

The Free State Foundation

A Free Market Think Tank For Maryland...Because Ideas Matter

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FSF Comments on FCC's Review of the Comcast-NBCU Joint Venture

Today Randolph May, President of The Free State Foundation, and Seth Cooper, FSF Adjunct Fellow, submitted [Comments](#) to the FCC in connection with the agency's consideration of the proposed joint venture that would bring together Comcast and NBCU. Some of the key points made by May and Cooper in the Free State Foundation comments follow:

"This transaction is primarily a 'vertical' integration, combining NBCU programming assets with Comcast distribution assets. The potential competitive concerns raised by vertical integrations are almost always much less than those raised by horizontal ones. This is true in this instance because the applicants largely operate in separate markets. To the extent there are any legitimate competitive concerns, any conditions imposed to address them should be narrowly drawn so as not to lose the benefit to consumers of the intended pro-competitive efficiencies."

"In considering the possibility of competitive harms arising from the proposed joint venture, the Commission must be very mindful of the video marketplace's rapid transformation through innovation and competition. At a much earlier point in time, foreclosure concerns relating to vertically integrated programming distributors had greater plausibility. During the days when traditional over-the-air broadcasters and perhaps a single cable operator served a particular territory, carriage on the cable operator's system likely was a matter affecting the financial fate of unaffiliated network and independent programmers. But, today, there are a multitude of program competitors and an increasing variety of distribution channels. According to the applicants, upon completion of the proposed transaction, the new NBCU will have about 12% of the overall national cable network advertising and affiliate revenues, and approximately six out of seven networks carried by Comcast Cable will be unaffiliated with Comcast or the new NBCU."

"Other trends demonstrate a transformative media marketplace unlike any which has existed in years past. Over 95% of Americans have access to broadband –

and the ability to access video online. Hulu or YouTube, unknown only a handful of years ago, now are widely known as alternative online outlets for consumers to access video programming and other content. With the continuing deployment of high-speed broadband, we face the possibility of future 'Internet-only' households whose residents have migrated completely away from cable, DBS or other video services and who instead access all of their video content online or through retail outlets."

"The Commission also needs to ensure the merger review process comports with sound principles of administrative law and fairness to the parties. Particularly considering the opportunity for input provided by the Commission's public comment period, and the extension of the comment deadlines to allow additional time for public input, treating the parties fairly means the Commission should act without unnecessary delay. This means rejecting calls to conduct repeated 'regulatory road shows,' whereby the review process would be dragged out without providing the agency with additional meaningful input that could not be made known through public comments."

"Moreover, acting under its vague 'public interest' authority, the FCC should not impose any conditions on the applicants that do not relate directly to competitive impacts allegedly caused by the merger. To the extent the Commission believes new rules are necessary – a doubtful proposition in the current dynamic, competitive communications marketplace – the agency should propose such rules in generic rulemaking proceedings, not through a back-door 'regulation-by-condition.'"

"Conditions imposed through secretive 'Let's Make A Deal'-style negotiations are inconsistent with a data-driven process rooted in economic analysis, and they are inconsistent with fundamental principles of administrative law and due process."

Randolph J. May, President of The Free State Foundation, is a former FCC Associate General Counsel and a former Chairman of the American Bar Association's Section of Administrative Law and Regulatory Practice. Mr. May is a nationally recognized expert in communications law, Internet law and policy, and administrative law and regulatory practice. He is the author of more than 125 scholarly articles and essays on communications law and policy, administrative law, and constitutional law, including several on reform of the FCC's merger review process. He is the editor of the new book, [*New Directions in Communications Policy*](#), and he is co-editor of other two books on communications law and policy: *Net Neutrality or Net Neutering: Should Broadband Internet Services Be Regulated?* and *Communications Deregulation and FCC Reform*. Seth L. Cooper is an Adjunct Fellow at the Free State Foundation.

A PDF version of the comments is [here](#).

The Free State Foundation is a nonpartisan, Section 501(c)(3) nonpartisan free market-oriented think tank.

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