Appendix B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States of America, State of California,	)	
State of Florida, State of Missouri,	)	
State of Texas, State of Washington	)	**Case: 1:11-cv-00106**
Plaintiffs,	)	**Judge: Richard, J. Leon**
v.	)	
	)	
Comcast Corp., General Electric Co., and	)	
NBC Universal Inc.	)	
	)	

TUNNEY ACT COMMENTS OF
THE CONSUMER FEDERATION OF AMERICA AND
CONSUMERS UNION

Commenters

The Consumer Federation of America (CFA)[1] and Consumers Union (CU)[2] participated actively in the review of the Comcast-NBCU merger at the Federal Communications Commission (FCC) and met with the team reviewing the merger at the Department of Justice (DOJ). CF/CU have decades of experience in examining mergers and public policy in the sectors affected by this merger – multichannel video programming distribution (MVPD), Internet access, and media markets.[3]

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[1] The Consumer Federation of America is one of the nation's oldest and largest consumer groups. Formed in 1968, CFA is an association of some 300 non-profit organizations, working to advance the consumer interest through research, education, and advocacy. Dr. Mark Cooper is Director of Research at CFA.

[2] Consumers Union of United States, Inc., publisher of Consumer Reports, is a nonprofit membership organization chartered in 1936 to provide consumers with information, education, and counsel about goods, services, health and personal finance. Consumers Union's publications have a combined paid circulation of approximately 7.3 million. These publications regularly carry articles on Consumers Union's own product testing; on health, product safety, and marketplace economics; and on legislative, judicial, and regulatory actions that affect consumer welfare. Consumers Union's income is solely derived from the sale of Consumer Reports, its other publications and services, fees, and noncommercial contributions and grants. Consumers Union's publications and services carry no outside advertising and receive no commercial support. Parul P. Desai is communications policy counsel for Consumers Union, Working out of the Washington, D.C. office. Parul manages the organization's advocacy efforts on cable, wireless, telephone, and Internet policy. She is also responsible for working closely with federal policy makers on telecommunications and media law and policy.

[3] Testimony of Dr. Mark Cooper, Director of Research, Consumer Federation of America on behalf of Consumer Federation of America, Free Press and Consumers Union before the Commerce Committee, U.S. Senate, Regarding, "Consumers, Competition and Consolidation in the Video Broadband Market," March 11, 2010, p. 11.

The Competitive and Consumer Benefits of the Proposed Final Judgment

In testimony before the Senate over a year ago, the Consumer Federation of America and Consumers Union pointed to critical moments in the recent history of the multichannel video market when policy makers had failed to effectively protect competition and consumers.

> Over the past quarter century there have been a few moments when a technology comes along that holds the possibility of breaking the chokehold that cable has on the multi-channel video programming market, but on each occasion policy mistakes were made that allowed the cable industry to strangle competition. This is the first big policy moment for determining whether the Internet will function as an alternative platform to compete with cable. We all hope the Internet will change everything in the video product space, but it has not yet… If policymakers allow this merger to go forward without fundamental reform of the underlying industry structure, the prospects for a more competition-friendly, consumer-friendly multi-channel video marketplace will be dealt a severe setback.

Our initial take was that the merger should be rejected, but the FCC and the DOJ have put together a set of conditions and enforcement measures that we believe will protect consumers and promote the public interest. The Proposed final Judgment in the instant proceeding, combined with the conditions included in the Memorandum and Order transferring various broadcast and cable license issued by the Federal Communications Commission (FCC),[4] mark an important milestone in the quarter of a century long struggle to protect consumers from the abuse of market power that was unleashed by the Cable Deregulation of 1984. These comments review both key conditions in the Proposed Final Judgment and the FCC Memorandum and Order, in so far as it affects the online video market. We state the obvious, when we point out that if the DOJ had locked the merger, none of the public interest benefits that flow from the Memorandum and Order would be realized.

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[4] In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees Memorandum opinion and order, MB Docket No. 10-56, January 20, 2011

The post-merger marketplace with the conditions will be friendlier to Internet consumers and more supportive of video competition than if the FCC and the DOJ would have blocked the merger in three critical ways

- consumer access to broadband,
- distributor access to consumers, and
- the availability of programming on the Internet platform.

The Proposed final Judgment adopts a framework that we have advocated for decades and presented in comments to the FCC and testimony to the Congress. It defines the markets carefully to assess the potential for the abuse of market power by the post-merger firm.

- It rests its concern on the local market power of the cable operators, including high current market shares protected by substantial barriers to entry.
- It defines the product market as the professional video programming industry, brushing aside the claim that all manner of short form content competes with long-form programming content.
- It identifies online video distribution (OVD) as an important nascent model that competes with the incumbent multichannel video program distributors (MVPD).

It identifies two specific types of anticompetitive conduct that would be rendered much more likely as a result of the merger.

- The withholding of must have content from potential or actual competitors could weaken competition.
- The provision of broadband Internet access service, as the key choke point and the indispensible input for OVD delivery of service, can be used to dramatically undermine competition through restriction on the availability of capacity, management of traffic flows, and/or pricing.

The Proposed Final Judgment addresses the vertical leverage problem that this merger poses.

Consumer Access to Broadband Internet Access Service

Consumers, particularly low income consumers, will have better access to broadband Internet access service.

- The program to increase broadband adoption among low income households will not only add millions of subscribers to the Broadband network in Comcast's service territory, it will serve as a model for the nation as we move into the implementation of the national broadband plan.
- Standalone broadband will be available at a price that cannot increase for three years.
- The DOJ ensures that service available to consumers will be required to be of sufficient quality to support OVD competition.

Distributor Access to the Broadband Internet

Distributors of video content over the Internet will have better access to broadband consumers.

- The network neutrality conditions recently implemented are secured for the largest broadband Internet access provider, regardless of the outcome of legislation or litigation.
- A minimum capacity adequate to support video distribution will be available for competing video is guaranteed.

The Flow of Programming onto the Internet Platform

The availability of programming for Internet distribution will be better.

- NBC will be required to match the best practices in making content available by independent programmers that are similar in size
- The contracting practices of Comcast and NBC will be constrained with respect to Internet distribution.
- The DOJ consent decree and the FCC order lay the foundation for ensuring that the Internet TV enjoys the Communications Act protections from the abuse of market power.
- The DOJ has tackled the problem of vertical integration more effectively than has been the case in decades.

Enforcement

These conditions will be enforceable and the enforcement mechanisms have been strengthened in two ways.

- The Federal Communications Commission has outlined improvements in its complaint process to accelerate dispute resolution and give.
- Most importantly, the Department of Justice will have the ability to enforce a consent decree.

These two improvements will work hand in hand. Since Comcast will have a strong incentive to avoid being hauled into the antitrust court, it will have an incentive to bargain in good faith and resolve disputes at the FCC.

Progress and Challenges

In our view the proposed final judgment accomplishes the immediate goals of the merger review and then some. Consumers and competition will be better off as a result of the judgment than if the merger had been denied. That does not mean there is not more work to be done. Monitoring and enforcement will have to be vigilant and aggressive. The conditions in the Proposed Final Judgment are not static by any stretch of the imagination. They seek to ensure that Comcast-NBC affords the same treatment to OVD competitors that MVPD and OVPD participants secure in the marketplace. Thus, the DOJ will have to closely monitor the development of competition in this space to enforce

Moreover, the complaint lays the basis for broader Section I or Section II action against other operators in the PVDI/MVPD sector. The Department has now established the product and geographic market definitions, the structural sources of horizontal market power and vertical leverage, and the behaviors that would constitute anticompetitive conduct that seeks to defend or extend the market power of the cable/broadband access companies.

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