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Merger Review by the Federal Communications Commission: Comcast-NBC Universal

Christopher S. Yoo*

Abstract

The Communications Act of 1934 created a dual review process in which mergers in the communications industry are reviewed by the Federal Communications Commission (FCC) as well as the antitrust authorities. Commentators have criticized dual review not only as costly and redundant, but also as subject to substantive and procedural abuse. The process of clearing the 2011 Comcast-NBC Universal merger provides a useful case study to examine whether such concerns are justified. A review of the empirical context reveals that the FCC intervened even though the relevant markets were not structured in a way that would ordinarily raise anticompetitive concerns. In addition, the FCC was able to use differences between its review process and that used by the Justice Department to extract concessions from the merging parties that had nothing to do with the merger and which were more properly addressed through general rulemaking. Moreover, the use of voluntary commitments also allowed the FCC to avoid subjecting certain aspects of its decision to public comment and immunized it from having to offer a reasoned explanation or subjecting its decision to judicial review. The aftermath of the merger provides an opportunity to assess whether the FCC's intervention yielded consumer benefits.

1 Introduction

Among the many innovations created by the Communications Act of 1934 was a unique regime for reviewing mergers between communications companies. As a general matter, mergers are subject to the general review process created by the Sherman Act of 1894 and the Clayton Act of 1914, which give the antitrust authorities (specifically the Federal Trade Commission (FTC) and the Antitrust Division of the Justice Department) the right to try to convince a court to block any merger that they believe would substantially lessen competition.

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The Clayton Act also gave the Interstate Commerce Commission (ICC) concurrent jurisdiction over mergers involving common carriers.

The Communications Act of 1934 transferred the ICC's authority to review telecommunications mergers to the newly created Federal Communications Commission (FCC). More importantly, the 1934 Act added two new provisions that the FCC has invoked as an alternative statutory basis for reviewing communications mergers. Specifically, these new provisions prohibit companies from acquiring or transferring any telecommunications lines or broadcast stations without the FCC's approval. The result is a system of dual merger review that requires that all communications mergers be cleared by two agencies instead of just one.[1]

Over the past two decades, the FCC's merger review authority has become increasingly controversial and has attracted substantial criticism from both commentators and FCC Commissioners.[2] These criticisms largely focus on: (1) the substantive standards that are applied by the FCC in reviewing mergers; and (2) the adequacy of the procedures that govern merger review by the FCC. The key complaint is that the FCC implements its merger review authority in ways that both harm consumers and are subject to potential abuse.

Comcast's January 2011 acquisition of NBC Universal (NBCU) provides a useful lens through which to evaluate both of these complaints. It shows how ambiguities in the substantive standards that are applied by the FCC as well as key differences in the procedural rules allow the

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[1] The 1934 Act initially gave the FCC authority to exempt telecommunications mergers from antitrust scrutiny, which made the FCC the sole merger review authority. This authority was repealed by the Telecommunications Act of 1996, which made dual review the norm.

[2] For FCC Commissioners' criticisms of FCC merger review processes, see, e.g., FCC (2005b) (separate statement of Abernathy, Commissioner); FCC (2001b) (Powell, Commissioner, concurring in part and dissenting in part); FCC (1999) (Furchtgott-Roth, Commissioner, concurring in part and dissenting in part). For scholarly critiques, see Barkow and Huber (2000); Tramont (2000); Kolasky (2001); Kovacic (2001); Troy (2001); Curran (2002); Russell and Wolfson (2002); Weiser (2008); Spulber and Yoo (2009); Rinner (2009); Koutsky and Spiwak (2010); Kaplan (2012). Although most commentators favor eliminating the FCC's merger review authority or reforming it to make it more like that of the antitrust authorities, some call for giving the FCC primary authority or for making general antitrust merger review more like the FCC's; see Weiss and Stern (1998) and Frankel (2008).

FCC to evade restrictions that are imposed on the antitrust authorities to help ensure that merger review promotes consumer welfare. A brief review of the aftermath of the decision raises questions as to whether this merger review benefited consumers.

2 Differences in the substantive standards of merger review

The antitrust authorities and the FCC apply different substantive standards when reviewing mergers. In short, the antitrust authorities must meet a higher evidentiary burden and have been more proactive in providing private actors with guidance about the process they will follow when reviewing mergers. The FCC, in contrast, has used the vagueness of its enforcement standards to restrict behavior that falls beyond the reach of traditional antitrust scrutiny and has provided less advance information about its enforcement practices.

2.1 Substantive principles governing merger review by antitrust authorities

The Clayton Act permits the FTC and the Justice Department's Antitrust Division to sue to block any mergers that would substantially lessen competition. The exacting standards established by previous judicial decisions establish consumer welfare as the authoritative benchmark for determining when a merger violates the antitrust laws. In such litigation, the antitrust authorities bear the burden of proof, and their conclusions are not entitled to any special judicial deference. In addition, antitrust review focuses only on the consumer harms that are created by the merger itself without taking into account any harms that pre-exist the merger and are not worsened by it (U.S. Department of Justice 2004).

The substantive standards embodied in the antitrust laws reflect a relatively accommodating view towards competitively neutral or ambiguous mergers. Placing the burden of proof on the government means that mergers whose competitive impact is neutral or unclear

are permitted to go forward. Moreover, in prohibiting only those that *substantially* lessen competition, the statute even tolerates mergers that reduce competition as long as the reduction is not significant. This legal standard and allocation of the burden of proof gives the benefit of the doubt to market-based outcomes.

Since 1968 the antitrust authorities have promulgated Merger Guidelines that lay out the analysis that they will apply when evaluating mergers. The guidelines were revised in 1982, 1984, 1992, 1997, and 2010. Although these guidelines do not create enforceable rights, they do provide a step-by-step roadmap of the way that antitrust authorities analyze mergers.

The guidelines draw a distinction between *horizontal mergers* and *vertical mergers*. A merger is horizontal if it is between two firms that sell products that substitute for one another. In short, consumers are likely to buy one or the other, which makes the firms selling these products direct competitors.

A merger is vertical if it is between one firm that sells products that are an input to another firm that integrates that input into a final product. Because both the input and the final product are consumed together, they are complementary, in which case the parties to a vertical merger do not compete directly with one another. On the contrary, consumers who buy a product that has complements actually have a strong incentive to buy the complement as well, since it is only by buying both products that consumers are able to enjoy them. Consequently, the Merger Guidelines incorporate more permissive standards for vertical mergers than for horizontal mergers (U.S. Department of Justice 2010).

Moreover, studies conducted by the Federal Trade Commission and the Justice Department have revealed that actual enforcement policy is more permissive than the guidelines indicate. The difference between the guidelines thresholds and actual enforcement activity

suggests that the quantitative standards contained in the Merger Guidelines are more properly regarded as safe harbors than as strict limits (Federal Trade Commission and the U.S. Department of Justice 2003; Federal Trade Commission 2007). In addition to emphasizing direct effects over market structure, the 2010 revision liberalized the relevant concentration thresholds to bring the guidelines more in line with actual enforcement policy.

2.2 Substantive principles governing merger review by the FCC

The principles governing FCC merger review are considerably less well defined. Although the FCC could evaluate mergers between common carriers under its Clayton Act authority, doing so would require it to meet the same exacting standards that apply to the antitrust authorities. Instead, the FCC almost invariably reviews mergers under the more lenient standard established by the Communications Act of 1934, which requires that the FCC determine only whether the merger would be in the public interest.

The FCC has indicated that its merger review will consist of four factors: (1) whether the transaction would create any violations of the communications statutes; (2) whether the transaction would create any violations of the FCC's rules; (3) whether the transaction would substantially frustrate or impair the FCC's enforcement of the communications statutes or their objectives; and (4) whether the transaction would yield affirmative public interest benefits (FCC 1999).

The first two factors, which ensure that the merger complies with existing law, are uncontroversial. The third factor, which considers whether the merger would impair the FCC's ability to regulate other matters, has drawn criticism for permitting regulation to become a justification for additional governmental interference (Barkow and Huber 2000). The net result

is a merger review policy that is less sympathetic to market-based outcomes and more geared towards intervention than is general antitrust policy.

It is in the context of the fourth factor that the FCC assesses the likely competitive impact of the transaction. In so doing, the FCC applies a methodology that is quite similar to that used by the antitrust authorities: The FCC focuses on defining relevant product and geographic markets, identifies sources of demand and supply substitution, evaluates the merger's impact on price, and evaluates potential merger-related efficiencies. Like the antitrust authorities, the FCC recognizes that vertical integration raises fewer competitive concerns than horizontal integration (FCC 2004a, 2006b).

However, the FCC applies a competitive analysis that is broader than the antitrust laws. For example, the antitrust laws place the burden on the government to show that the proposed merger would substantially lessen competition. The communications laws, in contrast, place the burden on the merging parties to show that the merger would affirmatively provide public interest benefits.

The merger review standard applied by the FCC thus adopts a markedly different stance towards competitively neutral mergers than does the standard applied by the antitrust authorities. While the antitrust authorities would allow competitively ambiguous mergers to proceed (and would even allow competitively harmful mergers to move forward so long as the harm is not substantial), the FCC has interpreted the public interest standard to require the merging parties to show affirmatively that the merger would promote competition. Thus, unlike antitrust review, FCC review erects a presumption against mergers.

In addition, the FCC applies an analysis that places greater emphasis on the loss of sources of potential competition than does conventional antitrust policy. At the same time, the

FCC has made clear that its public interest mandate includes considerations that fall outside the scope of traditional competition policy, such as diversity of content, universal service, localism, spectrum efficiency, national security, and the agency's continued ability to regulate in other areas. In practice, moreover, the FCC has not limited itself to merger-specific harms and has used the merger review process to promote other goals that are unrelated to the transaction.

Equally problematic is the fact that the FCC has provided little advance guidance as to how it will analyze mergers, which forces the parties to sift through past cases for hints about what the relevant polices are and how they will be applied to future transactions. The mutability of multifactor tests also makes the FCC's decisionmaking difficult to predict. The result is an analysis that is considerably more amorphous and malleable than antitrust review.

2.3 Horizontal effects in the markets for video distribution and programming

The differences in the approaches taken by the antitrust authorities and the FCC were on full display in the 2010-2011 review of Comcast's acquisition of NBCU. The proposed Comcast-NBCU merger had both horizontal and vertical aspects. Both companies served as sources of video programming, through broadcast networks (such as NBC and Telemundo) and cable networks (such as the USA Network and the Golf Channel). Both companies also provided retail distribution of video programming, through broadcast television stations owned and operated by NBC and cable operators owned by Comcast. The merger thus represented three different types of consolidation: horizontal integration in video programming, horizontal integration in retail video distribution, and vertical integration between these two adjacent levels in the chain of distribution.

The Merger Guidelines provide an analytical framework for evaluating horizontal mergers that turns on a measure of concentration known as the Herfindhal-Hirschman Index

(HHI). HHI measures the degree of market concentration by ranking it on a scale from 0 to 10000.

Mergers that create only a *small change in concentration*, defined by the Guidelines to be an HHI increase of less than 100 points, and mergers resulting in *unconcentrated markets*, defined by the 2010 Guidelines as markets with HHIs below 1500, are unlikely to have adverse competitive effects and ordinarily require no further analysis.

Mergers that create *moderately concentrated markets*, defined by the Guidelines as markets with HHIs between 1500 and 2500, potentially raise significant competitive concerns only if the merger would increase HHI by more than 100 points.

Mergers that create *highly concentrated markets*, defined by the Guidelines as markets with HHIs above 2500, and raise HHI by 100 to 200 points potentially raise significant competitive concerns and often warrant scrutiny. Mergers in highly concentrated markets that increase HHI by more than 200 points are presumed likely to enhance market power (U.S. Department of Justice and the Federal Trade Commission 2010).

Actual enforcement policy has been even more permissive than the Merger Guidelines suggest, particularly in the telecommunications industry. A 2003 study of actual enforcement practices with respect to telecommunications mergers found that of the 214 merger cases brought between 1999 and 2003, in only one case did the authorities challenge a merger with an HHI of less than 2400 or an HHI increase of less than 500 (Federal Trade Commission and U.S. Department of Justice 2003).

Before reviewing the details of the horizontal analysis of the Comcast-NBCU proposed merger, it bears noting that the merger was primarily vertical in nature. Although both firms provided both programming and retail distribution, each firm operated predominantly in one

product market and maintained only a small presence in the other product market. Specifically, NBC Universal predominantly provided video programming and was a minor presence in video distribution; while Comcast's primary business was video distribution and controlled only 3.3% of the aggregate of video programming networks. Although the horizontal effects of this proposed merger were likely to be quite small, completeness requires that they be considered.

2.3.1 Video distribution

In terms of video distribution, Comcast and NBCU employed different technologies. NBCU owned single-channel broadcast television stations that transmitted video signals over the air. Comcast owned multi-channel local cable operators that transmitted video signals via wires. The statute refers to this latter type of provider and direct broadcast satellite (DBS) providers such as DirecTV and the Dish Network as multi-channel video program distributors (MVPDs).

Whether the merger created higher horizontal concentration in video distribution depends on whether broadcasters and local cable operators operate in the same product market and whether they operate in the same geographic market.

Beginning first with the product market, when reviewing News Corp.'s acquisition of DirecTV, the FCC agreed that combining broadcast stations with an MVPD "does not present horizontal concentration issues" because the FCC had already determined that MVPDs and broadcast television are not sufficiently substitutable to fall within the same product market (FCC 2004a (citing FCC 1990, 2002)). Furthermore, when the FCC attempted to impose a rule preventing a single entity from owning both a cable operator and a television station in the same market, the reviewing court invalidated the FCC's action as arbitrary and capricious (*Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 [2002]). The FCC subsequently abandoned all

efforts to reinstate the cable/broadcast cross-ownership rule (FCC 2003). It is thus unsurprising that the FCC did not regard broadcasters and MVPDs as being in the same market (FCC 2011a).

In terms of geographic market definition, video distributors operate in three product markets, each with its own geographic scope: First, they distribute video to household subscribers. Second, they sell local advertising. Third, they obtain programs from various programming sources. The geographic scope of each market varies. The market for subscribers is local. The market for advertising is partly local and partly national, depending on the product being advertised. The market for programming is generally national.

We begin with the markets for video distribution to viewers: As noted above, these markets are local in scope. The FCC estimates that as of 2010, essentially all U.S. consumers had the choice between two MVPD services that are provided by the two national DBS providers: DirecTV and the Dish Network. Specifically, 98.5% of U.S. households had the choice of three MVPDs, consisting of the two DBS providers and the local cable operator. In fact, 32.8% of U.S. households had the choice of four MVPDs (consisting of the two DBS providers, the local cable operator, and the local telephone company).

In areas that were served by four MVPDs, the lowest possible theoretical HHI was 2500. In areas that were served by three and two MVPDs, the lowest possible HHI was 3333 and 5000, respectively (FCC 2012). Under the Merger Guideline standards, all of these areas would be regarded as highly concentrated.

Nonetheless, the horizontal market for MVPDs remained unproblematic under the approach established by the Merger Guidelines because the merger did not cause any increase in HHI in these markets. Because NBCU did not provide any MVPD services prior to the merger, the proposed merger neither increased nor decreased concentration in the MVPD market. As a

result, the merger had no horizontal effect on the 89% of U.S. households that depended on an MVPD for their television service.

Although the MVPD market remained highly concentrated, that concentration was not the product of the merger and would not be worsened by it. At the same time, Comcast possessed no broadcast television stations. The proposed merger thus also had no effect on the remaining 11% of U.S. households that relied solely on over-the-air service for the television needs.

In addition to the Merger Guidelines, Congress has provided a framework for determining when an MVPD faces effective competition. Under this standard, an MVPD faces effective competition if another MVPD offers service to at least 50% of households in the service area and the unaffiliated MVPDs together capture more than 15% of the market. An MVPD also faces effective competition if the local telephone company offers multichannel video service regardless of how many subscribers it has (47 U.S.C. § 543(*l*)(1)(B) & (D)). The legislative history reveals that Congress's enactment of this provision represented an affirmative rejection of the FCC's recent attempts to treat broadcast television stations as direct competitors to MVPDs (U.S. House Committee on Energy and Commerce 1992).

Measured against these standards, the market for MVPDs was effectively competitive at the time of the Comcast-NBCU merger. As noted above, DBS providers DirecTV and the DISH Network are both available nationwide and have emerged as direct competitors to cable companies (FCC 2001a; Goolsbee and Petrin 2004). Published reports indicate that as of mid-2009, DirecTV's share of video subscribers exceeded 15% in 181 out of 211 (or 90%) of all metropolitan areas (as determined by Direct Marketing Areas (DMAs)). In addition, the DISH

Network's share exceeded 15% in 132 out of 211 (or 63% of) DMAs. (Media Business Corp. 2009).

Even considering DirecTV alone, these data suggest that effective competition in MVPD markets existed in over 90% of the U.S. cities. Given the probability that the DMAs where the DISH Network served more than 15% of the market did not completely overlap with those areas where DirecTV reached 15% share, the percentage of cities subject to effective competition was likely even higher.

At the same time, telephone companies were investing billions to increase the capacity of their networks and were actively competing with cable operators in the market for distributing multichannel video. As of 2010, FiOS (which is provided by Verizon) and U-verse (which is provided by AT&T) served 32.5% of all U.S. households. Again, unless these areas completely overlapped with those DMAs in which DirecTV achieved 15% market share, it is quite likely that the percentage of DMAs in which the MVPD market was effectively competitive significantly exceeded 90%. Indeed, as the FCC (2012) noted, the consistent trend was towards greater levels of MVPD competition.

If we move from the market for video distribution to the market for local advertising, the geographic scope of the market for local advertising is, of course, local. In contrast to video distribution, MVPDs may compete with local television stations for local advertising. However, unlike video distribution, local advertisers have a wide range of choices beyond local broadcast stations and cable television, including radio, Internet, newspapers, and other local outlets. Indeed, even when aggregated together, broadcast television stations and cable television operators represent only 16% and 6%, respectively, of the aggregate of local advertising as of June 2010, for a collective total of 22%, as is shown in Table 1.

Table 1: Local advertising by sector, June 2010 ($millions)

Sector	Revenue	Share
Broadcast television	11,265	16%
Cable television	4,336	6%
Radio	11,300	16%
Internet	11,146	16%
Daily newspaper	18,574	26%
Regional sports networks	759	1%
Mobile	184	0%
Telco	105	0%
Other	13,612	19%
Total	71,281	100%

Sources: FCC (2012).

If MVPDs and broadcast stations were included in the same (local advertising) product market, the Comcast-NBCU merger did little to change the level of concentration in the vast majority of markets. NBCU owned only 26 stations. Of these, only six operated in areas that were predominantly served by Comcast.[3] Thus, in the areas that were served by the other 20 stations, the merger did not increase horizontal concentration no matter how the market for local advertising was defined.

The only arguable issue would be with respect to the six markets in which the merged entity would control broadcast stations and also cable distribution. The data reveal that each of these markets is also served by a substantial number of unaffiliated broadcast channels (see Table 2). Thus, even if the Commission were to break new ground and treat MVPDs and broadcasters as falling within the same (local advertising) product market, it is likely that the six overlap markets remained sufficiently competitive under the thresholds established by the

[3] Comcast also had a relatively small presence in the New York DMA, in which it serves less than 10% of the area.

statutes and the relevant agencies to eliminate any concerns that the merger will harm consumers.

Table 2: Number of commercial over-the-air channels available in overlap DMAs, 2009

Market	Total Channels	Channels Owned by NBC
Chicago	40	5
San Francisco	31	3
Washington	32	3
Miami	27	4
Philadelphia	30	2
Hartford-New Haven	21	1

Source: BIA Media Access Pro (2009).

With respect to the national market for advertising, a similar story largely holds true. In this case, broadcast television stations and video networks (both broadcast and cable networks) face competition from a wide range of other sources (see Table 3).

Table 3: National advertising by sector, June 2010 ($millions)

Sector	Revenue	Share
Broadcast television stations	8,678	6%
Broadcast networks	19,128	14%
Cable and VOD networks	22,372	16%
DBS	842	1%
Internet	15,747	11%
Radio	2,881	2%
Satellite radio	76	0%
Radio network	1,102	1%
Daily newspaper	4,221	3%
Barter syndication	2,819	2%
Mobile	1,347	1%
Other	62,187	44%
Total	141,400	100%

Sources: FCC (2012).

As of 2010, the Comcast-NBCU combination represented a relatively small entity in each of these segments. The combined company controlled roughly 2% of broadcast television stations, 16% of broadcast networks, and 12% of the aggregate of cable networks. A rough calculation based on these numbers suggests that the combined company controlled roughly 4% of the market for national advertising.

Together, these data reveal why the Justice Department did not include any discussion of horizontal issues in its Competitive Impact Statement. The FCC devoted 13 paragraphs and 7 pages of its report to potential harms from horizontal concentration in the video distribution and advertising markets. However, it spent most of this space simply recounting the arguments of the parties and drawing the same conclusions presented here: that the merger would not create any additional concentration in video distribution and was unlikely to harm competition in advertising (FCC 2011a).

2.3.2 Video programming

The merger also represented horizontal consolidation in the market for video programming. NBCU was clearly a significant entity in the market for television networks at the time of the merger and remains so today. If one considered only cable networks, NBC Universal (led by NBC, USA Network, SyFy, CNBC, and Bravo) controlled 14% of the market in terms of revenue, good for third place. In contrast, Comcast was a relatively minor provider of cable programming. Its highest ranked channel was E! Entertainment Television, which was the 34th-highest grossing cable channel.

Altogether, Comcast's cable programming properties accounted for only 2% of overall market revenues. As Table 4 shows, the post-merger HHI was 1186, which qualifies as unconcentrated, and the merger led to an increase of only 67 points. An analysis of market

concentration in terms of viewership leads to similar conclusions (U.S. Senate Subcommittee on Communications, Technology, and the Internet 2010).

Table 4: Total revenue from national television and cable networks, April 2009

Company	Revenue ($millions)	Pre-Merger Share	HHI	Post-Merger Share	HHI
Walt Disney	12,638	21%	428	21%	428
Time Warner Inc.	8,766	14%	206	14%	206
General Electric (NBC)	8,260	14%	183	16%	255
News Corp. (Fox)	5,724	9%	88	9%	88
CBS Corp.	5,546	9%	82	9%	82
Viacom	5,528	9%	82	9%	82
A&E Networks	2,504	4%	17	4%	17
Discovery	1,944	3%	10	3%	10
Comcast	1,505	2%	6	n/a	n/a
Liberty Media	1,371	2%	5	2%	5
Other	7,328	12%	13	12%	13
Total	61,114	100%	1119	100%	1186

Sources: SNL Kagan (2009).

No matter how the issue is framed, the level of horizontal concentration in the market for video programming that would result from this merger was sufficiently low to justify clearing the merger without undertaking any serious analysis. Indeed, the Justice Department did not include any discussion of these issues in its Competitive Impact Statement (DOJ 2011).

The FCC took a somewhat different tack, devoting 6 pages and 11 paragraphs to this issue in which it found legitimate concerns that the combined company would harm the market for video programming. The agency found no need to impose any remedy for this problem, however, because it believed the arbitration remedy imposed to address vertical concerns would deal with any such concerns (FCC 2011a). The FCC thus took a more interventionist approach with respect to horizontal integration than did the antitrust authorities.

2.4 Vertical effects from the integration of video programming and distribution

As noted earlier, compared to the horizontal aspects of the merger, the vertical aspects resulting from combining NBC Universal's content with Comcast's distribution were more significant and represented the primary focus of the agencies' review of the transaction. Vertical integration theory has long been a source of tremendous controversy in antitrust law (for a survey, see Yoo 2002, which reviews the history). Some basic points of consensus have emerged and are now reflected in the Non-Horizontal Merger Guidelines that were promulgated in 1984 (U.S. Department of Justice 1984). The Non-Horizontal Merger Guidelines have remained in place during every subsequent revision and remain published on both the FTC and Justice Department websites.

First, the firm must have market power in one market (sometimes called the primary market). Without market power in the primary market, the merging firm would have nothing to use as leverage over the other market. Market power in the primary market is assessed according to HHI. Because, as noted earlier, vertical mergers raise fewer anticompetitive concerns than horizontal mergers, the guidelines indicate that antitrust authorities are unlikely to challenge a vertical merger unless the HHI in the primary market exceeds 1800, which until 2010 represented the upper threshold for a moderately concentrated market. In 2010, the Guidelines were revised to increase the threshold to 2500 for the horizontal mergers. The HHI threshold in the Non-Horizontal Merger Guidelines was not formally revised.

Second, the other vertically related market (sometimes called the secondary market) must be structured in a way that makes it vulnerable to monopolization. Otherwise, any attempt by the merging firm to use its control over the primary market to exert pressure on the secondary

market would simply cause consumers to shift their purchases to other producers. This typically requires that the secondary market be concentrated and protected by entry barriers.

Third, even if these structural preconditions are met, the Merger Guidelines recognize that antitrust authorities might nonetheless permit a vertical merger to go forward if any anticompetitive price effects were offset by compensating efficiencies.

2.4.1 Impact of content on MVPDs

In the case of the Comcast-NBCU proposed merger, both the antitrust authorities and the FCC regarded the market for video programming as the primary market and the market for video distribution as the secondary market. The primary concern was that the combined company would use its control over NBCU content to harm unaffiliated video distributors. The authorities conducted separate analyses of traditional MVPDs, such as cable and DBS companies, and new online video distributors (OVDs), such as Netflix and Hulu. This represents an interesting inversion of the argument that is more usually raised with respect to the cable industry: that companies could use market power in distribution to harm content.

As an initial matter, it bears mentioning that the relevant geographic scope of the video distribution market for vertical issues is different from the relevant geographic scope for horizontal issues. Although the market in which video distributors contract with end users is local, for programming the market in which they contract with video program suppliers is essentially national. Although content producers would prefer to reach the broadest audience possible, they do not care if they can reach viewers in any particular location so long as they can reach a sufficient number of viewers to achieve minimum efficient scale. To the extent that

tastes in video programming are uniform nationwide, as is the case with most mass-market programming, it is national reach, not local reach, that matters (Yoo 2002).[4]

If we look first at the primary market, Table 4 shows that the market for video programming was unconcentrated as of the time of the merger. Moreover, barriers to entry into programming remained low, with talent and equipment generally being readily available (Yoo 2014). In fact, entry was quite common during this period, with the number of cable networks increasing from 565 in 2006 to roughly 800 in 2012 (FCC 2013a).

An analysis of the programming market in terms of movie studios does not alter the conclusion. NBCU controlled the sixth and eleventh largest movie studios with a combined market share of 9.9% in 2009. When the merger was announced, Comcast owned a 20% stake in MGM, which held a market share of 0.7%. Had MGM survived, the combined companies would have remained in sixth place (FCC 2011a). MGM was in obvious financial distress, however, and on November 3, 2010, shortly before the antitrust authorities and the FCC finished their review of the merger, MGM filed for bankruptcy, which completely eliminated Comcast's ownership interest in MGM. Consequently, the merger did not result in any change in concentration in terms of movie studios.

With respect to the secondary market (the market for video distribution by MVPDs), HHI was at most 1314, as is shown in Table 5. This level of industry concentration is regarded as unconcentrated and fell below the threshold for scrutiny under either the Horizontal Merger Guidelines or the Non-Horizontal Merger Guidelines.

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[4] There is one exception where tastes are sufficiently heterogeneous and localized to make the relevant market less than national: live sports (Yoo 2014).

Table 5: Subscribers in the national market for MVPDs, June 2010 (millions)

Company	Subscribers	Share	HHI
Comcast	22.8	23%	512
DirecTV	19.2	19%	363
DISH Network	14.1	14%	196
Time Warner Cable	12.4	12%	151
Cox	4.9	5%	24
Charter	4.5	4%	20
Verizon FiOS	3.5	3%	12
Cablevision	3.3	3%	11
AT&T U-verse	3.0	3%	9
Bright House	2.2	2%	5
Suddenlink	1.2	1%	1
Mediacom	1.2	1%	1
Other cable	7.3	7%	9
Other telephone	0.4	0%	0
All other providers	0.8	1%	1
Total	100.8	100%	1314

Sources: FCC (2012).

Thus, under widely accepted antitrust principles, the relevant markets were not structured in a way that made vertical integration likely to harm consumers. This is bolstered by the outcome of the FCC's attempts to restrict the number of nationwide subscribers that any one cable operator could control. On two occasions, the FCC attempted to impose a national subscribership cap of 30%, arguing that cable operators that controlled more than 30% of subscribers would be able to exert excessive vertical bargaining power on video programmers. Both times, the courts struck down the rules as arbitrary and capricious, concluding that the FCC had been unable to demonstrate that 30% ownership created any plausible risk of vertical harm (*Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126 [2001]; *Comcast v. FCC*, 579 F.3d 1 [2009]).

In addition, Congress, the FCC, and academic commentators have long recognized that vertical integration can produce efficiencies in the production, distribution, purchasing, and

marketing of video programming which can reduce subscriber costs and enable cable operators to make additional investments in physical infrastructure and in innovative and high-quality programming services (FCC 1990; U.S. House Committee on Energy and Commerce 1992; Waterman and Weiss 1997; Ford and Jackson 1997; Yoo 2002; U.S. Senate Subcommittee on Communications, Technology, and the Internet 2010).

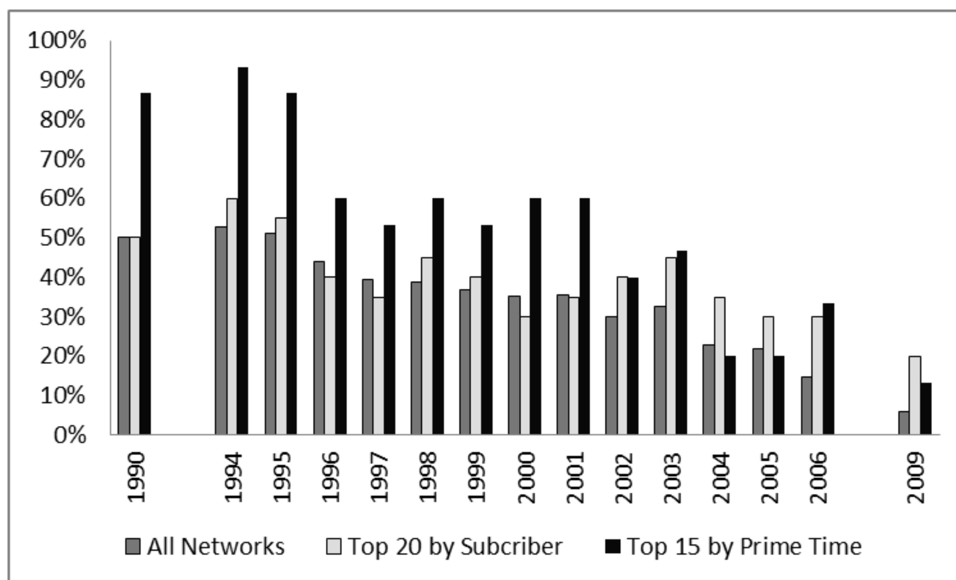
These conclusions are consistent with other empirical studies of vertical integration in the cable industry that have appeared in the peer-reviewed literature. Recent surveys of the peer-reviewed literature found that vertical integration was neutral or benefitted consumers in an overwhelming number of cases (Cooper et al. 2005; Lafontaine and Slade 2008). Studies of the cable industry that analyzed the welfare implications concluded that vertical integration benefitted consumers (Vita 1997; Chipty 2001; Suzuki 2009). Only one study found that vertical integration in the cable industry reduced consumer welfare: by $0.60 per cable subscriber per year (Ford and Jackson 1997). This is a welfare loss that a subsequent survey that was conducted by the FTC staff described as “minuscule” (Cooper et al. 2005, 648). Other studies found some evidence consistent with anticompetitive uses of vertical integration, but could not rule out the possibility that the conduct was motivated by efficiencies. (Waterman and Weiss 1997; Chen and Waterman 2007).

The study by Goolsbee (2007) that the FCC commissioned, and on which it relied, offered a methodology for examining indirectly whether vertical integration was motivated by anticompetitive or efficiency considerations. The Goolsbee study cautions that its findings are only suggestive and needed to be “applied with better data to more narrowly defined markets” before being used as a basis for policymaking. Indeed, a peer review of this report questioned

whether the instrument on which the report relied could isolate the effect of vertical integration (Waterman 2007).

In addition, the industry trend in the years leading up to the Comcast-NBCU merger has been towards vertical *dis*integration. For example, in 2008, News Corp. divested itself of its 2004 acquisition of DirecTV. Furthermore, in early 2009, Time Warner separated video programming from distribution when it spun off its cable operations into a separate company known as Time Warner Cable. As a result, vertical integration has dropped steadily for the past two decades in terms of the percentage of vertical integrated networks overall as well as the percentage among the top 20 networks by subscriber and among the top 15 networks by prime time viewership (see Figure 1). In addition, the FCC has created general regulations known as the program access rules that are designed to guarantee to rival MVPDs their access to content that is owned by vertically integrated media companies.

Figure 1: Vertical integration between cable networks and MVPDs, 1990-2009



Sources: Yoo (2002); FCC (2004b, 2005a, 2006a, 2009a); SNL Kagan (2009); Nielsen Media Research (2009).

Despite the fact that neither the primary nor the secondary market are structured in ways that allow vertical integration to harm consumers, the Justice Department nonetheless concluded that the merger would allow Comcast-NBCU to harm rival MVPDs by withholding content (U.S. Department of Justice 2011). The FCC reached the same conclusion, applying an innovative bargaining model instead of the more traditional structural model (see Rogerson 2013 for an excellent discussion). The fact that the program access rules already provided rival MVPDs with a remedy was deemed insufficient (FCC 2011a).

2.4.2 Impact of content on OVDs

Beyond the impact on MVPDs, the principal concern of both the antitrust authorities and the FCC was that the merger would stifle the development of the burgeoning market for online video distributors (OVDs), such as Netflix and Hulu. The Justice Department regarded the combined company's control over content as its primary source of leverage (U.S. Department of Justice 2011).

With respect to the combined company's ability to use content as leverage, the analysis is largely the same as the one presented in the preceding section. With respect to mass-market programming, the geographic scope of the market is national, and the unconcentrated structure of the market for content and the low entry barriers into program production make this market structurally ill-suited to allowing the merged entity to use vertical integration to harm competition. As noted above, local sports may represent an exception. OVDs have disavowed any interest in local sports, however, and in any event the OVD remedy is not tailored to the scope of this harm.

2.4.3 Impact of broadband Internet access on OVDs

The FCC added the concern that Comcast could also use its control over broadband Internet access to harm OVDs (FCC 2011a). With respect to the ability to use control over broadband Internet access to harm OVDs, the geographic scope of the relevant market is again national. A review of the industry structure as of the date of the merger reveals that the market for high speed Internet is unconcentrated under the Merger Guidelines (see Table 6).

Table 6: Concentration in the national market for high speed data, December 2010

Company	Subscribers (millions)	Share	HHI
Comcast	17.0	21%	443
AT&T	16.3	20%	408
Time Warner Cable	9.8	12%	147
Verizon	8.4	10%	108
Cox	4.4	5%	29
Charter	3.2	4%	16
Qwest	2.9	4%	13
Cablevision	2.7	3%	11
CenturyLink	2.4	3%	9
Frontier	1.7	2%	4
Windstream	1.3	2%	3
Mediacom	0.8	1%	1
Suddenlink	0.8	1%	1
Insight	0.5	1%	0
Cable ONE	0.4	1%	0
FairPoint	0.3	0%	0
Cincinnati Bell	0.3	0%	0
Other major cable	1.9	2%	1
All other companies	5.7	7%	2
Total	80.8	100%	1197

Sources: Leichtman Research Group (2011).

For both horizontal and vertical effects, none of the relevant markets were structured in a way that made it likely that the Comcast-NBC Universal would harm competition. This is true

regardless of whether content is viewed as leverage over distribution or if distribution is viewed as leverage over content. Both the FCC and the Justice Department concluded that the merged entity's control over broadband Internet access represented an anticompetitive threat to OVDs.

Interestingly, this was not a merger-specific harm, which makes the imposition of remedies to redress this concern highly questionable. Because NBCU did not provide any broadband Internet access services, whatever leverage the merged company enjoyed over broadband Internet access came from Comcast's position prior to the merger and was not enhanced in any way by the transaction (Rogerson 2013).

3 Differences in the merger review procedures

In addition to employing different substantive standards for reviewing mergers, the mere fact that two agencies review mergers in the communications industries has a number of undesirable consequences. As an initial matter, dual agency review necessarily requires the incurrence of greater costs, requiring the merging companies to submit information to and satisfy the demands of two agencies and increasing the number of government personnel needed to review the merger. Any system of dual review also creates the risk of inconsistent outcomes.

But the aspect of FCC merger review that has drawn the most criticism is the fact that the FCC's merger review procedures permit the agency to impose a wide range of conditions from the merging parties. Many of these conditions are not germane to the merger and represent one-off company-specific restrictions that the FCC could not impose through ordinary regulatory processes. In addition, these conditions lack an official agency explanation and public participation and are immune from judicial review. Lastly, it unnecessarily politicizes the merger review process.

3.1 Procedures governing merger review by antitrust authorities

Merger review by the antitrust authorities must adhere to stringent procedural requirements designed to ensure timely and accurate decisions. For example, because time is of the essence in most mergers, the Hart-Scott-Rodino Antitrust Improvement Act of 1976 gives the antitrust authorities an initial period of 30 days during which to review a merger. During this time, the government may clear the merger, sue to block it, or ask for more information by issuing what is commonly known as a "second request." Once the parties have substantially complied with the second request, the government has another 30 days to finish its review. Typically, the antitrust authorities complete their review in two to four months; but where the issues are more complex, the authorities typically ask the parties for additional time (which is almost always granted, since the alternative would likely be an immediate decision by the agency to challenge the merger in court).

In addition, the antitrust authorities cannot block mergers unilaterally. Instead, if they wish to block a merger, they must bring an action in U.S. District Court. Importantly, in court, the government bears the burden of showing that the merger would substantially lessen competition. If the evidence is ambiguous or inconclusive, the court will permit the merger to go through. In addition, the court will conduct its own independent review of the likely impact of the merger without according any deference to the conclusions that have been drawn by the antitrust authorities.

Furthermore, antitrust law with respect to mergers is not designed to allow the reviewing agencies to require proactive steps to improve the level of competition. Instead, merger review focuses exclusively on reductions in competition that are the direct result of the transaction.

Should the merger review end with a consent decree settlement that requires remedial action by the merging parties, the Tunney Act requires that courts review the proposed settlement so that it is in the public interest. In addition, all of the settlement terms are subject to public notice and comment.

3.2 Procedures governing merger review by the FCC

FCC merger review is subject to procedural requirements that are markedly different from antitrust merger review. As an initial matter, FCC review is not subject to any statutory time limits. Although the FCC has adopted self-imposed guidelines that limit its time for review to six months, it does not always follow those guidelines and routinely stops the clock at various points during the review process. The result is that FCC merger review typically takes from nine to twelve months. As the U.S. Court of Appeals for the D.C. Circuit has noted, in technologically dynamic industries, "[t]o delay a project six months will increase capital cost and diminish technological advantage; to delay it a year or more may destroy its attractiveness as an investment" (*United States v. FCC*, 652 F.2d 72 [1980]).

In addition to the lack of a time limit, the initial decision as to whether to forbid a merger from proceeding rests with the FCC, not the courts. As noted above, broadcast license transfers require the affirmative authorization of the FCC. Moreover, as noted above, instead of intervening only on an affirmative showing of consumer harm, FCC merger review places the burden on the merging parties to show that the merger would create affirmative benefits.

Although FCC orders approving mergers constitute official agency action and thus are subject to judicial review, the reviewing court will accord the FCC's conclusions substantial deference. The fact that the key decisionmaker is a regulator instead of a judge makes the process more political.

Moreover, the difference in the burden of proof changes the default result in the face of agency inaction: If an antitrust agency fails to act, the merger is allowed to proceed. The FCC, in contrast, can unilaterally prevent a merger from proceeding simply by doing nothing. When combined with the absence of a formal time limit, this "power of inertia" permits the FCC to draw out its investigation. The prospect of delay puts substantial pressure on the merging parties to find a way to move forward. This combination of factors leads to a special peculiarity of FCC merger review: Because the merging parties are typically in a hurry to consummate the transaction, they typically begin offering a series of "voluntary commitments."

The use of merger conditions and voluntary commitments is controversial for several reasons: As an initial matter, the FCC has repeatedly recognized that the better practice is to address problems that affect the entire industry through traditional rulemaking proceedings that create regulatory frameworks that are applicable to everyone. In contrast, merger conditions create incomplete solutions that are applicable only to the merging parties and that do not necessarily address the full scope of the relevant problems (FCC 1996, 2009b).

Most notably, in approving AT&T's acquisition of MediaOne, the FCC declined to condition approval of the merger on the company's agreement to provide access to its proprietary content, arguing that any disappointed party should seek relief through the generally applicable program access rules (FCC 2000). Yet the FCC followed the opposite course when reviewing News Corp.'s acquisition of DirecTV, requiring that the merged company comply with conditions that far exceeded those mandated by the program access rules (FCC 2004b). Since that time, conditions have become increasingly common features of merger clearances.

Equally problematic is the fact that the FCC has often used the merger review process to impose regulatory mandates that are not supported by law. For example, the FCC (2000)

conditioned its approval of AT&T's acquisition of MediaOne on the company's agreement to comply with the FCC regulation that limited the number of cable subscribers that any one company can reach nationwide to 30% of the U.S. population, only to see that regulation struck down as arbitrary and capricious (*Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126 [2001]). The FCC (2001c) agreed not to enforce the condition. Had it not done so, AT&T would have remained bound by its contractual commitment to follow the regulation (notwithstanding the fact that the regulation was illegal) and would have been the only company subject to the 30% cap.

Even worse, the FCC now routinely uses mergers as the opportunity to impose restrictions on conduct that has nothing to do with the merger. One classic example is the FCC's conditioning the Bell Atlantic-NYNEX merger on the companies' agreement to accept Total Element Long-Run Incremental Cost (TELRIC) as the methodology for determining access pricing under the Telecommunications Act of 1996 (FCC 1997). The FCC imposed this condition even though at the time the U.S. Court of Appeals for the Eighth Circuit had struck down TELRIC as being beyond the FCC's jurisdiction and the appeal was currently pending before the Supreme Court (*Iowa Utilities Board v. FCC*, 120 F.3d 753 [1997]). The Supreme Court decided the case without reaching the merits of TELRIC in 1999 (*Iowa Utilities Board v. FCC*, 525 U.S. 366 [1999]) and did not resolve the issue until 2002 (*Verizon Communications Inc. v. FCC*, 535 U.S. 467 [2002]).

The legal propriety of TELRIC as a pricing methodology did not turn on the merger in any way. Instead, the FCC simply used the occasion provided by the merger review process to promote unrelated goals that it would not otherwise have been able to achieve by binding the parties to follow TELRIC regardless of the outcome of the judicial challenge.

Agency officials should not regard the fact that a party is seeking to merge as carte blanche to promote the agency's larger regulatory goals regardless of how unrelated to the merger those other goals may be. The fact that the legality of TELRIC was being addressed in a general rulemaking makes the use of voluntary commitments to bind one company to TELRIC particularly troublesome both in terms of fairness and in terms of rule of law.

Furthermore, to the extent that these commitments are regarded as voluntary, they do not constitute official agency action. The use of both merger conditions and voluntary commitments can cause considerable confusion and requires observers to read orders carefully. Consider, for example, the FCC's treatment of network neutrality in the SBC-AT&T, Verizon-MCI, and AT&T-BellSouth mergers. Although some have suggested that these decisions represented the agency's official endorsement of network neutrality, in each case the FCC found mandating network neutrality to be unnecessary. Although the FCC took comfort from the merging parties' voluntary commitments to adhere to the principles contained in the FCC's 2005 policy statement on network neutrality and accepted these conditions as being in the public interest, as a formal matter the Commission found direct regulatory intervention to be unnecessary. It did accept the merging companies' voluntary commitment to adhere to the 2005 policy statement as being in the public interest (FCC 2005b, 2005c, 2007).

Thus as a formal matter, no official agency action forced the parties to abide by the 2005 Policy Statement, but the parties remain bound by their voluntary agreement to adhere to the Policy Statement as a matter of contract. The increasing use of voluntary commitments is thus the source of considerable confusion.

Unfortunately, the ambiguity has significant legal consequences: The fact that voluntary commitments do not constitute official agency action affects the public's ability to participate in

the proceeding. The FCC typically opens any measures that it plans to impose through its official merger review process to public notice and comment and offers a reasoned explanation to justify its actions. Because merger commitments are supposedly voluntary, they are not the action of the agency and need not be open to public comment or backed by a reasoned justification. Instead, they are typically announced in the order issued at the end of the merger review and simply accepted as being in the public interest without any further explanation.

But perhaps the most significant consequence of the FCC's use of voluntary commitments is with respect to judicial review. As noted earlier, the FCC already enjoys significant advantages over the antitrust authorities when its actions are challenged in court. Not only do the parties pursuing the transaction bear the burden of proof; the reviewing court also accords substantial deference to the FCC's conclusions. But even such permissive judicial review applies only to official agency action. To the extent that commitments are regarded as voluntary, they are not agency action and thus escape judicial review altogether.

3.3 The use of conditions and voluntary commitments in the Comcast-NBC Universal merger

Each of these procedural defects was on full display in the Comcast-NBC Universal merger. Regarding the length of time that the FCC took to clear the transaction, the merging parties filed their application with the FCC on January 28, 2010. The agency did not clear the transaction until January 18, 2011, nearly a year after the initial application was filed. Although the agency and the merging parties share responsibility for why this review took this long, the time frame is considerably longer than the deadlines that apply to the antitrust authorities.

The FCC also used the transaction as an occasion to impose restrictions on the merging parties notwithstanding the presence of general regulatory regimes designed to accomplish the

same goals. Specifically, the FCC protected rival MVPDs against being denied access to NBC Universal content by restricting the licensing fees that the merged company could charge and requiring arbitration of any disputes. The FCC imposed this restriction despite the existence of program access rules that are designed to address this exact problem. The program access rules have been criticized as ineffectual; but rather than fix them with respect to all parties, the FCC opted instead to impose a single-firm remedy that was limited to Comcast-NBCU.

The FCC also opted to require the merged company to make its online video content available to MVPDs and to make its MVPD content available to OVDs even if it had no plans to distribute that content online itself. The requirement that Comcast-NBCU make all of its traditional video content available online is curious: While a simple nondiscrimination mandate with respect to content that Comcast-NBC Universal had decided to distribute through its own online system might arguably have been justified, the FCC's order went farther: It required Comcast-NBCU to make its content available regardless of whether it was distributing its content online or not.

The FCC justified its actions by pointing to the benefits of promoting OVDs. It is hard to see the justification for forcing the merged company to pursue an online business model that it otherwise was not planning to pursue. Moreover, as noted earlier, whatever leverage the merged company would wield over OVDs was exclusively the product of Comcast's strong position in the market for broadband Internet access, and that leverage preexisted the merger and was not enhanced by it in any way. The conditions giving OVDs access to the merged company's broadband Internet access thus did not address harms specific to the merger. The FCC simply used the leverage it had over the merger to promote OVDs over MVPDs.

In addition, the merger conditions require Comcast-NBCU to adhere to restrictions that subsequent court decisions suggest fall outside the FCC's authority to impose through regulation. Specifically, the merger is subject to a number of provisions that the Commissioners characterize as open Internet commitments. Specifically, the FCC's approval requires the merged company to adhere to the FCC's 2010 Open Internet Order for seven years. Comcast-NBCU remains bound by these provisions notwithstanding the fact that the U.S. Court of Appeals for the D.C. Circuit overturned the nondiscrimination provisions of the FCC's *Open Internet Order* as being beyond the FCC's authority (*Verizon v. FCC*, 740 F.3d 623 [2014]).

But what is most striking is the sheer volume of other commitments that were imposed on Comcast NBC-Universal. The conditions span 26 pages and consist of well over 100 distinct conditions. Among other things, these include the obligations to:

- expand Spanish-language programming;
- expand local news, local public affairs, and other public interest programming;
- enter into cooperative agreements with locally focused non-profit news organizations;
- increase children's programming;
- develop an on-demand platform for public access, educational, and governmental channels;
- add 1,500 miles to its broadband network;
- upgrade service in at least six rural communities;
- provide 600 courtesy broadband account locations in schools, libraries and other community institutions in underserved areas; and
- create a Broadband Opportunity Plan to promote broadband adoption in low-income homes.

In addition, the order includes agreements between Comcast-NBC Universal and the Independent Film & Television Alliance to allocate $6 million per year for four years to fund independent productions. It also contained agreements with Congressman Bobby Rush and leaders of Asian American, African American, and Hispanic organizations that included commitments on governance, supplier, workforce, and program diversity by creating Diversity Advisory Councils, adding a Hispanic member to Comcast's Board of Directors, and other

measures. To the extent they are regarded as voluntary, these commitments are immune from judicial review.

As Commissioner McDowell noted in approving the merger, while all of these commitments are quite laudable, the problems they are designed to address are not products of the merger. Instead, the inclusion of these voluntary commitments is largely the product of the fact that political appointees rather than courts are the relevant decisionmakers for merger review.

Before the merger review process began, Comcast-NBC Universal was fairly confident that the two Republican Commissioners would vote to approve the transaction, as would Democratic Chairman Julius Genachowski. Although that would allow the merger to proceed by a vote of 3-2, forcing Chairman Genachowski to be the lone Democratic vote would have placed him in a politically awkward position. The strategy of agreeing to conditions was driven by the need to induce a second Democratic Commissioner to support the transaction in order to give Chairman Genachowski political cover. With Commissioner Michael Copps almost certain to oppose the merger under any circumstances, the conditions were designed to appeal to Mignon Clyburn, the other Democrat and the lone minority on the Commission (Fernandez 2011).

4 The aftermath of the merger

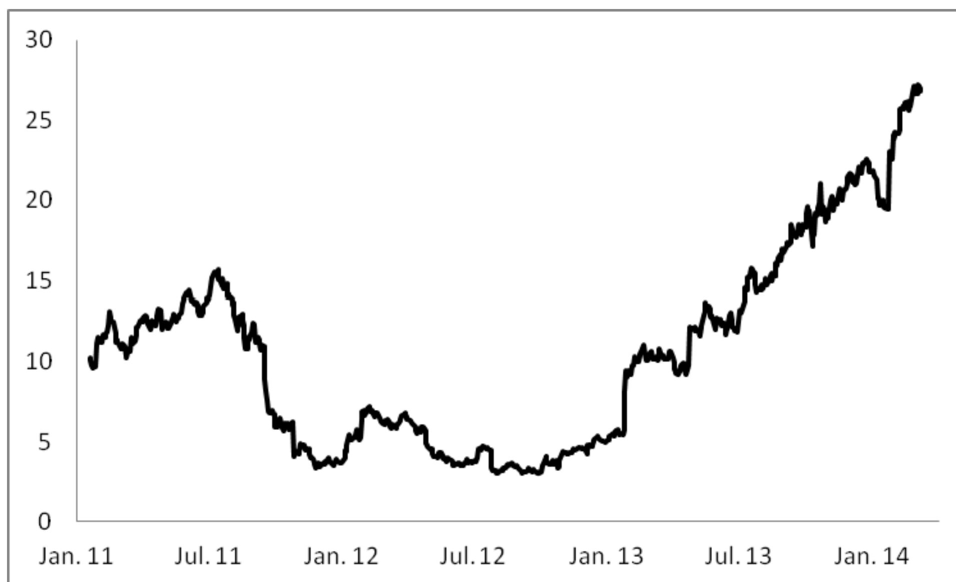
The passage of three years provides some ability to assess the impact of merger. The potential for competitive harm has been alleviated in no small part by the rise of other technologies as alternative platforms for broadband access. In addition, the supposed harm to OVDs has failed to materialize, as OVDs have thrived and even begun exerting bargaining power vis-à-vis broadband access providers.

4.1 The rise of Netflix and the Comcast-Netflix agreement

The past three years makes fairly clear that Comcast-NBC Universal has been unable to use its control over content to thwart the rise of OVDs. In fact, Netflix's recent success with original programming, such as Emmy-winning *House of Cards* and new episodes of *Arrested Development*, and Amazon's creation of *Alpha House* and *Betas* attest to OVDs' ability to develop alternative sources of supply (Yoo 2014).

Indeed, Netflix has thrived in the aftermath of the merger, although the ride has been anything but even. Netflix's market valuation, which was over $10 billion at the time of the merger was approved in January 2011 (see Figure 2), plummeted to just below $3 billion in August 2012, driven largely by the unpopularity of its shift from mail-based to Internet-based distribution. The stock price moved sideways until January 2013, when it began to rise sharply, as the company invested billions in forward contracts with movie studios to gain access to their content. As of March 7, 2014, Netflix market capitalization stood at nearly $27 billion.

Figure 2: Netflix market capitalization ($ billion)



Sources: YCharts (2014).

As a result, neither NBC Universal's control of its content library nor Comcast's control of broadband connections has proven much of an obstacle to Netflix, although that might arguably be the result of the remedies imposed. Indeed, to date, there does not seem to be any evidence that any OVD has availed itself of these merger conditions. If anything, Netflix may be in a position to exercise bargaining power in the opposite direction. Netflix's popularity is allowing it to pressure broadband access providers to deploy its Open Connect content delivery network and ask broadband Internet access providers to deliver its traffic for free (Yoo 2014).

These decisions provide the context that frames the interconnection agreement between Comcast and Netflix that was announced in late February 2014. It is far from clear what the impact will be for consumers. As an initial matter, the direct connection will provide a better streaming experience for Netflix customers. In addition, the pricing arrangement ensures that the costs of expanding capacity will be borne by the Netflix customers who are generating the increase in traffic and not by all Comcast subscribers regardless of whether they use Netflix or not.

The fact that Comcast is generating additional revenue could support larger buildouts by making additional customers more profitable. Further, any additional payments from Netflix to Comcast will be offset by the cost reductions from Netflix's not having to pay third-parties to deliver its traffic. Early indications are that cutting out the middlemen may lead to net cost savings by Netflix as well.

What is clear is that prior to the decision, the transmission path through which Netflix traffic flowed into Comcast's system was becoming increasingly congested. Two competing stories exist as to who was responsible: One version says that the fault lay with Comcast, which

was deliberately refusing to expand its capacity in an attempt to extract a better deal from Netflix. The other version places responsibility on the network that Netflix used to connect to Comcast, which was refusing to pay for the increase in capacity required by its increase in capacity by insisting that its contract remain a peering contract instead of a transit contract even though the traffic was no longer symmetrical.

From the outside, it is impossible to tell which story rings more true. The agreement makes clear that both parties have come to an arrangement that will permit them to focus on their shared interest in delivering greater value to consumers.

The inconsistent reaction of the public interest community underscores the difficulty of assessing the welfare implications of such arrangements. Initially, many complained that Comcast's refusal to reach an agreement with Netflix constituted anticompetitive exclusion. Now that both parties have reached agreement, advocates cannot decide whether the price that Comcast is charging Netflix is too high (in that it may reflect monopoly power) or too low (in that it may reflect giving Netflix a special deal). Policymakers would be better served by focusing on structural factors that make markets competitive than on the reasonableness of any particular price.

4.2 The proposed Comcast-Warner Cable merger

The other major development since January 2011 is Comcast's proposed acquisition of Time Warner Cable. It is unlikely that this merger will raise horizontal concerns in the MVPD market. As noted earlier, this market is unconcentrated, and the merging parties have already agreed to bring themselves below the 30% national ownership threshold. Since, as noted earlier, the courts have twice rejected the 30% limit as too restrictive, it is hard to see how a company that falls below that threshold could raise antitrust scrutiny.

Nor is the market for video networks likely to pose any problems. Time Warner Cable was created when Time Warner decided to divide cable programming and cable distribution into separate companies. Aside from a handful of local news channels and regional sports networks, Time Warner Cable does not control any video networks.

The only potential source of concern is the broadband access market. The resulting HHI in this market would be 1708, just below the threshold of concern under the Non-Horizontal Merger Guidelines and just above the minimum level for considering a market moderately concentrated under the Horizontal Merger Guidelines.

The potential game changer is the growing importance of other technologies. The spread of fiber to the home by Google and AT&T and the deployment of advanced DSL technologies, such as vectoring and VDSL, have made them viable alternatives to cable broadband. Although wireless broadband was once a limited technology that was unable to deliver high-speed data, the fourth generation wireless technology known as LTE is now delivering average download speeds of 12 Mbps and peak download speeds of 50 Mbps to most of the U.S. For reference, these speeds exceed the 8 Mbps recommended by Netflix. They also meet or exceed the 12 Mbps that Skype requires for multi-party video conference calling.

At the time of the Comcast-NBC Universal merger, deployments of the fourth generation wireless technology known as LTE were in their beginning stages, with Verizon beginning its LTE deployment in December 2010. Since that time, LTE has become nearly ubiquitous. By mid-2013, Verizon had completed its LTE buildout, with AT&T, T-Mobile, and Sprint reaching 85%, 66%, and 63%, respectively, of the population by the end of 2013 and racing to catch up. And waiting in the wings is LTE Advanced, which is already being deployed in South Korea and

Australia and is capable of delivering 150 Mbps (Yoo 2014). If wireless broadband is regarded as an effective competitor, any concerns about concentration in broadband access disappear.

5 Conclusion

The process of clearing the Comcast-NBC Universal merger spotlighted many of the shortcomings of the FCC merger review process. The fact that the FCC is not bound by antitrust law's commitment to consumer welfare as the lodestar for decisionmaking allowed it to intervene even in areas where economic analysis suggested that consumer harm was unlikely. In addition, the FCC was able to use its role to extract concessions from the merging parties that had nothing to do with the merger and which were more properly addressed through general rulemaking. The use of voluntary commitments also allowed the FCC to avoid subjecting certain aspects of its decision to public comment and immunized it from having to offer a reasoned explanation or subjecting its decision to judicial review.

In the wake of an era during which the FCC was often criticized for failing to follow good administrative practices (U.S. House Committee on Energy and Commerce 2008), insisting on the integrity of regulatory processes would appear to be particularly important. Indeed, recent years have witnessed innovations in business models and technologies that were not completely anticipated at the time of the merger. The continuing success of the industry underscores the benefits of making consumer welfare the central focus of FCC policy.

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