March 29, 2011

VIA ELECTRONIC MAIL

Nancy Goodman
Chief, Telecommunications & Media Enforcement Section
Antitrust Division
Department of Justice
450 Fifth Street, NW
Suite 7000
Washington, DC 20530

Re: Tunney Act Comments in U.S. v. Comcast Corp., General Electric Co., and NBC Universal, Inc.

Dear Ms. Goodman:

Attached please find comments of the American Antitrust Institute in U.S. vs. Comcast Corp., General Electric Co., and NBC Universal, Inc., pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C . § 16 (Tunney Act).

Sincerely,

Diana L. Moss

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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, and STATE OF WASHINGTON,	)	
Plaintiffs,	)	Case: 1:11–cv–00106 Judge: Richard, J. Leon
v.	)	
COMCAST CORP., GENERAL ELECTRIC CO., and NBC UNIVERSAL, INC.,	)	
Defendants	)	

TUNNEY ACT COMMENTS OF THE
AMERICAN ANTITRUST INSTITUTE
ON THE PROPOSED FINAL JUDGEMENT

I. Introduction

The American Antitrust Institute (AAI) is an independent Washington-based non-profit education, research, and advocacy organization. The AAI is devoted to advancing the role of competition in the economy, protecting consumers, and sustaining the vitality of the antitrust laws. The AAI is managed by its Board of Directors, which alone has approved this filing. Its Advisory Board consists of over 115 prominent antitrust lawyers, economists, and business leaders. The AAI has had an interest in this proceeding because it raises critical issues of competition policy and consumer choice involving video programming and distribution and diversity in the media. In June 2010, the AAI filed comments with the Federal Communications Commission (FCC) in the docket assigned

to the Comcast/NBCU joint venture (JV).[1] Those comments discuss some of the key competitive issues raised by the JV and urge the FCC to reject the transaction.[2]

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act (APPA), 15 U.S.C. § 16 (Tunney Act), the AAI submits these comments on the Proposed Final Judgment (PFJ or consent decree) in the above-mentioned case.[3] Congress has made this Court the final arbiter of the propriety of mergers under the antitrust laws. The Court must "determine that the entry of such judgment is in the public interest."[4] If the Court cannot make this finding, it must reject the PFJ unless more adequate provisions are made to protect the public interest. In the following analysis, the AAI respectfully argues that for the numerous reasons set forth, the consent decree is not in the public interest and should be rejected by the Court.

The AAI's comments proceed as follows. Section II provides an overview of the Comcast/NBCU JV and details the major reasons why it will establish poor precedent for merger policy. Section III summarizes the U.S. Department of Justice (DOJ) Complaint.[5] Section IV outlines specific problems that make the consent decree unsuitable, and Section V concludes with suggested modifications to the PFJ that would bring it more into line with the Complaint. The PFJ suffers from the following problems:

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[1] See Federal Communications Commission, *in the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal. Inc. for Consent to Assign Licenses or Transfer Control of Licensees*, MB Docket No. 10-56.

[2] American Antitrust Institute, Comments, *in the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal. Inc. for Consent to Assign Licenses or Transfer Control of Licensees*, MB Docket No. 10-56 (June 21, 2010). Available at http://www.antitrustinstitute.org/sites/default/files/AAI_Comcast_NBCU%20Comments_2_070220101958.pdf.

[3] U.S. Department of Justice, Proposed Final Judgment, *U.S. and Plaintiff States v. Comcast Corp., et al.,* No. 1:11-cv-00106 (D.C. Cir. January 18, 2011).

[4] 15 U.S.C. § 16(e). *See, e .g., United States v. Microsoft Corp.,* 56 F.3d 1448, 1458 (D.C. Cir. 1995).

[5] U.S. Department of Justice, Complaint, *U.S. and Plaintiff States v. Comcast Corp., et al.,* No. 1:11-cv-00106 (D.C. Cir. January 18, 2011).

- The PFJ lacks a strong justification for the use of open access remedies, which are inconsistent with the DOJ's guidelines and principles of antitrust remedies.

- The PFJ contains requirements that are defined by subjective terms and therefore invite dispute, arbitration, delay, and expense.

- The PFJ's requirements are based on static benchmarks that will undoubtedly change in an emerging and dynamic online video distribution (OVD) industry but for which the PFJ envisions no adjustments or flexibility.

- The PFJ's delegation of NBCU's voting rights in Hulu will compromise important voting dynamics regarding management and governance, potentially affecting how the most important OVD develops.

- Short of the DOJ suing to stop the transaction, no set of remedies will prevent the JV from controlling how rivalry develops between two major, important systems – the delivery of programming through cable television and cable modem high-speed internet (HSI).

II. Overview

The combined Comcast/NBCU will arguably be the pre-breakup "Standard Oil" of modern video programming and distribution. By placing valuable and important NBCU programming under Comcast's control, the JV will directly or indirectly control everything from the creation to delivery of video programming to the consumer through a variety of distribution conduits or channels. With the JV, Comcast will be in a position to decide whether or not to sell important NBCU programming to its rivals, including other multi-video programming distributors (MVPDs) such as digital broadcast satellite (DBS) providers, telcos, cable overbuilders, and OVDs. Because the OVD segment of the video programming distribution (VPD) market is in the early stages of development and would benefit the most from competitive market forces, the JV is particularly troublesome. And because Comcast is a dominant supplier of cable modem HSI and cable television

services in numerous geographic areas in the U.S., its control over NBCU will enable it to determine, step-by-step, how the delivery of programming via the two competing modes of distribution develops over time. As a result, the JV will adversely affect competition in the market for VPD, to the detriment of consumers.

Thousands of pages of comments and protests in the FCC docket describe the multitude of competitive and consumer harms potentially inflicted by the merger.[6] Questions, concerns, and calls for rigorous merger enforcement have been raised in media commentaries, hearings, and other public fora. Yet we need look no further than the DOJ Complaint *itself* to assess the gravity of the JV's anticompetitive effects:

> …the proposed joint venture…would allow Comcast, the largest cable company in the United States, to control some of the most popular video programming among consumers, including the NBC Television Network [ ] and the cable networks of NBC Universal, Inc. [ ]. If the JV proceeds, tens of millions of U.S. consumers will pay higher prices for video programming distribution services, receive lower-quality services, and enjoy fewer benefits from innovation.[7]

Herein lies the dilemma facing the court. The DOJ's failure to match its Complaint with an appropriate cure diverges from its own remedies guidelines and from long-standing precedent in vertical merger cases. For example, the DOJ's *Antitrust Division Policy Guide to Merger Remedies (Policy Guide)* states: "There must be a significant nexus between the proposed transaction, the nature of the competitive harm, and the proposed remedial provisions."[8] For the reasons set forth in Section IV below, the lack of such a nexus means that the PFJ will not protect or restore competition, which the Supreme Court has emphasized is the paramount purpose of an antitrust

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[6] See Federal Communications Commission transaction team re: Comcast Corporation and NBC Universal. Available http://www.fcc.gov/transaction/comcast-nbcu.html#record.
[7] *Supra* note 5, at para. 2.
[8] United States Department of Justice, Antitrust Division, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES (October 2004), at p. 2. Available http://www.justice.gov/atr/public/guidelines/205108.pdf.

remedy.[9] Moreover, if the PFJ is found by the Court to be in the public interest, it will set a dangerous precedent for merger policy, for three major reasons.

First, the troubling incongruity between the strength of the DOJ's Complaint and the weakness of the PFJ will only encourage the very conduct identified in the Complaint; it is reminiscent of when a larcenist gets off with a warning and immediately repeats his crime. This incongruity creates a standard that is likely to serve as a green light for all future mergers to come – no matter how anticompetitive or anti-consumer. Enforcement with a "bark but no bite" will limit the effectiveness of merger control as a tool for protecting competition in the U.S. economy.

Second, the PFJ employs weak, regulatory-style conduct remedies for a transaction that, as discussed later, the DOJ Complaint states is devoid of any countervailing efficiencies.[10] Indeed, the antitrust agencies have reserved conduct remedies for cases where they specifically wish to preserve *demonstrated* efficiencies resulting from vertical integration. The *Policy Guide* states, for example, that:

> . . . the use of conduct remedies standing alone to resolve a merger's competitive concerns is rare and almost always in industries where there already is close government oversight. Stand-alone conduct relief is only appropriate when a full-stop prohibition of the merger would sacrifice significant efficiencies and a structural remedy would similarly eliminate such efficiencies or is simply infeasible.[11]

Whether this departure from the agency's preferred practice reflects the undue influence of the regulatory culture in the DOJ/FCC collaborative process or other

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[9] *Id.*, at p. 4. Citing to *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961).
[10] *Supra,* note 5, at para. 56.
[11] *Id.,* at para. 20.

forces, it is a dangerous line to cross. If the PFJ is not rejected, it is likely to set a precedent for the use of weak behavioral remedies in similarly harmful transactions.

Finally, we can expect that the demonstrated and documented problems with conduct remedies will come to bear on the post-merger conduct of the JV, limiting their effectiveness and exposing competition and consumers to the harms so clearly described in the Complaint. For example, conduct remedies are known to be easy to circumvent. Moreover, such remedies are difficult to enforce and impose undue compliance and monitoring burdens on the Courts. For these reasons, the antitrust agencies themselves have typically disfavored such approaches. Adopting conduct remedies here is unprecedented and effectively transforms the DOJ into a regulatory agency.

III. The Complaint – Competitive Harm Inflicted by the Proposed Comcast/NBCU JV

According to the Complaint, by adding NBCU's content to its existing arsenal of assets, Comcast will have the increased ability to cut off or raise the price of important NBCU programming to rival VPDs. Those distributors include both (1) traditional MVPDs such as rival cable companies, DBS, cable overbuilders, and telcos, and (2) OVDs.[12] These effects thus capture standard anticompetitive vertical foreclosure or raising rivals costs concerns associated with vertical integration. Comcast/NBCU, however, is a one-sided coin. Vertical efficiencies such as economies of coordination and lower transaction costs that often have a countervailing effect on anticompetitive harms are not present here. The Complaint, in fact, states that the

[12] *Supra* note 5, at para. 4.

proposed JV "will not generate verifiable, merger-specific efficiencies sufficient to reverse the competitive harm of the proposed JV."[13]

The loss of NBCU as an independent force in the production of programming will inflict particularly serious damage to competition and consumers. For example, the Complaint stresses the importance of NBCU's programming to both MVPDs and OVDs, referring to it as "vital" and a "potent tool" which, if controlled by Comcast, could be used to disadvantage VPD rivals.[14] Moreover, NBCU content is critical for rival distributors to "attract and retain customers" and to "compete effectively."[15] Further, NBCU has been one of the content providers "most willing to support OVDs and experiment with different methods of online distribution."[16] The Complaint's predicted effects of the JV include a diminution of innovation in the relevant market for VPD, fewer choices for consumers, and higher prices for programming.[17]

The likely effect of the JV on OVDs, however, is particularly pernicious. The Complaint notes that Comcast documents "consistently portray the emergence of OVDs as a significant competitive threat"[18] and that Comcast has taken steps to prevent its cable customers from cord-shaving or cord-cutting in favor of OVDs.[19] The Complaint characterizes the impact of the JV on emerging competition from OVDs as "extremely troubling" given that OVDs are in the nascent stages of development and that they have

[13] *Id.*, at para. 56.
[14] *Id.*, at para. 4.
[15] *Id.*, at para. 6 and 49.
[16] *Id.*, at para 52.
[17] *Id.*, at para 4.
[18] *Id.*, at para 36 and 46.
[19] *Id.*, at para. 53.

the potential to "significantly increase competition" by introducing programming with new and innovative features, packaging, pricing, and delivery methods."[20]

Thus, by cutting off or raising prices of NBCU content to OVDs, the Complaint predicts that Comcast could "curb" nascent OVD competition and "encumber" the development of "nascent distribution technologies and the business models that underlie them…."[21]As a result, Comcast will face less competitive pressure to innovate and the future evolution of OVDs will likely be muted.[22] Given that entry in traditional VPD in Comcast's many service areas is difficult and unlikely, the Complaint states that OVDs' are "likely the best hope for additional video programming distribution competition in Comcast's cable franchise areas."[23] Impairing competition from OVDs would therefore inflict particularly grave harm on consumers.

IV. The Proposed Final Judgment – Weak Conduct Remedies that Fail to Address Competitive Harms and do not Preserve Competition

The breadth and depth of the competitive concerns articulated in the Complaint could, in theory, support a government decision to seek a full-stop injunction that would prevent the parties from consummating the transaction. Absent that, the strength of the Complaint warrants conditions that are far stronger than the conduct remedies that are contained in the consent decree. The contrived world in which the JV is allowed to go forward will be defined by a series of prescriptive and far-reaching prohibitions, requirements, and permissions

[20] *Id.*, at para 52.
[21] *Id.*, at para. 54.
[22] *Id.*
[23] *Id.*, at para. 9.

regarding the JV's conduct, many of which are duplicated in the FCC's order.[24] The DOJ's guidelines for remedies clearly disfavor conduct-based fixes. The logic behind this is well known. For example, the *Policy Guide* states that:

> "A carefully crafted divestiture decree is simple, relatively easy to administer, and sure to preserve competition. A conduct remedy, on the other hand, typically is more difficult to craft, more cumbersome and costly to administer, and easier than a structural remedy to circumvent."[25]

The following sections address several flaws in these myriad conditions that make them subject to dispute and arbitration, relatively ineffective, difficult to enforce, and therefore not in the public interest.

A. The PFJ lacks a strong justification for the use of open access remedies, which are inconsistent with the DOJ's guidelines and principles of antitrust remedies.

The core of the PFJ describes what is essentially an open access or fair dealing requirement for how Comcast/NBCU may deal with OVDs that the Complaint stresses are particularly imperiled by the JV. The open access requirement also covers how the JV deals specifically with Hulu, a leading OVD, in which NBCU will be allowed to maintain its ownership interest. The PFJ requires the JV to provide programming to OVDs that is: (1) economically equivalent to what it provides to rival MVPDs and (2) economically equivalent and comparable to what a rival OVD receives from a peer (i.e., broadcast networks, cable programmers, etc.).[26] The PFJ

[24] See Federal Communications Commission, Memorandum Opinion and Order, *the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal. Inc. for Consent to Assign Licenses or Transfer Control of Licensees*, MB Docket No. 10-56 (January 20, 2011), Appendix A.
[25] *Supra* note 8, at p. 8 (internal citation and quotation omitted).
[26] *Supra* note 3, Sections IV(A) and (B).

also requires the JV to provide programming to Hulu comparable to that offered by a Hulu broadcast network owner providing the greatest quantity of programming.[27]

Presumably, the open access requirement is designed to replicate a situation where competitive market forces govern how an independent NBCU engages with OVDs. This is a notoriously difficult task, however, and doing so in a nascent industry is a largely untested and risky endeavor. This regulatory framework will shape how the industry evolves, the pace of innovation, and the choices available to consumers, with uncertain and potentially harmful effects relative to what might happen if NBCU remained independent. The *Policy Guide* again provides critical insight: "When used at all in Division decrees, such [conduct] provisions invariably require careful crafting so that the judgment accomplishes the critical goals of the antitrust remedy without damaging market performance."[28]

Open access conditions have been favored by regulators in restructuring industries such as electricity, natural gas, and telecommunications. They have also been employed in some cases as conditions required for regulatory approval of mergers.[29] Conduct remedies require ongoing oversight, monitoring, and compliance that regulators are institutionally set up to deal with, but which the courts are woefully not. Such fixes have even stymied regulators, as vertically-integrated firms find loopholes and ways to work around the requirements to engage in the discriminatory behavior that is in their best economic interest. Indeed, the DOJ's *Policy Guide* identifies this very concern in discussing conduct remedies when it states: "…care must be taken to avoid potential

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[27] *Id.*, Section IV(G).
[28] *Supra* note 8, at p. 25.
[29] See, e.g., Public Serv. Co. of Col., 58 F.E.R.C. 61,322, at 62,039 (1992) (approving the proposed merger because the parties agreed to provide transmission access to third parties).

loopholes and attempted circumvention of the decree."[30] Perhaps the most notable example is open access in the U.S. electricity industry. Ongoing anticompetitive behavior by vertically-integrated transmission owners has perpetuated successive rulemakings designed to patch or close gaps in conduct requirements.[31]

Rarely have open access conditions been employed as a merger remedy by an antitrust agency. In the merger of America Online/Time Warner, the Federal Trade Commission used an open access requirement to ensure that the merged firm would not foreclose rival internet service providers.[32] However, in comparison to the sweeping open access requirements employed by the DOJ in Comcast/NBCU, it was a tailored remedy and did not involve technologies or markets in the same formative stage as OVDs. In light of the foregoing, the use of open access or fair dealing remedies are inconsistent with internal guidelines and well-established principles of antitrust remedies. As a result, there ought to be a strong justification for their use here, which is lacking in the PFJ.

B. The PFJ contains requirements that are defined by subjective terms and therefore invite dispute, arbitration, delay, and expense.

Under the PFJ's open access requirements, programming to be provided by the JV to OVDs must be economically equivalent to that which: (1) it provides to MVPDs and (2) peers provide to OVDs. Economically equivalent means the "prices, terms, and conditions that, in the aggregate, reasonably approximate" those on which the JV provides programming to an MVPD.[33] The open access requirement with respect to the programming provided by the JV to an OVD is also required to be "comparable" or

[30] *Supra* note 8, at p. 6.
[31] See, e.g., *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, at para. 26.
[32] See Federal Trade Commission, Decision and Order, *in the Matter of America Online Inc. and Time Warner Inc.,* Docket No. C-3989 (December 14, 2000).
[33] *Supra* note 3, at Section IV(A).

"reasonably similar in kind and amount, considering the volume and its value" to that which an OVD receives from a peer.[34] Moreover, the programming to be provided by the JV to Hulu must be "comparable" in terms of "type, quantity, ratings, and quality" and provided on "substantially the same terms and conditions."[35]

Any condition containing subjective terms such as "in the aggregate" or "reasonably approximate," "reasonably similar," or "substantially the same" lacks clarity and requires the application of judgment. The *Policy Guide* emphasizes that remedies must be clear and understandable:

> "Consequently, decree provisions must be as clear and straightforward as possible, always focusing on how a judge not privy to the settlement negotiations is likely to construe those provisions at a later time."[36]

and:

> "Remedial provisions that are vague or that can be construed when enforced in such a manner as to fall short of their intended purposes can render the enforcement effort useless."[37]

The need for clear and precise terms is essential for establishing the starting set of open access conditions that constitute economic equivalency and comparability for the JV's provision of programming. Clarity and precision, however, become particularly important when determining what adjustments to the prices, terms, and conditions for the JV's programming are necessary over the term of the PFJ.[38] The meaning of these terms – which is not specified in the PFJ – will be interpreted differently by the JV and rival OVDs. This will open the door to disputes and arbitration, thus impeding the implementation of the remedies and increasing the costs of monitoring and compliance.

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[34] *Id.*, at Section IV(B).
[35] *Id.*, at Section IV(G).
[36] *Supra* note 7, at p. 6.
[37] *Id.,* at p. 5.
[38] *Supra* note 3, at Section IV(B)(4).

Predictability, which is so important for investment decisions that will be critical to this industry's future, is absent. Unpredictability is inherently advantageous to the JV, whose decisions will have to be challenged after the fact, implying a competitive disadvantage in time and expense to competitors.

C. The PFJ's requirements are based on static benchmarks that will undoubtedly change in an emerging and dynamic OVD industry but for which the PFJ envisions no adjustments or flexibility.

Key elements of the PFJ's open access requirements are defined by benchmarks that will undoubtedly change as the nascent OVD industry develops over the time the PFJ is in effect. But the consent decree does not explain or account in any way for how such benchmarks should be adjusted or modified as a result of changes in a dynamic industry. There are three major areas where the open access requirement suffers from this problem.

First, the PFJ states that economic equivalence will be determined, in part, by differences in the: (1) advertising revenues earned through MVPD versus OVD distribution and (2) value of programming received by the JV versus through a peer.[39] As a preliminary matter, how these important revenue and value *differences* should be interpreted is not explained in the PFJ, making it a "black box" calculation that will inevitably lead to disputes. More important, advertising revenue and value are particularly dynamic concepts in a nascent OVD market. As the market develops over the seven years the PFJ is in effect, we could expect differences in these parameters to change as a result of how OVDs and their business models evolve and how the MVPD segment of the VPD market responds to changes in competition from OVD.

Second, the open access condition makes the provision of video programming by the JV to OVDs contingent on a current set of OVD relationships. For example, provision of programming by the JV is contingent on what the OVD *already* receives – both in terms of the category of peer (e.g., broadcast network, cable programmer, or production

[39] *Supra* note 3, at Section IV(A)(1).

studio), choice of specific peer, and number of peers.[40] In regard specifically to Hulu, the PFJ requires the JV to continue to provide programming on "substantially the same" terms and conditions that were in place on January 1, 2011.[41] Again, as the OVD industry develops and matures, we would expect change not only in the programming that Hulu buys, but the types of peers with which Hulu deals.

Third, the PFJ's open access requirements state that the provision of programming by the JV to OVDs that is also provided to MVPDs may be conditioned on the ability of the OVD to "satisfy reasonable quality and technical requirements for the display and secure protection of the JV's programming."[42] As in many other instances, the PFJ does not state how such quality and technical requirements are to be determined. More importantly, the consent decree does not make provisions for how quality and technical standards might change as the OVD industry develops and matures.

Static benchmarks for setting the JV's programming terms for OVDs generally, and for Hulu specifically, take no account of how such entities will develop over time in an emerging OVD market and how their programming needs will change as a result of changes in the market. The DOJ's *Policy Guide* identifies this as a distinct downside of conduct remedies when it states: "…even where 'effective,' efforts to regulate a firm's future conduct may prevent it from responding efficiently to changing market conditions."[43] Tying the conduct of the firm to parameters that are rooted in existing market conditions in a dynamic market situation runs the risk of shaping or constraining how competition in a nascent OVD market develops. Such conditions are ill-founded and

[40] *Id.*, at Section IV(B)(5).
[41] *Id.*, at Section (IV)(G).
[42] *Supra* note 3, at Section IV(A)(6).
[43] *Supra* note 7, at pp 8-9.

likely to be ineffective, time consuming, and expensive. The PFJ is devoid of any provisions that specifically address the importance of this aspect of emerging competition from OVDs that the Complaint so clearly states is at risk.

D. Delegation of NBCU's voting rights in Hulu will compromise important voting dynamics regarding management and governance, potentially affecting how the most important OVD develops.

Hulu is one of the leading and most innovative OVDs. Rather than require the divestiture of Hulu, in which NBCU has a 33 percent interest, the PFJ will allow the JV to retain its ownership share, subject to a number of restrictions. The PFJ states, among other things, that the JV must delegate its voting and other rights in Hulu "…in a manner and amount proportional to the vote of all other votes cast by other Hulu owners…"[44] The effect of this provision will be to proportionately "scale-up" the voting shares of the other Hulu owners – ABC, Fox, and Providence Equity Partners. In other words, each remaining owner will assume a portion of NBCU's voting rights, in proportion to its ownership share.

This remedy will potentially affect decision-making that has made Hulu an innovative OVD and shaped competition in that segment of the VPD market. For example, under the PFJ, each non-NBCU Hulu owner will have a larger vote in matters relating to governance and management. This is akin to NBCU giving its proxy to the remaining three owners in proportion to their respective ownership shares. As a preliminary matter, the downsides of proxy voting are well-known, which deprives the decision-making process of the independent, informed judgment of the non-voting member. The scaling-up approach also changes the dynamics of consensus-building involving Hulu governance and management decisions. For example, before the JV,

[44] *Supra* note 3, at Section IV(D).

NBCU needed the vote of any one of the remaining three owners to gain a majority. But unless the remaining three owners all teamed up, they could not gain a majority. Post-JV, any of the three owners with adjusted voting shares would gain a majority if they team up with only one other owner. The adjustment of voting shares under the PFJ condition will soften the internal "give and take" among the Hulu owners necessary to reach consensus on key decisions.

The critical question therefore is whether the scaling-up of voting shares envisioned by the consent decree will preserve the dynamics that have been responsible for Hulu's innovative strategy and growth. This dynamic has, in turn, played a fundamental role in shaping competition in the OVD segment of the VPD market. The scaling-up condition will likely not protect competition (as is required for the PFJ to be in the public interest) relative to a scenario that preserves the pre-JV structure of voting on Hulu governance and management matters. Such an approach would require NBCU to divest its interest in Hulu to a viable third party buyer.

E. Short of the DOJ suing to stop the transaction, no set of remedies will prevent the JV from controlling how rivalry develops between two major, important systems – the delivery of programming through cable television and cable modem HSI.

As described in the Complaint, the adverse effect the JV will have on competition can be viewed through a slightly different lens. In its comments to the FCC, for example, the AAI characterized the competitive problem as one in which the JV will increase Comcast/NBCU's control over two major programming and distribution systems – cable television and cable modem HSI. Such control allows the JV to potentially forestall inter-system rivalry, by monitoring and controlling the development,

pace of innovation, accessibility, quality, positioning, and viability of the two systems.[45] Indeed, the Complaint highlights the fact that Comcast has taken actions to control how consumers make choices between programming delivered via the two competing systems.[46]

Absent the JV, market forces would be the determining factor in how the delivery of programming to consumers via the two rival systems evolves over time. In light of the flaws in the PFJ's conditions and requirements described above, there is a high probability that the JV will exercise significant control over how the OVD system develops relative to the cable television distribution system, to the detriment of competition and consumers.

V. Conclusion

Based on the foregoing analysis, the AAI respectfully suggests that the weaknesses in the remedies set forth in the PFJ are ill-matched to the competitive harms outlined in the Complaint. The Court should not give DOJ "a pass" in its review of this merger. There is little in the PFJ that is likely to preserve effective competition in the relevant markets, or to prevent the consumer harm that will flow from the impairment of competition. We understand that this Court is not authorized to re-write the consent decree, but it can note the availability of modifications to which the parties might agree in order to meet the public interest test.

First, rather than risking the inevitable disputes and abuse that open access remedies invite, independent management and governance of the JV should be considered. Walling off management decisions on the programming side of the JV from

[45] *Supra* note 2, at pp. 4, 6, and 17.
[46] *Supra* note 20.

decisions on the distribution side will help prevent foreclosure of OVDs. Under this condition, all officers and directors of the JV should be unaffiliated with either of the JV owners. Second, NBCU should divest its ownership interest in Hulu to an independent party that will exercise full voting rights and inject the competitive discipline that is an essential part of corporate decision-making. That Hulu is a key player in the OVD industry stresses the importance of divestiture as the only way to ensure that it does not suffer anticompetitive harm at the hands of the JV and that it remains a viable entity, unfettered by the constraints of the JV.

Respectfully Submitted,

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