rivalry Between Content and Distribution

The Applicants focus their efficiency arguments in large part on how the JV will eliminate negotiating friction between content producers and MVPD and HSI

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[49] *Supra* note 29, at 126.

[50] *In re Formal Compl. of Free Press & Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, 23 F.C.C.R. 13,028 (2008) (Order), 13,054, ¶ 44. Comcast subsequently sought review of the FCC's order in Comcast Corp. v. Federal Communications Commission, Case No. 08-1291 (D.C. Cir.) (April 6, 2010). In that decision, the D.C. Circuit found that the Commission did not have regulatory authority over Comcast's "unreasonable network management practices" because it failed to link that authority to any express statutory authority.

[51] *See e.g.,* Julius Genachowski, *The Third Way: A Narrowly Tailored Broadband Framework*, Federal Communications Commission (May 6, 2010). Available http://www.broadband.gov/the-third-way-narrowly-tailored-broadband-framework-chairman-julius-genachowski.html.

distribution.[52] The Applicants appear particularly focused on aligning NBCU's and Comcast's incentives under the JV to boost content for Comcast's services such as video-on-demand, DVD day-and-date release, and Fancast XFinity TV. [53] As a preliminary matter, we note that by virtue of the fact that Comcast launched these services *before* the JV, the company presumably anticipated that they would be profitable. This begs the question: Why is a JV the size and scope of Comcast/NBCU necessary to further develop these services? More important, unlike most efficiency defenses, elimination of bargaining also poses a *competitive threat*. Content providers compete in a highly competitive market for distribution. NBCU, with enormous efficiencies of scale, succeeds in producing and marketing content. While rivals must compete with NBCU and other kings of content, because of competition, they press on.

Post-JV, NBCU's competitive decisionmaking will be altered by jointly profit-maximizing its production decisions with NBCU's and Comcast's other businesses. NBCU would therefore have a leg up, simply from the fact that it faces a much lower risk of non-distribution. Post-JV, there will fewer incentives to hold back any content since it will be distributed by Comcast. That means less room and need for better competitive offerings for which the JV would have to pay third parties. Thus, the avoidance of "negotiating friction" cited by the Applicants as an efficiency justification translates to

[52] Gregory L. Rosston, *An Economic Analysis of the Competitive Benefits from the Comcast-NBCU Transaction*, in the Matter of Applications of Comcast Corporation General Electric Company, and NBC Universal Inc. for the Consent for Transfer of Control Licenses, MB Docket No. 10-56 (May 4, 2010), at 4. Applicants also offer up other standard rationales for why the JV would benefit consumers, including elimination of double marginalization, elimination of the hold-up or opportunism, and corporate control.
[53] *Id.*, at 12.

an avoidance of the vertical competition necessary for content producers to gain distribution.

When the hard bargaining that characterizes arms-length transactions between independent content providers and distributors is eliminated, so are some of the incentives to produce valuable, diverse, high quality, innovative content. Such vertical competition is one of the major drivers of innovation in media, as it is in wireless telephony smartphones and their operating systems.[54] Since the JV will eliminate vertical competition between content and distribution, the only avenue left to recapture the innovation lost through the JV will be to have a sufficient number of competing platforms in the creation and delivery of content to consumers. How many competing platforms are necessary to ensure robust competition and benefits to consumers is a key question in this regard. In the current context, however, inter-system competition is likely to be sorely lacking in a world dominated by Comcast/NBCU.

To complicate matters further, much of the vertical competition eliminated by the JV also involves dynamic markets, as Comcast/NBCU themselves point out.[55] Some forms of content and distribution are essentially "nascent," in that dramatic growth is underway or universally anticipated but the dynamics of that growth are still very difficult to predict. This stands in stark contrast to a mature, stable market. Good examples of markets in transition include the aggregation and marketing of content online and distribution of content through technologies such as video-on-demand.

[54] *See, e.g., Keynote: Open Platforms the Key to Handset Innovation Says HTC*, MobileInnovation (June 19, 2009). Available http://mobileinnovation2009.wordpress.com/2009/06/19/keynote-open-platforms-the-key-to-handset-innovation-says-htc/.
[55] *Supra* note 29, at 62, 85, and 122 and *supra* note 7, at 1.

While consolidation that affects nascent markets is not unfamiliar to regulators and antitrust enforcers, it is not a well-tested area and consolidation raises more questions that it answers.[56]

For example, there are open questions regarding how relevant content markets should be defined. Markets could be defined as professional long-form video or semi-professional and user-generated video (e.g., YouTube). It could also be the case that downloaded or streamed video content from an online aggregation and marketing site is a separate product market from online news and entertainment. Measurement of shares in online content markets is also controversial. For example, very different shares can be obtained by looking at total number of videos downloaded or streamed versus videos per viewer.[57] And market shares have fluctuated widely over the last several years as online video content distributors have expanded and updated their offerings. Moreover, business models for online content distributors are also changing rapidly—ranging from free distribution to subscription-based services. This is clearly reflected in Hulu's recent difficulties in determining whether to migrate from an ad-supported model to subscription.[58]

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[56] *E.g.,* the 2000 merger of America OnLine and Time Warner raised similar concerns involving the development of (then) relatively new DSL and instant messaging technologies. For more discussion see, e.g., Gerald R. Faulhaber, *Access and Network Effects in the 'New Economy': AOL-Time Warner (2000)*, Case 18 in THE ANTITRUST REVOLUTION (4th ed.), Oxford University Press (, John E. Kwoka, Jr. and Lawrence J. White, eds. 2004).

[57] Market shares can vary dramatically based upon measure. *See, e.g., Hulu Continues Ascent in U.S. Online Video Market, Breaking Into Top 3 Properties by Videos Viewed for First Time in March*, com Score (April 28, 2009). Available http://www.comscore.com/Press_Events/Press_Releases/2009/4/Hulu_Breaks_Into_Top_3_Video_Properties.

[58] Greg Sandoval, *Hulu's Backers Bicker as Web Video Soars*, Cnet News (November 16, 2009). Available http://news.cnet.com/8301-31001_3-10398698-261.html. *See also* Erin Stuelke, *Hulu Streaming Its Way*

Special care should also be taken is evaluating consolidation in markets (such as media and advertising) that already display network effects or have characteristics suggesting the likely presence of network effects. Indeed, consolidation and strategic competition in the presence of network effects has garnered significant attention in the economics literature, including the importance of early-stage rivalry, strategic product positioning, and the potential for tipping to a single technology or platform.[59] Finally, in any nascent market, there is the distinct possibility that firms will conceive new competitive strategies to respond to changing incentives and a fluid market environment. These effects may be difficult for enforcers to predict in the context of a forward-looking merger analysis.

IX. Conclusions and Potential Remedies

Over the years, the cable industry has not been known for its competition, its quality of service, its competitive prices, or its innovation. Cable's customer satisfaction ratings, according to one recent report "have been among the worst of any industry."[60] In the American Customer Satisfaction Index, based on surveys of U.S. households, "the four largest cable TV providers—Comcast, Time Warner Cable Inc., Cox Communications Inc. and Charter Communications Inc.—have averaged 59 on a scale of 1 to 100 since 2004."[61] Even though cable companies, faced with some increase in competitive

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Into Netflix's Market Share? Geek Shui Living (April 2, 2010). Available http://geekshuiliving.com/2010/04/02/hulu-streaming-its-way-into-netflixs-market-share/.

[59] For more discussion see, e.g., *Network Issues: The Legal and Economic Context*, in THE ANTITRUST REVOLUTION (4th ed.), Oxford University Press (John E. Kwoka, Jr. and Lawrence J. White, eds. 2004), at 474-486. See also Diana L. Moss, *Lessons Learned and Policy Recommendations*, NETWORK ACCESS, REGULATION AND ANTITRUST, Routledge (Diana L. Moss ed. 2005), at 255-272.

[60] Deborah Yao, *Customers' Revenge: Cable Providers to Play Nice*, ASSOCIATED PRESS (May 23, 2010).

[61] *Id*.

pressures, have sought to repair their reputations, cable TV still ranks below airlines in consumer satisfaction.[62] If Americans remain unhappy with their cable service, it is incumbent upon the FCC to ask: What does the JV between Comcast and NBCU bring to the table?

The proposed JV is designed to shelter Comcast and NBCU businesses from competition. This rationale is based fundamentally on the enhancement of market power and the potential to execute anticompetitive strategies. NBCU and Comcast have failed to satisfy their burden of showing how the JV improves diversity, increases competition, or is otherwise in the public interest. To overcome the competitive concerns articulated in the AAI's comments, a combination such as Comcast/NBCU would need to generate benefits that could demonstrably improve diversity, the pace innovation, quality, choice, and lower prices to consumers. This is a high hurdle indeed, and the AAI encourages the FCC to consider its importance for a public interest finding. The situation is analogous to horizontal mergers, in which precedent dictates that high levels of concentration should bring forth commensurately larger efficiencies.[63] A similar *quid pro quo*—but applicable in the systems or platform competition context—might well be considered here.

Given the significant anticompetitive risks posed by the JV (and the significant implications of false negatives in the media industry), the FCC should not approve it. Absent such a denial, the Commission should consider appropriate remedies that could address some of the competitive issues ignored by the Applicants. These include:

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[62] *Id*.

[63] *See, e.g.*, In re Baby Food Antitrust Litigation, 166 F.3d 112 (3d Cir 1999).

- **Divestiture of key internet content assets.** These could include online content aggregation and marketing, such as NBCU's ownership interest in Hulu and Comcast's Fancast. Such divestitures would take critical, nascent internet content assets out from under the control and influence of Comcast/NBCU.

- **Establishment of firewalls between internet content affiliates of the JV and Comcast's cable systems business.** This condition would prevent any strategic conduct designed to affect the development, pace of innovation, or relative positioning of the content/MVPD and content/HIS platforms.

- **Independent management and governance of the JV.** Walling off management decisions on the content side from decisions on the distribution side will help preserve a vestige of a competitive content production market. Under this condition, all officers and directors of the JVs should be unaffiliated with either of the JV owners.

- **Prohibitions on certain Comcast practices (or potential practices) designed to monitor and control consumer access and consumption decisions.** These practices include tying access to Comcast's internet content to subscriptions to its cable television services, bundling MVPD and HSI with penalties for dropping one service, charging supracompetitive prices for higher levels of access, or blocking access to content. This would prevent Comcast from monitoring and controlling consumer choices across platforms and within platforms, thus affecting the evolution of competition and benefits to consumers.

Respectfully submitted,

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