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COMCAST-NBCU, NETFLIX, AND THE FCC: THE DUAL MERGER REVIEW PROCESS AS A HOUSE OF CARDS

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INTRODUCTION

The year is 2020. The golden age of television persists, but a war for exclusive content has erupted. HBO has emptied its coffers to produce another season of *Game of Thrones*. Netflix has constructed even more lavish sets for *The Crown*. And Hulu followed *The Handmaid's Tale* with multiple critically acclaimed dramas. Inundated by the sheer volume of programming, viewers have no choice but to sit before their television sets (or computers, or tablets, or phones) with glassy-eyed, expressionless faces and watch.[1]

But in this not-so-distant future, the problem is too much choice. First, dwindling profits in its video division prompt Comcast to allow its licensing agreements with Netflix to expire. Each show now streams exclusively on Comcast's proprietary service. Then, Disney follows suit, pulling its ABC shows from online providers and placing them on its newly developed distribution site. Soon, the movies shown on FX+ are not available on Amazon, and the shows on Crackle do not align with those on VUDU. Everyone with exclusive content refuses to share. Viewers are forced to pay for à la carte subscriptions. To compete with Comcast, Time Warner purchases a traditional network, but regulators initiate a two-year investigation. Yet, Netflix attempts to buy Hulu, and federal agencies simply watch, lacking jurisdiction to treat this merger similarly.

This is the environment emerging under the antiquated telecommunications regulatory regime. The weight of technological change has crippled a system designed for telephones and cable—not the internet. Still, the Federal Communications Commission (FCC or "Commission"), other federal agencies, and the courts must manage the fallout. While this Essay could discuss a variety of

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1 *See generally* DAVID FOSTER WALLACE, INFINITE JEST (1996) (centering around a videotape so engaging that it is used as a weapon, forcing those who watch to lose their ability to function). Wallace further describes present culture as a "U.S.A. that would die . . . for the so-called perfect Entertainment." *Id.* at 318.

influential transactions, the merger discussed below was critical in introducing many of the issues now plaguing the industry.

On December 3, 2009, Comcast announced it would acquire the National Broadcasting Company-Universal (NBCU) from General Electric (GE).[2] This combination fused the largest cable company with a leader in video production.[3] Before the ink dried on the purchase agreement, however, consumer activists and competitors organized in opposition. Specifically, they feared that non–Comcast subscribers would lose access to NBCU programming or pay unfair prices for content.[4] Needless to say, the principal telecommunications regulators—the FCC and the U.S. Department of Justice ("DOJ" or "Department")—sought review of this merger.[5]

The DOJ and the Federal Trade Commission (FTC) historically split merger review jurisdiction among industries, but telecommunications transactions are unique in that both the DOJ and the FCC simultaneously review mergers.[6] Yet, these twin processes can lead to confusion and inconsistency.[7] For instance, the DOJ's review often parallels trends in antitrust theory,[8] taking a more free-market approach, while the FCC regulates with a heavier hand.[9] These differing agency attitudes can result in unequal treatment and negative market consequences.[10]

On January 18, 2011, the FCC and the DOJ approved the Comcast-NBCU merger.[11] The Commission's order (the "Order") underscored Comcast's ability to hoard its newly acquired content and to raise prices on competitors.[12] For the first time, however, the FCC examined the online video distributor (OVD) market—

2 *See* Applications and Pub. Interest Statement of Comcast Corp., Gen. Elec. Co., & NBC Universal, Inc. at 1, MB Docket No. 10-56 (Fed. Commc'ns Comm'n Jan. 28, 2010).

3 Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Thirteenth Annual Report, 24 FCC Rcd. 542, 550, 555 (2009) [hereinafter FCC Competition Report].

4 *See* Tim Arango, *G.E. Makes It Official: NBC Will Go to Comcast*, N.Y. TIMES (Dec. 3, 2009), http://www.nytimes.com/2009/12/04/business/media/04nbc.html (describing the deal's political tensions).

5 Applications of Comcast Corp., Gen. Elec. Co., & NBC Universal, Inc. for Consent to Assign Licenses & Transfer Control of Licensees, 26 FCC Rcd. 4238, 4246–47 (2011) [hereinafter Comcast-NBCU Order].

6 *See* Rachel E. Barkow & Peter W. Huber, *A Tale of Two Agencies: A Comparative Analysis of FCC and DOJ Review of Telecommunications Mergers*, 2000 U. CHI. LEGAL F. 29, 29.

7 *Id.* at 31.

8 *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007) (following *Sylvania*—per se illegality of vertical integration is unnecessary); Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) (moving away from per se vertical merger illegality). *See generally* Christopher S. Yoo, *Vertical Integration and Media Regulation in the New Economy*, 19 YALE J. ON REG. 171, 188 (2002) (discussing how the Chicago School questioned the need to regulate vertical mergers).

9 *See* Barkow & Huber, *supra* note 6, at 34.

10 *See* RICHARD A. POSNER, ANTITRUST LAW 227 (2d ed. 2001) ("Because there are motives for mergers unrelated to either monopolistic intent or economies of integration, one cannot be certain that a series of vertical mergers reflects the existence of substantial economies of vertical integration . . . .").

11 *See* Comcast-NBCU Order, *supra* note 5, at 4243.

12 *Id.* at 4250–51.

Netflix, Hulu, Amazon—as a potential threat to multichannel video programming distributors (MVPDs) like Comcast.[13] Because of this market's embryonic state, the FCC felt the merger threatened its development and imposed conditions to ensure its growth. While the FCC correctly included this burgeoning technology in its analysis, it failed to accurately process how this market would develop. Like a new parent, the FCC insulated the nascent OVDs from competition—all but ensuring their unchecked expansion.

This Essay argues that the FCC inconsistently dissects market trends, and its costly processes—paired with DOJ review—stymie growth in the telecommunications industry. Part I traces the history of dual review and compares the FCC's procedures with the DOJ's. Part II evaluates the Comcast-NBCU deal—its history, the FCC Order, and the conditions imposed. Part III argues that the FCC is not adept at analyzing telecommunications transactions, and is certainly not adept at predicting market developments. It then claims that the Comcast-NBCU deal unearthed serious problems in the dual review process. Specifically, jurisdictional restrictions facing the FCC limit the types of transactions it can regulate, as compared to traditional antitrust agencies. Ultimately, this Essay recommends that the DOJ have sole authority to review mergers because it can apply a consistent framework to *all* telecommunications transactions.

I. THE FCC AND DUAL REVIEW

Created during the New Deal era, the FCC initially sought to make "available . . . a rapid, efficient . . . wire and radio communication service with adequate facilities at reasonable charges."[14] This straightforward task expanded through time to include modern technology.[15] Nevertheless, the FCC's chief duties still include issuing broadcast licenses[16] and ensuring that consumers have access to telecommunications services.[17] One way the agency exercises this latter function is through merger review.[18]

The agencies traditionally responsible for this review, the DOJ and the FTC, derive their authority from a series of antitrust statutes. First, the Sherman Antitrust Act grants enforcement power to prevent unreasonable "restraint[s] of trade or commerce,"[19] and to prevent "monopoliz[ation]."[20] Next, the Clayton Act places

13 *Id.* at 4267.

14 Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended at 47 U.S.C. § 151 (2012)).

15 *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

16 *See* 47 U.S.C. § 310(d) (outlining license transfer procedures).

17 *See id.* § 151.

18 Though "public interest" has a broad definition, one goal of its use in the FCC context is universal consumer coverage. *See id.* §§ 214, 310 (stating that license transfers must promote "the public interest, convenience, and necessity"); *see also* Barkow & Huber, *supra* note 6, at 34 n.20 (reiterating the source(s) of FCC merger review authority).

19 Sherman Antitrust Act, ch. 647, § 1, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. § 1 (2012)).

20 *Id.* § 2 (codified as amended at 15 U.S.C. § 2).

default merger jurisdiction in the FTC and the DOJ.[21] Under this law, both agencies regulate instances of price discrimination[22] and review mergers crossing certain thresholds.[23] Further, the Hart-Scott-Rodino Antitrust Improvements Act establishes premerger notification and filing procedures.[24]

Conversely, the Communications Act of 1934 grants the FCC authority to regulate mergers through the spectrum license transfer process—that is, whether the "public interest, convenience, and necessity w[ould] be served" in the transfer.[25] In addition, section 214 gives the Commission authority to regulate "acquisition[s] of lines by a common carrier" using the public interest standard.[26] At the same time, Congress granted the FTC superfluous jurisdiction to review mergers involving common carriers under sections 7 and 11 of the Clayton Act.[27] But when the FCC discusses its jurisdiction, it "invariably notes this authority, then states that it need not rely upon the Clayton Act because the Commission's review under the Communications Act['s public interest standard] is sufficient."[28] This public interest standard has been "construed broadly"[29] to grant the Commission wide latitude to intervene in the industry.

The DOJ and the FTC divide jurisdiction among particular industries to avoid overlap.[30] In telecommunications transactions, however, the FCC is charged with reviewing mergers that the DOJ also regulates, creating a dual review process with inconsistent standards.[31] The FCC's process is arduous, while the DOJ's antitrust procedures are more straightforward. For instance,

> [a]ny DOJ challenge to a proposed merger requires the DOJ to bear the burden of proving a violation of the antitrust laws. This procedural posture is crucial—mergers are presumed not to substantially lessen competition absent a contrary showing. Against this backdrop, the DOJ's analysis of proposed mergers results in a predictable standard that allows companies to forecast the benefits of the merger.[32]

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21 Clayton Act, Pub. L. No. 63-212, ch. 323, § 7A, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. § 18a).

22 15 U.S.C. § 13.

23 *Id.* § 18a.

24 Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, § 201, 90 Stat. 1383 (codified as amended at 15 U.S.C. § 18a).

25 47 U.S.C. § 309(a) (2012).

26 STUART MINOR BENJAMIN & JAMES B. SPETA, TELECOMMUNICATIONS LAW AND POLICY 489 (4th ed. 2015).

27 Clayton Act, ch. 323, §§ 7, 11, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 18, 21(a)) (giving the FCC enforcement jurisdiction over "common carriers").

28 Barkow & Huber, *supra* note 6, at 41.

29 William J. Rinner, Comment, *Optimizing Dual Agency Review of Telecommunications Mergers*, 118 YALE L.J. 1571, 1574 (2009).

30 *See* William E. Kovacic, *The Institutions of Antitrust Law: How Structure Shapes Substance*, 110 MICH. L. REV. 1019, 1022–26 (2012) (reviewing DANIEL A. CRANE, THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT (2011)).

31 *See* Rinner, *supra* note 29, at 1577 ("Parties seeking to merge must clear regulatory hurdles set at different heights—transactions that clear the DOJ's well-advertised test might compel the FCC to attach broad-ranging conditions.").

32 *Id.* at 1573–74 (footnote omitted).

Thus, the DOJ fosters free-market principles by blocking *only* substantially anticompetitive transactions,[33] whereas "the FCC frequently uses merger reviews as forums for advancing its regulatory agenda."[34] It accomplishes this by "order[ing] merging parties to submit to conditions in order to obtain license transfer approval."[35] And lack of approval ultimately blocks the deal.[36]

From a procedural standpoint, the DOJ and the FTC can review mergers in any industry, provided that the transactions are anticompetitive. The FCC's threshold for jurisdiction, however, is limited to broadcast license transfers or the acquisition of wire infrastructure. That said, once the FCC has jurisdiction, it is constrained only by the broad public interest standard.[37] The result: "In adjudications, the Commission can advance its policies in a way that seems entirely fact-specific, which leaves it room to retain its position in the next case or to abandon it at will."[38] Not bound by rulemaking's formalities, the FCC has flexibility to make unpredictable, nonprecedential decisions.

A final difference is timing. The DOJ process is bound by the Hart-Scott-Rodino Act,[39] where "[n]otification of a proposed merger triggers a thirty-day waiting period."[40] No action results in implicit acceptance.[41] However, the FCC faces no such constraint. Only "[a] self-imposed 180-day deadline" exists (though is rarely adhered to).[42] In the end, the FCC's unclear process may chill investment, deter mergers, and stymie long-term planning efforts.

At the core of the FCC's review, however, is the public interest standard. The Commission "employs a balancing test, weighing any potential public interest harms of the proposed transaction against any potential public interest benefits."[43] And it applies opaque standards like the affected quality of "communications services," "technological . . . changes," and "trends within the communications industry."[44] Ultimately the applicants "bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest."[45]

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33 *See* Barkow & Huber, *supra* note 6, at 39.

34 *Id.* at 34. *See generally* JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 330 (1989) (arguing that broadcasters give the FCC a wide berth by preemptively censoring themselves, fearing that the agency will overregulate otherwise).

35 Barkow & Huber, *supra* note 6, at 62.

36 *See id.*

37 *See id.* at 66; *see also* BENJAMIN & SPETA, *supra* note 26, at 491 ("[T]he FCC's merger review standards are potentially much broader than the standards applied under the antitrust laws . . . .").

38 Barkow & Huber, *supra* note 6, at 67.

39 *See generally* Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (codified at 15 U.S.C. § 1311 (2012)).

40 Rinner, *supra* note 29, at 1573.

41 *Id.*

42 *Id.* at 1574.

43 Comcast-NBCU Order, *supra* note 5, at 4247.

44 *Id.* at 4248 (admitting that the FCC's analysis is "informed by but not limited to traditional antitrust principles").

45 *Id.* at 4247.

II. BRAVE NEW WORLD: THE COMCAST-NBCU MERGER

Abstract discussions of dual review are feasible, but a better pedagogical strategy examines agency processes through the lens of past transactions. Here, Comcast-NBCU serves as the focal point because it brings into sharp relief many current issues in the video market.

In 2006, Comcast was the largest cable provider in the Americas.[46] Through the 2000s, Comcast pursued an aggressive growth strategy, most notably in its failed bid to take over The Walt Disney Corporation for $54.1 billion.[47] But despite its continued growth, Comcast's hostile tactics impaired its reputation with consumers.[48]

NBC was founded in 1926.[49] One of the preeminent networks since inception, it now houses an array of stations.[50] In 1986, GE took control of NBC, and in 2004 it purchased a majority stake in Universal, forming NBCU.[51] This combination retained the programming wing, but now included Universal's movie studios and resorts.[52]

In December 2009, GE announced a deal to cede control of NBCU to Comcast.[53] Initially, it was structured as a joint venture, where Comcast would control fifty-one percent, but over time it could purchase the remaining shares for $30 billion.[54] For GE, this was one of several post–financial crisis divestitures to shift back to its industrial roots.[55] For Comcast, NBCU fit within the company's

46 *See* FCC Competition Report, *supra* note 3, at 555–56 & tbl. 2 (showing that, as of June 2006, Comcast, with 21.5 million subscribers, had approximately double the subscribers of its closest competitor, Time Warner).

47 Geraldine Fabrikant, *Comcast Pulls Disney Bid Off the Table, and Wall Street Breathes a Sigh of Relief*, N.Y. TIMES (Apr. 29, 2004), http://www.nytimes.com/2004/04/29/business/comcast-pulls-disney-bid-off-the-table-and-wall-street-breathes-a-sigh-of-relief.html.

48 *See* Jennifer Saranow Schultz, *The Results of the Worst Company in America Vote*, N.Y. TIMES (Apr. 30, 2010), https://bucks.blogs.nytimes.com/2010/04/30/the-worst-company-in-america/; *see also* Alison Griswold, *The Most Hated Merger in America*, SLATE (Apr. 24, 2015), http://www.slate.com/articles/business/moneybox/2015/04/comcast_time_warner_cable_merger_why_it_fell_apart.htm (arguing that Comcast's actions led to negative reactions).

49 *Our History*, NBCUNIVERSAL, http://www.nbcuniversal.com/our-history (last visited Sept. 30, 2018).

50 *Id.*

51 *Id.*

52 *See* Comcast-NBCU Order, *supra* note 5, at 4244.

53 *See* David B. Wilkerson & Steve Goldstein, *Comcast Scores Controlling Stake in NBC Universal*, MARKETWATCH (Dec. 3, 2009), http://www.marketwatch.com/story/comcast-to-buy-nbc-stake-as-venture-formed-2009-12-03 ("The long-awaited agreement would give Comcast control of one the country's most storied broadcast networks . . . .").

54 *See* David Goldman & Julianne Pepitone, *GE, Comcast Announce Joint NBC Deal*, CNNMONEY (Dec. 3, 2009), http://money.cnn.com/2009/12/03/news/companies/comcast_nbc/; *see also* Press Release, Comcast, Comcast to Acquire Gen. Elec.'s 49% Common Equity Ownership Interest in NBCUniversal (Feb. 12, 2013), http://corporate.comcast.com/news-information/news-feed/comcast-to-acquire-general-electrics-common-equity-ownership-interest-in-nbcuniversal.

55 *See* Press Release, Gen. Elec., GE to Create Simpler, More Valuable Indus. Co. by Selling Most GE Capital Assets; Potential to Return More Than $90 Billion to Inv'rs Through 2018 in

growth model,[56] creating synergies between proprietary content and its distribution network.[57]

The deal was at best met with suspicion,[58] and at worst, full-scale opposition.[59] Most of the industry remained silent, especially competitor MVPDs, but programmers feared Comcast would leverage its network to unfairly benefit NBCU.[60] Yet, early commentary indicated begrudging acceptance, as "[m]ost stakeholders expect[ed] regulators to approve the deal, with conditions attached, by early [2011]."[61]

Nevertheless, Comcast endured both FCC and DOJ review,[62] eliciting over 29,000 comments and months of hearings.[63] DISH Network, a distribution opponent, feared that Comcast would leverage its network to limit customers' access to NBCU programming. In their petition to deny, DISH argued that "[t]he merged Comcast-NBCU would have a greater incentive and ability to discriminate against competitors in the online video and [MVPD] markets than [did] either company pre-merger."[64] From a content standpoint, Bloomberg carried the torch in opposition. At stake was its popular business news service: Bloomberg TV. It argued that pairing the largest MVPD with one of the largest content providers would uniquely position Comcast to unfairly "discriminate against BTV to protect [Comcast-NBCU]."[65] Arguing that news networks must retain objectivity and free-flowing

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Dividends, Buyback & Synchrony Exch. (Apr. 10, 2015), https://www.ge.com/sites/default/files/ge_webcast_press_release_04102015_1.pdf (providing another example where GE ridded itself of divisions outside its core business).

56 *Cf.* Paul R. La Monica, *Comcast Bids for Disney*, CNNMONEY (Feb. 18, 2004), http://money.cnn.com/2004/02/11/news/companies/comcast_disney/ (discussing the Disney bid).

57 *See* Press Release, Comcast, Comcast and GE Receive Regulatory Clearance for NBC Universal Transaction (Jan. 18, 2011), http://corporate.comcast.com/images/Comcast-GE-Regulatory-Clearance-FINAL-11811.pdf [hereinafter Comcast Regulatory Clearance Press Release].

58 Brian Stelter, *In NBC-Comcast Deal, Quiet Concerns*, N.Y. TIMES (June 21, 2010), http://www.nytimes.com/2010/06/21/business/media/21comcast.html.

59 Joe Flint, *Comcast-NBC Universal Merger Draws Criticism*, L.A. TIMES (June 22, 2010), http://articles.latimes.com/2010/jun/22/business/la-fi-ct-fcc-20100622.

60 *See id.*

61 *See* Stelter, *supra* note 58; *see also* Cecilia Kang, *Comcast-NBC Merger Gains Traction*, WASH. POST (Dec. 24, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/12/23/AR2010122305390.html (mentioning that the FCC Chairman would vote for the merger).

62 *See* Comcast Regulatory Clearance Press Release, *supra* note 57; *see also* Competitive Impact Statement at 6–7, United States v. Comcast Corp., No. 11-cv-00106, 2011 WL 5402137 (D.D.C. Sept. 1, 2011) [hereinafter Competitive Impact Statement], https://www.justice.gov/atr/case-document/competitive-impact-statement-72 (commenting on the coordination between agencies).

63 *See* Comcast-NBCU Order, *supra* note 5, at 4246.

64 Petition to Deny of DISH Network L.L.C. and Echostar Corp. at ii, Applications for Consent to the Transfer of Control of Licenses Gen. Elec. Co. to Comcast Corp., MB Docket No. 10-56 (Fed. Commc'ns Comm'n June 21, 2010) (stating that Comcast and NBCU showed "a propensity to leverage its power to thwart competitors").

65 Petition to Deny at 4, Applications for Consent to the Transfer of Control of Licenses Gen. Elec. Co. to Comcast Corp., MB Docket No. 10-56 (Fed. Commc'ns Comm'n June 21, 2010).

information, Bloomberg invoked a purposive reading of the public interest standard to condemn the deal.[66]

Yet, when the dust settled, regulators approved the merger and issued separate opinions describing their respective decisions.[67] This review process, in particular, fostered "unprecedented" cooperation between the agencies,[68] so the conditions were roughly identical.[69] That said, the FCC and the DOJ analyzed the market in subtly different, but important, ways. Part II discusses the FCC's analysis of the programming and distribution markets. Then it briefly compares this analysis to the DOJ's. Finally, it concludes with a discussion of the conditions imposed on the parties.

A. FCC and DOJ Market Analyses

The Commission focused its analysis on two categories: competitive harms to MVPDs and competitive harms to OVDs.[70] The Order acknowledged that "[t]his transaction would effectuate an unprecedented aggregation of video programming content."[71] As the largest cable distributor, Comcast could command a "higher price in negotiations over the terms of arrangements for [NBCU] programming" with competitor MVPDs.[72] Comcast claimed, however, that its new programming division would only account for approximately thirteen percent of the content market; thus, the threat against competitor MVPDs was overblown.[73] The FCC determined, however, that "[t]he record show[ed] that the loss of Comcast-NBCU programming, including the programming contributed by NBCU, would harm rival video distributors, reducing their ability or incentive to compete with Comcast for subscribers."[74]

The Commission also evaluated how the Comcast-NBCU merger would affect the burgeoning OVD market.[75] It stated that "[o]ne half of American consumers

66 *Id.*

67 Eliza Krigman, *FCC Approves Comcast-NBC Merger*, POLITICO (Jan. 19, 2011), http://www.politico.com/story/2011/01/fcc-approves-comcast-nbc-merger-047757.

68 *See* Press Release, Dep't of Justice Antitrust Div., Justice Dep't Allows Comcast-NBCU Joint Venture to Proceed with Conditions (Jan. 18, 2011), https://www.justice.gov/opa/pr/justice-department-allows-comcast-nbcu-joint-venture-proceed-conditions.

69 *Compare* Comcast-NBCU Order, *supra* note 5, at 4240–41 (listing the conditions), *with* United States v. Comcast Corp., No. 11-cv-00106, 2011 WL 5402137, at *4–12 (D.D.C. Sept. 1, 2011) (articulating comparable conditions).

70 *See* Comcast-NBCU Order, *supra* note 5, at 4250, 4263.

71 *Id.* at 4240.

72 *Id.* at 4251 (commenting that Comcast "engaged in foreclosure strategies in the past"); *see also id.* at 4258–59 ("In fact, [Comcast-NBCU's] own documents support the conclusion that some of the national cable networks combined in this transaction have such loyal viewers that the transaction will allow Comcast-NBCU to extract higher rents from MVPDs."); *id.* at 4255–56 (limiting the market size of MVPDs to cable-related services).

73 *Id.* at 4252.

74 *Id.* at 4254; *see also id.* at 4255 (treating Comcast as the sole owner of this joint venture with GE).

75 *See id.* at 4263.

watch some video over the Internet."[76] Therefore, the FCC wrote that "as a vertically integrated company, Comcast will have the incentive and ability to hinder competition from other OVDs."[77] Next, the FCC listed anticompetitive strategies Comcast might employ to limit OVD growth, including restrictions of "access to or raising the price of affiliated online content; . . . blocking, degrading, or otherwise violating open Internet principles[; and] . . . using Comcast set-top boxes to hinder the delivery of unaffiliated online video."[78]

There was a natural fear that Comcast could withhold content from OVDs, with the FCC admitting that these services posed a threat to traditional MVPDs. Commenters responded, arguing that OVDs "already—or soon will—provide viable commercial alternatives to traditional MVPDs."[79] Comcast, however, argued that these online streaming services did not compete directly, but rather were "supplement[al]."[80] The cable provider also stated that OVDs could not stand alone as profitable businesses because "it is too expensive for OVDs to purchase professional video from the content owners, who make significantly more money by selling to the traditional MVPDs."[81] The Commission agreed that "cord-cutting" rarely occurred and that "most consumers *today* do not see OVD service as a substitute for their MVPD service, but as an additional method of viewing programming."[82] The FCC's mixed reading shines through. It admits that OVDs pose a competitive threat, but it couches its analysis in language that fails to describe these services as legitimate substitutes.

The DOJ released its findings and its final judgment on the same day the FCC released its Order.[83] The conditions were filed in district court, but in accordance with the Antitrust Procedures and Penalties Act, the Department also considered the merger's competitive impact.[84] Thus, it simultaneously released a competitive impact statement (the "Statement") to assess the industry.

Here, the two agencies drew similar conclusions about the budding OVD industry. Like the FCC Order, the Statement claimed that "Comcast and other MVPDs recognize the threat posed to their video distribution business from the growth of OVDs."[85] And further, it noted that "Comcast's and other MVPDs' reactions to the emergence of OVDs demonstrate that they view OVDs as a future competitive threat."[86]

76 *Id.* at 4264 (claiming that online distribution "figures prominently in the plans of many MVPDs and other OVDs").

77 *Id.* at 4263.

78 *Id.*

79 *Id.* at 4267.

80 *Id.* at 4268. *But see* MCKINSEY & CO., GLOBAL MEDIA REPORT 5 (2015), https://www.mckinsey.com/industries/media-and-entertainment/our-insights/global-media-report-2015 (claiming that cord-cutting has become more prevalent).

81 Comcast-NBCU Order, *supra* note 5, at 4268.

82 *Id.* at 4269.

83 *See* Competitive Impact Statement, *supra* note 62, at 1.

84 15 U.S.C. § 16(e) (2012).

85 Competitive Impact Statement, *supra* note 62, at 19.

86 *Id.* at 20.

However, parts of the DOJ analysis revealed a more nuanced understanding of the online video industry. It claimed that OVDs "represent the most likely prospect for successful competitive entry into the existing video programming distribution market."[87] Unlike the FCC, it acknowledged differences in OVD service models, and that "undoubtedly [some OVDs] will be viewed by consumers as closer substitutes for MVPD services than others."[88] Moreover, the DOJ admitted that it was uncertain as to future market developments. Yet, any technological changes "would follow *standard merger evaluation principles* and consider not only the role of OVDs, but also factors such as the extent to which the merging firms' offerings are close substitutes and compete directly."[89] Therefore, rather than making unilateral rulings on a case-by-case basis, the DOJ stated it would continue to follow time-tested antitrust practices. In sum, the FCC had the wherewithal to envision OVDs as a competitive threat, but it failed to take the next step in analyzing future developments that might affect the conditions it ultimately imposed.

B. The FCC's Merger Approval Conditions

The Commission found that Comcast had incentives to withhold NBCU content from MVPDs, and even though the OVD market was small in 2010, Comcast believed it could eventually threaten the industry. Therefore, in close coordination, both the DOJ and the FCC imposed conditions on the Comcast-NBCU merger. This Section, however, focuses specifically on the FCC Order.

First, the Commission wanted to ensure that other MVPDs had access to NBCU programming on equal terms. As part of this condition, the FCC adopted an arbitration process to provide companies access to formal proceedings to "resolv[e] disputes about prices, terms, and conditions for licensing."[90]

Next, the Commission wanted to safeguard OVDs from MVPDs withholding content.[91] It required Comcast to offer NBCU content "at fair market value and non-discriminatory prices."[92] The cable conglomerate also had to grant OVDs access at the same nondiscriminatory prices.[93] Further, the Commission prevented Comcast from entering "into agreements to hamper online distribution of its own video programming or programming of other providers."[94] To supplement these conditions, the FCC wanted to guarantee that online providers had access to

87 *Id.* at 28; *see also id.* at 17 (imagining OVDs as a threat depends upon factors "such as the OVD's ability to obtain popular content, its ability to protect the licensed content from piracy, its financial strength, and its technical capabilities to deliver high-quality content").

88 *Id.* at 17.

89 *Id.* at 19 (emphasis added). The DOJ competitive impact statement does not quite predict the current market segmentation among OVDs, but it mentions consumer use of multiple OVDs. *Id.* at 18 ("[C]ustomers may rely on an individual OVD or may view video content from a number of OVDs . . . .").

90 *See* Comcast-NBCU Order, *supra* note 5, at 4241.

91 *Id.*

92 *Id.* The Cable Act of 1992 first envisioned vertical integration problems associated with video distribution. *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified as amended in scattered sections of 47 U.S.C.).

93 *See* Comcast-NBCU Order, *supra* note 5, at 4241.

94 *Id.*

broadband at "reasonable prices and . . . sufficient bandwidth."[95] The underlying fear in the Order was Comcast's mountain of exclusive content, and the conditions ensured "that Comcast not discriminate in video programming distribution."[96]

To shepherd the deal past the regulators, Comcast also agreed to several voluntary conditions. These included broadband access to low-income households and assurances that NBCU would provide local news and children's programming.[97] While consumer access to fairly priced content underpinned most of the FCC's conditions, these voluntary provisions were meant to directly address consumer fears.[98]

III. RETHINKING THE ROLE OF THE FCC IN TELECOMMUNICATIONS MERGERS

The postmerger commentary was skeptical, yet still optimistic. Opponents objected to the merger of "programming and distribution when News Corp. acquired DirecTV in 2003, only to see News Corp. reverse the transaction five short years later."[99] Additionally, Time Warner spun off its cable business in 2008, creating a more focused organization.[100] These maneuvers suggest that trepidation with Comcast-NBCU was overblown, but scholars feared "Comcast still sought to slow down the growth of OVDs until it could transition its customers to its own Internet-based video distribution platform."[101] Others claimed, however, that "it is hard to see how [Comcast] could use its control over content to harm competition. To do so would require the merged company to have a dominant position in content and the market to be protected by entry barriers."[102] While the Commission lacked the requisite crystal ball to forecast the future market, the comments above demonstrate the uncertainty surrounding this transaction.

This Part evaluates the flaws in the FCC's analysis. It discusses recent market developments, which are a byproduct of this merger. Next, it argues that dual review failed the telecommunications industry. Finally, it claims that consumers would benefit by ceding authority to traditional antitrust agencies.

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95 *Id.*

96 *Id.* at 4287.

97 *Id.* at 4242.

98 *Id.*

99 Christopher S. Yoo, *Technological Determinism and Its Discontents*, 127 HARV. L. REV. 914, 917 (2014) (reviewing SUSAN CRAWFORD, CAPTIVE AUDIENCE: THE TELECOM INDUSTRY AND MONOPOLY POWER IN THE NEW GILDED AGE (2013)).

100 Press Release, Time Warner, Time Warner and Time Warner Cable Agree to Separation (May 21, 2008), http://ir.timewarner.com/phoenix.zhtml?c=70972&p=irol-twcseparation.

101 Yoo, *supra* note 99, at 933; *see also* Tom Teodorczuk, *Comcast Is Trying to Win Over Millennials with New Streaming Service*, MARKETWATCH (July 28, 2017), http://www.marketwatch.com/story/comcast-is-trying-to-win-over-millennials-with-new-streaming-service-2017-07-27 (targeting millennials with Xfinity Instant TV).

102 Yoo, *supra* note 99, at 935.

A. Mistakes in the FCC's Analysis

The FCC merger review is derived from the public interest language embedded in the Communications Act,[103] which invokes the New Deal–era belief that agencies deliver nonpolitical expertise.[104] While the DOJ and the FTC have proficient merger procedures,[105] the FCC is expected to possess more knowledge about telecommunications transactions.[106] Still, the FCC frequently faces criticism because of its bloated processes.[107]

In this instance, the Commission misjudged the progression of the online video market and protected OVDs to the detriment of MVPDs. The FCC highlighted commenters claiming "that OVDs need NBCU content to be effective competitors."[108] At base, Comcast was required to fairly deal with OVDs to ensure their survival. While it is easy to gloss over this statement, it underpins the conditions imposed on Comcast and generates a few problematic assumptions.[109]

First, it assumes OVDs are limited in the content they can acquire. But NBCU only constituted approximately thirteen percent of the programming market.[110] OVDs had access to a vast library outside Comcast's control.[111] For instance, when Netflix created its streaming service, it signed agreements with Viacom[112]

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103 *See* 47 U.S.C. §§ 214, 309(a) (2012).

104 *See* JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 154–55 (1938); *see also* GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 72 (7th ed. 2016) ("The structure of administrative institutions . . . cannot help but be shaped by the theories of agency behavior that are dominant at any particular time.").

105 *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010) [hereinafter MERGER GUIDELINES].

106 *Cf.* BENJAMIN & SPETA, *supra* note 26, at 487 (discussing the FCC's power to review telecommunications mergers and the remedies it can independently impose, distinct from those remedies imposed by antitrust agencies).

107 *See, e.g.*, Brendan Sasso, *The FCC Has the 'Worst Idea in the History of the Civilized World!!!!!!'*, ATLANTIC (Feb. 19, 2014), https://www.theatlantic.com/politics/archive/2014/02/the-fcc-has-the-worst-idea-in-the-history-of-the-civilized-world/457233/ (showing that comments flooded the FCC in response to a rule allowing cell phones on planes).

108 *See* Comcast-NBCU Order, *supra* note 5, at 4268. *But see* Competitive Impact Statement, *supra* note 62, at 11 (emphasizing that growth of OVDs depends, in part, on their ability to acquire programming from content providers).

109 *See* MICHAEL E. PORTER, COMPETITIVE ADVANTAGE: CREATING AND SUSTAINING SUPERIOR PERFORMANCE 8–11 (1985) (outlining the framework for analyzing competitive markets).

110 Comcast-NBCU Order, *supra* note 5, at 4252.

111 *See* Opposition to Petitions to Deny and Response to Comments at 182–84, Applications of Comcast Corp., Gen. Elec. Co., & NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licensees, MB Docket No. 10-56 (Fed. Commc'ns Comm'n June 21, 2010) [hereinafter Comcast Opposition] (arguing that Comcast would not have the market power to limit OVDs).

112 *See* Julianne Pepitone, *Amazon Prime Scores Viacom Shows After Netflix Deal Expires*, CNN (June 4, 2013), http://money.cnn.com/2013/06/04/technology/amazon-viacom/index.html (discussing Viacom's signing with Amazon after the Netflix deal expired).

(Paramount, MTV, Nickelodeon, et al.) and Disney[113] (Pixar, ABC, ESPN, et al.), in addition to NBCU.[114] The FCC's assumption only makes sense if other programmers refused access to OVDs, which at the time rarely occurred.[115]

Second, the FCC assumed that OVDs cannot provide original content.[116] Yet, Netflix began spending billions of dollars on shows like *House of Cards* and *Orange Is the New Black*. In the third quarter of 2017, it spent $2.6 billion developing new programming.[117] In addition to this never-ending stream of content, many OVDs continue to license rerun shows.[118] This creates a steady diet of new and existing content, illustrating how OVDs can independently present competitive challenges to MVPDs.

Finally, the statement assumes OVDs will remain dependent upon distributors. While the FCC opinion notes that OVDs are not purely supplemental, the conditions assume as much.[119] Comcast-NBCU was forced to offer its content at competitive prices to OVDs.[120] Perhaps OVDs were dependent at infancy, but they have now grown so significantly that they pose challenges to MVPDs. The new Disney service is the best example of OVD independence, and their ability to operate without the crutch of cable distribution. Here, the FCC failed to foresee these developments, and its merger conditions did little to facilitate a competitive market.

B. Video Programming Developments

In the beginning, Netflix and other OVDs licensed network shows, acting as centralized content hubs.[121] Consumers received shows at any time, often under a

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113 *See* Doreen McCallister, *Disney Will End Netflix Deal and Offer Its Own Streaming Services*, NPR (Aug. 9, 2017), http://www.npr.org/sections/thetwo-way/2017/08/09/542353743/disney-will-end-netflix-deal-and-offer-its-own-streaming-services (announcing Disney's competitor service).

114 *See* Julianne Pepitone, *Netflix Renews Contract for NBCUniversal Movies and TV*, CNNMONEY (July 13, 2011), http://money.cnn.com/2011/07/13/technology/netflix_nbc/index.htm (discussing the first deal between Netflix and NBCU postmerger).

115 Comcast Opposition, *supra* note 111, at 181–82 (demonstrating Comcast's belief that the "combined entity would need to have market power in online video programming content").

116 Neither the FCC Order nor the DOJ final judgment refer to OVDs potentially producing original content. *See generally* United States v. Comcast Corp., No. 11-cv-00106, 2011 WL 5402137 (D.D.C. Sept. 1, 2011); Comcast-NBCU Order, *supra* note 5.

117 *See* Max A. Cherney, *Here's How to Break Down the Billions Netflix Spends on Original Movies and Shows*, MARKETWATCH (Oct. 18, 2017), http://www.marketwatch.com/story/how-netflix-reveals-the-billions-it-spends-on-content-2017-10-16.

118 *See* Mark Rogowsky, *How Are the Negotiating Dynamics Changing Between Netflix and the Movie / TV Studios?*, FORBES (Jan. 10, 2014), https://www.forbes.com/sites/quora/2014/01/10/how-are-the-negotiating-dynamics-changing-between-netflix-and-the-movie-tv-studios/#2f94f67f18a3 (arguing that OVD growth increases the value of licensing agreements).

119 *See* Comcast-NBCU Order, *supra* note 5, at 4269.

120 *Id.* at 4241.

121 *See* Competitive Impact Statement, *supra* note 62, at 15–17.

monthly fee, per transaction fee, or free-with-ads pay structure.[122] Networks did not believe there was "much appetite" for streaming services, so they licensed shows inexpensively.[123] But as streaming became profitable, networks sought to exploit these licensing agreements.[124] As a result, Netflix shifted its focus to original content; therefore, the "library has become increasingly exclusive."[125] Amazon tripled the number of original shows last year,[126] while Apple is budgeting one billion dollars for original content in 2018.[127]

The breadth of content and the meteoric growth of subscriptions rightfully worried traditional producers. As Netflix expanded, it utilized its subscription base to gain leverage over production studios,[128] signing exclusive agreements that forced distribution through Netflix.[129] This created resentment within the industry—so much so that networks began allowing their licensing agreements to expire.[130] In turn, many services now produce exclusive content, with limited network programming.

As a result, studios are searching for new content delivery streams. For example, FX partnered with Comcast to create FX+: Comcast customers, for a

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122 This statement is generally true; however, OVDs operate a variety of business models. For more information, see *id.* at 11, 16–17.

123 *See* Todd VanDerWerff, *Why Shows Leave Netflix*, VOX (Mar. 30, 2017), https://www.vox.com/culture/2017/3/30/15114748/why-shows-leave-netflix (offering a descriptive account of this market evolution).

124 *See id.*; *see also* David Ng, *Netflix Is on the Hook for $20 Billion. Can It Keep Spending Its Way to Success?*, L.A. TIMES (July 29, 2017), http://beta.latimes.com/business/hollywood/la-fi-ct-netflix-debt-spending-20170729-story.html (arguing that fees continue to increase). To provide an example, Netflix spent $2 million per episode for *Blacklist*, a popular show. *See* Teresa Jue, *Netflix Acquires 'The Blacklist' for $2 Million an Episode*, ENT. WEEKLY (Aug. 28, 2014), http://ew.com/article/2014/08/28/netflix-acquires-the-blacklist-for-2-million-per-episode/ ("The $2 million price tag will be the largest per-episode fee paid by a subscription-based video-on-demand company for a television show.").

125 *Top Investor Questions*, NETFLIX, https://web.archive.org/web/20171116025216/https://ir.netflix.com/faq.cfm (last visited Oct. 14, 2018).

126 *See* Adam Levy, *Amazon's Content Budget Is Catching Up with Netflix's (If It Hasn't Already)*, MOTLEY FOOL (Apr. 18, 2017), https://www.fool.com/investing/2017/04/18/amazons-content-budget-is-catching-up-with-netflix.aspx.

127 *See* Todd Spangler, *Apple Sets $1 Billion Budget for Original TV Shows, Movies (Report)*, VARIETY (Aug. 16, 2017), http://variety.com/2017/digital/news/apple-1-billion-original-tv-shows-movies-budget-1202529421/.

128 *See* Ashley Rodriguez, *Netflix and Amazon Are Now So Big That They're Changing the Way Global TV Shows Are Financed*, QUARTZ (Mar. 29, 2017), https://qz.com/944921/netflix-nflx-and-amazon-amzn-are-now-so-big-that-theyre-changing-the-way-global-tv-shows-are-financed-starting-in-the-uk/.

129 *See* Lucas Shaw, *Netflix's Biggest Critic Responds with His Own Paid Service*, BLOOMBERG (Sept. 25, 2017), https://www.bloomberg.com/news/articles/2017-09-25/netflix-s-biggest-critic-responds-with-a-paid-service-of-his-own (expressing anger over the exclusive deal to license *American Crime Story: The People v. O.J. Simpson*).

130 *See* Christopher Palmeri, *Disney to Launch Online-Only ESPN, Drops Movie Deal with Netflix*, BLOOMBERG (Aug. 8, 2017), https://www.bloomberg.com/news/articles/2017-08-08/disney-to-launch-online-only-espn-drops-movie-deal-with-netflix.

monthly fee, gain access to FX's entire catalogue.[131] At the same time, Comcast is testing its own service to compete with OVDs, called Xfinity Instant TV.[132] Additionally, Disney's service may alter the market because ESPN streaming would create the first foray into online sports viewing—not to mention access to their famed movie studios (Marvel, Lucas Films, Pixar, Walt Disney Studios).[133]

The current video world is one of immense competition, and the central-hub conception of OVDs is in jeopardy. The success of Netflix, Amazon, and Hulu created a backlash. In an effort to compete, streaming services are now available through MVPDs, OVDs, and even traditional studios. The theory of "cord-cutting" was gaining traction,[134] but as content went directly online, it created market segmentation. Consumers once received content in a single location, but now programmers are becoming possessive of their content. The result is an endless array of services with little overlap. Now, commentators believe "cord-cutting" will make little economic sense for consumers, and that overall entertainment bills will rival the cable bills once complained of—a development contrary to what the FCC envisioned in its attempt to protect OVDs from Comcast-NBCU.[135]

C. Dual Review Exposed in the Comcast-NBCU Merger

While other industries work with either the DOJ or the FTC, telecommunications companies manage two processes simultaneously. Again, the Commission derives its merger authority from a few statutes. First, the FCC has authority to review spectrum license transfers or the acquisition of lines by a common carrier.[136] But the "Commission possesses no statutory authority to review 'mergers' writ large,"[137] because these provisions address only *limited* aspects of the industry. And technological advances could limit the FCC's authority. Still, once it has jurisdiction, the public interest standard provides wide regulatory discretion.[138]

131 *See* Press Release, Comcast, FX Networks Partners with Comcast to Launch New Serv. Sept. 5th (Aug. 7, 2017), http://corporate.comcast.com/news-information/news-feed/fx-networks-new-service.

132 *See* Nelson Granados, *Comcast Launches XFinity Instant TV with Entry-Level Video Bundle; Will It Succeed?*, FORBES (Sept. 29, 2017), https://www.forbes.com/sites/nelsongranados/2017/09/29/comcast-goes-over-the-top-with-xfinity-instant-tv-will-it-succeed/#4589a497147b.

133 *See* Press Release, The Walt Disney Co., The Walt Disney Co. to Acquire Majority Ownership of BAMTech (Aug. 8, 2017), https://thewaltdisneycompany.com/walt-disney-company-acquire-majority-ownership-bamtech/.

134 *See* Comcast-NBCU Order, *supra* note 5, at 4268; *see also* Jeffrey Prince & Shane Greenstein, *Measuring Consumer Preferences for Video Content Provision via Cord-Cutting Behavior*, 26 J. ECON. & MGMT. STRATEGY 293, 314 (2017) (arguing that cord-cutting occurs most often among lower-income households and younger consumers).

135 Todd VanDerWerff, *Netflix or Hulu Won't Win the Streaming Wars. Your Cable Company Will*, VOX (Oct. 13, 2016), https://www.vox.com/new-money/2016/10/13/13156848/netflix-hulu-amazon-cable ("[I]f you subscribed to every streaming service . . . your monthly bill would be more expensive than an average cable bill on its cheapest tier.").

136 *See* 47 U.S.C. §§ 214, 309(a), 310(d) (2012).

137 Applications of Ameritech Corp. & SBC Commc'ns Inc., 14 FCC Rcd. 14712, 15188 (1999) (Comm'r Harold Furchtgott-Roth, concurring in part and dissenting in part).

138 *See* Rinner, *supra* note 29, at 1574.

The DOJ, however, has jurisdiction to review *most* mergers, but its analysis is limited to the transaction's competitive effects.[139]

In reviewing the FCC's authority, it is useful to walk through the jurisdictional issues because they expose its limitations. First, the Communications Act's license transfer provisions are unambiguous.[140] For example, if two OVDs merged—neither owning broadcast licenses—the FCC could not review the transaction.[141] And no court could interpret broader review authority from this language.

Second, "common carrier" authority is even more opaque. According to the Telecommunications Act, "common carrier" is defined as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy."[142] This unhelpful definition has become the centerpiece of several U.S. Court of Appeals for the D.C. Circuit decisions addressing FCC authority. Most recently, the "common carrier" distinction appeared in the open internet debates. In 2010, the D.C. Circuit held that the FCC had "no express statutory authority" to regulate "an Internet service provider's network management practices."[143] The Communications Act granted the Commission "express and expansive authority to regulate common carrier services," but Comcast remained classified as an information services provider.[144] Then in 2014, that same court held that the Commission had authority to regulate certain internet rules,[145] but given that broadband companies were classified as information service providers, some FCC-promulgated rules were vacated.[146] In 2015, however, the FCC reclassified broadband services as common carriers, subjecting providers to regulation under Title II of the Communications Act.[147] Soon after, this question returned to the D.C. Circuit. The Court held, in rejecting three separate petitions to reverse the Open Internet Order, that the Commission made a reasonable decision to reclassify broadband services as telecommunications services, thus subjecting providers to common carrier regulations.[148] The Court reiterated: most consumers treat content-containing applications (information services) and internet providers (telecommunications services) differently.[149] The Supreme Court has not heard this appeal, but one thing is clear: ad-on applications (OVDs) are not within the purview of common carrier regulations.[150] While OVDs

139 *See generally* 15 U.S.C. §§ 1, 18, 18a, 21 (2012); *see also* MERGER GUIDELINES, *supra* note 105, at 2–3.

140 47 U.S.C. § 310(d).

141 *See id.*

142 *Id.* § 153(11).

143 Comcast Corp. v. FCC, 600 F.3d 642, 644, 661 (D.C. Cir. 2010).

144 *Id.* at 645; *see also* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 996–97 (2005) (holding the FCC classification of broadband companies as information services providers as lawful).

145 Verizon v. FCC, 740 F.3d 623, 628 (D.C. Cir. 2014).

146 *Id.* at 650 ("We think it obvious that the Commission would violate the Communications Act were it to regulate broadband providers as common carriers.").

147 Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, 5615–16 (2015).

148 U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 697–98 (D.C. Cir. 2016), *petition for cert. filed*, No. 17-504 (U.S. Oct. 3, 2017).

149 *See id.* at 698–700.

150 *See id.* at 698.

act as content aggregators, delivering video to consumers, they still require broadband infrastructure.[151] The implication: the FCC has no authority to review OVD mergers under common carrier rules.

The only other way the FCC might argue it has jurisdiction to regulate telecommunications mergers is through ancillary jurisdiction. Section 4(i) of the Communications Act states that "[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."[152] Read broadly, this might grant the FCC jurisdiction to review mergers beyond its traditional scope, but the courts have narrowly construed this passage. To qualify for ancillary authority, the Commission must have jurisdiction under Title I, and the "regulations [must be] reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities."[153] In *Comcast Corp. v. FCC*, the court held that general policy statements were not sufficient for ancillary authority, and that such authority required grounding in congressional delegation.[154] The Commission could argue that given the coalescence in the industry, it needs ancillary authority to govern mergers, but to include OVDs would directly contradict carriage classifications and previous precedent.[155]

Thus, the FCC's merger authority leaves a large portion of the video market free from scrutiny. For instance, imagine a world where two significant OVDs merge—say Netflix and Amazon. Neither company has spectrum licenses and neither is a common carrier. Despite the massive viewership and endless content libraries, the Commission would have no power to review this merger. If two traditional networks were to merge however, say ABC and CBS, licenses would transfer, and the FCC *would* review the deal. To provide another example, imagine Comcast purchases Netflix. Again, there would be no transfer of licenses or infrastructure acquisition because Netflix does not broadcast its content. The FCC would have no authority to oversee this transaction, despite the impact on consumers. The irony is that the Commission purposefully protected OVDs and facilitated their growth; now it would have difficulty regulating them.

This is not to say that these transactions would occur free from scrutiny. Given the scope of these hypothetical deals, the DOJ would intervene to determine whether anticompetitive behavior exists. Three serious problems are created, though, in a world where the FCC has jurisdiction over *only* a portion of the market. First, the Commission might regulate mergers in a silo. Without regard to broader market conditions, it is foreseeable that when the FCC has jurisdiction to regulate a merger, it will review the transaction in a vacuum. In many respects, this is the approach the Commission took in Comcast-NBCU. While it scrutinized the OVD and MVPD

151 While OVDs are not broadcasters, they are a better substitute for broadcast television than cable or broadband providers, given their focus on content production. *See* FCC v. Midwest Video Corp., 440 U.S. 689, 702 (1979) ("The Commission is directed explicitly by § 3(h) of the [Communications] Act not to treat persons engaged in broadcasting as common carriers.").

152 47 U.S.C. § 154(i) (2012).

153 Am. Library Ass'n v. FCC, 406 F.3d 689, 691–92 (D.C. Cir. 2005).

154 Comcast Corp. v. FCC, 600 F.3d 642, 654 (D.C. Cir. 2010).

155 *See Midwest*, 440 U.S. at 702.

markets, it failed to consider downstream effects. Thus, the ex post developments discussed above were overlooked.

Second, and more likely, the FCC could regulate mergers too broadly and place conditions on parties to counterbalance the void in jurisdiction. For instance, if the FCC were faced with a merger between a distributor and a content provider, it might implement broader conditions to display its clout because it lacks authority to regulate OVD-centered transactions.[156]

And finally, when transactions occur, and the FCC has no jurisdiction, the Commission might infiltrate the DOJ processes to regulate behind the scenes. Given the coordination between departments, the FCC could influence the DOJ through joint merger guidelines and policy statements. While efficiency and coordination are good, administrative overstep is not. Thus, these trends create regulatory problems—where MVPDs are overregulated and OVDs are underregulated; they expose the perils of dual review and the need for reform.

Under these circumstances, it makes sense to leave the merger review process to the DOJ. While its scope is limited, only reviewing mergers in light of their competitive effects, it has authority to review *all* mergers within the telecommunications industry. Where the FCC has constantly played catch up to justify its jurisdiction, the DOJ has fewer roadblocks. Given the constantly changing telecommunications landscape, it makes sense to have a dynamic merger review process, instead of squeezing technology into antiquated statutes.

CONCLUSION

Despite the problems with dual agency review, the video distribution market continues to thrive. However, designing a stable process that allows review of *all* telecommunications transactions would result in greater consistency. Companies would plan accordingly when faced with DOJ review, rather than face the cloud of uncertainty associated with the FCC. Further, as the content and distribution markets converge, companies desire regulatory consistency to succeed in an increasingly competitive market. And the DOJ as sole reviewer could best manage this process to ensure fairness and uniformity.

156 *See* LANDIS, *supra* note 104, *in* FEDERAL ADMINISTRATIVE LAW, *supra* note 104, at 86–87 (highlighting the natural administrative proclivity toward more regulation).