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May 5, 2010

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The proposed joint venture between Comcast Corporation and NBC Universal is a significant transaction in a significant market. The transaction will create a large media and distribution company, including the programming assets of both NBC, a leading national programmer, and Comcast, which owns several cable networks and some regional sports networks, and the distribution assets of NBC (namely, its owned-and-operated broadcast television stations). This new company will be majority-owned by Comcast, which in its own right is the nation's largest distributor of multi-channel video programming, and Comcast could be in the position, within the next few years, to own 100% of the new joint venture.[1] The size of the transaction is made more important by the markets in which the companies operate: the companies are more than just producers and distributors of entertainment and sports programming, which are of course important in their own rights, the companies also produce and distribute news and political programming. The mass media has long been considered a market important enough not only to draw scrutiny from antitrust authorities but also to justify the

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[1]The transaction's specifics, as well as the market context and many of the arguments for and against the transaction, are well-described and evaluated in a report from the Congressional Research Service: Charles G. Goldfarb, Congressional Research Service, The Proposed Comcast-NBC Universal Combination: How It Might Affect the Video Market, Feb. 2, 2010 (available at: http://assets.opencrs.com/rpts/R41063_20100202.pdf). The parties' description of the transaction is available at: http://www.comcast.com/nbcutransaction/regulatoryinfo.html.

attention of a specialized regulator, using sector-specific regulation designed to achieve specific outcomes.[2]

Given the contested nature of media policy, it is perhaps unsurprising that the NBC/Comcast transaction drew both immediate and intense commentary. Criticism of the transaction has alternately suggested that it be refused outright, or that it be permitted only with substantial concessions from the parties or conditions on their post-transaction behavior. Much of the criticism has claimed that the merger will be anticompetitive, injuring both competitors to the combined companies and consumers. These criticisms have focused on effects in the markets for advertising, programming, and distribution, and have suggested various mechanisms by which the combined companies will be able to act. These competition criticisms have been joined with arguments that the merger will hurt the Federal Communications Commission's traditional goals for media policy of localism and diversity.

In this paper, I suggest three screens that can help simplify the competition arguments and focus analysis and discussion on those aspects of the transaction that really matter, that really present potential competition issues.[3] These screens come from basic antitrust analysis of mergers, which requires that the evaluation focus on whether the transaction will create new injuries to competition that harm consumers. This is, of course, implicit in the basic statutory standard, which forbids mergers that "substantially … lessen competition, or … tend to create a monopoly."[4] The transaction does, at least potentially, present some real competition issues – issues that require the development of data and the application of serious economic analysis. I

[2] On the similarities and difference of antitrust and sector-specific review of media mergers, see Howard A. Shelanski, *Antitrust Law as Mass Media Regulation: Can Antitrust Protect the Public Interest?*, 94 Cal. L. Rev. 371 (2006).
[3] *Cf.* Frank H. Easterbrook, *The Limits of Antitrust*, 63 Texas L. Rev. 1 (1984) (proposing a number of screens for antitrust cases generally).
[4] Clayton Act § 7, 15 U.S.C. § 18.

do not seek to prejudge those issues. But where an issue can be screened out – and several can be – their continued discussion only diverts from what is at stake in this important merger, in this important market.

In brief, the three screens are these:

- *First*, the transaction should be blocked or conditioned only if the transaction actually makes matters worse in a relevant way, in a relevant market. For example, claims that cable companies behave badly by charging high prices to consumers are simply irrelevant, unless the merger increases market power. Similarly, claims that the broadcast market is not performing well are irrelevant, for the transaction does not relevantly change the broadcasting market – it simply changes control of the stations from General Electric to joint control with Comcast to, perhaps, eventual sole control by Comcast.
- *Second*, the transaction should be blocked or conditioned only if the transaction injures competition in a manner that harms consumers. This simply applies the rule that antitrust laws are designed to protect "competition not competitors."[5] Thus, claims that the joint venture will drive certain competitors out of business (or at least injure them) because the joint venture will be able to offer products or services that are uniquely attractive, such as advertising packages that cannot easily be duplicated, are not claims that the transaction injures competition in the manner that the antitrust law recognizes.
- *Finally*, as a corollary of the first two, competition analysis of the transaction should focus on market power in horizontal markets, for such power is necessary to create consumer injury. Vertical combinations can, of course, give rise to foreclosure opportunities, but foreclosure opportunities arise only if the company has the necessary

[5] Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962).

power to effect foreclosure. The analysis of that question starts with a horizontal analysis.

Together, these screens remove a significant number of complaints being made against the transaction in the guise of competition arguments.

Screen 1: Whether the Transaction *Reduces* Competition

The text of the Clayton Act prohibits transactions where the effect "may be substantially *to lessen* competition, or to *tend to create* a monopoly."[6] The plain meaning of this language – that it is triggered only where a transaction changes the competitive landscape in an anticompetitive manner – is one of the basics of merger analysis. Although the courts have vigorously debated the quantum of evidence required, "[t]he core question is whether a merger may substantially lessen competition, and necessarily requires a prediction of the merger's impact on competition, present and future."[7] The Hart-Scott-Rodino's preclearance regime does not give the government carte blanche to deny mergers, and certainly not as a penalty for any alleged bad behavior by the applicants. After the parties have complied with HSR evidentiary requirements, the government must sue and meet its burden under section 7 – to prove that the merger has anticompetitive effects – or the merger is permitted.[8]

The *Merger Guidelines* confirm that each step of its antitrust analysis focuses only on the effects of the merger: "The process of assessing market concentration, potential adverse competitive effects, entry, efficiency and failure is a tool that allows the Agency to answer the ultimate inquiry in merger analysis: whether the merger is likely to create or enhance market

[6] 15 U.S.C. § 18 (emphasis added)
[7] FTC v. Proctor & Gamble Co., 386 U.S. 568, 577 (1967); *see also* U.S. v. Falstaff Brewing Co., 410 U.S. 526, 556-57 (1973).
[8] 15 U.S.C. § 18a.

power or to facilitate its exercise."[9] Even the FCC has a similar doctrine, under which it refuses to address in a merger proceeding conditions that do not address "merger specific harms," but instead raise questions that are common to an industry as a whole. For example (and as relevant to this proceeding), the FCC refused to impose Internet open access conditions on Comcast's merger with AT&T and TimeWarner Cable because the arguments for such conditions applied to the cable companies whether or not they merged.[10]

As to the NBCU/Comcast transaction, several parties have focused on matters that are not implicated by the merger. On behalf of the Consumer Federation of America, Free Press, and Consumers Union, Dr. Mark Cooper has featured several complaints about Comcast that, even if true, are unrelated to the combination with NBC. For example, he has testified that "Comcast already raises its rates every year for its cable subscribers, and prices are likely to rise further after the merger."[11] Of course, Comcast's alleged ability to raise prices[12] derives from its position as the retail distributor of content, a position that is unchanged by the merger (because NBC owns no multi-channel cable properties which could, post-transition, increase Comcast's position in that market). The specifically asserted mechanism by which Comcast will further raise its price is that "Comcast will have the opportunity and incentive to charge its competitors more for NBC programs and force competitors to pay for less desirable Comcast cable channels

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[9] Horizontal Merger Guidelines § 0.2 (as amended 1997).

[10] In Re Comcast Corp., 17 F.C.C.R. 23246, 23301 (2002) ("The concerns raised by commenters are not specific to AT&T Comcast's agreements with unaffiliated ISPs, but relate to the business relationships between all cable operators and all unaffiliated ISPs. The question of whether government intervention is necessary or appropriate to ensure that unaffiliated ISPs have access to cable systems built with private capital is squarely at issue in our Cable Modem NPRM, as are the terms and conditions of such access. We conclude that the merger is not likely to create a public interest harm with regard to unaffiliated ISP access to AT&T Comcast systems."); *see also, e.g.,* Applications for the Transfer of Certain Spectrum Licenses and Section 214 Authorizations … from Verizon to Fairpoint, 23 F.C.C.R. 514, 538 (2008) (rejecting certain conditions as not addressed to merger specific harms).

[11] Testimony of Dr. Mark Cooper, before the Senate Commerce Committee, "Consumers, Competition and Consolidation in the Video Broadband Market," March 11, 2010, at 6 (available at: http://commerce.senate.gov/public/?a=Files.Serve&File_id=e6645c9b-71a8-4b9a-9552-dd0dafd0ba46).

[12] It is familiar that, in order to get an accurate picture of cable prices, one has to examine channel-adjusted prices, for cable companies have often added channels at the same time they have raised prices. *See, e.g.,* Thomas W. Hazlett, *Cable Television Rate Deregulation*, 3 Int'l J. Econ. of Bus. 145 (1996).

in order to get NBC programming – those added costs will mean bigger bills for cable subscribers."[13] This argument, however, assumes that NBC is currently behaving irrationally and charging cable companies less than the maximum possible for its programming. Even if Comcast were to require MVPDs to carry other cable networks in order to receive NBC programming, that is merely a change in the form of compensation. The NBC programming has whatever degree of market power it has based on its copyrighted content – which may be great or may, given how much news and entertainment is available, may be little. The same can be said for the argument, also advanced by critics, that, "[o]nce Comcast acquires NBC, it will [have] a two-fold incentive to drive-up retransmission rates for NBC broadcast stations."[14] NBC surely charges the most that the market will bear for its programming currently; nothing in the transaction – even Comcast's asserted track-record for raising rates – changes that. Similar unfounded doubts over NBC's current rationality are behind concerns that, after the transaction, content currently being broadcast by NBC will be moved to cable channels, making that content unavailable to over-the-air viewers. "[W]ith over-the-air stations struggling for revenues, Comcast could be tempted to migrate much of its best content onto its cable channels or its extensive video-on-demand offerings, where it could charge extra."[15] But nothing today prevents NBC from selling content to cable networks. Even absent the transaction, if NBC owns

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[13] Cooper, *supra* note 11, at 6.

[14] *Id*. at 7; *see also* Testimony of Andrew Jay Schartzman, President and CEO, Media Access Project, Subcomm. On Antitrust, Sen. Judiciary Comm., Feb. 4, 2010, at 4 (available at: http://judiciary.senate.gov/pdf/10-02-04%20Schwartzman%20Testimony.pdf) ("Retransmission consent for NBC Network and Telemundo programming poses an especially important problem. Without Comcast's permission, competing MVPDs would be unable to offer this essential programming.").

[15] Kevin Whitelaw, 6 Ways Comcast-NBC Deal Could Affect Consumers, NPR.ORG, Dec. 11, 2009 (available at: http://www.npr.org/templates/story/story.php?storyId=121337359) ("Comcast's main motivation for the deal is to get access to entertainment content, whether it's from NBC Universal's cable channels or its other divisions, including the flagship NBC broadcast network and Universal Studios. But with over-the-air stations struggling for revenues, Comcast could be tempted to migrate much of its best content onto its cable channels or its extensive video-on-demand offerings, where it could charge extra."); *see also* Goldfarb, *supra* note 1, at 24 ("Some observers, noting that broadcast networks traditionally have had only a single revenue source—advertising—that currently is facing serious cyclical and structural challenges, have predicted that Comcast might convert NBC to a cable network, abandoning its local affiliated broadcast stations and their local programming.").

or develops programming, it can decide to distribute it through cable operators if that is the revenue-maximizing option.

Of course, the transaction does combine some programming and distribution assets, and such a combination could have a relevant effect on market power. But this traditional antitrust problem (discussed below) is very different from the claim that merely changing the ownership of the NBC content will be anticompetitive.

Screen 2: Whether Competitors Are Injured in an *Anticompetitive* Manner

A corollary of the first screen is that a merger or other transaction's injury to competitors is not an antitrust injury – is not an injury to competition – unless that injury arises from anticompetitive effects. Competitors can be injured by mergers in a number of ways, including that the merged firm is a more powerful competitor. But where the injury if of that sort – where it results from the merged firm's enhanced ability to compete – it provides no grounds for blocking the proposed transaction.

This fundamental rule of antitrust injury formed the basis of the Supreme Court's seminal decision in *Brunswick Corporation v. Pueblo Bowl-o-Mat, Inc.*,[16] and the importance of the principle bears some review. Brunswick, the leading manufacturer of bowling lanes and automatic pinsetters, began to purchase failing bowling alleys (which owed it large amounts on financed lanes and equipment). Competing bowling alleys sued, alleging that the acquisitions violated section 7. At trial, these bowling alleys proved their damages by showing that Brunswick's purchases meant "that competitors were continued in business, thereby denying [plaintiffs] an anticipated increase in market share."[17] But the Court held that plaintiffs could not complain under the antitrust laws of this injury, for it resulted from "preserved competition," not

[16] 429 U.S. 477 (1977).
[17] *Id*. at 484.

anticompetitive effects of the merger.[18] "Every merger of two existing entities into one, whether lawful or unlawful, has the potential for producing economic readjustments that adversely affect some persons. But Congress has not condemned mergers on that account; it has condemned them only when they may produce anticompetitive effects."[19]

In a similar vein, some of the complaints leveled at the NBC/Comcast transaction are complaints that the combined entity will be a better competitor in the marketplace, able to offer products that some consumers will find much more desirable, to the detriment of the combined companies' competitors. Consider Dr. Cooper's principal argument that the merger will harm other local television stations. He contends that "a merger between Comcast and NBC is likely to cause a significant decline in competition in local advertising markets and excessive domination by the merged company."[20] But this asserted harm is not caused by the merged company garnering market power in the advertising market. Rather, according to this theory, local broadcasters lose advertising revenues because the merged firm is able to offer advertisers a superior product: "A standalone broadcaster will not be able to offer package deals and volume discounts for advertising across multiple channels the way that Comcast/NBC will be able to do post-merger."[21] An injury to competitors because the new company is able to offer a better product is not an antitrust injury; it does not hurt competition.

In fact, this scenario identifies not an anticompetitive effect of the merger, but a procompetitive efficiency. If advertisers are attracted to bundled advertising purchases, it is because those bundled purchases reduce transactions costs. Such transactions costs are real, as evidenced by the many institutions that have arisen in media markets to confront them. The

[18] *Id*. at 488.
[19] *Id*. at 487.
[20] Cooper, *supra* note 11, at 4.
[21] *Id.* at 4-5.

broadcast networks, in fact, arose in principal part to reduce the transactions costs of both advertising and program purchasing.[22] If the merger enables advertisers to further reduce their transactions costs, that is a benefit, not a harm. Moreover, independent stations can use other institutions, such as advertising firms and advertising brokers, to offer packages of advertising at lower costs. This is a dynamic area, as Google's launch of an online tool for television advertising purchasing reveals.[23] Although Google's tool is currently limited to cable network advertising, it is an example of how local stations could respond to any transactions costs advantages that the NBC/Comcast transaction created.

A merger among programmers or among program distributors could theoretically have anticompetitive effects in the advertising market, if the merged company were able to gain market power in selling advertising. But such market power would be exercised by the company through *increased* prices for advertising. And such increases in pricing would *benefit* other firms that sell advertising, such as "standalone broadcasters." The standalone broadcasters would either undercut the merged firm's new, higher prices or raise their own prices under the merged firm's umbrella. In other words, one cannot (as the critics do) simply point to alleged injuries to independent television stations as proof that the merger has anticompetitive effects in the advertising market.

Complaints that the merger could anticompetitively injure broadcast stations through the advertising market thus falter on one of two basic antitrust principles: (1) competition is not injured when a merger creates efficiencies that injure competitors, or, alternatively, (2) one cannot assert that a merger creates market power by identifying injury to competitors (for competitors are helped when a merged company raises its prices). Two classic Supreme Court

[22] Bruce M. Owen & Steven S. Wildman, Video Economics 153 (1992) ("The broadcast networks act as brokers and consolidators for local affiliated television stations in the business of selling access to audiences.").
[23] http://www.google.com/adwords/tvads/index-b.html.

cases building on *Brunswick* establish these rules clearly. First, in *Cargill, Inc. v. Monfort of Colorado, Inc.*,[24] competitors to a merger sued, and alleged that they would be injured because the merged company would "lower its prices … because of [new] multiplant efficiencies its acquisition … would provide. To remain competitive, [the plaintiff] would have to lower its prices [and] would suffer a loss in profitability."[25] The Court held that the antitrust laws provided no protection from "vigorous competition. To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result …."[26] This same rule applies here: if the danger to other media companies is that the merged company will gain efficiencies and offer consumers better products or lower prices, those injuries are not injuries to *competition*. Second, in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,[27] plaintiffs challenged an alleged Japanese television cartel. But the Court made clear that plaintiffs could not challenge the cartel on the basis of its charging high prices: "Nor can respondents recover damages for any conspiracy by petitioners to charge higher than competitive prices in the American market. Such conduct would indeed violate the Sherman Act, but it could not injure respondents: as petitioners' competitors, respondents stand to gain from any conspiracy to raise the market price …."[28]

To be clear, the antitrust laws do recognize that a merged company can injure competition if it charges prices that are too low or too high. "Too low" prices can be predatory, and antitrust law recognizes that competitors may sue to challenge predatory pricing by a merged

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[24] 479 U.S. 104 (1986).
[25] *Id*. at 115.
[26] *Id*. at 116.
[27] 475 U.S. 574 (1986).
[28] *Id*. at 582-83.

company (even though it also recognizes that such a scenario is quite unlikely).[29] "Too high" prices result when the merged company has market power. But competitors are not the parties to bring that suit: that challenge is brought by the customers injured by the higher prices, or by the Government. Mergers can create injuries to competition (on which more just below). What is important from these precedents is that they rule out at least one of the transmission mechanisms on which criticism of the NBC/Comcast transaction is based. The claim is that the transaction will create efficiencies that will injure other distribution companies – particularly other local television stations (or perhaps other MVPDs). And this injury may occur. But, if the injury is in fact due to efficiencies, then the injury is not an injury to competition. Alternatively, if the merger's overwhelming effect is to create market power (which is also being claimed), then, absent a foreclosure theory (on which also more below), the result will not be injury of any kind to competing local stations, for they will benefit from the merged company's higher prices.

Similar transactions costs savings suggest another pro-consumer aspect of the merger. Dr. Cooper worries that the merger will be anticompetitive because "NBC and Comcast are also suppliers of content and distribution platforms, which are goods and services that complement one another."[30] Currently, "broadcasters and cable operators argue about" terms of carriage, but "[t]he merger will eliminate this natural rivalry . . . ."[31] Eliminating such "arguments" is, at a minimum, a transactions costs savings, for the parties do not consume valuable resources in negotiations over the terms of carriage.[32] Even under the extreme scenario (of which no

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[29] *See, e.g., Cargill*, 479 U.S. at 120 (rejecting Government's suggestion of a *per se* rule denying competitors standing to challenge mergers under predatory pricing theories: "predatory pricing is an anticompetitive practice forbidden by the antitrust laws. While firms may engage in the practice only infrequently, there is ample evidence suggesting that the practice does occur.").
[30] Cooper, *supra* note 11, at 3.
[31] *Id*.
[32] *Compare* Richard A. Epstein, The Comcast and NBCU Merger: The Upside Down Analysis of Dr. Mark Cooper, Free State Foundation Perspective, Feb. 12, 2010 (available at: http://www.freestatefoundation.org/images/The_Comcast_and_NBCU_Merger.pdf).

evidence has yet been offered for this transaction) in which both the upstream supplier and the downstream retailer have market power, a merger between the two has the familiar effect of eliminating "double marginalization" – the inefficient charging of monopoly rents by both firms.[33] Savings of either kind – of simple transactions costs or of double rents – benefit consumers through cost-savings.

Viewing the transaction through this alternative lens also puts a very different light on what seems to be a concern of many: that this transaction, if permitted, would prompt more media consolidation. Of course, media consolidation is nothing new, having ebbed and flowed over the past several decades. The most notable recent developments have actually been away from vertical integration, as the separation of the former AOL/Time Warner entities demonstrates.[34] Nevertheless, many have claimed that, if this transaction is "'allowed to go through, that is going to encourage other companies to arm up to compete with this behemoth. We could be sparking a whole new wave of media consolidation, which we argue is bad for consumers, because prices will go up.'"[35] But, of course, if the reason that other companies feel the need to vertically integrate is that a vertically integrated entity is more competitive, then the spread of vertical integration throughout the industry increases the efficiency of the entire industry, which should redound to consumers' benefit. To be sure, a tightly oligopolistic industry may not be competitive in precisely the same manner as atomistic perfect competition, but no communications market has ever met that theoretic model. If vertical integration yields

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[33] Jean Tirole, The Theory of Industrial Organization 175 (1988) (under these conditions, "the integrated industry makes more profit, and the consumer price is lower in the case of the integrated industry").

[34] *See, e.g.*, Tim Arango, How It Went So Wrong, N.Y. Times, Jan. 11, 2010, at B1 (reviewing history of AOL/Time Warner transaction and subsequent split).

[35] Whitelaw, *supra* note 15 (quoting Craig Aaron, Senior Program Director for Free Press); *see also* Cooper, *supra* note 11, at 6 ("The likely effect of the merger will be for other cable distribution and broadband companies to muscle up with their own content holdings to try and offset Comcast's huge advantage. In other words, there is only one way to deal with a vertically integrated giant that has must-have content and control over two distribution platforms – you have to vertically integrate yourself.").

efficiencies, then the combinations, on balance, might yield consumer benefits. In all events, one cannot simply conclude that consolidation is necessarily anticompetitive. And one cannot reject this transaction unless it creates anticompetitive effects. Future consolidation may or may not occur, and may or may not be anticompetitive. Antitrust authorities of course consider how concentrated an industry has already become when evaluating each transaction, and can act if and when the industry threatens to become too concentrated.

Screen 3 (Simplification): Does Either Company Now Have, or Will the Transaction Create, Market Power in the Programming or Distribution Markets

Once the foregoing issues are screened out, competition analysis should focus on the horizontal aspects of the merger, on whether NBC or Comcast currently has, or whether the merged entity will acquire, market power in any relevant horizontal market. Here, one can identify most easily the distribution and programming markets, although it may be necessary to define certain submarkets within those broader markets, and each of the companies does have some assets in each of those markets that the transaction would bring under Comcast's control.[36] Some commentators and critics have offered preliminary estimates.[37] My intent is not to address these questions on the merits, but to explain how (other than the foregoing) all of the issues in the merger are based upon these common questions.

The remaining competition arguments against the transaction generally fall into two categories, including two horizontal effects and two vertical effects. Horizontally, the

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[36] As noted, the transaction is not a straight merger, but the formation of a joint venture for the NBC assets and the Comcast programming assets. And this structure is meaningful, because General Electric will have the incentive to prevent those foreclosure strategies that involve the denials of NBC programming in order to bolster Comcast's position in the marketplace – for those strategies reduce revenues to the joint venture, while any compensating increase in cable or Internet subscriptions inure solely to Comcast's benefit.

[37] *E.g.*, Written Testimony of Christopher S. Yoo, Hearing on Competition, Consumers, and the Proposed Comcast-NBC Merger, Sen. Commerce Comm., March 11, 2010 (available at: http://commerce.senate.gov/public/?a=Files.Serve&File_id=f8591508-cc2f-49c3-8a4a-4aa3fa390efb]) (calculating concentration measures in many affected markets).

transaction brings the NBC owned-and-operated stations into the joint venture. These owned-and-operated stations distribute programming, as do Comcast's cable systems. In those local markets that include an NBC owned-and-operated station, the transaction therefore has an effect in the distribution market. Similarly, the transaction places in the joint venture both NBC's programming assets, which include network owned programming, an archive of video rights, and a movie studio, and Comcast's programming assets, which include several national cable networks and several regional sports networks.[38]

Some critics add that both companies are involved in Internet video distribution – with NBC's stake in Hulu.com and Comcast's developing plans for Internet video distribution.[39] Critics sometimes describe this as a distribution issue, but it is more clearly related to programming. Hulu.com does not actually distribute the content, but aggregates rights into a website. It operates at the content or applications layer, rather more like a traditional network aggregates content for distribution by others, than a distribution channel itself. Moreover, while Internet video appears to be "free," while video-on-demand appears to be "pay," that oversimplifies matter. Concerns that Comcast might alter the business model for the NBC content currently on Hulu have to be taken within the context of a rapidly changing marketplace, where it is clear that even Hulu's business model is constantly evolving, to try to realize the

[38] *See supra* note 1.

[39] *See* Cooper, *supra* note 11, at 5 ("NBC is a stakeholder in Hulu, an online video distribution portal that draws millions of viewers. Comcast has put resources into developing its own online video site – 'Fancast' – where consumers can find content owned by the cable operator. This merger eliminates this nascent, head-to-head competition."); Whitelaw, *supra* note 15 ("Some consumer advocates worry that Comcast could use its programming heft to reduce competition among other emerging Internet video start-ups.").

value of the programming.[40] As the analysis for the Congressional Research Service concluded, "With or without the Comcast-NBCU combination, the video market is in a state of flux."[41]

At either the distribution or the programming levels, merger review has well-established methods for evaluating whether the acquisition creates or enhances market power. That is not to say that the questions are necessarily easy; both the data-gathering and the economic analysis are significant challenges. Nevertheless, it is a standard question for merger review.

The vertical issues are somewhat more specific to the video market,[42] but they can still be simplified to start with the very common antitrust problem of identifying market power. Here, critics tell two foreclosure stories. First, critics claim that Comcast could "withhold or delay access to the Universal film library from competing MVPDs" or deny "[r]etransmission consent for NBC Network and Telemundo programming."[43] Asserting that "even the most powerful satellite or cable companies cannot last for a day without major TV network programming,"[44] this argument claims that such programming denials would drive customers from other MVPDs to Comcast. (Comcast has, in the FCC proceeding, submitted a report by two economists arguing that such foreclosure would not be rational, for the lost revenues from the refusal to sell NBC would swamp any likely increase in revenues from consumers switching MVPD providers.[45]) Second, critics say that "the merger will provide greater incentive for Comcast to discriminate against competing independent programmers [because p]ost-merger it will have a

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[40] *E.g.*, Dawn C. Chmielewski and Meg James, Online video site Hulu to test pay subscriptions, L.A. Times, April 23, 2010 (http://articles.latimes.com/2010/apr/23/business/la-fi-ct-hulu-20100423) (stating that, as of May 24, 2010, Hulu will institute a $10/month fee for access to its full library).
[41] Goldfarb, *supra* note 1, at 2.
[42] Goldfarb summarizes these arguments *id*. at 18-26.
[43] Schwartzman, *supra* note 14, at 4.
[44] *Id*.
[45] *See* Mark Israel and Michael L. Katz, Application of the Commission Staff Model of Vertical Foreclosure to the Proposed Comcast-NBCU Transaction, Feb. 26, 2010 (filed March 5, 2010).

lot more content to favor."[46] In addition to denying access to Comcast's own systems, the argument goes, Comcast will require other MVPDs to purchase additional Comcast cable networks as a condition of purchasing NBC. "Each time a Comcast channel is forced into the program menu, there is one less slot for independently owned programming."[47]

As with the horizontal issues, however, these vertical foreclosure stories depend on finding market power. Here, the market power may be pre-existing or it may be supplied by the merger, with the acquisition in the upstream or downstream market providing the company the leverage necessary to exploit its market power. But models of foreclosure do require a finding of market power "at one horizontal level."[48] And, as a result, they tap into the same sort of analysis as the horizontal issues, an analysis that is very traditional in antitrust law.

Finally, one should note that, even if some increase in market power or risk of foreclosure could be shown, that does not necessarily mean that the transaction should be blocked. As the *Merger Guidelines* acknowledge, a merger could have both pro-competitive and anticompetitive effects and, so long as the pro-competitive effects are merger-specific (that is, they cannot be otherwise achieved) and are greater than the anticompetitive effects, the merger can proceed.[49] As already noted, even the critics of the merger have identified efficiencies that will result from the merger – namely, lower transactions costs of program acquisition and greater

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[46] Cooper, *supra* note 11, at 6; *see also* Schwartzman, *supra* note 14, at 2 ("After the acquisition, Comcast will have even more cable networks to favor in deciding what to carry on its cable platform. Because it will create incentives for Comcast to make programming decisions based on self-serving financial factors rather than program quality, approval of the merger would mean that the public will get inferior programming. Discrimination of this kind also generates higher prices for all Americans, not just Comcast customers.").

[47] Schwartzman, *supra* note 14, at 2; *see also* Whitelaw, *supra* note 15 ("Comcast could also be in a stronger position to pressure other cable and satellite providers to carry their less successful networks as a condition for getting access to the most popular ones.").

[48] *See, e.g.*, Paul L. Joskow & Roger G. Noll, *The Bell Doctrine: Applications in Telecommunications, Electricity, and Other Network Industries*, 51 Stan. L. Rev. 1249, 1255 (1999) ("If a firm enjoys significant market power at one horizontal level, it may be able to increase the profits of the entire vertical structure by refusing to deal with its upstream or downstream affiliate's competitors."); Herbert Hovenkamp, *Merger Actions for Damages*, 35 Hastings L.J. 937, 965 (1984) ("Such anticompetitive foreclosure can only occur, however, in a market in which one of the parties to the vertical merger already has market power.").

[49] *See generally* Merger Guidelines § 4.

ability to offer bundled advertising. These may or may not meet the *Guidelines'* rigorous tests; other efficiencies may also appear; and they may or may not be enough to outweigh any anticompetitive effect. Although far from simple, they are also part of a standard merger analysis.

Conclusion

While the NBC/Comcast transaction does raise some issues that require scrutiny in the merger review process to ensure that it does not "substantially lessen competition," the issues that raise genuine anticompetitive concerns are far fewer and far less exotic than critics of the merger have claimed. Applying basic antitrust doctrine screens a number of criticisms out, at least as competition concerns. Concerns that Comcast will use the NBC programming in particular ways, to raise prices or disadvantage over-the-air broadcast delivery, ignores that NBC certainly maximizes the value of the programming on its own. The transaction simply does not create any new opportunity to charge more for NBC programming standing alone, or to move that content to a different distribution model. Similarly, claims that the transaction will allow the new entity to offer new and more attractive products, potentially injuring others in the video marketplace, do not state competition problems. In fact, they are competition enhancements. Beyond these simple screens, most other competition arguments can begin simply with a common first question of whether the parties have, or are likely to acquire through the transaction, market power in any market. That is where government competition analysis will focus, and where the debate should remain.