Before the
Federal Communications Commission
Washington, D.C. 20554

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

PETITION TO DENY OF
PUBLIC KNOWLEDGE

Harold Feld
Sherwin Siy
Michael Weinberg
Mart Kuhn, Law Clerk

Public Knowledge
1818 N St., NW,
Suite 410
Washington, DC 20036

June 21, 2010

Table of Contents

SUMMARY **1**

ARGUMENT **2**

I. The Commission Has a Specific Duty to Protect The Public Interest Beyond Horizontal Guidelines. **2**

II. The Merged Entity Will Create Problems in the Marketplace for Online Video. **4**

A. The Merged Entity Will Have Incentives to Restrict Access to Non-NBCU Content. 4

B. The Merged Entity Will Have Incentives to Restrict the Availability of NBCU Content. 10

III. Proposed Conditions **13**

CONCLUSION **15**

SUMMARY

The proposed merger of NBC Universal (NBCU) and Comcast presents potential harms not just to the competitive media landscape, but also to the public interest in the diversity of media voices, technological advancement, and promotion of the public interest, convenience, and necessity.

Public Knowledge limits the scope of this petition solely to the harmful effects of the merger upon the distribution of video content over the Internet. Naturally, the merger of these two companies presents a wide variety of other concerns and considerations that the Commission must also address.

The proposed integration of a leading video programmer and a leading distributor leads to questions about the new entity discriminating against other content creators as a distributor, and discriminating against other distributors as a content creator.

These concerns converge in Internet-based "over-the-top" (OTT) distributions of content. The nascent nature of the OTT market, with its wide range of small competitors with varied business models, means that the competitive market might well be more fragile than the established market for broadcast and MVPDs. OTT is uniquely positioned to bring true competition to the MVPD market.[1] Unlike traditional cable or satellite based MVPD service, OTT can leverage existing infrastructure to distribute content to consumers. This allows OTT services to quickly and nimbly compete with

[1] As Senator Kohl recently noted: "It is clear that video over the Internet has the real potential to become a strong competitive alternative to traditional MVPD providers and offer consumers new choices to obtain video programming without expensive MVPD subscriptions." Letter from Herb Kohl, Chairman, Subcommittee on Antitrust, Competition Policy and Consumer Rights, United States Senate to Christine Varney, Assistant Attorney General, Antitrust Division, United States Department of Justice (May 26, 2010) ("Kohl Letter").

entrenched MVPD services, provided they are not stifled by an inability to access content on reasonable terms or throttled by incumbent Internet service providers.

The merger thus represents a grave threat to the viability of these new producers and distributors of video content, and should be denied absent strong conditions that would prevent the new entity discriminating against non-NBCU programmers or against non-Comcast providers who desire access to NBCU content. Such conditions could range from non-discrimination principles and requirements for access to programming, to requirements of divestiture in potential online competitors to cable programming such as Hulu, to granting wholesale access to broadband Internet infrastructure.

ARGUMENT

I. The Commission Has a Specific Duty to Protect The Public Interest Beyond Horizontal Guidelines.

In analyzing the proposed merger, the Commission is required to examine the public interest, convenience, and necessity, ensuring that the resulting entity will promote competition in the marketplace.[2] This mandate of protecting competition is necessarily broader than the more specific antitrust analysis of the Department of Justice and the Federal Trade Commission, which is limited to addressing potential antitrust harms. The Commission has the affirmative duty to encourage competition and effectuate the purposes of the Communications Act.[3] Those purposes expressly include ensuring "the widest possible diversity of information sources and services to the public"[4] as well as

[2] Communications Act of 1934, 47 U.S.C. §§ 214(a); 257(b); 309(e); 310(d) (2006).
[3] *See* Applications for Consent to Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor to AT&T Corp., Transferee, 14 F.C.C.R. 3160, 3169 (1999).
[4] 47 U.S.C. § 521(4) (2006).

promoting competition in cable communications.[5] This duty is broadly drawn and widely applicable.[6] Furthermore, the Commission has recognized that this duty extends to "the provision of new or additional services,"[7] not merely the mature markets impacted by the merger.

The Commission's analysis of the merger thus must balance any potential competitive benefit of the merger against harms not only to competition, but also to the separate goals of media diversity and development of online services. As such, the Commission must not limit itself to the question of how much market share the merged entity will gain in the markets for television distribution, Internet access services, or the production of television content. Rather, the Commission must include in its inquiry the enormous effects on various markets that will result from the vertical integration of NBCU, a leading content producer, and Comcast, a leading provider of both MVPD and broadband Internet access services. If the record cannot provide satisfactory answers to these issues, the Commission should refer the matter for a hearing before an administrative law judge.

The Commission's inquiry into OTT video markets is particularly necessary given the nascent nature of the online video market. While a number of outlets exist, the number is constantly changing, with new services appearing and others disappearing with

[5] *Id.* §§ 521(6), 532(a).

[6] *See, e.g.*, *id.* §§ 151, 207(b). As this merger involves the consolidation of broadcast licenses, a broad application of the Commission's public interest obligations applies. *See Red Lion Broad. Co., Inc. v. FCC*, 395 U.S. 367, 380 (1969).

[7] Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines, CC Docket No. 98-141, FCC 99-279 at 50 (1999). The Commission also acted to protect the development of then-nascent instant messaging technology in the merger between AOL and Time Warner. *See* Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee, CS Docket No. 00-30, FCC 01-12 at 128–200 (2001).

some regularity.[8] In such an emerging market, the Commission must even more carefully scrutinize the efforts of major media incumbents to leverage that incumbency into the new market. The Commission's involvement in the Computer Inquiries, for example, was spurred by AT&T's established market power in the telecommunications market being leveraged into the emerging market for remote computer data processing.[9] In initiating the Computer Inquiries, the Commission recognized then, as it should now, the particular vulnerability of new markets to the leveraged power of old incumbents.

The Communications Act requires the Commission to promote diversity of information sources, not merely a larger number of competitors in the MVPD field. Diverse sources of information benefit the public interest regardless of the technical means by which their signals reach consumers. Whether video is being provided by the merged entity over dedicated cable lines, the Internet, or other technologies, the dominance of the merged entity could quash the intermodal competition between different video sources.

II. The Merged Entity Will Create Problems in the Marketplace for Online Video.

A. The Merged Entity Will Have Incentives to Restrict Access to Non-NBCU Content.

As a leading provider of both MVPD service and of broadband Internet access, Comcast is well placed to favor affiliated content providers over other content. This is not mere supposition, as Comcast has repeatedly acted in the past to restrict other

[8] *See, e.g.* VDC Corporation, http://www.vdc.com/; Sky Angel, http://www.skyangel.com.
[9] *See* Regulatory and Policy Problems Presented by the Interdependence of Computer and Commc'ns Servs., *Tentative Decision*, ¶ 33, 28 F.C.C.2d 291, 18 Rad. Reg. 2d (P & F) 1713 (1970) ("Computer I").

methods of online video content distribution, either by blocking those distributions outright,[10] or by selectively tying access to online content to cable subscriptions.[11]

Comcast's position as both a major cable television distributor and a major broadband Internet access provider gives it significant market power in both the MVPD and the broadband Internet access markets.[12] Multiplying this power is the fact that its large market share in both markets can be exercised against both end users and content providers.

For example, Comcast's prominence as a cable television distributor not only gives it advantages in the market of selling television services to consumers; it also give it advantages in the market of buying television programming from providers. The same is true for Comcast's role as a broadband ISP: Comcast's market power affords it advantages vis-à-vis recipients of Internet video content as well as creators of Internet video content. For example, Comcast will be able to distribute NBC content through its Xfinity online offering without having to pay itself license fees.

This two-sided market advantage results from Comcast's position as a gatekeeper: it provides access to customers for content creators and it provides access to content for customers. Control over both directions of this transaction allows Comcast the opportunity for anticompetitive behavior against either content creators or consumers, or both simultaneously.

---

[10] *Comcast Corp. v. FCC*, 600 F.3d 642, 644–45 (D.C. Cir. 2010).
[11] Comcast's Xfinity offering allows consumers to access cable programming via the Internet only if they have a Comcast MVPD subscription.
[12] Comcast has acted to restrict competition by traditional MVPDs as well, by demanding exclusivity in Video-on-Demand licensing agreements and by creating "terrestrial loophole" regional sports networks.

1. Comcast has incentives to degrade traffic in non-NBCU content on the Internet.

In the case of OTT video, Comcast's ability to control users' access to content means that it 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.[13] For example, a combined Comcast-NBCU entity would have a distinct incentive to ensure that video streaming of television programs from NBC.com (or from Hulu, of which NBCU owns a 32% share) would load faster and play back more smoothly than programs from ABC.com or any other competitor's website. These practices would unfairly disadvantage competitors by driving traffic away from sites perceived to have lower-quality video services.

Such tactics would not easily be policed by the marketplace itself. Consumers, simply noting the difference in speed and quality between the two sites, could easily blame the disparity on ABC's servers or site design, rather than on interference by their ISP.

The two-way nature of an ISP's gateway power can also be used to extract anticompetitive rents from competing content creators. Faced with the possibility of having their online offerings degraded or blocked from reaching millions of Comcast subscribers, content providers with varying degrees of bargaining power may be charged additional fees to be in a preferred tier of access for customers.

The Commission therefore has a duty to ensure that the merged entity cannot unfairly disadvantage other networks from delivering their programming to consumers

---

[13] Comcast has successfully defended its right to de-prioritize and throttle content in court. *See Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

over the Internet. The competitive advantage resulting from Comcast's ability to control access not only allows the monetary harms of anticompetitive pricing and behavior, but threatens the public interest in a diversity of new programming that can only be found on the Internet.

The Commission's duty to promote competition in the emerging market for online video content is particularly salient when we consider the fact that the marketplace of online video content is not merely populated by major broadcast and cable television networks. These competitors include a wide variety of formats and content, including informative news and commentary programming,[14] industry information and discussion,[15] creative dramatic and comedy productions,[16] musicians showing videos or recordings of live performances,[17] videos from print news media outlets,[18] or even individuals sharing sporadic bursts of creativity or aspects of their personal lives.[19] 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 systems. Because of the relatively low cost and wide reach of Internet-based content, a much wider variety of perspectives can bloom in the digital media environment.

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. Despite the large number of these nontraditional online video creators, the

---

[14] *See, e.g.* FCC Action: Necessary or the "9/11 For the Internet"? Experts Debate (Video), TechCrunchTV (May 5, 2010) *available at* http://techcrunch.com/2010/05/05/fcc-action-necessary-or-the-911-for-the-internet-experts-debate-video/.
[15] *See, e.g.* E&E TV, http://www.eenews.net/tv/.
[16] *See, e.g.* Web Site Store, CollegeHumor (Jun 29, 2009) *available at* http://www.collegehumor.com/video:1913584.
[17] *See, e.g.* BandsVideos, http://www.bandsvideos.com/.
[18] *See, e.g.* New York Times Video, http://video.nytimes.com/.
[19] *See, e.g.* Vimeo, http://vimeo.com/.

market share and market power of each of these individual creators is infinitesimal compared to that of any established cable programmer, let alone an incumbent "big three" network that includes a vast array of broadcast, cable, and motion picture studios.

In the interest of ensuring that these new voices have the chance to acquire public attention and increased popularity, the Commission should ensure that established media conglomerates are unable to leverage a newfound control over the distribution channels of the Internet to quash new entrants in their incipiency.

2. Comcast has the incentive to discriminate against new, non-Comcast controlled methods of delivering content over the Internet.

Naturally, discrimination against competitors' data would not be limited to content originating at a competitor's website. The ISP operations of the merged entity would also have the ability to throttle or degrade video delivered by a competitor to the merged entity's MVPD service. A Comcast Internet customer streaming non-NBCU content from Netflix's Internet video service, for instance, would be subject to any technological degradation that Comcast decided to implement. Non-streaming services could also be targeted. Indeed, Comcast has in the past explicitly blocked BitTorrent traffic, which provides a potential source of competition for Internet-delivered video programming.[20]

Again, the open nature of the Internet has so far allowed not only a wider variety of content, but also a wider variety of distribution methods to flourish. Internet video can not only be delivered through pre-selected real-time streaming, but also through various methods of on-demand streaming and downloading, customizable for viewing on any

[20] *See* Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-To-Peer Applications, *Memorandum Opinion & Order*, 23 FCC Rcd. 13,028 (2008).

network-capable devices. Various models for distributing content, all dependent upon transferring data over the Internet, are continuing to emerge and compete with established MVPDs for consumer (and advertiser) attention.

Internet video is not limited to computer monitors. A variety of Internet-based distribution systems bring content directly to users' televisions. These range from "Internet MVPD" models like Sky Angel,[21] which delivers content from cable programmers over the Internet to consumer devices, to systems like Boxee,[22] which create a more unified interface to integrate streamed and downloaded Internet content with users' stored media onto their televisions. Although the implementation may differ, the ability to present Internet video on a television creates a clear competitor to traditional MVPD service.

As broadband access increases in its ubiquity and its importance to consumers, the distinction between OTT and MVPD distribution will diminish. With the rise of increasingly intelligent and user-friendly devices able to present all video in a unified way, no matter its source,[23] the different types of distribution services will increasingly be competing directly for the same consumers.

The merged entity would therefore not only have an incentive to discriminate against non-NBCU sources of programming, it would have an incentive to degrade any forms of distribution that competed with its lucrative MVPD offerings. This would naturally include any offerings over the Internet, which would not only compete with

---

[21] *See In the Matter of Sky Angel U.S., LLC Emergency Petition for Temporary Standstill*, DA 10-679, Order (Apr. 21, 2010) *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-10-679A1.pdf.
[22] http://www.boxee.tv/.
[23] *See, e.g.* Apple TV, http://www.apple.com/appletv//; Google TV, http://www.google.com/tv/; Roku Player, http://www.roku.com/. *See also* Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment, CS Docket No. 97-80, PP Docket No. 00-67, *Fourth Further Notice of Proposed Rulemaking*, FCC 10-61 (Apr. 21, 2010).

MVPD content, but also occupy finite bandwidth which the company could be using to deliver its own for-pay or advertiser-supported content. The same incentives to throttle, degrade, or block web video content would apply equally to other methods of OTT distribution. The lack of competitive broadband Internet options in many areas limits the ability of consumer flight to prevent this type of action.

As with various types of web-based video content, the ISP's discrimination can be used to apply pressure either to consumers (driving them from competitors' content or extracting additional payment for unencumbered access) or from competing content providers (demanding that they enter into agreements with Comcast in order to effectively access Comcast customers).

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. With an ownership interest in even more content produced by NBCU, the merged entity will, absent strong conditions, have even greater reason to prevent innovative new competitors in both content and distribution from gaining a hold in the marketplace.

B. The Merged Entity Will Have Incentives to Restrict the Availability of NBCU Content.

NBCU's prominence in the media market provides another distinct source of influence that could motivate practices that would reduce competition and media diversity, frustrating the policy goals of the Communications Act. While any creator of video programming has incentives to price discriminate and tightly control access to its works, that motivation is traditionally balanced by the desire to distribute programming to a broad audience. However the merged entity, with an interest in both the video production of NBCU and the distribution network of Comcast, will have an incentive to restrict the distribution of NBCU programming. This is especially true in restricting access to distributors who may directly compete with Comcast's own MVPD offerings, such as OTT providers.

1. The merged entity will have incentives to deny programming to OTT MVPDs.

Existing conditions already encourage video programmers to prevent alternative distribution of their programming. In the recent past, Hulu has been reconfigured to prevent other services from presenting its content in customized browsers. For instance, in 2009, Hulu first asked Boxee not to present Hulu programming via its system, and later declared that only "authorized" web browsers could access content that Hulu published on the web. These steps clearly represented an attempt to prevent consumers from viewing Hulu content on their televisions, thus preventing Hulu from competing directly with MVPDs.[24] A nearly identical set of facts surrounded Hillcrest Labs' Kylo television browser being blocked from viewing Hulu.[25]

NBCU has also used less technical means to pressure OTT video from carrying its content. Recently, Universal Studios negotiated a 28-day delay between the time that DVD and Blu-Ray copies of movies are released to the public and the time that Netflix can make them available on-demand over the Internet.[26] NBCU's desire to restrict other carriers from delivering its programming will only increase when the combined entity has

---

[24] Brad Stone, *Boxee Brings Hulu Back to Its Service*, Bits Blog, March 6, 2009, http://bits.blogs.nytimes.com/2009/03/06/sidestepping-objections-boxee-brings-hulu-back-to-its-service/; Brad Stone, *Hulu Evades Boxee's Embrace (Again)*, Bits Blog, March 6, 2009.

[25] Steve Donohue, *Hillcrest: Hulu Is Blocking 'Kylo' TV Browser*, Light Reading Cable, March 22, 2010, http://www.lightreading.com/document.asp?doc_id=189493&site=lr_cable.

[26] Frank Michael Russell, *Netflix Agrees to 28-Day Delay for Fox, Universal Movies, TV Shows*, SAN JOSE MERCURY NEWS, April 10, 2010, *available at* http://www.mercurynews.com/breaking-news/ci_14853037?nclick_check=1.

a far more direct stake in video distribution. By barring—through contract or technical means—video browsers like Boxee, Kylo, or Roku from displaying NBCU content, the merged company can drive Internet users to subscribe to Comcast MVPD services, or restrict online viewing to dedicated, proprietary applications. This not only impoverishes the market of online video content, but also leverages NBCU's market power to increase Comcast MVPD subscriptions, while simultaneously disadvantaging new applications that consumers might use to view online video on their televisions.

Other video programmers have already refused to provide programming to OTT services that act for all intents and purposes like an MVPD. Both VDC[27] and Sky Angel[28] have faced considerable (and in VDC's case, fatal) obstacles in providing consumers with OTT video programming due to programmers failing to license their content on terms that would have been required were they a more traditional MVPD.

Sky Angel and any similar services face this drought of content, as do the many other services that bear less resemblance to MVPDs. Absent strong protections against these practices, each of these new competitors to traditional MVPDs will face a unified, vertically integrated competitor with a commanding majority of market share.

2. The merged entity will have incentives to anticompetitively tie MVPD services to Internet access services.

Even as the merged entity starves OTT video providers of programming, it can, through tying, drive broadband consumers to subscribe to its MVPD offerings by withholding programming even from its own broadband subscribers absent a subscription

[27] Ted Hearn, *Streamer Seeks Program Access*, MULTICHANNEL NEWS, January 21, 2007, http://www.multichannel.com/article/127551-Streamer_Seeks_Program_Access.php.
[28] John Eggerton, *Sky Angel Files Program Access Complaint Against Discovery*, BROADCASTING & CABLE, April 9, 2010, http://www.broadcastingcable.com/article/451265-Sky_Angel_Files_Program_Access_Complaint_Against_Discovery.php.

to its MVPD service. Already being explored through TV Everywhere, Comcast's ability to tie access to online video content to subscriptions to its MVPD service will only be exacerbated by a merger with a leading purveyor of television and motion picture content.

In the absence of any rules to the contrary, the merged entity can withhold NBCU content from online sources, conditioning access upon a consumer subscribing either to Comcast's MVPD service, its broadband service, or both. The ability to tie the two services together, combined with the increased bargaining power of having more programming to withhold, would permit the merged entity to draw consumers away from other MVPD providers.

Whereas a competing MVPD can now avail itself of program access rules to deliver content to consumers, a broadband provider has no such option if its customers are denied NBCU programming on OTT systems. Depending upon which tactic yields greater revenues or market share, the merged entity would have the ability to grant online content only to Comcast broadband subscribers (driving consumers from other broadband services), only to Comcast MVPD subscribers (driving consumers from other MVPDs, or encouraging "cord-cutters" to subscribe to Comcast MVPD services), or some combination of both, encouraging consumers to accept two separate services from the merged entity.

III. Proposed Conditions

With the proposed merger giving the newly created company the power to restrict access as a distributor and as a programmer, the negative effects of the merger would far outweigh any offsetting pro-competitive effects. Not only would the merger permit and incentivize anticompetitive behavior against other MVPDs, other broadband Internet providers, and competing programming providers, but the merger would also serve to stifle the diversity of emerging independent content creators and new platforms for video distribution.

Limited competition in today's Internet and MVPD market further incentivizes anticompetitive behavior. While there are a number of Internet service providers and MVPDs that exist in the United States, the historical requirement of large capital expenditure to enter either market means that at the local level choice is often severely limited. The Commission's program access rules for MVPDs, and Internet principles for Internet service providers, both flow from a recognition of that fact.

If the merger is to move forward, the public interests detailed above must be protected by preventing the newly vertically integrated company from abusing both its position as a conduit and as a source of programming.

Preventing the newly merged entity from abusing its position as a conduit will require vigilant enforcement of at least two conditions. First, the Commission must impose strict non-discrimination rules that prevent the entity from interfering with the distribution of non-affiliated content through filtering, blocking, or degrading distribution.[29] The growth of Internet distributed content should not be stifled simply because the newly formed entity would prefer consumers continue paying for its MVPD service.

Second, the Commission must recognize that temptation for anticompetitive behavior flows largely from Comcast's control of last mile networks. Competition in last mile networks can mitigate the impact of the combination of (in many instances

[29] This condition is similar to Senator Kohl's eleventh suggested condition. *See Kohl Letter* at 6.

exclusive) last mile control and significant content ownership. The newly merged entity should be required to offer wholesale broadband access services to unaffiliated ISPs.[30] Allowing unaffiliated ISPs to access the last mile networks of the newly merged entity and compete for Internet customers would impose a valuable check on any anticompetitive impulses.

The Commission must also impose conditions to prevent the newly merged entity from abusing its position as a source of programming. These conditions should come in the form of expanded program access requirements for all content controlled by the newly merged entity.[31] In addition to existing obligations to make content available to traditional MVPDs on reasonable and nondiscriminatory (RAND) terms, the Commission should require that the content be made available on RAND terms to OTT providers and other non-traditional competitors to MVPD service. This will guarantee that the newly merged entity will not attempt to stifle the development of potential competitors by starving them of popular programming.

CONCLUSION

Public Knowledge does not suggest that resolution of the issues around over-the-top video would be sufficient to ensure that the merger serves the public interest. Public Knowledge has focused on this issue to draw the Commission's attention to the need to protect the emerging OTT market, consistent with past Commission precedent. The Commission should reject the arguments made by Applicants that they would have no incentive to influence the evolution of online video to avoid competition with either their

[30] Public Knowledge understands that commenter Earthlink, Inc. is proposing a more detailed description of this type of condition.
[31] This condition is similar to Senator Kohl's sixth suggested condition. *See Kohl Letter* at 5.

MVPD or over-the-air lines of business, or that they would lack the capacity to do so. If the Commission grants the Application, it must impose conditions along the lines suggested here that would adequately protect the evolution of online video.

WHEREFORE, the Commission should grant this Petition to Deny.

Respectfully Submitted,

_____________/s/_____________

Harold Feld
Sherwin Siy
Michael Weinberg
Mart Kuhn, Law Clerk
Public Knowledge
1818 N St. NW, Suite 410
Washington, DC 20037
(202) 861-0020