
ACHIEVING “THE FRANCHISE”: THE COMCAST–NBC UNIVERSAL MERGER AND THE NEW MEDIA MARKETPLACE

Thomas Curtin[†]

I. INTRODUCTION

In 1997, then-Chairman of the Federal Communications Commission (“FCC” or “Commission”) Reed Hundt delivered a speech to the leaders of the cable industry in which he described the future of cable television in terms of what he called “the Franchise.”¹ According to Hundt, this model “consists of the core package of the most popular TV channels and the most popular way to deliver them.” Hundt acknowledged that the cable industry “has made huge inroads on the delivery side,” and classified broadcast television as “the other side of the Franchise.”² The Chairman further forecasted that “the core programming package may or may not be possessed by local broadcasters in the future.”³

Nearly thirteen years after Chairman Hundt foretold an all-in-one entertainment content and delivery service, the Comcast Corporation (“Comcast”) is on its way to realizing this vision of “the Franchise,” as the media delivery giant undertakes efforts to merge with NBC Universal.⁴ If successful, the merger would give the nation’s largest cable corporation control over NBC Univer-

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¹ Reed Hundt, Chairman, Fed. Commc’ns Comm’n, Speech at the National Cable Television Association: Cable, Broadcasting, and The Franchise (Mar. 18, 1997) [hereinafter Chairman Hundt speech].

² *Id.*

³ *Id.*

⁴ See Cecilia Kang, *Merger Plans for Comcast, NBC Ignite Battle Over Television Access*, WASH. POST, Dec. 4, 2009, at A1.

would give the nation's largest cable corporation control over NBC Universal's immensely popular programming, along with its entire production, distribution, and entertainment interests.⁵ Since Chairman Hundt's prediction, the video entertainment market has undergone widespread changes—from the increased popularity of satellites, to the advent of online television, which allows broadcasters to stream previously-aired television programs and encourages users to become the creators and publishers of video content, often for free and without advertising support. These developments are direct challenges to traditional multichannel video programming distributors ("MVPDs"), which must experiment with new business models in order to remain competitive.⁶

This article analyzes the merger between Comcast and NBC Universal to determine whether the FCC should block the merger or place conditions on the parties as a prerequisite to the merger. The article concludes that, when viewed through the lens of the "new media marketplace," the combination of a large cable company such as Comcast and media giant NBC Universal will not present a cognizable, defined harm to the public interest.

The Commission's public interest mandate is to ensure diversity, competition, innovation, and localism in the marketplace. In the new media marketplace, diverse programming thrives in a highly competitive and innovative environment, and those who wish to produce and disseminate content face low barriers to entry. The FCC should not impose conditions for niche and minority programming as a prerequisite to clearing its merger review. However, the proposed merger may harm local programming. Thus, any merger conditions should assure that NBC affiliate stations have sufficient funds to deliver quality local programming to the public.

Furthermore, while the Commission may be tempted to go beyond its public interest mandate, it should refrain from imposing any conditions that would better be addressed through industry-wide rulemaking or Congressional action. Network neutrality and retransmission rules are not appropriate issues for the Commission to address under the auspice of a merger review. The Comcast-NBC model may not be the optimal way to deliver the most popular content, and the intense competition of the new media marketplace may very well render the model unviable—a prospect that many stakeholders have yet to recognize.

Part II introduces the merger, the parties involved, and the controversial

⁵ See Memorandum from Comm. on Energy and Commerce Democratic Staff to Members of the Subcomm. on Commc'ns, Tech. and the Internet 1 (July 2, 2010), available at <http://energycommerce.house.gov/documents/20100702/Briefing.Memo.CTI.2010.07.08.pdf>.

⁶ See, e.g., Greg Sandoval, *Hulu-Disney Deal Hurts YouTube, Helps Cable*, CNET.COM (Apr. 30, 2009, 12:11 PM PDT), http://news.cnet.com/8301-1023_3-10231195-93.html.

“TV Everywhere” concept, which many argue that, after the merger, will result in anti-consumer and anti-competitive effects. Part III explains the role of the FCC in the proposed deal and provides a primer on its public interest standard as applied to cable and broadcasting. Part IV examines the public interest tenets of competition and innovation, diversity, and localism through the lens of the new media marketplace. Part IV also contains a forward-looking discussion of the various distribution and business models of the new media marketplace. Part V will address the FCC’s temptation to tackle issues beyond the acceptable scope of a merger review. While it is enticing to proclaim that the public interest mandate allows the Commission to regulate net neutrality and failing retransmission rules, such regulation would be ill-advised. The article concludes by suggesting that the new business model pursued by Comcast may not, in fact, survive in the new media marketplace—and will address whether Comcast-NBC has truly achieved Hundt’s vision of “the Franchise.”

II. THE COMCAST-NBC MERGER AND ITS IMPLICATIONS

Announced in December 2009, the Comcast-NBC Universal merger promises to usher in the “future of media and entertainment.”⁷ Upon approval of the proposed merger, Comcast would own fifty-one percent of NBC Universal.⁸ More importantly, Comcast would control NBC Universal’s vast wealth of content. The vertical integration of development, programming, and delivery raises questions about the future of video entertainment, both in the traditional video marketplace and online.

A. The Pre-Merger Entities

Over its nearly fifty-year history, Comcast has grown from a humble single cable system in Tupelo, Mississippi to the largest multichannel video programming video distributor, largest residential broadband provider, and one of the largest telephone service providers in the United States.⁹ In its own words,

⁷ David Goetzl, *Comcast Pitches Hollywood, Pals On NBC Merger*, MEDIA POST NEWS (July 1, 2010, 5:25 PM), http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=132436&nid=116840.

⁸ *NBC Universal Transaction: About the Transaction*, COMCAST, <http://www.comcast.com/nbcutransaction/about.html> (last visited Jan. 1, 2011). The two companies would have redemption rights that allow for Comcast’s eventual 100 percent ownership of the new venture. *Id.*

⁹ *Corporate Information*, COMCAST, <http://www.comcast.com/corporate/about/corporateinfo/corporateinfo.html> (last visited Jan. 1, 2011); *About Comcast Cable*, COMCAST, <http://comcastcalifornia.mediaroom.com/index.php> (follow “Bios and Facts” hyperlink)

“Comcast is principally involved in the development, management, and operation of cable systems and the delivery of programming content” in thirty-nine states and the District of Columbia.¹⁰ Today, the company serves “22.9 million cable subscribers, 16.7 million high-speed Internet customers, and 8.4 million Comcast Digital Voice customers.”¹¹ The company also owns a number of television stations, including nearly a dozen local sports channels (the Comcast SportsNet stations), Versus, The Golf Channel, E! Entertainment Television, The Style Network, and TVOne.¹²

Majority-owned by General Electric since 2004,¹³ NBC Universal is a media and entertainment conglomerate comprised of a television group, film production and distribution network, numerous theme parks, and an innovative digital media operation.¹⁴ NBC Universal is home to some of America’s most beloved media and entertainment assets, including *The Tonight Show*, *Saturday Night Live*, *Sunday Night Football*, and the productions of Universal Studios in Hollywood,¹⁵ with its film operations anchored by the wildly successful Universal Pictures, Universal Home Entertainment, and Focus Features.¹⁶ Together, these entities produce and hold title to a vast collection of new and classic films.¹⁷ NBC Universal’s media interests also include numerous news stations, such as

(last visited Jan. 1, 2011).

¹⁰ See *Comcast Press Kit*, COMCAST, <http://www.comcast.com/medialibrary/1/1/about/pressroom/documents/PressKit.pdf> (last visited Jan. 1, 2011), at 1.

¹¹ See *Corporate Overview*, COMCAST, <http://www.comcast.com/corporate/about/pressroom/corporateoverview/corporateoverview.html> (last visited Jan. 1, 2011). Comcast Digital Voice is “an innovative and reliable IP-enabled home phone service that includes all of the functions of traditional phone services, plus enhanced features that are integrated with other Comcast services.” *Id.*

¹² See *Comcast Cable Networks*, COMCAST, <http://www.comcast.com/corporate/about/pressroom/comcastcablenetworks/comcastcablenetworks.html> (last visited Jan. 1, 2011).

¹³ General Electric purchased NBC in 1985. In 2004, it renamed the media venture “NBC Universal,” after gaining control of Universal Studios and a number of cable networks. David Goldman, *GE, Comcast Announce Joint NBC Deal*, CNNMONEY.COM (Dec. 3, 2009, 9:57 AM), http://money.cnn.com/2009/12/03/news/companies/comcast_nbc/index.htm.

¹⁴ *Company Overview: This Is NBC Universal*, NBC UNIVERSAL, http://www.nbcuni.com/About_NBC_Universal/Company_Overview/NBC_Universal_Tele_vision_Group.shtml (last visited Jan. 1, 2011) (providing a full list of NBC Universal’s entertainment assets) [hereinafter *NBC Universal Overview*].

¹⁵ *Id.*; see also Press Release, Comcast Corp., Joint Venture Fact Sheet, available at <http://www.comcast.com/nbcutransaction/pdfs/JointVenureFactSheet.pdf> [hereinafter *Joint Venture Fact Sheet*].

¹⁶ *Id.* *NBC Universal Company Overview, Film*, NBC UNIVERSAL, http://www.nbcuni.com/About_NBC_Universal/Company_Overview/Film.shtml (last visited Nov. 7, 2010)

¹⁷ See, e.g., *id.* (listing some of the company’s most successful films).

CNBC and MSNBC, and international and online media operations.¹⁸

B. The Post-Merger Entity

Upon approval of the proposed merger, Comcast would own fifty-one percent of NBC Universal.¹⁹ Initially, General Electric would retain forty-nine percent of the company, with a path provided for Comcast's eventual 100 percent ownership.²⁰ Functionally, the new NBC Universal will be headquartered in New York, but managed by Philadelphia-based Comcast.²¹ The new entity's five-member board of directors will be comprised of three Comcast executives and two General Electric executives.²²

Along with its movie and television production studios, online video and news companies, and Universal theme parks, the new venture would bring together the entirety of both NBC Universal's and Comcast's cable television stations,²³ as well as NBC's Telemundo stations and its 234 NBC network broadcast affiliates.²⁴ Importantly, the combined entity would have ownership of a massive collection of film titles and television shows and their distribution services.²⁵

C. The Business Model of the Post-Merger Entity

One of the most controversial aspects of the post-merger entity is the employment of a new method of distribution method termed "TV Everywhere." The TV Everywhere model links online media viewing with the traditional cable bill, requiring that users authenticate their cable subscription to gain access to online content.²⁶ Opponents of the merger argue that, by joining forces

¹⁸ *Id.*; Press Release, Comcast Corp., *JV Cable Networks and Digital Assets Overview*, available at http://www.comcast.com/nbcutransaction/pdfs/JV_CableNetworks_and_DigitalAssetsOverview.pdf [hereinafter *JV Digital Assets Overview*].

¹⁹ *NBC Universal Transaction: About the Transaction*, COMCAST, <http://www.comcast.com/nbcutransaction/about.html> (last visited Jan. 1, 2011)

²⁰ *See id.* (noting that the agreement provides that "GE may retain a preferred interest in the venture in certain circumstances.").

²¹ Joint Venture Fact Sheet, *supra* note 15.

²² *Id.*

²³ These include the USA, Bravo, SyFy, Universal HD, CNBC, CNBC World, MSNBC, Chiller, mun2, Sleuth, Oxygen, E!, Golf Channel, Style Network, Versus, G4, and The Comcast Network cable television networks. *Id.*

²⁴ *Id.*

²⁵ *Id.* These include NBC Universal Domestic and International Distribution and Universal Studios Home Entertainment.

²⁶ Chris Albrecht, *Everything You Need to Know About TV Everywhere*, NEWTEEVEE (June 23, 2009, 11:03 PM), <http://newteevee.com/2009/06/23/what-you-need-to-know-about-tv-everywhere/>; *see* Chris Albrecht, *Media Companies Plan Weapons of Mass Au-*

with NBC Universal and employing “TV Everywhere”, Comcast would act as gatekeeper to a massive wealth of premium content, with anti-competitive and anti-consumer results.²⁷

Comcast touts its model as fundamentally providing more content across new platforms; offering customers “exponentially more free content, more choice and more HD programming online as well as on TV.”²⁸ From Comcast’s perspective, controlling and integrating the production, programming, and video cache aspects of NBC Universal is integral to these goals. By merging with NBC Universal, Comcast is essentially purchasing outright something for which it would have to pay more under traditional programmer-MVPD arrangements.²⁹ Thus, internalizing and streamlining NBC Universal content is the least expensive way to pursue its TV Everywhere model. In reality, the post-merger entity will provide endless video entertainment on-demand, to the benefit of consumers.³⁰

D. Criticisms of the Post-Merger Business Model

Critics of the merger worry that, by combining with NBC Universal, Comcast would be in possession of a vast amount of “must-see” programming that would only be available to Comcast subscribers. They suggest that, because TV Everywhere originated out of cooperation with cable companies, the TV Everywhere business model would constitute collusion, violate basic antitrust laws, and stifle online video competition.³¹ For example, in a January 2010 report, Marvin Ammori of the media reform organization Free Press observed that this business plan, which transposes the existing cable TV model onto the online market, “consists of agreements among competitors to divide markets,

thentication, NEWTEEVEE (Mar. 3, 2009, 8:00 AM), <http://newteevee.com/2009/03/05/media-companies-plan-weapons-of-mass-authentication/>.

²⁷ See David Hatch, *Cutting the Cord: The Proposed Comcast-NBC Merger Could Put a Crimp in the Hottest Trend in Television Viewing*, NATIONAL JOURNAL (Dec. 16, 2010, 5:22 AM), <http://www2.nationaljournal.com/member/magazine/nbc-comcast-merger-may-curb-cord-cutting—20101216>.

²⁸ *Id.*

²⁹ See CHARLES GOLDFARB, CONG. RESEARCH SERV., R41063, THE PROPOSED COMCAST-NBC UNIVERSAL COMBINATION: HOW IT MIGHT AFFECT THE VIDEO MARKET 14 (2010).

³⁰ For example, because NBC Universal holds title to all Universal Studios motion pictures, movies released on DVD could be viewed on-demand through Comcast’s delivery services the day of release (or conceivably even earlier). Additionally, customers can take greater advantage of existing agreements between Comcast and Netflix, and online delivery platforms such as Hulu.

³¹ MARVIN AMMORI, FREE PRESS, TV COMPETITION NOWHERE: HOW THE CABLE INDUSTRY IS COLLUDING TO KILL ONLINE TV (2010), *available at* <http://www.freepress.net/files/TV-Nowhere.pdf>.

raise prices, exclude new competitors, and tie products . . . a textbook case of collusion.”³² Other critics of the model have issued white papers³³ and sent letters to the Department of Justice³⁴ calling for immediate investigations into both the method of establishing the service and its alleged threat to online competition.³⁵

The collusion claims asserted by Free Press and others are grounded in allegations of price fixing among companies.³⁶ While TV Everywhere is a collaborative effort between two leading cable companies, Comcast and Time Warner,³⁷ the two entities do not set a fixed price on this service. The TV Everywhere model simply requires that a viewer pay their traditional cable bill—a figure that is set independently by each cable provider.³⁸ The question then becomes whether this collaborative effort rises to the level of an antitrust violation by way of intentionally discouraging competition and acting as gatekeeper to content on the Web. Free Press and others would answer this question in the affirmative, and have accordingly filed petitions with the FCC to deny the merger.³⁹ However, any model that Comcast decides to employ will do little to quell the robust competition in the online video market.

Additionally, opponents argue that Comcast and Time Warner are dividing the market and unlawfully tying their new product to existing services.⁴⁰ The

³² *Id.* at 3.

³³ See, e.g., MARK COOPER, CONSUMER FED’N OF AM. & CORIE WRIGHT, FREE PRESS, WHY THE COMCAST/NBC MERGER POSES A MAJOR THREAT TO VIDEO COMPETITION THAT ANTITRUST AUTHORITIES CANNOT IGNORE, available at http://www.freepress.net/files/FP_CFA-Comcast-NBC-WhitePaper.pdf [hereinafter Free Press White Paper].

³⁴ See, e.g., Letter from Mark Cooper, Consumer Fed’n of Am., et al., to Christine Varney, Assistant Att’y Gen., U.S. Dep’t of Justice (Jan. 4, 2010), available at http://www.freepress.net/files/TV_Everywhere_DOJ_Letter.pdf [hereinafter Letter to Dep’t of Justice] (requesting an investigation into potential antitrust violations regarding TV Everywhere).

³⁵ See Free Press White Paper, *supra* note 33; Letter to Dep’t of Justice, *supra* note 34.

³⁶ See Free Press White Paper, *supra* note 33; see also BLACK’S LAW DICTIONARY 1309 (9th ed. 2009) (defining “price fixing” as “the artificial setting or maintenance of prices at a certain level, contrary to the workings of a free market”).

³⁷ Staci Kramer, *Comcast, Time Warner Decide To Fight Together (Instead of Each Other) For TV Everywhere*, PAIDCONTENT.ORG, (June 23, 2009, 6:45 PM EDT) <http://paidcontent.org/article/419-comcast-time-warner-decide-to-fight-together-instead-of-each-other-for-/>; see also Tim Arango, *Cable TV’s Big Worry: Taming the Web*, N.Y. TIMES, June 24, 2009 at B1.

³⁸ See Arango, *supra* note 37.

³⁹ *In re Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses or Transfer Control of Licensees, Petition to Deny of Consumer Federation of America, Consumers Union, Free Press, and Media Access Project*, MB Docket No. 10-56 (June 21, 2010) (accessible via FCC Electronic Comment Filing System) [hereinafter Consumer Federation of America Petition to Deny].

⁴⁰ See AMMORI, *supra* note 31 (describing the market in the context of the TV Nowhere model).

division of markets argument, although seemingly a direct violation of antitrust laws,⁴¹ is merely a de facto result of the companies' different geographical service areas.⁴² Because the authentication process hinges on existing cable subscriptions, it logically follows that Comcast will authenticate in certain areas of the country while Time Warner authenticates in others. As for tying, critics argue that "by tying online television to incumbent MVPD subscriptions, TV Everywhere is designed to undermine new forms of competition and consumer choice currently emerging over the Internet."⁴³ Again, the new entity will merely offer what it already provides to its cable subscribers on an additional, innovative platform.⁴⁴

III. THE COMMISSION'S ROLE

The FCC has jurisdiction over the merger by virtue of the transfer of broadcast licenses between NBC and Comcast. In its review, the Commission must evaluate the effects of the proposed combination through its mandate to uphold the ambiguous "public interest".⁴⁵ The Department of Justice (DoJ) is also charged with independent reviews of mergers under section 7 of the Clayton Act,⁴⁶ however "the trend in antitrust law has not been to review 'vertical' mergers closely."⁴⁷ Thus "given the direct interrelationship between these mergers with regulatory policy, the FCC stands in an important position" among federal agencies to ensure that the merger serves the interests of the public.⁴⁸ The Commission's review of the proposed joint venture becomes especially important in this particular case.⁴⁹

⁴¹ See Sherman Antitrust Act § 1, 15 U.S.C. § 1 (2010).

⁴² See Hali Pedersen & Kari Hirsch, *T.V. Violations Everywhere?*, DIGITALHHR.COM (Feb. 19, 2010, 9:09 PM), <http://digitalhhr.com/2010/02/t-v-i-olations-everywhere/>.

⁴³ Letter to Dep't of Justice, *supra* note 34, at 2; see also AMMORI, *supra* note 31, at 37.

⁴⁴ Statement, Nat'l Cable & Telecomms. Ass'n, Statement of NCTA President & CEO Kyle McSlarrow on TV Everywhere (Jan. 4, 2010), available at <http://www.ncta.com/ReleaseType/Statement/McSlarrow-Statement-on-TV-Everywhere.aspx>. [hereinafter McSlarrow Statement].

⁴⁵ Thomas M. Koutsky & Lawrence J. Spiwak, *Separating Politics from Policy in FCC Merger Reviews: A Basic Legal Primer of the "Public Interest" Standard*, 18 COMMLAW CONSPECTUS 329, 334 (2010).

⁴⁶ See Jonathan E. Nuechterlein & Philip J. Weiser, *Digital Crossroads* 424-25 (2005).

⁴⁷ Koutsky & Spiwak, *supra* note 45, at 335.

⁴⁸ *Id.*

⁴⁹ It practically follows that the federal agency charged with regulating the telecommunications field would have the responsibility to evaluate mergers within that field. This "dual-review process" is not uncommon in complex industries. The FCC's public interest evaluation naturally overlaps with the DOJ's and FTC's antitrust analyses and involves "a thorough economic analysis of competitive issues." However, the Commission is distinguished as a regulatory body with expertise in the telecommunications field, which can and will often come to different conclusions than those of the DOJ or FTC. In contrast to the

A. The FCC's Statutory Authority

Congress and the FCC have long intervened in the MVPD market to foster the goals of competition, innovation, diversity, and localism. For example, the Commission has regulated the relationship among video distribution platforms via its retransmission requirements,⁵⁰ “must-carry obligations,”⁵¹ and “program access” rules.⁵² The FCC rules have aimed to promote greater programming diversity and localism via channel occupancy rules,⁵³ and horizontal ownership limits.⁵⁴

Congress expanded the FCC's regulatory authority to include cable through several legislative acts—namely the Cable Communications Policy Act of 1984, the Cable Television Consumer Protection and Competition Act of 1992, and the Telecommunications Act of 1996.⁵⁵ In the text of the 1984 Act, Congress noted its goals of ensuring that cable systems were “responsive to the needs and interests of the local community” and “encouraged to provide the widest possible diversity of information sources and services to the public,” while “promot[ing] competition in cable communications and minimiz[ing] unnecessary regulation that would impose an undue economic burden on cable systems.”⁵⁶ In 1992, Congress recognized that the cable industry had become “highly concentrated” and that “[t]he potential effects of such concentration [were] barriers to entry for new programmers and a reduction in the number of

traditional antitrust approach, which “by definition, largely focuses the attention of the anti-trust authorities on the *current* competitive environment,” the FCC takes into account “the environment that is likely to emerge over the next five to ten years”—a context that is of particular note in this case. *See id.* at 339-340.

⁵⁰ 47 U.S.C. § 325(b)(1)(A) (2006) (forbidding cable systems from retransmitting broadcast signals without the express permission of broadcasters).

⁵¹ 47 U.S.C. §§ 534, 535 (2006) (requiring local cable systems to carry broadcasters' programming in place of retransmission consent negotiations).

⁵² 47 U.S.C. § 548(c)(5) (providing that restrictions should remain in effect only if “necessary to preserve and protect competition and diversity in the distribution of video programming”).

⁵³ 47 U.S.C. § 533(f)(1)(B) (limiting the number of channels on a cable system in which the operator has a financial interest).

⁵⁴ 47 U.S.C. § 533(f)(1)(A) (limiting the number of subscribers a cable company may reach). The horizontal cable ownership rules aimed “to preclude cable companies from growing large enough to exercise monopsony power, principally through collusive favoritism for certain programming suppliers”. *See* NUCHECHTERLEIN & WEISER, *supra* note 46, at 370.

⁵⁵ *See* Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2780 (codified as amended in scattered sections of 47 U.S.C.); Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified as amended in scattered sections of 47 U.S.C.); Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

⁵⁶ Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2780 (codified at 47 U.S.C. § 521 (2006)).

media voices available to consumers.”⁵⁷ Congress also recognized that

[t]he cable industry has become vertically integrated; cable operators and cable programmers often have common ownership. As a result, cable operators have the incentive and ability to favor their affiliated programmers. This could make it more difficult for noncable-affiliated programmers to secure carriage on cable systems. Vertically integrated program suppliers also have the incentive and ability to favor their affiliated cable operators and programming distributors using other technologies.⁵⁸

With these concepts in mind, the FCC has the power to regulate cable providers and programmers through licensing.⁵⁹ Today, the Commission can issue certificates for new cable lines,⁶⁰ assign and transfer licenses,⁶¹ regulate carriage and carriage agreements, and set terms and conditions regarding video programming distribution, with the goal of developing competition and diversity therein. Each of these duties is intrinsically tied to the public interest standard that the Commission must uphold.

B. The Public Interest Standard

Despite the Commission’s commitment to upholding it, the public interest is ambiguous.⁶² Often, instead of blocking a merger, the Commission will impose so-called “voluntary” conditions as a prerequisite for merger approval.⁶³ Despite these condition, however, there are “still few guideposts to structure the analysis of what remedies are appropriate and whether they are enforced effectively.”⁶⁴ Thus, we are left in an “era of informality” in the merger review process.⁶⁵ Indeed, the public interest evaluation “has been an ambitious enterprise” and one that is further complicated by technological developments.⁶⁶ As the Benton Foundation aptly noted more than ten years ago,

[t]his challenge has been complicated in recent years by rapid and far-reaching

⁵⁷ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified at 47 U.S.C. § 521 (2006)).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See 47 U.S.C. § 214(a) (2006) (requiring common carriers to obtain a certificate of public convenience and necessity).

⁶¹ See 47 U.S.C. § 310(d) (2006) (giving the FCC the authority to determine whether transfer of licenses will be in public interest).

⁶² See Philip Weiser, *Reexamining the Legacy of Dual Regulation: Reforming Dual Merger Review by the DOJ and the FCC*, 61 FED. COMM. L. J. 167, 169-170 (2008).

⁶³ *Id.* at 168.

⁶⁴ *Id.* at 197.

⁶⁵ *Id.* at 170 (noting that “such conditions are developed without the benefit of notice and comment, are often negotiated in haste, and are not subject to judicial review. Nonetheless, given the FCC’s ability to simply withhold approval of a license transfer . . . parties understandably view such conditions as a cost of doing business.”); see also *id.* at 197 (“the selections of merger remedies remain relatively opaque and under-analyzed.”).

⁶⁶ BENTON FOUNDATION, CHARTING THE DIGITAL BROADCASTING FUTURE 17 (1998), available at <http://www.benton.org/sites/benton.org/files/recs.pdf>.

changes in technology and market structures, not to mention evolving public needs. As competition in the telecommunications marketplace becomes more acute and as the competitive dynamics of TV broadcasting change, the capacities of the free marketplace to serve public ends are being tested as never before.⁶⁷

While The Benton Foundation made this observation almost a decade ago, the advent of new technologies and the evolving online media marketplace make this especially true today.

The rationales that once justified regulation of broadcast radio and television are not applicable to the new media market. Cable has not traditionally been subject to the same stringent regulation as scarce resources like radio.⁶⁸ In fact, “it has never been regulated as a public trustee required to provide public service content in categories such as children’s television or informational programming.”⁶⁹ In the diverse and competitive new media market, the scarcity of spectrum rationales that once justified regulation of broadcast industries are no longer applicable to cable.⁷⁰ Now, in the diverse and competitive new media market and its unlimited entrant potential, calls for higher regulation will be that much harder to defend.

Courts have previously rebuked the Commission for exceeding the proper limits of its authority in the context of a merger review generally. For instance, although the public interest standard requires a review of competitive effects, courts have made it clear that it is *not* the Commission’s duty to “subordinate the public interest to the interest of ‘equaliz[ing] competition among competitors.’”⁷¹ Applied to the case at hand, this means that the agency would be outside the bounds of its mandate if it were to impose conditions on the merger solely out of fear that the new entity would harm competition among existing MVPDs, and not because there was a genuine, cognizable harm to the *public*. Thus, the Commission must ensure that it limits the scope of its analysis to the interests and needs of the public, and not Comcast’s competitors or even those who claim to speak for the public at large.

As the FCC proceeds through its public interest review of the current merger, it will certainly need to limit the scope of its analysis to the needs and interests of the *public*. The Commission must recognize also the limitations placed on its scope by the courts when dealing with cable communications.

⁶⁷ *Id.*

⁶⁸ *Serving the Public Interest in the Digital Era: Hearing Before the FCC* (2010) (statement of Henry Geller, Former FCC General Counsel).

⁶⁹ *See id.* (citing the Cable Communications Act of 1984 § 624(f)(1)).

⁷⁰ *See generally* *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (finding that cable regulation should be held to a lower of scrutiny than that of broadcast because spectrum scarcity and signal interference are not present with cable, and therefore do not create cause for regulation).

⁷¹ *See* *Koutsky & Spiwak, supra* note 45, at 342-343 (quoting *SBC Commc’ns Inc. v. FCC*, 56 F.3d 1484, 1490 (D.C. Cir. 1995)).

Most importantly, the public interest analysis must take place through the lens of the new media marketplace – as this is the current and emerging market in which the Commission is charged with upholding the public interest.

IV. A PUBLIC INTEREST ANALYSIS THROUGH THE LENS OF THE NEW MEDIA MARKETPLACE

In its public interest analysis, the Commission must consider the potential effects of the merger to ensure four qualities are found in the current and emerging video market: (1) competition, (2) innovation, (3) diversity, and (4) media localism. Although opponents argue that the FCC should impose conditions on the merger related to each of these, this section demonstrates that merger conditions are not necessary for the competition, innovation, and diversity prongs of the public interest analysis. However, it recognizes that conditions may be appropriate to preserve investment in and availability of local news and entertainment programming. In each case, however, it is imperative that the Commission review the merger through the lens of the new media marketplace—a video market robust with competition, innovation, and low barriers to entry for minority and niche content producers.

A. Competition and Innovation

The proposed merger between Comcast and NBC Universal comes at a time when the video entertainment market is on the brink of fundamental change.⁷² For years, technological constraints and high barriers to entry limited innovation in both programming and delivery. The traditional media marketplace revolved around the need to gather around the family television set at a predetermined time to view content created by broadcast networks. Now, new devices and services facilitate both the creation and delivery of content, and have abolished any such obstructions to consumer choice. Current FCC Commissioner Robert McDowell aptly describes the current age as a time of “media adolescence.”⁷³ This adolescent market holds the promise of incredibly innovative ways to deliver content, combined with previously-unthinkable low barriers to entry in the market for creating that content. The combination of low-to-nonexistent barriers to entry and increasingly innovative video platforms require traditional MVPDs to adapt to ensure their continued survival.

⁷² See GOLDFARB, *supra* note 29, at 2-6.

⁷³ Robert M. McDowell, Comm’r, Fed. Commc’ns Comm’n, Remarks at the Virginia Association of Broadcasters 73d Annual Summer Convention (June 25, 2010), *available at* <http://www.fcc.gov/commissioners/mcdowell/speeches.html>.

1. Innovation: TV Without the TV

The viewers of the new media marketplace are increasingly trading in cable subscriptions and television sets for newer technologies that provide free, on-the-go programming. As noted by a series of articles in the Washington Post last year, viewers are becoming increasingly reluctant to sit in front of a television at a time predetermined by broadcast networks or cable stations.⁷⁴ Additionally, many of these viewers have come to expect programming to be free – “never something [they] expected to pay for in the first place.”⁷⁵ Although many viewers are disconnected from the classic broadcast and cable television schedule, they do not miss out on the programs enjoyed by millions of Americans each week via more traditional methods. Rather, these technology-savvy citizens are able to stream or download programs directly to their laptops, iPods, and other portable devices.⁷⁶

The result has been the emergence of an entirely new, innovative and competitive industry. In the mobile video market, device manufacturers continue to roll out products for the sole purpose of watching programming on the go. As an example, Qualcomm’s FloTV, made popular by 2010 Superbowl ads,⁷⁷ utilizes a UHF channel to integrate live television with its own portable player, and “instead of the often-flaky 3G service offered by most [wireless] carriers.”⁷⁸ The service “broadcast[s] about [twenty] mobile channels, including ESPN, Nickelodeon, MTV, and Disney Channel,” and continues to add channels, including news giant CNN.⁷⁹ Other devices, such as the iPhone, permit users to record video and stream content live to the web.⁸⁰ By enabling viewers to “cut the cable cord,” the proliferation of such devices permit viewers to watch and create video when and where they want, often commercial-free or with limited interruption.⁸¹ Thus, the threat of an “entertainment void” facing

⁷⁴ See Paul Farhi, *Click, Change: The Traditional Tube Is Getting Squeezed Out of the Picture*, WASH. POST, May 17, 2009, at E1; Monica Hesse, *Web Series Are Coming Into A Prime Time of Their Own*, WASH. POST, May 17, 2009, at E1.

⁷⁵ Farhi, *supra* note 74, at E1.

⁷⁶ *Id.*

⁷⁷ Dan Butcher, *Qualcomm’s FloTV Runs Three Super Bowl Ads*, MOBILE MARKETER (Feb. 2, 2010), <http://www.mobilemarketer.com/cms/news/television/5329.html>.

⁷⁸ See Alex Pham, *FloTV Drives Mobile Television Beyond Cellphones*, L.A. TIMES COMPANY TOWN BLOG (Jan. 14, 2010, 3:46 PM), <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2010/01/flo-tv-mobile-dtv-television-cell-phones.html>.

⁷⁹ See Press Release, Qualcomm, CNN Mobile Now Available on the FLO TV Service (Mar 12, 2010), available at <http://www.qualcomm.com/news/releases/2010/03/12/cnn-mobile-now-available-flo-tv-service>.

⁸⁰ RefreshedIT, *Broadcast Live Video Over 3G Cell Phones*, YOUTUBE (Sept. 26, 2009), <http://www.youtube.com/watch?v=Is6q6hG7ijA>.

⁸¹ Nick Bilton, *Cable Freedom Is a Click Away*, N.Y. TIMES, Dec. 10, 2009, at B5.

viewers who drop their cable bill becomes something of a fiction.⁸²

Nick Bilton of the New York Times recently chronicled the countless ways in which someone hoping for “cable freedom” can cut the cord.⁸³ Mr. Bilton described his family’s move from tossing out their television into creating what sounds like the living room of the future, right down to the new \$99 “chocolate-frosted doughnut”-like remote.⁸⁴ In the process, however, Mr. Bilton catalogued the assortment of “retired devices” in his “Gadget Graveyard.”⁸⁵ Along with his cable box, traditional remote, and canceled cable subscription are “single-serving contraptions” like the Roku box, Apple TV, Slingbox, and Vudu players, which have only recently become available in the past three years.⁸⁶ Yet, even these new devices are threatened by future all-encompassing technologies.

In his article, Mr. Bilton triumphantly arrives at having only “a Mac Mini, wireless mouse and a Microsoft Xbox hooked up to [the] television.”⁸⁷ However, one cannot help but wonder how long such a setup will last. With the array of obsolete devices in the Bilton living room evocative of a scene out of *The Brave Little Toaster*,⁸⁸ innovative video distributors must constantly wonder when their newest products will become obsolete as well. Along with innovation, viability in a competitive market should be a major concern for any-

⁸² *Id.*

⁸³ *Id.*; see also Berin Szoka, *Cutting the Video Cord: Pro-Regulatory NYT Realizes ‘Cable Freedom Is a Click Away’*, TECH. LIBERATION FRONT (Dec. 15, 2009), <http://techliberation.com/2009/12/15/cutting-the-video-cord-pro-regulatory-nyt-realizes-cable-freedom-is-a-click-away/>.

⁸⁴ Mr. Bilton refers to a device that navigates the screen; to use it “you hold it out and wave your hand from side to side as if you are conducting an orchestra.” Bilton, *supra* note 81, at B5.

⁸⁵ *Id.*

⁸⁶ *Id.*; see Editorial, *Inside the Tech of the Netflix Player with Roku*, HOTHARDWARE (May 29, 2008), http://hothardware.com/News/Inside_The_Tech_Of_The_Netflix_Player_With_Roku1/ (describing Roku as a Netflix “set-top box for watching on-demand movies and TV”); Press Release, Apple, *Apple TV Now Shipping* (Mar. 21, 2007), available at <http://www.apple.com/pr/library/2007/03/21appletv.html> (“Apple TV [is] an easy to use and fun way to wirelessly play all of your favorite iTunes content from your PC or Mac on your widescreen TV, including movies, TV shows, music, photos and podcasts.”); *Slingbox*, SLINGBOX, <http://www.slingbox.com/go/slingbox> (last visited Jan. 1, 2011) (“Slingbox makes it easy to watch and control your home TV from virtually anywhere, anytime on your desktop, Mac, laptop, or mobile phone.”); *Background*, VUDU, http://www.vudu.com/aboutus_background.html (last visited Jan. 1, 2011) (“VUDU box and service deliver instant access to thousands of movies and TV shows directly through the television, without requiring a computer or cable/satellite TV service.”).

⁸⁷ *Id.*

⁸⁸ See *THE BRAVE LITTLE TOASTER* (Hyperion Pictures 1987); see also *The Brave Little Toaster*, THE INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt0092695/> (last visited Jan. 1, 2011) (describing the film about a group of dated appliances as having a “dark subtext of abandonment, obsolescence, and loneliness”).

one hoping to deliver video to the masses in a more amenable fashion.

2. Competition: *The New Business Models of the New Media Marketplace*

The traditional business model for media has been to pursue profits through advertising.⁸⁹ In this model, radio stations and broadcast networks remained operational because advertisers readily paid large sums of money for airtime. In a changing media landscape, where the absence of commercials is one of the biggest draws of new distribution technologies,⁹⁰ MVPDs must find new ways of generating profits without relying on advertising.⁹¹ “Unfortunately,” as Shelly Palmer of WNBC-NY aptly observes, “there is no business model called ‘no one pays.’”⁹² Palmer has adapted to find new ways to profit from his free online program through what he calls the “Jerry Garcia model”, earning money through consultations, speaking engagements, and by selling books and other merchandise.⁹³ By becoming as widely known as possible, Mr. Palmer has branded himself—and his brand has value. Those who wish to take advantage of his skills and use him outside the television show and Mediabytes program must pay for his more conventional services and appearances.⁹⁴ He continues to explore ways to make a daily online program both free of third party advertisements and free to users.⁹⁵ Similarly, other content-holders are struggling to find models that produce profits as well, and have experimented in a number of ways.

⁸⁹ See Adam Marcus, *The Quid Pro Quo In Practice*, TECH. LIBERATION FRONT BLOG (Sept. 9, 2009), <http://techliberation.com/2009/09/09/the-quid-pro-quo-in-practice/>; Berin Szoka, *There Is No Free Lunch! No Advertising, No Media*, TECH. LIBERATION FRONT BLOG (June 25, 2009), <http://techliberation.com/2009/06/25/there-is-no-free-lunch-no-advertising-no-media/>.

⁹⁰ Marcus, *supra* note 89.

⁹¹ Szoka, *supra* note 83.

⁹² Shelly Palmer, *A Serious Online Video Advertising Problem*, SHELLEY PALMER DIGITAL LIVING (June 14, 2009), <http://www.shellypalmermedia.com/2009/06/14/a-serious-online-video-advertising-problem/>. Palmer’s half-hour television show and two-minute online show, MediaBytes, can be seen on WNBC and online. MediaBytes is a “two-minute show” that “allow[s] an audience of people who are interested in [Palmer’s] thoughts about technology, media and entertainment to self-assemble.” *Id.*

⁹³ *Id.*

⁹⁴ *Id.* Palmer notes that “Mediabytes, and the associated production materials, takes up approximately 25% of my day . . . I have not missed a business day in two years and I take a complete road rig with me when I travel and produce Mediabytes from wherever I am. Over the past week I was at Ft. Meade, MD, then in Rome, Italy, then in Banff, Canada and back to NYC. I produced the show from every city and it was available by 9 AM EDT each business day.”

⁹⁵ Szoka, *supra* note 83 (noting as an example of the commercial prong, that the introduction of an eleven-second promotion at the beginning of the two-minute program “cheapened” the program).

a. Traditional Players Utilize the Web; the Web Utilizes Traditional Players

In response to the intense competition among media distribution methods, traditional MVPDs have deployed innovative Web tools to distribute video online. For example, in addition to investing billions into its fiber optic service, ⁹⁶ new entrant Verizon FIOS has placed stock in on-demand programming and an interactive, Web-based “widget bazaar.”⁹⁷ In the reverse, YouTube has recently expanded its operations to secure deals with talent agencies⁹⁸ and stream full-length movies and television shows.⁹⁹ By producing and distributing professional content, YouTube hopes to generate advertising revenue while “becoming a home for premium video.”¹⁰⁰

Other entities have focused on brokering deals with broadcasters to deliver content both online and via traditional television by using some of the products mentioned above.¹⁰¹ Apple has shown interest in partnering with ABC and CBS to deliver shows directly through the Apple site, without requiring a cable or satellite subscription.¹⁰² In this way, the viewer could “cut the cable cord”¹⁰³ and make payments to Apple (presumably at a lower cost), while Apple pays the broadcast networks for content—much like a traditional MVPD.¹⁰⁴

⁹⁶ *Video Competition in a Digital Age: Hearing Before the H. Subcomm. on Commc'ns, Tech., and the Internet of the H. Comm. on Energy and Commerce*, 111th Cong. 1-3 (2009) (statement of Terry Denson, Vice President of Content and Programming, Verizon), available at http://energycommerce.house.gov/Press_111/20091022/denson_testimony.pdf [hereinafter Denson Statement].

⁹⁷ *Id.* at 5-6. Denson commented that:

FiOS TV Widgets . . . allow[] consumers to access content in an interactive manner on their television, including some content and services from the Internet. Initially, Verizon offered Widgets that allowed interactive and customizable access to weather, traffic, local and national news headlines, daily national sports headlines, community news or daily horoscopes. More recently, however, Verizon introduced additional Widgets that allow consumers access to some Web content, including from Facebook and Twitter. [Verizon plans] to foster a “Widget Bazaar,” which is akin to an application store for FiOS that will enable third-parties to develop innovative new Widgets for FiOS customers.

Id.

⁹⁸ See Brian Stelter, *YouTube Said to Be Near Hollywood Deal*, N.Y. TIMES, Jan. 29, 2009, at B1.

⁹⁹ Daisy Whitney, *YouTube Dips Its Toe in Full-Length Video Market*, TV WEEK (Oct. 19, 2008, 8:40 PM), http://www.tvweek.com/news/2008/10/youtube_dips_its_toe_in_fullle.php.

¹⁰⁰ *Id.*

¹⁰¹ See discussion, *supra* Part IV.A.1.

¹⁰² See Brian Stelter, *A Proposal From Apple to Offer Online TV Subscriptions Stirs Network Interest*, N.Y. TIMES, Dec. 22, 2009, at B8.

¹⁰³ See Adam Thierer, *Cutting the Cord: The Shift to Online Video Continues*, TECH. LIBERATION FRONT (Oct. 6, 2008), <http://techliberation.com/2009/10/06/cutting-the-video-cord-the-shift-to-online-video-continues/>.

¹⁰⁴ Sam Schechner & Yukari Iwataki Kane, *Apple TV Proposal Gets Some Nibbles*,

Similarly-modeled Hulu, the flagship video-on-demand (“VOD”) service and brainchild of NBC and Fox, is a perfect example of networks venturing together to provide online content on an on-demand basis.¹⁰⁵ This model has proven an extremely successful with both online viewers¹⁰⁶ and advertisers¹⁰⁷ in the face of increased MVPD competition.¹⁰⁸

b. Cutting Out the MVPD Middle-Man: Broadcasters Take Matters Into Their Own Hands

In some cases, the broadcast networks have become their own distributors, completely internalizing the production and distribution process over the Internet and cutting out the MVPD middle man.¹⁰⁹ These programmers need eyes on the screen to view their content, and understand that viewers are migrating from their living room television set to the online marketplace.¹¹⁰ In his October 2009 testimony before Congress on “Video Competition in a Digital Age,” Disney Global Distribution President Benjamin Pyne recognized this trend, and described the steps his network, ABC, is taking in response. “Looking into

WALL ST. J., Dec. 22, 2009, at B1; Neil Kjeldsen, *Download Your TV—The Current Options*, TECHCRUNCH (May 22, 2006), <http://techcrunch.com/2006/05/22/download-your-tv-the-current-options/>.

¹⁰⁵ See Berin Szoka, *Who Needs a DVR When You’ve Got Hulu?*, TECH. LIBERATION FRONT (Jan. 24, 2009), <http://techliberation.com/2009/01/24/cutting-the-video-cord-who-needs-a-dvr-when-youve-got-hulu/>.

¹⁰⁶ See Dan Frommer, *Chart of the Day: Hulu Has More Viewers Than Time Warner*, BUSINESS INSIDER (Aug. 28, 2009, 4:45 PM), <http://www.businessinsider.com/chart-of-the-day-hulu-has-more-watchers-than-time-warner-cable-2009-8> (showing that in July 2009, Hulu had 38 million viewers while Time Warner only had 34 million).

¹⁰⁷ See, e.g. Ian Paul, *The Simpsons: Worth More on Hulu Than Fox*, PCWORLD (June 25, 2009, 9:14 AM) (explaining that advertisement rates on Hulu are more than that of prime time television because of the targeted nature of VOD services).

¹⁰⁸ See Brief for The Progress and Freedom Foundation as Amicus Curiae Supporting Petitioner, *Comcast Corp. v. FCC*, 600 F.3d 642 (2010) (No. 08-1114) at 8 [hereinafter *Progress and Freedom Foundation Amicus Brief*] (noting that,

only in the last year . . . has the large-scale delivery of television content online become a reality, as large numbers of programmers have begun distributing increasing numbers of complete episodes and entire series through their own websites and/or through a new class of rapidly-growing Internet Video Programming Distributor (IVPD) websites such as Netflix, Hulu These IVPDs already offer a staggering, and growing, library of currently-airing and archived content—as much as 90% of broadcast shows and 20% of cable shows.)

Id. See Nick Wingfield, *Turn On, Tune Out, Click Here: TV Viewers Cut Cable’s Cord; Here’s What They’re Watching Instead*, WALL ST. J. (Oct. 3, 2008), online.wsj.com/article/SB122299231747100497.html.

¹⁰⁹ *Hearing on Video Competition in a Digital Age Before the H. Subcomm. on Communications, Technology and the Internet*, 111th Cong. (2009) (statement of Benjamin Pyne) [hereinafter *Pyne Testimony*].

¹¹⁰ *Id.* at 1; see also GOLDFARB, *supra* note 29, at 7.

the future, as video consumption continues to migrate from traditional cable and satellite distribution to broadband . . . consumers and programmers will continue to have access to multiple distributors that are competitive and equivalent.”¹¹¹ For ABC, this includes not only their television programs, but their national and local news as well.¹¹² The online video players that the networks have created in response have become highly successful, bearing out Mr. Pyne’s predictions.¹¹³

c. User-Generated Content: Cut the Programmer, Cut the MVPD

Innovative user-generated content has flourished over the past few years.¹¹⁴ The leading example, YouTube, has transformed media viewers into content creators and publishers. This shift is no longer comprised of short clips and home videos. Entire series, often available exclusively on the web, have exploded in popularity and become “insanely personalized.”¹¹⁵ Some Web series have even reached the point of incorporating traditional writers and actors (particularly during the 2008-2009 writers’ strike), and boast their own reviews and award ceremonies—truly becoming “the new mainstream.”¹¹⁶

All of these services constitute the innovative, competitive, and vibrant new media marketplace. As discussed above, the merger and TV Everywhere model is the response to this staggeringly competitive environment. The traditional players no longer have a stronghold on media, and will naturally seek to tame this market.

3. *The New Entity’s Role in the Online Market*

Opponents of the merger argue that the Comcast merger and its TV Everywhere model will stifle competitive online video services to the detriment of

¹¹¹ Pyne Testimony, *supra* note 109 at 1.

¹¹² *See id.* at 7. Pyne commented that:

Notably, [ABC has] worked with the local ABC broadcast affiliates to design a version of the media player for ABC content in which both the network and the affiliates are able to participate. Affiliates can brand the player with their station’s channel number and call letters, include local advertising, and provide links to local news and public information that broadcasters provide their communities.

Id.

¹¹³ *See id.* at 6-7 (“Since September 2008, the ABC.com media player alone has served over 215 million episode requests. This summer alone, over 280 million Disney Channel videos were streamed on Disney.com.”).

¹¹⁴ Deborah Halbert, *Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights*, 11 VAND. J. ENT. & TECH L. 921, 926 (2009).

¹¹⁵ *See Hesse, supra* note 74 (noting that “3,000 would be a conservative estimate” on the number of web series in May of 2009).

¹¹⁶ *Id.*

consumers and competitors. In reality, the new entity merely offers what it already provides to its cable subscribers on an additional, innovative platform.¹¹⁷ As noted by National Cable and Telecommunications Association (“NCTA”) President and CEO, Kyle McSllarrow, the new model is simply “an effort to ensure more content than ever is distributed over the Internet at no extra charge to consumers.”¹¹⁸ According to McSllarrow, the crux of the Free Press claims lies in a misunderstanding of how programmers and distributors work to bring video to the viewer.¹¹⁹ He argues that “as online video evolves, various distributors and content companies may – and likely will – come to widely varying bilateral arrangements” as to how that content is delivered.¹²⁰ In other words, such innovative business models are natural in the evolving MVPD market and should not be viewed as collusive efforts. Supporter and telecommunications author Andrew Keen provides a succinct bottom line on the TV Everywhere model:

Those who choose to pay for cable service will be able to access this content for free on the Internet; those who don’t . . . won’t. And if current cable subscribers object for any reason to the TV Everywhere scheme, then they can simply end their commercial relationship with Comcast and go elsewhere to acquire their media.¹²¹

As evidenced above, the highly competitive current media market provides a plethora of opportunities for consumers to do so.

Additionally, because content owners have myriad retransmission agreements across the spectrum of MVPDs,¹²² the viewer who does not approve of Comcast (or any other cable company, for that matter) is free to move their business to a cable competitor, satellite provider, or the online marketplace.¹²³ Finally, as McSllarrow has noted, “antitrust laws do not prohibit, but encourage collaboration, even among competitors, that lead to innovation and new products and services for consumers.”¹²⁴ For Comcast to then go a step further by securing what will naturally be better, internalized retransmission deals via vertical integration with NBC-Universal is simply “their business model, their very *raison d’être*.”¹²⁵

Furthermore, it is not clear that the TV Everywhere model developed by Comcast can actually survive market realities and remain a viable business

¹¹⁷ McSllarrow Statement, *supra* note 44.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Andrew Keen, *Only the Paranoid Are Scared of TV Everywhere*, TECHCRUNCH (Jan. 16, 2010), <http://techcrunch.com/2010/01/16/paranoid-tv-everywhere/>.

¹²² GOLDFARB, *supra* note 29, at 9-10 (describing examples of content owners negotiating for higher carriage rates from MVPDs); *see also* discussion, *supra* Part IV.A.2.

¹²³ Keen, *supra* note 121.

¹²⁴ McSllarrow Statement, *supra* note 44.

¹²⁵ Keen, *supra* note 121.

plan. Traditional media platforms are up against an inexorably rising tide of web-based and web-utilizing delivery models. The old business model is surely being eaten away by those making the switch to online media exclusively, and to simply stamp a website and media player on the old model may well prove to be a fruitless effort. The advent of video over the Internet “is perhaps the single largest investment controversy in the media sector,”¹²⁶ and with the public clearly embracing this new technology, it is only natural that cable is rushing to fill the void and attempting to “tame the web.”¹²⁷

Free Press and other merger opponents seem to assume that cable will be successful in this endeavor.¹²⁸ For example, Marvin Ammori of Free Press recently opined in this publication that “the current market structure provides limited competition among MVPDs, with no additional competition on the horizon.”¹²⁹ However, as demonstrated above, the horizon reveals a tide of innovation in both the production and delivery of media, marked by a deluge of user-generated content and diverse, personal video the likes of which have never existed before.¹³⁰

B. Diversity and Minority Programming

The post-merger entity will promote diverse programming and advance the interests of minority-directed media companies without onerous merger conditions. Opponents of the deal fear that voluntary public interest commitments are insufficient to protect the interests of the ostensibly slim and endangered sources of minority programming.¹³¹ They argue that, absent stringent condi-

¹²⁶ Arango, *supra* note 37.

¹²⁷ *Id.*

¹²⁸ See, e.g., AMMORI, *supra* note 31 ; see also Free Press White Paper, *supra* note 33.

¹²⁹ Marvin Ammori, *Copyright's Latest Communications Policy: Content-Lock-Out and Compulsory Licensing for Internet Television* 18 COMMLAW CONSPECTUS 375, 377 (2010).

¹³⁰ Indeed, “the vertically integrated post-merger entity may have so many parts with conflicting market incentives that it proves impossible to craft an internally consistent profit-maximizing business strategy, no less exploit market power to undermine competition.” GOLDFARB, *supra* note 29, at 18-27.

¹³¹ See *The Proposed Combination of Comcast and NBC Universal: Field Hearing Before the H. Comm. on the Judiciary*, 111th Cong. (2010) (testimony of Stanley Washington, President and Chief Executive Officer, National Coalition of African American Owned Media) [hereinafter Stanley Washington Testimony] (arguing that

[a]s of 2007, there were only eight African American owned full power commercial television stations left in the entire nation. And most importantly, that same report showed that in 2007, no cable networks were 100% African American owned. Today, there are no cable networks with full nationwide distribution that are 100% African American owned; thanks to gatekeepers such as Comcast).

Contra Comcast and NBC Universal: Who Benefits?: Field Hearing Before the H. Comm. on Energy and Commerce, 111th.Cong. (2010) (testimony of Will Griffin, Chairman and CEO, Hip Hop On Demand) [hereinafter Will Griffin Testimony] (emphasizing that “if you

tions (ranging from mandating wholesale broadband sales to regulating carriage rates to assuring that additional minority-owned stations be placed on the dial), the deal would spell disaster for existing minority-directed niche channels and others who wish to enter the market.¹³²

In fact, the merger is poised to advance the interests of minority-directed media companies and programming in the traditional video sphere. As Will Griffin, Chairman and CEO of Hip Hop On Demand, testified at Congressional field hearings, “Comcast has the best infrastructure of inclusion [for minorities] to build upon in the media industry.”¹³³ As an industry leader in minority management that serves predominantly urban areas, Comcast is in a prime position to ensure that minority programmers’ messages reach consumers.¹³⁴ Indeed, Comcast has a competitive interest in protecting minority programming in its traditional television lineup—by scaling back minority programming, Comcast would risk losing customers in the company’s core service areas.¹³⁵

More importantly, any fears of a “highly powerful and influential media and information colossus”¹³⁶ are allayed in light of the existing and emerging video

define Africa-American Media Ownership at 100%, that undercuts the longstanding and important work” in Congress to “invest in minority asset managers who in turn invest in minority media firms.” Griffin goes on to say that:

[t]his line of racial purity in public policy almost cost us a chance at American History. Our President is Black enough. And so is TV One and so is Hip Hop On Demand. This proposed myopic approach attempts to measure African-American media ownership with a protractor, when what is truly needed is a compass. The True North is heading in the direction of greater distribution access on more platforms, increased leadership inside of media companies, and combining our influence to secure our fair share of advertising dollars.

Id.

¹³² *Comcast and NBC Universal: Who Benefits?: Field Hearing Before the H. Comm. on Energy and Commerce*, 111th Cong. (2010) (testimony of Samuel R. DeSimone, General Counsel, EarthLink, Inc.) [hereinafter DeSimone Testimony]; Stanley Washington Testimony, *supra* note 132; *The Proposed Combination of Comcast and NBC Universal: Field Hearing Before the H. Comm. on the Judiciary*, 111th Cong. (2010) (statements of Rep. Maxine Waters, Member House Comm. On Judiciary).

¹³³ Will Griffin testimony, *supra* note 131.

¹³⁴ *Id.* at 4-5.

¹³⁵ The company’s core service areas include mostly inner cities and urban areas. *See id.* at 5.

¹³⁶ *See Comcast and NBC Universal: Who Benefits?: Field Hearing Before the H. Comm. on Energy and Commerce*, 111th Cong. (2010) (statement of Rep. Bobby L. Rush) [hereinafter Rep. Rush Testimony]. Rep. Rush commented:

On that day, should Comcast and NBC-Universal secure their last approval from federal and state regulators to combine their highly attractive, and lucrative, distribution and video programming assets, a very *powerful* and *influential* media and information colossus will be born. If that day comes, this combined entity will have the immediate power to determine *what* our nation watches, *what* we read, *from where* we get our news and, even, *on which* electronic and communications devices those images and data will appear.

Id.

entertainment market. Just as Rep. Judy Chu of California was “shocked to read [during one of the field hearings] that five companies own the bulk of the broadcast and cable networks,”¹³⁷ lawmakers might be equally surprised to learn the realities of the new media marketplace—that diversity and minority programming is the essence of the new media market. Even merger-detractor Samuel DeSimone of EarthLink correctly stated, “the costs and ease of market entry in the [new media] market substantially enhances diverse and minority viewpoints.”¹³⁸

Admittedly, the emerging video market—robust with opportunities for minority entrants—will place stress on traditional MVPDs and advertisers, which may create cause for traditional MVPDs to cut programming. This is, however, the nature of any emerging market that challenges the status quo, and these pressures will not be confined to minority-directed content. Comcast’s voluntary commitments and “infrastructure of inclusion” are more than sufficient to maintain a healthy lineup of minority programming.¹³⁹ Mr. Griffin notes that if Comcast does not live up to these expectations, the largely minority representatives in Comcast’s key service areas can threaten to block license and franchise renewals or put political pressure on the company.¹⁴⁰ In this respect, “[minority] consumers and policy makers have more potential leverage over Comcast than any other media company.”¹⁴¹

C. Localism: Possibilities for Conditions

Maintaining a sufficient segment of local programming is an essential tenet of the FCC’s public interest mandate. Communities nationwide enjoy and depend on local news, sports, and entertainment, making local affiliate stations invaluable services. However, the emerging MVPD and online video market poses a cognizable threat to these traditional local stations. While Comcast has argued that investment in the struggling affiliate networks is an almost certain byproduct of the merger and will surely spur additional, better quality programming,¹⁴² the new media market will place pressure on MVPDs to cut their

¹³⁷ Joe Flint, *Comcast-NBC Universal Hearing Offers Civics Lessons, But Not Always the Right Ones*, L.A. TIMES COMPANY TOWN BLOG (June 9, 2010, 10:40 AM), <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2010/06/Comcast-nbc-universal-hearing-offers-a-civics-lesson-but-not-the-right-one.html>.

¹³⁸ DeSimone testimony, *supra* note 132.

¹³⁹ *Id.* at 3.

¹⁴⁰ *Id.* at 5.

¹⁴¹ *Id.*

¹⁴² *In re Applications for Consent to the Transfer of Control of Licenses General Electric Company, Transferor, To Comcast Corporation, Transferee, Applications and Public Interest Statement*, MB Docket No. 10-56, at 39-40 (Mar. 5, 2010) (accessible via FCC Electronic Comment Filing System) [hereinafter *Applications and Public Interest Statement*].

bottom line.

Indeed, investment in quality Comcast-owned programming is one of the central reasons for the proposed merger.¹⁴³ Additionally, “the proposed transaction creates significant opportunities to extend that news programming to other outlets and platforms, such as Comcast’s local and regional cable networks, VOD [video-on-demand], and online.”¹⁴⁴

However, the challenge will become whether Comcast makes its local sports and broadcast stations available at reasonable rates. NBC affiliates themselves have asked this much of the FCC. Specifically, “NBC’s affiliates told the FCC that the agency needed to ensure the availability of highly valued sporting events on free, over-the-air broadcasting by preventing the migration of such programming to Comcast cable channels.”¹⁴⁵ Thus, many localism concerns raised by Free Press and others¹⁴⁶ are not unfounded.

The profitability of local programming is declining alongside local newspapers and other news sources in the face of online media and news reporting,¹⁴⁷ and Comcast will undoubtedly seek to minimize losses to their bottom-line. As news programming provided by NBC and its over 200 affiliate stations truly are staples of American media culture,¹⁴⁸ it will be important for the Commission to ensure that this content is readily available to the general public at minimal or no cost. Comcast has conceded to “remain[] committed to continuing to provide free over-the-air television through its O&O [owned and operated] broadcast stations and through local broadcast affiliates across the nation.”¹⁴⁹ However, it must be ensured that this commitment is carried out—especially with the non-owned affiliate stations, as these remain staples of local culture, and have been faced with rising costs and decreasing revenues.¹⁵⁰

The goal here will be to make these assurances though conditions which

¹⁴³ See Memorandum from David L. Cohen, Executive Vice President, Comcast 1-2 (Dec. 3, 2009), available at <http://www.comcast.com/nbcutransaction/pdfs/PublicInterestCommitments.pdf>; see also *Applications and Public Interest Statement*, *supra* note 142, app. 7, at 2.

¹⁴⁴ *Applications and Public Interest Statement*, *supra* note 142, at 40-41.

¹⁴⁵ See Joe Flint, *NBC Affiliates Tell FCC to Make Sure Comcast Keeps Sports on NBC After Merger*, *LA Times Company Town Blog* (June 10, 2010, 16:20 EST), <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2010/06/nbc-affiliates-tell-fcc-to-make-sure-comcast-keeps-sports-on-nbc-after-merger.html>; see also *In re Applications for Consent to the Transfer of Control of Licenses, General Electric Company, Transferor, To Comcast Corporation, Transferee, Comments of the NBC Television Affiliates*, MB Docket No. 10-56 (June 21, 2010) (accessible via FCC Electronic Comment Filing System).

¹⁴⁶ See, e.g. Free Press White Paper, *supra* note 33.

¹⁴⁷ See GOLDFARB, *supra* note 29, at 4-7.

¹⁴⁸ *Company Overview*, NBC UNIVERSAL, http://www.nbcuni.com/About_NBC_Universal/Company_Overview/overview02.shtml (last visited Sept. 7, 2010).

¹⁴⁹ *Applications and Public Interest Statement*, *supra* note 142, app. 8.

¹⁵⁰ See generally GOLDFARB, *supra* note 29, at 23-25.

state clearly Comcast's financial commitment to NBC affiliates and O&O broadcast stations, so that these are not undercut by online distributors and other competitors in the new and traditional media marketplace. Such a condition would be essential to preserving the public interest aspects of the deal, and maintaining localism in news, sports, and public service programming in American communities.¹⁵¹ Ideally, the merger should be conditioned on the establishment and maintenance of online local programming as currently employed by ABC as discussed above.¹⁵²

V. THE TEMPTATION TO OVERREACH: WHY CONDITIONS ON NET NEUTRALITY AND RETRANSMISSION WOULD BE UNWISE

The vague public interest standard creates the opportunity for the FCC to occasionally overreach in its regulatory authority.¹⁵³ Often, ad hoc decision-making at the Commission will result in the imposition of merger conditions that would better be served by broader rulemakings at the Commission or policymaking in Congress.¹⁵⁴ The story is the same with many of the major mergers the FCC reviews: the Commission, when presented with the opportunity to approve a deal, will take advantage of the position the parties are in and impose conditions that satisfy stakeholders and interest groups in the short term, but do not solve policy issues in the broader sense or for the longer term.

For example, during the Adelphia Cable merger with Comcast and Time Warner in 2006, the Commission imposed a condition that required parties to engage in arbitration to solve programming carriage disputes.¹⁵⁵ Programming carriage disputes were, and still are, a major point of contention during that merger. The hope in imposing a condition was obvious—to ensure fair dealing between programmers and MVPDs. However, the “solution” sought by the Commission was not a solution at all. The imposed condition was merely cherry-picked from a condition placed on parties in a previous merger, and did

¹⁵¹ See GOLDFARB, *supra* note 29, at 24-25.

¹⁵² See discussion, *supra* Part IV.A.2.b.

¹⁵³ See Weiser, *supra* note 62, at 198 (“because the imposition of “voluntary conditions” provides an inviting (but less deliberative) alternative than industry-wide rulemaking or formal adjudications, a cessation of that practice would encourage the FCC to rely on such procedures. . .”).

¹⁵⁴ *Id.* at 170-174.

¹⁵⁵ *In re Applications for Consent to the Assignment and/or Transfer of Control of Licenses Adelphia Communications Corporation, (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees; Adelphia Communications Corporation, (and subsidiaries, debtors-in-possession), Assignors and Transferors, to Comcast Corporation (subsidiaries), Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corporation, Transferee, Memorandum Opinion and Order*, 21 F.C.C.R. 8203 ¶ 190 (July 13, 2006) [hereinafter *Adelphia Order*].

little to solve the overall problem of carriage rate negotiations. As shown below, the Commission is poised to do the same with Comcast-NBC. In these cases, “it is difficult to see how the public is better served through such ad hoc decisions made in the merger review context—which leave incumbent providers not involved in mergers free of the relevant obligations—than through a greater commitment to addressing those issues through industry-wide rulemaking or adjudication.”¹⁵⁶

The issues of net neutrality and retransmission disputes are representative of cases where the Commission will be tempted to regulate via condition-setting, but would actually be better served by either industry-wide-rulemaking or Congressional action.

A. Net Neutrality

It is not within the scope of this article to suggest an ultimate fix to the problem of net neutrality; numerous articles and reports have devoted countless pages to more thorough analyses.¹⁵⁷ However, it is essential that all broadband providers are subject to the same rules regarding network management. An exhaustive analysis of the current broadband environment and rules that reflect current practices are preferable, instead of imposing conditions on Comcast alone during a merger review.

Unfortunately, the Commission is poised to fail in both respects. While the FCC approved net neutrality rules in late December, these regulations do not reflect current practices in the broadband provider community.¹⁵⁸ Further, the new rules fail to provide certainty in the market.¹⁵⁹ This is evident not only in the inherent vagueness of the Commission’s Order, but also in the Congressional backlash that the Commission provoked.¹⁶⁰ Ultimately, in the face of the *Comcast* decision,¹⁶¹ Congressional action—as opposed to further attempts to

¹⁵⁶ Weiser, *supra* note 62, at 173-74.

¹⁵⁷ See, e.g. Brooke Ericson, “Möbius-Strip Reasoning”: *The Evolution of the FCC’s Net Neutrality Nondiscrimination Principle for Broadband Internet Services and Its Necessary Demise*, 62 ADMIN. L. REV. 1217 (2010); Tim Wu, *Why Have A Telecommunications Law? Anti-Discrimination Norms in Communications*, 5 J. TELECOMM. & HIGH TECH. L. 15 (2006); Christopher S. Yoo, *Innovations in the Internet’s Architecture that Challenge the Status Quo*, 8 J. ON TELECOMM. & HIGH TECH. L. 79 (2010).

¹⁵⁸ See Dissenting Statement of Commissioner Robert McDowell *In re* Preserving the Open Internet, GN Docket No. 09-191, *Broadband Industry Practices*, WC Docket No. 07-52 at 3-4 (Rel. Dec. 23, 2010).

¹⁵⁹ *Id.* at 6-8.

¹⁶⁰ See Tony Romm, *GOP Lawmakers Threaten to Repeal Net Neutrality*, POLITICO (Dec. 21, 2010, 2:37 PM), <http://www.politico.com/news/stories/1210/46685.html>.

¹⁶¹ See *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010). In April 2010, the D.C. Circuit Court invalidated the Commission’s initial attempt at regulating network management. The Commission’s actions in its net neutrality order, have been an attempt at circum-

regulate by the Commission—would be preferable. This would yield clear and certain rules, perhaps with the Commission left to enforce violations of the law as defined by Congress.¹⁶²

To some, the emerging media market is viewed simply as another space in which the new entity can restrict content and ensure that the “whenever, wherever” media that the public is craving will not be permitted unless approved by Comcast first.¹⁶³ The fear is that the flourishing minority and niche voices described above will ultimately be stifled by the imposition of discriminatory network management on the part of Comcast.¹⁶⁴ Public Knowledge presented this argument succinctly in its petition to the FCC to oppose the merger:

the availability of video on the Internet is providing an unprecedented number of diverse media voices that are simply not possible via broadcast or MVPD system. . . . However, the diversity of this content does not ensure its continued survival in a marketplace of far larger entities, especially if those entities also control the means of distribution.¹⁶⁵

The basic idea is that the Internet provider (in this case, Comcast) would be able to degrade service speeds at specific times, or when the user is attempting to access certain content (*e.g.* streaming video or peer-to-peer programs).¹⁶⁶ Comcast has quite famously employed these practices in the past: the provider’s 2007 imposition of network management and “throttling” of service related to bitTorrent is a stark example of how the new media market can be subdued by service providers who stand in the position of gatekeepers.¹⁶⁷ It also gives credence to concerns that post-merger Comcast would continue to engage in similar activity.¹⁶⁸

Even with the passage of net neutrality rules, the Commission remains

venting this decision to achieve the same intended ends.

¹⁶² See, *e.g.* Henry Waxman, *Statement on Net Neutrality Proposal*, REPRESENTATIVE HENRY A. WAXMAN (Sept. 29, 2010), <http://www.henrywaxman.house.gov/News/DocumentSingle.aspx?DocumentID=209385>.

¹⁶³ See *In re Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign or Transfer Control of Licensees, Petition to Deny of Public Knowledge*, MB Docket No. 10-56, at 6-10 (June 21, 2010) (accessible via FCC Electronic Comment Filing System) [hereinafter *Public Knowledge Petition*] (stating that “[Comcast] can unfairly discriminate against non-NBCU content, either by refusing to connect users to the online video content of established competitors, or, more likely, simply de-prioritizing or throttling the bandwidth available to these competitors versus NBCU content.”).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 7.

¹⁶⁶ See Saul Hansell, *Comcast Tests a New Bandwidth Throttle*, N.Y. TIMES BITS BLOG (June 4, 2008, 2:07 PM), <http://bits.blogs.nytimes.com/2008/06/04/comcast-tests-a-new-bandwidth-black-list/>.

¹⁶⁷ See *Comcast Corp. v. F.C.C.*, 600 F.3d 642, 644 (D.C. Cir. 2010).

¹⁶⁸ *Public Knowledge Petition*, *supra* note 163, at 10 (“Comcast’s past actions in blocking alternative content and delivery methods demonstrate that the merged entity has existing means and motive to continue such practices.”).

committed to imposing conditions on the merger regarding Comcast's provision of content over the Internet. While this is certainly unsurprising, it fuels the argument that the Commission's current rules are uncertain. At best, a merger condition related to Comcast's network management and online programming will be a signal to the industry that the Commission's newly-championed net neutrality rules will be ineffective.

B. Retransmission Rules: Ripe for Reform

While Comcast and NBC Universal have no doubt proven to be impressive innovators in the video production and delivery business,¹⁶⁹ reservations linger regarding how their combination will affect the traditional video entertainment market.¹⁷⁰ No clearer have these fears played out than in the recent carriage disputes between programmers and distributors. For example, the dispute between Cablevision and Fox wreaked havoc in the Northeast through most of October. Failing to reach a carriage agreement, three million viewers in the New York area were deprived of Fox programming—along with the entirety of the National League Championship Series and much of the World Series.¹⁷¹ After what amounted to be an extraordinarily long and dramatic blackout (two weeks in all), Fox was restored just in time for the last two games of the World Series.¹⁷² With three million viewers in the New York area blacked out during baseball playoffs, one can only image what would have happened if the Yankees had made it to the World Series.

In fact, sports programming has been particularly affected by retransmission disputes. According to Terry Denson, Vice President of Content and Programming for Verizon:

Regional sports is among the most popular programming to consumers, many of whom are loyal sports fans and insist on the ability to see the games of their local teams. Given its very nature, this programming is unique and cannot be duplicated by new entrants who are denied access. For consumers who are Knicks or Rangers fans, the games of other teams or other sports are no substitute, and a competitive provider lacking those games—or lacking them in HD—will not be [a] meaningful alternative

¹⁶⁹ See generally *An Examination of the Proposed Combination of Comcast and NBC Universal, Hearing Before the House Subcommittee on Communications, Technology, and the Internet*, 111th Cong. (2010) (testimony of Brian Roberts and Jeff Zucker).

¹⁷⁰ See generally Free Press White Paper, *supra* note 33.

¹⁷¹ See Brian Stelter & Bill Carter, *Fox-Cablevision Blackout Reaches a Second Day*, N.Y. TIMES, Oct. 18, 2010, at B3.

¹⁷² Brian Stelter & Bill Carter, *Fox and Cablevision Deal Returns Signal*, N.Y. TIMES, Oct. 31, 2010, at A28 (noting that “most blackouts of local stations last only a matter of hours”); see also *2010 MLB Postseason Schedule*, MLB.COM, <http://mlb.com/mlb/schedule/ps.jsp?y=10> (last visited Nov. 9, 2010) (showing that the National League Championship Series was played between Oct. 16 and Oct. 23, and the World Series was played between Oct. 27 and Nov. 1).

at all.¹⁷³

Indeed, Verizon and its FiOS service have been effectively locked out of carrying the Madison Square Garden networks in the New York area for some time—a situation that has undoubtedly affected subscribership.¹⁷⁴ Similarly, hockey fans with DirecTV were left in the dark for much of the 2010 season; in the face of a heated dispute between the satellite provider and the Comcast-owned sports network VS.¹⁷⁵ Even the Tennis Channel has filed an FCC complaint against Comcast regarding its carriage,¹⁷⁶ yet another case in a long line of disputes between programmers and distributors.

Unfortunately, complaints to the Commission regarding carriage rate disputes have not been well-received. Larry Cohen of the Communications Workers of America pointed out during the February House Judiciary Committee hearing that “bringing a carriage access complaint to the FCC is not a meaningful remedy. The complaint process currently lacks any concrete deadlines for FCC action, with many complaints languishing at the Commission for years.”¹⁷⁷

However, there lies a caveat in the argument that the Commission should take action during its review of the proposed merger of Comcast and NBC Universal: none of the above-noted carriage disputes involve Comcast. While this is not to say that Comcast does not engage in similar behavior—it certainly does¹⁷⁸—the issue affects the entire traditional MVPD market, not just the parties under current review. As Congresswoman Blackburn expressed during a February House Subcommittee hearing, the FCC should not undertake “regulatory shenanigans” by using this merger as an excuse to impose regulations that would better passed independently of the current merger.¹⁷⁹ As precedent dictates, when the Commission attempts to impose regulation where it would not

¹⁷³ Denson Statement, *supra* note 96, at 8-9.

¹⁷⁴ *Id.* at 10.

¹⁷⁵ See Richard Sandomir, *Dispute May Prevent Viewers From Watching NHL Opener on DirecTV*, N.Y. TIMES.COM (Oct. 1, 2009), <http://www.nytimes.com/2009/10/01/sports/hockey/01versus.html>.

¹⁷⁶ See Todd Shields, *Tennis Channel Files an FCC Complaint Against Comcast*, BUSINESSWEEK (Jan 6, 2010, 11:45 AM), <http://www.businessweek.com/news/2010-01-06/tennis-channel-files-an-fcc-complaint-against-comcast-update1.html>.

¹⁷⁷ *Competition in the Media and Entertainment Distribution Market: Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 6 (2010) (testimony of Larry Cohen, President, Communications Workers of Am.), available at <http://judiciary.house.gov/hearings/pdf/Cohen100225.pdf> [hereinafter Cohen Testimony].

¹⁷⁸ *Id.* at 5-6.

¹⁷⁹ *An Examination of the Proposed Combination of Comcast and NBC Universal before the House Subcommittee on Communications, Technology and the Internet*, 111th Cong. (2010) (statement of Rep. Marsha Blackburn, Member, House Comm. on Energy and Commerce).

otherwise have the authority, courts are reluctant to defer to the agency.¹⁸⁰ So, while fears of even more retransmission negotiation failures may be well-grounded, the current merger review is not the appropriate venue for FCC action that would be better suited to apply across the industry as a whole.¹⁸¹

Alternatively, in the absence of FCC action, Congress has begun to respond to the public's calls for reform. In late October, Senator John Kerry voiced his frustration with FCC inaction by sending the Commission draft legislation to resolve the problem.¹⁸² Senator Kerry noted that "the voices of angry consumers in... news coverage [of negotiation failures] speak volumes," and that "there are important equities and business interests at stake in these negotiations."¹⁸³ If and until Congress or the Commission decide to act on this issue, viewers can use technology to view their favorite sports programs online.¹⁸⁴

VI. CONCLUSION

Any evaluation of the proposed merger between Comcast and NBC Universal must take place in the context of the new media marketplace. In its public interest analysis, the FCC is charged with looking ahead to future developments in its particularized field and acting accordingly. The new media marketplace introduced and evaluated above *is* this future—with increased competition among content producers and programmers, combined with the latest innovative technologies to deliver it. The traditional players in the programming and MVPD field will be forced to adjust or fall by the wayside. The giants among these—Comcast and NBC Universal—have recognized this reality

¹⁸⁰ Weiser, *supra* note 62, at 173-74.

¹⁸¹ Koutsky & Spiwak, *supra* note 45, at 336 ("In reviewing cable industry mergers, the FCC makes a careful determination as to whether such programming distribution issues are better resolved through company-specific, merger-specific conditions, or whether existing program access laws, which apply to the industry generally, are sufficient.")

¹⁸² See Letter from John Kerry, United States Senator, to the Honorable Julius Genachowski, Chairman, Fed. Comm'ns Comm'n, (Oct. 19, 2010), *available at* <http://kerry.senate.gov/press/release/?id=84bcc1bf-c9dc-4893-9488-aedf56d8b953>. Senator Kerry wrote that:

[Chairman Genachowski] testified before the Senate Commerce Committee that the retransmission consent system was under review and had been since the previous New Year. Further, a petition that seeks to modify the FCC's rules for retransmission consent negotiations has been pending before the FCC since March 2010. The FCC has had sufficient time to consider the comments that have been filed on that petition and begin the process to revise its rules. But in the absence of FCC action, I feel a responsibility to begin to consider the smartest, least intrusive actions to reform the law.

Id.

¹⁸³ *Id.*

¹⁸⁴ For example, this is what New York area viewers did during the October 2010 Fox blackout. See Christian Livermore, *Cable Clash Turns Some to Web*, TIMES HERALD RECORD, Oct. 20, 2010, at 51.

and begun to respond accordingly.

Few claims that the deal will harm the public interest actually hold water when viewed in this context. Arguments against the localism repercussions of the merger will be the most successful, and the Commission would be advised to place conditions accordingly – namely that the new entity establish and maintain online local broadcasting for free, in the model espoused by ABC.¹⁸⁵ Those claims that the deal will stifle minority and diverse programming are *de facto* countered by the very nature of the new media marketplace – which thrives on innovative, diverse, and user-generated content to make the video entertainment of tomorrow “insanely personalized.”¹⁸⁶ Assertions that the new entity will harm competition rely fundamentally on the assumption that “the current market structure provides limited competition among MVPDs, with no additional competition on the horizon”¹⁸⁷—a claim that is patently untrue in the face of the new and emerging media marketplace.

If there is any lesson to be learned from analyzing the dynamics of the new media marketplace, it is that the most popular method of delivering the most popular content is constantly changing. The likely projection is that the new media marketplace will soon usher in a new era of viewership that will leave the traditional media giants struggling to adapt and adjust to maintain profits. The Xfinity “TV Everywhere” model proposed by Comcast may likely find itself as one player amidst intensifying competition between delivery mediums, many of which sustained by business models which are incredibly innovative and are not reliant on traditional profit-gathering methods.

The proposed merger should and likely will be passed with few conditions. This will set the stage for a future in which the Commission can step in to broadly regulate the programming carriage problems that have plagued the cable industry for years, and the additional network management concerns that are beginning to manifest. These regulatory steps should not take place in the context of a narrow merger review, where they will be ineffective at best, and outside the realm of Commission authority at worst.

¹⁸⁵ See discussion *supra* Part IV.A.2.b.

¹⁸⁶ Hesse, *supra* note 74.

¹⁸⁷ Marvin Ammori, *Copyright's Latest Communications Policy: Content-Lock-Out and Compulsory Licensing for Internet Television* 18 COMMLAW CONSPECTUS 375, 377 (2010).