

Expert Declaration of Matthew L. Spitzer
Concerning Diversity and Localism Issues Associated
with the Proposed Comcast-NBCU Transaction

January 26, 2010

I. INTRODUCTION

1. At the request of Comcast Corporation (“Comcast”), I have reviewed the proposed Comcast/General Electric (“GE”) transaction relating to NBC Universal (“NBCU”) with a focus on the core public interest concerns of diversity and localism that underlie the Federal Communications Commission’s (the “Commission”) broadcast ownership regulations.

2. Some critical commentary already surrounds the proposed transaction, casting it as everything from a “mega-merger”¹ to a “juggernaut”² to a “train wreck.”³ Such discourse rings hollow; familiar refrains and the automatic equation of “big” with “bad” media provide little insight into the Commission’s appropriately nuanced public interest inquiry. Instead, conceptualizing the proposed transaction in the modern media marketplace requires considered thought, and such an analysis shows that this transaction is not the type of transaction that implicates the Commission’s core concern about a reduction in the diversity of voices. Thus, amidst alarmist claims that the proposed transaction “poses a genuine threat to free expression and diversity of speech in our democratic society,”⁴ I will calmly focus on the framework and core concerns of the Commission’s traditional public interest inquiry.

¹ Press Release, Free Press, Comcast/NBC Universal Merger Bad for the Public Interest (Oct. 13, 2009).

² *Id.*

³ Josh Silver, *Too Big to Block? Why Obama Must Stop the Comcast-NBC Merger*, THE HUFFINGTON POST, Nov. 13, 2009, http://www.huffingtonpost.com/josh-silver/too-big-to-block-why-obam_b_356826.html.

⁴ The Editors, *Should Consumers Fear the Comcast Deal?*, N.Y. TIMES, Dec. 8, 2009 (quoting Andrew Jay Schwartzman, President, Media Access Project), <http://roomfordebate.blogs.nytimes.com/2009/12/08/should-consumers-fear-the-comcast-deal/?pagemode=print>.

3. As discussed in detail below, I conclude that the proposed transaction, representing a fundamentally vertical combination of a content producer and a distributor, does not raise the traditional diversity and localism concerns regarding media consolidation and the reduction of local broadcast voices. As demonstrated herein, the Commission has been very concerned about mergers that reduce diversity of voices, such as the combination of two competing broadcast outlets, two cross-service broadcast outlets, or a newspaper and broadcaster in the same market.⁵ This is not that type of transaction.⁶

II. QUALIFICATIONS

4. I am a lawyer and an economist. I have a J.D. from the University of Southern California (“USC”) and a Ph.D. in Social Science from the California Institute of Technology (“Caltech”). I currently hold joint appointments at USC, where I am a Professor of Political Science and hold the Robert C. Packard Trustee Chair in Law, and at Caltech, where I am a Professor of Law and Social Science. Previously, from July 2000 through June 2006, I was Dean of the Gould School of Law at USC.

5. Over the past 30 years, I have studied, taught, hosted conferences, and written about the Commission’s regulation of broadcasting and cable television, including its regulation of media ownership and concentration. I was the founding director of the USC Center for Communication Law and Policy (<http://cclp.usc.edu/>) and in that capacity I created and hosted many conferences and roundtables on broadcasting and cable regulation. The topics ranged from a retrospective on the deregulation of cable television to an evaluation of sex and violence on television. In this capacity, I followed closely the Commission, Congress, and the broadcasting and cable industries, and categorized and evaluated the various arguments about media ownership.

6. I currently teach Regulatory Policy and Administrative Law (at USC), Introduction to Law (at Caltech), and a graduate course in Law and Politics (at Caltech).

⁵ See *infra* Part III.

⁶ I base my analysis on information provided to me by Comcast and NBCU, from the Commission and other government agencies, and from academic, journalistic, and foundation sources. Where I rely on such information, I cite it here.

Previously during my academic career, I have taught Broadcasting Regulation, Telecommunications Regulation, Antitrust Policy, Law and Economics, Torts, Property, and Administrative Law.

7. I have published numerous books and articles on a variety of legal and economic issues associated with Broadcast and Cable Regulation.⁷ These include Public Policy Toward Cable Television (1997, AEI/MIT Press, with Thomas Hazlett) and “Television Mergers and Diversity in Small Markets” in the *Journal of Competition Law and Economics* (forthcoming 2010). Finally, I have attached my curriculum vitae, which includes a more formal list of my background, experience and publications.

III. SUMMARY OF TRANSACTION STRUCTURE

8. On December 3, 2009, Comcast and GE announced an agreement pursuant to which Comcast would acquire a majority interest in NBCU and its affiliated broadcast licensee companies from GE.⁸ The transaction will create a joint venture that combines,

⁷ SEVEN DIRTY WORDS AND SIX OTHER STORIES: CONTROLLING THE CONTENT OF PRINT AND BROADCAST (1986). PUBLIC POLICY TOWARD CABLE TELEVISION (1997) (with Thomas Hazlett). *Multicriteria Choice Processes: An Application of Public Choice Theory to Bakke, the FCC, and the Courts*, 88 YALE L.J. 717 (1979). *Radio Formats by Administrative Choice*, 47 U. CHI. L. REV. 647 (1980). *Controlling the Content of Print and Broadcast*, 58 S. CAL. L. REV. 1349 (1985). *Broadcasting and the First Amendment*, in 1 NEW DIRECTIONS IN TELECOMMUNICATIONS POLICY 155 (Paula R. Newberg ed., 1989). *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U. L. REV. 990 (1989). *Justifying Minority Preferences in Broadcasting*, 64 S. CAL. L. REV. 293 (1990). *Testing Minority Preferences in Broadcasting*, 68 S. CAL. L. REV. 841 (1995) (with Jeff Dubin). *Dean Krattenmaker's Road Not Taken: The Political Economy of Broadcasting in the Telecommunications Act of 1996*, 29 CONN. L. REV. 353 (1996). *An Introduction to the Law and Economics of the V-Chip*, 15 CARDOZO ARTS & ENT. L.J. 429 (1997). *A First Glance at the Constitutionality of the V-Chip Ratings System*, in TELEVISION VIOLENCE AND PUBLIC POLICY [*page range*] (James T. Hamilton ed., 1998). *Turner, Denver and Reno*, in A COMMUNICATIONS CORNUCOPIA: MARKLE FOUNDATION ESSAYS ON INFORMATION POLICY 172-217 (Roger Noll & Monroe Price eds., 1998). *Digital Television and the Quid Pro Quo*, 2 BUS. & POL. 115 (2000) (with Thomas Hazlett). *Advanced Wireless Technologies and Public Policy*, 79 S. CAL. L. REV. 595 (2006) (with Thomas W. Hazlett). *Television Mergers and Diversity in Small Markets*, __ J. COMP. L. & ECON. __ (forthcoming 2010).

⁸ Comcast and GE to Create Leading Entertainment Company, Joint Announcement by Comcast Corporation and General Electric Company (Dec. 3, 2009) available at <http://www.genewscenter.com/content/detail.aspx?ReleaseID=9206&NewsAreaID=2>.

Accompanying the announcement, the applicants set forth certain voluntary Public Interest Commitments that build on their strengths and histories of service to the public, particularly in the areas of diversity and local programming. Of note, the applicants have committed to “continuing to provide free over-the-air television through [NBCU’s O&O] stations and through local broadcast affiliates across the nation,” to “using the combined resources of NBC and Comcast to strengthen localism,” to “ensuring that the content of NBC’s news and public affairs programming [will] not be influenced by the non-media interests of [its corporate parents],” to “mak[ing] an expanded commitment to meeting the viewing needs of children, and the needs of parents to better control their family’s viewing,” and to “expand[ing] the

inter alia, NBCU's national broadcast networks (NBC and Telemundo), NBCU's owned and operated ("O&O") broadcast television stations, cable programming networks, theme parks, and a motion picture studio (Universal), with Comcast's cable programming and regional sports networks, as well as certain online content businesses of Comcast. Upon closing, Comcast and GE will own 51-percent and 49-percent shares in the joint venture, respectively. Thus, the transaction is fundamentally a vertical integration of content (in the joint venture) with distribution (Comcast's cable systems held outside the joint venture).

9. This transaction is not the sort of horizontal merger that has been at the core of the concerns about localism and diversity over the past several decades. The Commission has been very concerned about mergers that combine two or more broadcasters within the same service in the same market. The Commission has also been concerned about mergers of broadcasters in different services within the same market.⁹ These concerns, in fact, led the Commission decades ago to adopt numerous structural rules that control the ability of broadcasters to merge in the same market.¹⁰ These rules are founded on the concepts that having a healthy and robust marketplace of ideas requires independent voices, that the public benefits from having many types of programs from which to choose, and that a broadcaster must address the needs, interests, and issues of concern of the community that it is licensed to serve. And, of course, horizontal mergers between television stations and daily newspapers in the same market have generally been prohibited by structural ownership rules adopted in 1975.¹¹

availability of over-the-air programming to the Hispanic community." Letter from David L. Cohen, Executive Vice President, Comcast Corporation, *Comcast/ GE Announcement Regarding NBC Universal* (Dec. 3, 2009) ("December 3 Cohen Letter").

⁹ See, e.g., *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking*, 16 FCC Rcd 19861, 19863 ¶ 6 (2001) ("In the early 1970s, the Commission briefly restricted local radio ownership further by prohibiting, with certain exceptions, common ownership of different service broadcast stations in the same market. These limits were designed to advance diversity by maximizing the number of independent owners of broadcast media in a market.") (internal citation omitted).

¹⁰ *Id.* at 19899 ("The effects of a proposed transaction on the diversity of voices and economic competition in a given market have long been core considerations in making this public interest determination. The Commission's concern for diversity and competition in broadcast markets has prompted us to adopt and maintain structural ownership rules intended to vindicate these interests.").

¹¹ See *2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 23 FCC Rcd 2010, 2018-19 ¶¶ 13-14 (2008) ("2006 Quadrennial Review Order") (adopting a presumption that "certain limited

10. But this transaction has none of these elements. It is, from the standpoint of traditional Commission concerns, almost entirely a vertical transaction. Comcast does not have a broadcast network (or a daily newspaper) and has modest cable programming assets, and NBCU is bringing a pair of broadcast networks and a number of local broadcasting stations. Conversely, NBCU does not provide cable, high-speed Internet, or digital voice services, which form the bulk of Comcast's business. Thus, in terms of traditional considerations, combining the NBCU content with Comcast distribution does not result in the sort of reduction in the number of local broadcast voices that has prompted Commission concern.¹² Instead, at its core, it is much more a vertical combination, putting together a company which produces popular content (NBCU) with a company that distributes content over cable television systems (Comcast).

IV. PUBLIC INTEREST CONCERNS OF DIVERSITY AND LOCALISM

11. The Commission must determine whether the proposed transaction would comply with the Communications Act of 1934 ("Communications Act"), other applicable statutes, and its own rules.¹³ As part of this inquiry, the Commission must determine whether the applicants for transfer or assignment of broadcast licenses have shown that the public interest, convenience, and necessity will be served by the proposed transaction.¹⁴

combinations in the of newspaper and broadcast facilities in the largest markets are in the public interest"), *appeal pending*, *Prometheus Radio Project v. FCC*, Nos. 08-3078 et al. (3d. Cir. Apr. 14, 2009); *See generally Chancellor Media/Shamrock Radio Licenses, L.L.C. and Cox Radio, Inc.*, 15 FCC Rcd 17053, 17055 ¶ 6 (2000) ("In adopting the 1975 rule that generally prohibited the common ownership of a newspaper and broadcast station serving the same community, the Commission made it clear that fostering diverse viewpoints from antagonistic sources is at the heart of our licensing responsibility.").

¹² There are some possible horizontal elements in the combination of cable networks, but these do not represent the traditional, core concerns of the Commission. Because the horizontal aspects of this merger involving cable networks are very unlikely to have any significant effect on over-the-air broadcast diversity and localism, I will not discuss them in this Declaration. In addition, there are vertical aspects of the transaction that will be examined, particularly under the competition prong of the public interest standard. Others will examine pricing issues within the vertical aspects of the transaction. In terms of diversity and localism, the vertical aspects of the transaction are extremely unlikely to be troublesome. Creation of a problem in diversity or localism in the broadcast markets, as a result of the vertical elements of this transaction, would require a very convoluted and improbable mechanism.

¹³ *See Clear Channel Communications, Inc.*, 23 FCC Rcd 1421, 1423 ¶ 3 (2008); *Citadel Broadcasting Corp. and The Walt Disney Co.*, 22 FCC Rcd 7083, 7104 ¶ 50 (2007).

¹⁴ 47 U.S.C. § 310(d).

12. There are a number of rules that control directly the ownership structure and market behavior of broadcasters, cable systems, and cable networks.¹⁵ The Commission's structural rules, notably its media ownership rules, include limitations on newspaper/broadcast cross-ownership in a single market,¹⁶ radio/television cross-ownership in particular markets,¹⁷ ownership of multiple television stations in a single market,¹⁸ ownership of multiple radio stations in a single market,¹⁹ national reach of television stations owned by a single entity,²⁰ and dual broadcast network rules.²¹ These media ownership rules are designed to foster the Commission's longstanding public interest policies of competition, diversity, and localism.²² And more specifically, as further described below, each of these rules is intended to protect against reduction in the number of independent broadcast voices in a local market. Indeed, with respect to transactions involving broadcast licenses, the Commission's central theory has been that

¹⁵ Also relevant to the proposed transaction is the lack of applicable rule. The DC Circuit vacated the once-extant cable/broadcast cross-ownership rule, opining "that the Commission's diversity rationale for retaining the [Cable/Broadcast Cross-Ownership] Rule is woefully inadequate." *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002), *rehearing granted*, 293 F.3d 537 (D.C. Cir. 2002) (vacating cable-broadcast cross-ownership rule); *1998 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd 3002 (2003) (repealing cable/broadcast cross-ownership rule). The DC Circuit also has remanded the horizontal ownership rule adopted by the Commission for further consideration. *The Commission's Cable Horizontal and Vertical Ownership Limits, Fourth Report & Order and Further Notice of Proposed Rulemaking*, 23 FCC Rcd 2134, 2187-92 ¶¶ 125-34 (2008) ("2008 Cable Ownership Order"), *vacated* *Comcast Corp. v. FCC*, 579 F.3d 1, 23 (D.C. Cir. 2009) (holding the [horizontal] 30% subscribership limit as arbitrary and capricious because "the Commission failed adequately to take account of the substantial competition cable operators face from non-cable video programming distributors.").

¹⁶ *2006 Quadrennial Review Order*, 23 FCC Rcd at 2018-57 ¶¶ 13-79.

¹⁷ *Id.* at 2057-60 ¶¶ 80-86.

¹⁸ *Id.* at 2060-69 ¶¶ 87-109.

¹⁹ *Id.* at 2069-82 ¶¶ 110-38.

²⁰ *See id.* at 2084 ¶ 142 n.454 (noting that Section 629(l) of the 2004 Consolidated Appropriations Act "amends *Section 202(c)* of the 1996 Act to direct the Commission to modify the national television ownership limit, contained in *section 73.3555* of the Commission's rules, to specify 39 percent as the maximum aggregate national audience reach of any single television station owner.") (citing 47 U.S.C. § 202(c)(1)).

²¹ *Id.* at 2082-84 ¶¶ 139-41.

²² *2006 Quadrennial Review Order*, 23 FCC Rcd at 2016-17 ¶ 9 ("The media ownership rules are designed to foster the Commission's longstanding policies of competition, diversity, and localism. We set these policies out in detail in the 2002 Biennial Review Order, and we reaffirm those goals.") (citing *2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd 13620, 13627-45 ¶¶ 17-79 (2003) ("2002 Biennial Review Order"), *aff'd in part and remanded in part*, *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d. Cir. 2004)).

maintaining a sufficient number of independent voices is crucial to supporting the core concerns of diversity and localism.²³

13. Throughout the last decade, the Commission has consistently applied a corresponding public interest framework to media transactions.²⁴ In this Declaration, I will address the public interest concerns of diversity and localism as they relate to the proposed transaction.

A. Diversity

14. Diversity has long been considered by the Commission to be a guiding principle for its regulation of the media marketplace because it resonates with values implicit in the First Amendment.²⁵ The two crucial aspects of diversity for purposes of evaluating this transaction are *viewpoint* diversity and *program* diversity.

15. Viewpoint diversity, defined as “the availability of media content reflecting a variety of perspectives,”²⁶ is of central importance to the Commission. The Commission has stated that viewpoint diversity helps to ensure an informed citizenry in our

²³ *UTV of San Francisco Inc. et al. and Fox Television Stations, Inc.*, 16 FCC Rcd 14975, 14977 ¶ 8 (2001) (“Where broadcast licenses are concerned, the effects of a proposed transaction on the diversity of voices and economic competition in a given market have long been core considerations in determining whether a transaction serves the public interest, convenience, and necessity.”).

²⁴ *Applications for Consent to the Transfer of Control of Licenses from XM Satellite Radio Holdings Inc. to Sirius Satellite Radio Inc.*, 23 FCC Rcd 12348, 12364 ¶ 30 (2008); *News Corp. and DIRECTV Group, Inc. and Liberty Media Corp. for Authority to Transfer Control*, 23 FCC Rcd 3265, 3276-77 ¶ 22 (2008); *Applications for Consent of Assignment and/or Transfer of Control of Licenses from Adelphia Communications Corporation to Time Warner Cable Inc., and from Adelphia Communications Corporation to Comcast Corporation*, 21 FCC Rcd 8203, 8217-18 ¶ 23 (2006); *General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee*, 19 FCC Rcd 473, 483 ¶ 15 (2004); *Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, 17 FCC Rcd 23246, 23255 ¶ 26 (2002).

²⁵ 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Cross-Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets*, 17 FCC Rcd 18503, 18516 ¶ 33 (2002) (“2002 Biennial Review Notice”) (“It advances the values of the First Amendment, which, as the Supreme Court stated, ‘rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.’”) (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

²⁶ 2002 Biennial Review Order, 18 FCC Rcd at 13627 ¶ 19.

democratic society.²⁷ Accordingly, having independent voices in the media marketplace is needed for a healthy and robust marketplace of ideas, particularly with respect to news and public affairs.²⁸ The basic idea is that if a single person were to gain control of a substantial amount or all of the media in a market, he or she could tilt the discussion of news and public affairs in a way that would mold public opinion to resemble his or her own, even if the facts and arguments would not support such a result. On the other hand, if there is a large number of independent voices in the media marketplace, any attempt to tilt coverage of news and public affairs will be counterbalanced by others, who can be counted on to point out the tilt and correct it. Thus, preventing concentrated political influence provides the strongest justification for viewpoint diversity and the maintenance of a large number of independent voices in news and public affairs programming.²⁹

16. The main focus of concern for viewpoint diversity is *local* broadcast news, public affairs, and other local programming. Applying this insight, the Commission has stated that “the greater the diversity of ownership in a particular area, the less chance there is that a single person or group can have an inordinate effect, in a political, editorial, or similar programming sense, on public opinion at the regional level.”³⁰ There is nothing in the fundamentally vertical structure of *this* transaction that would reduce the number of independent broadcast voices in any local market. After the transaction, all of NBCU’s O&O broadcast stations will continue to operate and provide local news and other local programming. There is no consolidation of broadcast assets within any local

²⁷ *Id.* (citing Richard Brown, *Early American Origins of the Information Age, A NATION TRANSFORMED BY INFO.: HOW INFORMATION HAS SHAPED U.S. FROM COLONIAL TIMES TO THE PRESENT* (Oxford Univ. Press, New York, NY, 2000) at 44-49 *passim* (“Because people widely believed that their republican government required an informed citizenry, they scrambled to make sure that they, and often their neighbors, were properly informed.”)).

²⁸ While the most important influence on our civic life comes from local news and public affairs, the Commission has acknowledged that entertainment programming may have significant public affairs content. *Id.* at 13631 ¶ 33.

²⁹ *See, e.g., 2006 Quadrennial Review Order*, 23 FCC Rcd at 2038 ¶ 49 (“[O]ur new rule is designed to promote diversity by presumptively prohibiting combinations in the markets with the fewest number of voices, while presumptively permitting certain combinations in the largest markets where the loss of diversity is not a significant risk.”). *See generally, 2002 Biennial Review Order*, 18 FCC Rcd at 13630 ¶ 28 (“[O]wners of media outlets clearly have the ability to affect public discourse, including political and governmental affairs, through their coverage of news and public affairs. Even if our inquiry were to find that media outlets exhibited no apparent ‘slant’ or viewpoint in their news coverage, media outlets possess significant *potential* power in our system of government.”).

³⁰ *Id.* at 13632 ¶ 38 (quoting *Amendment of Sections 73.35, 73.240, and 73.636 of the Commission’s Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations*, 45 F.C.C. 1476, 1477 ¶ 3 (1964)).

market as a consequence of this transaction. Instead, this transaction *transfers* broadcast licenses from the control of GE to the control of Comcast. In no way does this combination of content with distribution impinge on the Commission's core concern – the *reduction* in the number of independent voices in local broadcast markets. Nor does the transaction impact *national* viewpoint diversity in any way.³¹

17. *Program* diversity refers to providing a large number of types of programs (dramas, sitcoms, “reality” a.k.a. nonscripted, science fiction, sports, news, children's, etc.) to viewers.³² The Commission clearly prefers to rely, in general, on competition in the video marketplace to ensure diversity of programming, rather than try to regulate the provision of program types directly.³³

18. There is no basis to anticipate that NBC, Telemundo, or any of their O&Os will alter programming in a way that would decrease the diversity of programming. The slight horizontal aspects of the merger (Comcast is contributing no over-the-air broadcast assets to the joint venture) indicate that there will be no significant, transaction-specific incentive to change or reduce programming for the NBC or Telemundo networks, or in the programming of their O&Os. All program types that are currently represented will continue to be represented – there is simply no credible incentive for the new entity to reduce program diversity, and no apparent reason to expect that such a reduction will take place. Thus, we should anticipate no reduction in program diversity in broadcast outlets. In addition, the December 3 Cohen Letter demonstrates that the companies intend to increase the diversity of content available on multiple platforms as well as

³¹ In any event, the Commission has clearly concluded that there is a very robust market in national news and public affairs. *Id.* at 13631 ¶ 35.

³² *Id.* at 13631 ¶ 36.

³³ The Commission restated this preference within the last decade. *Id.* at 13632 ¶ 37. This is a long-running preference of the Commission. *See* FCC v. WNCN Listener's Guild, 450 U.S. 582, 590 (1981) (“[T]he Commission explained why it believed that market forces were the best available means of producing diversity in entertainment formats. First, in large markets, competition among broadcasters had already produced ‘an almost bewildering array of diversity’ in entertainment formats. Second, format allocation by market forces accommodates listeners’ desires for diversity within a given format, and also produces a variety of formats. Third, the market is far more flexible than governmental regulation and responds more quickly to changing public tastes. Therefore, the Commission concluded that ‘the market is the allocation mechanism of preference for entertainment formats, and . . . Commission supervision in this area will not be conducive either to producing program diversity [or] satisfied radio listeners.’”) (citing *Development of Policy re: Changes in the Entertainment Formats of Broadcast Stations, Memorandum Opinion and Order*, 60 F.C.C.2d 858, 863-866 (1976)).

adding programming targeted to children and the Hispanic community.³⁴ This provides further assurance that the public interest concern of diversity will be served by the transaction.

19. Of course, individual programs may be replaced as they lose popularity, as is the nature of series programming. But the public interest goal—diversity of programming—is not about preserving individual shows. Rather, it is about ensuring a broad menu of *types* of programs for viewers. In this case, the types of programming that are supplied by the networks will almost certainly continue to be supplied; sports programming, comedies, dramas, science fiction, food, fashion, celebrity gossip, and so forth will continue to be available in abundance. In short, there is no significant probability that diversity of programming in broadcasting will be adversely affected by this transaction due to horizontal integration. The transaction is predominantly vertical in nature, and such combinations do not tend to induce the parties to eliminate program types that would otherwise be profitable to produce and distribute.

B. Localism

20. The phrase “localism” covers many different topics,³⁵ linked by the concern that a broadcaster must address the needs, interests, and issues of concern of the community that it is licensed to serve.³⁶ The Comcast and NBCU transaction is irrelevant to most of these topics, and does not threaten, and in some cases may aid, the remainder. This result is reinforced by the applicants’ voluntary public interest commitments in the December 3 Cohen Letter to strengthen localism through their owned-and-operated broadcast stations, On Demand and On Demand Online Programming platforms, and public,

³⁴ *Supra* note 8.

³⁵ There is a set of issues, usually addressed with fairly precise regulations, that is often addressed under the banner of localism. However, they are all quite tangential to evaluating the transaction *in this case*. These include disaster warnings, *In the Matter of Broadcast Localism, Report and Notice of Proposed Rulemaking*, MB Docket No. 04-233, 23 FCC Rcd 1324, 1358-61 ¶¶ 81-87 (2008) (“2008 Broadcast Localism Report”), Network Affiliation Rules, *id.* at 1361-64 ¶¶ 88-96, payola and sponsorship identification, *id.* at 1364-69 ¶¶ 97-112, and license renewal procedures, *id.* at 1370-73 ¶¶ 113-124. Because this transaction raises no genuine issue as to any of these concerns, I will not discuss them in text.

³⁶ *Id.* at 1326 ¶ 2.

educational, and government (“PEG”) access programming.³⁷ Putting more local content on more platforms will directly promote localism.

21. There is a significant overlap between *localism* and *diversity* because one of the central concerns of each goal is the extent to which broadcasters provide local news, public affairs, and other local programming. Localism differs slightly because diversity focuses on the *number of different types* of local programs, while localism focuses more on the *amount and source* of local programs.³⁸

22. The Commission has long been interested in whether broadcasters provide “enough” community-responsive programming.³⁹ Because there is no reduction in the number of independent voices in any broadcast market in this transaction, there is nothing about the transaction that would lead us to expect any reduction in local news or public affairs programming, or similar community-responsive broadcast programming.⁴⁰ In addition, the December 3 Cohen Letter demonstrates that the companies plan to increase locally-oriented programming.

23. Similarly, there is nothing about this transaction that would lead the applicants to reduce service to underserved audiences. The Commission has pursued policies directed at ensuring that “enough” programming is provided to underserved audiences, primarily women and racial and ethnic minorities.⁴¹ The Commission’s theory is that all

³⁷ *Supra* note 8.

³⁸ Typical community-responsive content includes local news stories, investigative features, consumer advocacy issues, politics, sports, community events, cultural offerings, weather, and emergency notices. *2008 Broadcast Localism Report*, 23 FCC Rcd at 1338 ¶ 31.

³⁹ *See id.* at ¶ 30 (“Having recognized that certain groups have long complained that broadcasters do not air enough community-responsive programming, the Commission sought comment on the nature and amount of such programming in the *NOI*. The Commission inquired as to how broadcasters were serving the needs of their communities, whether they were providing enough community-responsive programming, whether the Commission could or should take action to ensure that broadcasters aired programming that served their communities’ needs and interests, and whether non-entertainment or non-locally originated programming should constitute local programming.”). This, in turn, raises questions about what “counts” as community-responsive, how to combine time allocated to different categories (such as local public affairs and public service announcements), and whether the same rules should apply in all markets and to all classes of service.

⁴⁰ Thus, for example, regardless of how one views the studies cited by the Commission in its *2008 Broadcast Localism Report*, 23 FCC Rcd at 1341-42 ¶ 38 (citations omitted), and regardless of whether one thinks the amount of local news and public affairs increases with network ownership, all of the broadcast stations in this transaction were part of a network before the transaction, and will be part of a network after the transaction. In short, there is no change.

⁴¹ *2008 Broadcast Localism Report*, 23 FCC Rcd at 1354-55 ¶ 70.

significant groups in the community of a licensee should get some level of service.⁴² This requires the Commission to walk a very fine line; intervening too far to require particular content threatens First Amendment values, while only issuing hortatory declarations may produce no action at all. The Commission's most recent approach to this subject relied on several structural responses. The Commission is proposing that broadcasters form community advisory boards that help to inform the broadcaster about the needs and issues of underserved audiences.⁴³ Further, the Commission is considering ways to increase ownership of broadcast outlets by "Eligible Entities," which may include minority- and women-owned businesses.⁴⁴ No matter how the Commission resolves the question of underserved audiences, there is nothing in this fundamentally vertical transaction that reduces incentives to serve underserved audiences. There is no consolidation of broadcast assets at the local market level. Hence, the broadcast outlets will continue to have every incentive to appeal to and retain as wide and diverse an audience as possible.

24. Within the localism sphere, the Commission also has expressed concern with the process of engagement among broadcasters, viewers, and community leaders. In the 1970s, the Commission promulgated a highly detailed set of regulations to govern the process of communication.⁴⁵ In the 1980s these regulations were relaxed,⁴⁶ but recently the Commission has proposed making them more formal for television.⁴⁷ Nothing about this transaction will produce any significant change in the O&Os' interactions with viewers and community leaders. The stations can be expected to continue to comply with applicable regulations, will continue to learn about the needs and interests of their local communities, and will continue to air programming that responds to these needs and interests. There is no reason why the structure of the proposed transaction would affect the merging entities' incentives to continue to comply with, or indeed exceed,

⁴² *Id.* at 1354 ¶ 69.

⁴³ *Id.* at 1336-37 ¶¶ 25-27, 1356 ¶ 73. Note, this requirement is not yet effective.

⁴⁴ *Id.* at 1356-57 ¶¶ 74-76.

⁴⁵ *Primer on Ascertainment of Community Problems by Broadcast Applicants, Report and Order*, 27 F.C.C.2d 650 (1971); *Ascertainment of Community Problems by Broadcast Applicants, First Report and Order*, 57 F.C.C.2d 418 (1976).

⁴⁶ *Deregulation of Radio, Report and Order*, 84 F.C.C.2d 968 (1981); *Revision of Programming and Commercialization Policies, Ascertainment Requirements and Program Log Requirements for Commercial Television Stations, Report and Order*, 98 F.C.C.2d 1076, 1099 (1984).

⁴⁷ *2008 Broadcast Localism Report*, 23 FCC Red at 1333-37 ¶¶ 16-27.

regulations in this area. Moreover, as outlined in the December 3 Cohen Letter, the companies are undertaking additional efforts to promote localism, which will further enhance the public interest benefits of the transaction.

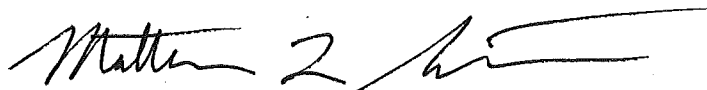
V. CONCLUSION

25. Based on public information provided to me by Comcast and NBCU, together with my analysis of publicly available information cited here, I have evaluated the consequences of the proposed transaction in terms of *diversity* and *localism*—two areas that have been at the center of the Commission’s previous regulatory reviews with regard to the public interest. In my opinion, this transaction does not represent the sort of horizontal merger that has been at the core of the Commission’s diversity and localism concerns over the past several decades. Notwithstanding the rhetoric of some, this transaction will not result in any reduction in the diversity of broadcast voices in a local market or any reduction in localism.

26. In summary, this transaction is, from the standpoint of traditional Commission diversity and localism concerns, almost entirely a vertical transaction. I conclude that the proposed transaction will have no adverse effect on localism and diversity and thus is fully consistent with the Commission’s the public interest approach along these dimensions. It is not the type of transaction that implicates the core concern of reduction in the diversity of voices in a local market.

I, Matthew L. Spitzer, declare under penalty of perjury that the foregoing declaration is true and correct.

Executed on JANUARY 26, 2010

A handwritten signature in black ink, appearing to read "Matthew L. Spitzer", written over a horizontal line.

Matthew L. Spitzer

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EDUCATION

Ph.D. (Social Science) California Institute of Technology, 1979
J.D. University of Southern California, 1977
B.A. (Mathematics) University of California, Los Angeles, 1973

PROFESSIONAL ASSOCIATIONS AND SERVICE POSITIONS

Member, KUSC University Advisory Board, July 2000 to October 2001.
Member, USC Budget Steering Group, August 2000 to July 2001.
Member, USC Capital Planning Committee Radisson Subcommittee, August 2000 to August 2001.
Member, USC Urban Deans Council, July 2000 to March 2004.
Member, USC Provost's Council, August 2000 to June 2006.
Member, Executive Committee, USC Provost's Council, August 2001 to June 2005.
Member, Board of Directors, American Law and Economics Association, 1997 to 2000.
Member, Board of Editors, American Law & Economics Review, 1998 to 2000.
Director, American Law Deans Association, September 2000 to 2002.
Member, American Law Deans Association, September 2000 to June 2006.
Member, The American Law Institute, 2000 to present.
Member, The Fellows of the American Bar Foundation, 2003 to present.
Member, Board of Governors, Beverly Hills Bar Association, 2005 to 2006..
Member, Law School Council, The Committee of Bar Examiners of The State Bar of California, 2005 to 2006.
Member, Board of Directors, Telecommunications Policy Research Conference, 1993 to 1995.
Organizing Committee for Telecommunications Policy Research Conference, 1991 to 1994.

APPOINTMENTS

Litigator with Nossaman, Krueger & Marsh, Los Angeles, California, from January 1977 to July 1979.
Assistant Professor of Law at the Northwestern University School of Law, July 1979 to August 1981.

Associate Professor of Law at the University of Southern California Law School, August 1981 to May 1984.

Professor of Law at the University of Southern California Law School, May 1984 to July 1987.

William T. Dalessi Professor of Law at the University of Southern California, August 1987 to June 2000.

Visiting Professor of Law and Social Science in Division of Humanities and Social Sciences at California Institute of Technology, Pasadena, California, January 1988 to June 1988; January 1990 to June 1990; January 1991 to June 1991; and January 1992 to June 1992.

Professor of Law and Social Science in Division of Humanities and Social Sciences at California Institute of Technology, Pasadena, California, July 1992 to June 2001 and July 2006 to present.

Visiting Associate in Division of Humanities and Social Sciences at California Institute of Technology, Pasadena, California, July 2001 to June 2006.

Visiting Professor of Law at University of Chicago, October 1996 to December 1996.

Visiting Professor of Law at Stanford University, September 1997 to December 1997.

Director, Olin Program in Law and Rational Choice at the University of Southern California Law School, July 1990 to June 2000.

Director, USC Center for Communications Law and Policy, August 1998 to June 2005.

Dean and Carl Mason Franklin Chair in Law at the University of Southern California Law School, July 2000 to June 2006.

Dean and Carl Mason Franklin Chair in Law and Professor of Political Science at the University of Southern California Law School, November 2002 to June 2006.

Robert C. Packard Trustee Chair in Law and Professor of Political Science at the University of Southern California Gould School of Law, July 2006 to present.

PUBLICATIONS -- BOOKS

SEVEN DIRTY WORDS AND SIX OTHER STORIES: CONTROLLING THE CONTENT OF PRINT AND BROADCAST (1986, Yale University Press).

PUBLIC POLICY TOWARD CABLE TELEVISION (1997, AEI/MIT Press)(with Thomas Hazlett).

ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES (5th Edition, 2002, Aspen Law & Business)(with Stephen Breyer, Richard Stewart, and Cass Sunstein).

PUBLICATIONS -- ARTICLES

1. *An Economic Analysis of Sovereign Immunity in Tort*, 50 S. CAL. L. REV. 515 (1977).
2. *Multicriteria Choice Processes: An Application of Public Choice Theory to Bakke, the FCC, and the Courts*, 88 YALE L.J. 717 (1979).
3. *A Reply to Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 53 S. CAL. L. REV. 1187 (1980) (with Elizabeth Hoffman).
4. *Radio Formats by Administrative Choice*, 47 U. CHI. L. REV. 647 (1980).
5. *The Coase Theorem: Some Experimental Tests*, 25 J. LAW & ECON. 73 (1982) (with Elizabeth Hoffman).
6. *Unions, Fairness, and the Conundrums of Collective Choice*, 56 S. CAL. L. REV. 465 (1983) (with Mayer Freed and Daniel Polsby).
7. *A Reply to Hyde, Can Judges Identify Fair Bargaining Procedures?* 57 S. CAL. L. REV. 425 (1984) (with Mayer Freed and Daniel Polsby).
8. *Entitlements, Rights and Fairness: An Experimental Examination of Subjects' Concepts of Distributive Justice*, 14 J. LEGAL STUDIES 259 (1985) (with Elizabeth Hoffman). [Reprinted in Fall/Winter USC Cites at 10-23; reprinted in ECONOMIC JUSTICE (G. Brosio and H. Hockman Eds. 1998).]

9. *Experimental Law & Economics: An Introduction*, 85 COLUM. L. REV. 991 (1985) (with Elizabeth Hoffman).
10. *Controlling the Content of Print and Broadcast*, 58 SO. CAL. L. REV. 1349 (1985).
11. *Experimental Tests of the Coase Theorem with Large Bargaining Groups*, 15 J. LEGAL STUDIES 149 (1986) (with Elizabeth Hoffman).
12. *Fear and Loathing in the Coase Theorem: Experimental Tests Involving Physical Discomfort*, 16 J. LEGAL STUDIES 217 (1987) (with Don L. Coursey and Elizabeth Hoffman).
13. *Coasian Solutions to the Externality Problem in Experimental Markets*, 97 ECONOMIC J. 388 (1987) (with Glenn W. Harrison, Elizabeth Hoffman and E. E. Rutstrom).
14. *Antitrust Federalism and Rational Choice Political Economy: A Critique of Capture Theory*, 61 SO. CAL. L. REV. 1293 (1988).
15. *Broadcasting and the First Amendment* in Volume 1 of NEW DIRECTIONS IN TELECOMMUNICATIONS POLICY (1989, Duke Univ. Press).
16. *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U.L. REV. 990 (1989).
17. *Comment on Noll and Krier's Some Implications of Cognitive Psychology for Risk Regulation*, 19 J. LEG. STUD. 801 (1990).
18. *Justifying Minority Preferences in Broadcasting*, 64 S. CAL. L. REV. 293 (1990).
19. *Extensions of Ferejohn and Shipan's Model of Administrative Agency Behavior*, 6 J.L. ECON. & ORGANIZATION 29 (1990).
20. *Judicial Choice of Legal Doctrines*, 8 J.L. ECON. & ORGANIZATION 8 (1992)(with Pablo Spiller).
21. *Term Limits*, 80 GEORGETOWN L.J. 477 (1992)(with Linda Cohen). [Reprinted in MAXWELL STEARNS, PUBLIC CHOICE AND PUBLIC LAW (1996).]
22. *Willingness-to-Pay versus Willingness-to-Accept: Legal and Economic Implications*, 71 WASHINGTON UNIVERSITY L.Q. 59 (1993)(with Elizabeth Hoffman).
23. *Solving the Chevron Puzzle*, 57 JOURNAL OF LAW & CONTEMPORARY PROBLEMS 65 (1994)(with Linda Cohen).
24. *Testing Minority Preferences in Broadcasting*, 68 SOUTHERN CALIFORNIA LAW REVIEW 841 (1995)(with Jeff Dubin).
25. *Judicial Deference to Agency Action*, 69 SOUTHERN CALIFORNIA LAW REVIEW 431 (1995)(with Linda Cohen).
26. *Framing the Jury*, 81 VIRGINIA LAW REVIEW 1342 (1995)(with Ed McCaffery and Dan Kahneman).
27. *Where is the Sin in Sincere? Sophisticated Exploitation of Naive Judges*, 11 JOURNAL OF LAW, ECONOMICS & ORGANIZATION 32 (1995)(with Pablo Spiller).
28. *Dean Krattenmaker's Road Not Taken: The Political Economy of Broadcasting in the Telecommunications Act of 1996*, 29 CONN. L. REV. 353 (1996).
29. *An Introduction to the Law and Economics of the V-Chip*, 15 CARDOZO ARTS & ENTERTAINMENT LAW JOURNAL 429 (1997).
30. *Evaluating Direct Democracy: A Response*, 4 UNIVERSITY OF CHICAGO LAW SCHOOL ROUNDTABLE 37 (1997).

31. *A First Glance at the Constitutionality of the V-Chip Ratings System*, in TELEVISION VIOLENCE AND PUBLIC POLICY, Edited by James T. Hamilton (U. Mich. Press, 1998).
32. *Turner, Denver and Reno*, pages 172-217 in A COMMUNICATIONS CORNUCOPIA: MARKLE FOUNDATION ESSAYS ON INFORMATION POLICY (1998, Roger Noll and Monroe Price, Eds.).
33. *Judicial Auditing*, 29 JOURNAL OF LEGAL STUDIES 649 (2000) (with Eric Talley).
34. *The Government Litigant Advantage: Implications for the Law*, 28 FLORIDA STATE UNIV. L. REV. 391 (2000) (with Linda R. Cohen).
35. *Digital Television and the Quid Pro Quo*, 2 BUSINESS AND POLITICS 115 (2000) (with Thomas Hazlett).
36. *Endowment Effects within Corporate Agency Relationships*, 31 JOURNAL OF LEGAL STUDIES 1 (2002) (with Jennifer H. Arlen and Eric L. Talley).
37. *Advanced Wireless Technologies and Public Policy*, 79 SOUTHERN CALIFORNIA LAW REVIEW 595 (2006)(with Thomas W. Hazlett).
38. *Television Mergers and Diversity in Small Markets*, __ JOURNAL OF COMPETITION LAW AND ECONOMICS __ (2010)(forthcoming).

OTHER PUBLICATIONS

1. *Book Review* (of HUMAN INFERENCE by Richard Nisbett and Lee Ross), 9 HOFSTRA L. REV. 1621 (1981).
2. *Book Review* (of MISREGULATING TELEVISION by Stanley M. Besen, Thomas G. Krattenmaker, A. Richard Metzger, and John R. Woodbury), 2 INFORMATION ECON. AND POLICY 91 (1986).
3. Editor of Discussion in *Symposium: Punitive Damages*, 56 S. CAL. L. REV. 1, 155 (1982).
4. *Bargaining Solutions to Environmental Problems*, NEUE ZURCHER ZEITUNG, pg. 66, Sept. 16, 1987, (with R. S. Radford).
5. *Jurisprudence and Formal Models*, 12 INT'L REV. L. AND ECON. 284 (1992).
6. *Freedom of Expression*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW, Edited by Peter Newman (Stockton Press, 1998).
7. *Book Review* (of J. GREGORY SIDAK, FOREIGN INVESTMENT IN TELECOMMUNICATIONS), 59 Journal of Economic History 1124 (1999).
8. *Taking Over*, 33 UNIVERSITY OF TOLEDO LAW REVIEW 213 (Fall 2001).
9. *Evaluating Valuing Empiricism (at Law Schools)*, 53 JOURNAL OF LEGAL EDUCATION 3 (September 2003).
10. *Diamonds and Deep Breathing*, 36 UNIVERSITY OF TOLEDO LAW REVIEW 191 (Fall 2004).
11. *Memorial Tribute to Dave Carroll*, 78 SOUTHERN CALIFORNIA LAW REVIEW 13 (2004).

PRIZE

Ronald H. Coase Prize for excellence in law and economics