

**XFINITY ON XBOX:
A LEGAL ANALYSIS OF COMCAST’S DATA POLICY**

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INTRODUCTION

In spring of 2012, Comcast enacted a policy regarding the treatment of data usage for Xfinity video services viewed on the Xbox 360. This policy possibly violates the Federal Communications Commission (FCC) rules regarding net neutrality, as well as the specific net neutrality-like merger conditions attached to the approval of the Comcast-NBC Universal merger. Under the Comcast policy in question, consumers who used the Xfinity app to view video content on an Xbox 360 game console did not have the usage counted against their monthly data cap allotment. Similar video content provided by non-Xfinity apps received no such exemption, and counted towards a consumer's monthly cap.¹ On its surface at least, the different treatment appears to violate net neutrality rules because it incentivizes Comcast customers to use the Xfinity app instead of using competing services.²

This analysis examines whether Comcast's policy violated two different FCC imposed legal requirements.³ First, the FCC has issued a Memorandum and Order regarding net neutrality,⁴ wherein the FCC broadly outlines policy goals and rules for internet service providers regarding treatment of content delivered over their networks.⁵ Second, the FCC expressed concern about the new entity's increased incentive to engage in anti-competitive behavior and attached conditions to its approval of the NBC Universal and Comcast merger. These conditions sought to remedy future harm by creating net neutrality-like rules which applied only to the newly formed company.⁶

This paper provides a critical analysis of Comcast's Xbox 360 app policy and determines whether Comcast is acting within the letter of the law. The first section of this essay will provide definitions of pertinent terms, background information on Comcast, and a broad overview of the positions taken by both sides in the debate. In the second section, the paper will lay out the applicable laws concerning this controversy and analyze the legality of Comcast's treatment of its Xbox 360 app. Given the cutting edge nature of the debate, to date there is no case law interpreting the net neutrality rules; therefore, the bulk of the applicable law used in this analysis is drawn from largely untested FCC net neutrality rules and Comcast-NBC Universal merger conditions. While this controversy creates a case of first impression, this analysis will aid one in understanding the evolution of the regulatory environment for broadband service and online video industries.

¹ *FAQs: Xbox 360*, XFINITY (Jan. 22, 2013), <http://xbox.comcast.net/faqs.html>.

² Subsequent to the public outcry over their Xbox app policy, Comcast suspended their 250gb data cap policy. See Ryan Singel, *Comcast Suspends Data Cap Temporarily, Will Test New Overage Fees*, WIRED (May 17, 2012) <http://www.wired.com/threatlevel/2012/05/comcast-raises/data-cap/>.

³ This paper does not address whether Comcast's policy violated antitrust law. The Department of Justice is reportedly investigating whether Comcast's policy violates the separate consent.

⁴ *Preserving the Open Internet*, 25 FCCR 17905 (2010).

⁵ The FCC's statutory authority to regulate the broadband industry is still a matter of much debate. Comcast successfully rebuffed the FCC's effort to exercise jurisdiction over its throttling of BitTorrent users. See *Comcast Corp. v. Fed. Comm'n's Comm'n*, 600 F.3d 642 (D.C. Cir. 2010). Verizon is currently appealing the FCC's jurisdiction over broadband internet access. See *Brief of Appellee-Respondents, Verizon v. Fed. Comm'n's Comm'n*, No. 11-1355 (Jan. 16, 2013) <http://www.fcc.gov/document/verizon-v-fcc-no-11-1355-dc-cir-1>.

⁶ The Memorandum and Merger Order, hereinafter Merger Order, included many other conditions, but this paper focuses only on the net neutrality-like conditions. To further explore the other conditions, reference Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc., 26 FCCR 4238 (2011).

This paper concludes that Comcast's policy is likely not in violation of the net neutrality rules as they are currently written, because Comcast's Xfinity-Xbox app is likely to be considered a "specialized service" which the FCC considered but did not ultimately prohibit when it adopted net neutrality rules. Comcast is, however, likely in violation of the merger conditions outlined by the FCC, in part, because possible exemptions to the net-neutrality rules are not available under the merger conditions. In fact, the merger conditions provide additional rules for Comcast above and beyond what is required of the industry in the net neutrality rules.

I. BACKGROUND

A. Comcast

Comcast, an entity owned by Comcast Corporation, is the largest cable television provider in the United States,⁷ and is a vertically integrated organization that offers a vast array of communications and media services. In addition to cable transmission of television and movie content, Comcast provides film and television production and distribution, broadband internet access services, voice over internet protocol (VoIP) telephony, advertising, and smart home solutions. Comcast's size and scope gives the company a distinct advantage over many competitors in both the broadband service and online video industries, few of which have similar control at such numerous points in the service chain.

Comcast's unprecedented size is, at least in part, a result of several high-profile mergers and acquisitions.⁸ In 2002, Comcast acquired AT&T Broadband, a move which more than doubled its subscriber base. In 2011, Comcast expanded further by acquiring a controlling interest in NBC Universal, its joint venture with General Electric. The NBC Universal purchase allowed Comcast to vertically integrate its cable and media services and acquire NBC Universal's approximately 32 percent interest in a competing online video service provider, Hulu.⁹ The Comcast portfolio now includes television and film content, television and film production studios, and a distribution network of broadcast channels and internet sites.¹⁰

Comcast provides much of its digital television and broadband services under its Xfinity brand. Xfinity TV's service includes hundreds of cable channels, many of which are owned by Comcast.¹¹ Recently, Comcast began offering digital access to its content via mobile devices such as laptops, tablet computers, smartphones, and video game consoles,¹² enabling Comcast to compete directly with online video offerings from Netflix, Hulu, and Amazon.

Internet service providers (ISPs), including Comcast, have sought to institute policies to manage the amount of data being used over their networks to include capping usage, commonly referred to as a "data cap." Until recently, Comcast maintained a 250gb per month data cap policy which limited the amount of data customers could transmit over their network in one month. Customers who exceeded the allotted amount could receive usage restrictions, overage

⁷ Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc., *supra* note 6, at 3.

⁸ See *Our Company: Our Story*, COMCAST (Feb. 6, 2013), <http://corporate.comcast.com/our-company/our-story>.

⁹ See Letter from Harold Feld, Legal Director, Public Knowledge to Julius Genakowski, Chairman, FCC (Oct. 21, 2010), *available at* <http://publicknowledge.org/letter-fcc-implications-foxs-internet-blocking>.

¹⁰ See *Our Company: Our Story*, *supra* note 3.

¹¹ See COMCAST, "*Our Company: Our Businesses*", <http://corporate.comcast.com/our-company/businesses/comcast-cable> (last visited Feb. 6, 2013).

¹² See, *id.*

fees, or even cancellation of services.¹³ Until the new Xbox app was released, this policy applied to any data delivered to Comcast customers over the public internet, regardless of the content or who provided it.

B. Xfinity-Xbox Controversy

On May 27, 2012, Comcast released a new service that would allow its customers to view Xfinity subscription content by using an app on the Xbox 360 gaming console.¹⁴ Although providing online video content over a gaming console was not unique at the time, the treatment of the content viewed on the app was. Comcast announced that unlike data usage from unaffiliated online video providers such as Netflix or Amazon, data usage generated by using the Xfinity app would not be counted towards an Xfinity customer's data cap. Comcast's initial contention was that data used by the app was being routed through a separate "private network" instead of the public internet,¹⁵ and thus fell within the category of "specialized services"¹⁶ for which the FCC has not yet crafted clear rules.

Net neutrality advocates decried the policy as a discriminatory use of Comcast's broadband network¹⁷ and dismissed the idea that the internet used to provide data to the app was somehow different than that which carried non-affiliated video.¹⁸ While advocates on both sides look to net neutrality rules to support their positions, the FCC has yet to make a definitive declaration regarding this particular controversy, nor have similar controversy been presented to the FCC for decision.¹⁹

II. ANALYSIS

To conduct a proper legal analysis of Comcast's Xfinity-Xbox app policy, the general framework of our national telecommunications laws must be examined. Under 47 U.S.C., the FCC is granted authority to regulate the national telecommunications industry in order to encourage growth and competition. While there is no explicit grant of authority over net

¹³ See Nicolas Cardella, *Comcast's New Policy Raises Net Neutrality and Antitrust Concerns*, INTELL. PROP., MEDIA & ENT. L. J. (October 4, 2012), available at iplj.net/blog/archives/5376.

¹⁴ Major Nelson, *Comcast XFINITY TV, HBO GO and MLB.TV now available on Xbox LIVE* (March 27, 2013), <http://majornelson.com/2012/03/27/comcast-xfinity-tv-hbo-go-mlb-tv-now-available-on-xbox-live/>.

¹⁵ See Mark Hachman, "Comcast's Xfinity-on-Xbox Plans Draw Net Neutrality Fire" (March 26, 2012) www.pcmag.com/article2/0,2817,2402149,00.asp (Hereinafter PCMag).

¹⁶ The Open Internet Order does not provide a clear definition of what is or is not a specialized service beyond stating that they are services provided over the same last-mile of network used to provide broadband internet.

¹⁷ See PCMag, *supra* note 15, (quoting Free Press policy director Matt Wood claiming that the policy amounts to "preferred treatment" of Comcast content and "unfair treatment" of other internet video services).

¹⁸ See Andrew Dugan, "An IP Engineer and Consumer View of Xfinity Traffic Prioritization" (May 17, 2012) <http://blog.level3.com/internet-broadcast/an-ip-engineer-and-consumer-view-of-xfinity-traffic-prioritization/>. ("We executed a ping command to see if the servers were reachable and would respond. Sure enough they did. This implies that Comcast serves Xfinity traffic utilizing the Internet rather than a virtually or physically private network.").

¹⁹ An as yet unnumbered senate bill entitled, the *Data Measurement Integrity Act* would have restricted data caps and, for present purposes, would have prohibited preferential treatment of data based on content or source. The bill is expected to be reintroduced during the next Congress. See Paul Barbagallo, *Bill Limiting Internet Usage Data Caps Could Signal Next Big Tech-Policy Battle*, BLOOMBERG BNA (Dec. 26, 2012), <http://www.bna.com/bill-limiting-internet-n17179871568/>.

neutrality issues in the U.S. Code, the FCC asserts that the right to regulate them is included in the “ancillary jurisdiction” clause of 47 U.S.C. § 154²⁰ and is supported by U.S. Supreme Court precedent.²¹

The FCC also has an obligation to review any mergers of telecommunication companies and will often make approval of mergers subject to certain conditions.²² These merger conditions, which are expressly incorporated into the merger approval, are a source of law which must be adhered to by the parties to the merger. The FCC has historically used these powers to shape national telecommunication policy and has done so in the instant controversy.²³

A. Net Neutrality Order

1. FCC Concerns Over Network Neutrality

The FCC drafted the net neutrality rules to address future potential harms, which could arise from the erosion of the open nature of the internet platform. The FCC cited the internet’s openness as a key driver for innovation, investment, competition, and free expression. The FCC set out three broad concerns, which it sought to address. First, its concern that broadband providers had means to limit the open nature of the internet by way of their control of network facilities and incentives—both financial and competitive. Second, the FCC indicated that past broadband provider actions, such as blocking access to competing VoIP services, are strong predictors of future anti-competitive behavior. Finally, the FCC found that the cost of maintaining an open internet to broadband providers was outweighed by the benefits gained from maintaining its openness.

2. Non-Discrimination Requirement In Net Neutrality Rules

In 2010, the FCC issued a Report and Order entitled “In the Matter of Preserving the Open Internet Broadband Industry Practices,” indicating the importance of maintaining a non-discriminatory (i.e. neutral) internet network. The FCC also created binding rules applicable to broadband internet access providers.²⁴ The Open Internet Order, while not all inclusive, is a comprehensive treatment that covers all broadband service providers (both wireline and wireless), including Comcast. In it, the FCC referenced prior decisions and industry norms to craft three broad rules that require broadband service providers to provision service in

²⁰ See 47 U.S.C. § 154 (“The 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.”).

²¹ See *IN THE MATTER OF PRESERVING THE OPEN INTERNET: BROADBAND INDUS. PRACTICES*, 25 F.C.C.R. 17905, at 18098 n.366 (2010) (hereinafter Open Internet Order). “Consistent with longstanding Supreme Court precedent, we have understood this authority to include our ancillary jurisdiction to further congressional policy”.

²² See 47 U.S.C.A. § 214 (West 2013).

²³ As stated above, the FCC’s jurisdictional authority over broadband providers, and the net neutrality rules themselves, are still a matter of much debate and are currently on appeal. See Brief for Appellee-Respondents, *Verizon v. FCC*, No. 11-1355 (D.C. Cir. filed Jan. 16, 2013).

²⁴ See *In The Matter of Preserving the Open Internet Broadband Industry Practices*, 25 FCCR 17905 (2010). The earlier Internet Policy Statement adopted in 2005 was non-binding, and courts rejected the FCC’s attempt to enforce the rules therein against Comcast. In the *Comcast* case, the Court refused to recognize the FCC’s authority to restrict Comcast from blocking BitTorrent’s peer-to-peer sharing service. *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

accordance with Net Neutrality rules. Among those rules is a prohibition against unreasonable discrimination which states that “[f]ixed broadband providers may not unreasonably discriminate in transmitting lawful network traffic.”²⁵

The FCC’s prohibition against “unreasonable discrimination” of lawful consumer internet traffic is the most relevant of the net neutrality rules in this discussion.²⁶ Broadband internet access, like Comcast’s services, must treat all network traffic equally unless the provider is conducting “reasonable network management.”²⁷ To determine whether there exists unreasonable discrimination, the FCC will consider several factors: (1) whether the policies are transparent to the end user, (2) whether the provider allows for end-user control of the discrimination, (3) whether the discrimination is use-agnostic, and (4) whether the policy follows standard industry practices.²⁸

The FCC specifically refused to create a bright line rule banning all network discrimination²⁹ because it found that some discrimination could be beneficial to consumers and the competitive environment. For example, the FCC declared that lowering speeds for all customers (independent of what content is transmitted), providing tiered data plans that require users who consume more data to pay higher fees, and allowing end-users to control data discrimination were not unreasonable forms of discrimination. In contrast, unreasonable forms of discrimination would include throttling access speeds without notice, charging additional monthly service fees based on the content of the data being carried, pay for priority (providing faster content transmission for users that pay additional fees), and differential treatment that prioritizes data transmission based on the device used to access the broadband network.

In the Open Internet Order, the FCC acknowledged that there were special concerns regarding Specialized Services, such as existing facilities-based VoIP and IP video-offerings, but it declined to create a rule regarding the use of such services. Furthermore, the FCC did not provide a clear definition of the term “specialized services,” aside from stating that they were services provided over the same last mile as broadband internet access.

In a previous public notice, the FCC acknowledged that the question of “specialized services” was underdeveloped in the Open Internet Proceedings that lay the groundwork for the

²⁵ The other two rules require that broadband service providers must (1) ensure transparency in their network management practices, performance characteristics, and terms and conditions of their service; and (2) not block lawful content, applications, services, non-harmful devices, lawful websites, or applications that compete with their voice or video telephony services. These rules were not included in this discussion as they are not relevant to this controversy. *See* 25 FCCR at 17906.

²⁶ *See Id.* at 17944 (“A person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not unreasonably discriminate in transmitting lawful network traffic over a consumer’s broadband Internet access service. Reasonable network management shall not construe unreasonable discrimination.”).

²⁷ *See Id.* at 17993. (“Broadband Internet access service. A mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the protections set forth in this Part.”); *See Id.* (“Reasonable network management. A network management practice is reasonable if it is appropriate and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service.”).

²⁸ *Id.* at 17944 -17946.

²⁹ *Id.* at 17948-77 (“A strict nondiscrimination rule would be in tension with our recognition that some forms of discrimination, including end-user controlled discrimination can be beneficial.”).

Open Internet Order.³⁰ In particular, the FCC expressed concerns regarding anti-competitive conduct by vertically integrated broadband service providers.³¹ The FCC suggested six requirements which might be employed to allay concerns which could align the specialized services policy with the Net Neutrality rules (the cornerstones of the Open Internet Order): (1) definitional clarity for “broadband” services with any services not meeting the criteria for such definition falling under “specialized” services, (2) truth in advertising restricting cross advertisement of broadband and specialized services, (3) require disclosure of more information regarding services offered, (4) require Non-Exclusivity for offers made to affiliated parties, (5) limit the quantity of specialized services that may be offered by providers, and (6) guaranty capacity for broadband internet access.³² In its final memorandum and order addressing net neutrality, the FCC did not include any of the above provisions.

In the Open Internet Order, the FCC took a cautious approach regarding regulation of specialized services within the net neutrality rules. They declared that they would closely monitor the future impact of specialized services on competition within the broadband industry, as well as the effect these special services might have on the expansion of broadband internet services. In particular, the companies indicated that specialized services may create incentives to expand the capacity available for specialized services to the detriment of the expansion of current broadband internet capacity, a problem which would be exacerbated by the limited choices of broadband access providers available. On the other hand, the FCC stated that it does not want to upset what it deems to be a highly successful status quo, and points to the adoption rates of VoIP telephony service as evidence of this success. The FCC concluded that the benefits gained from innovation of new services stemming from private investment outweigh the cost of potential consumer harms.

3. Comcast’s Policy Likely Does Not Violate The Open Internet Order Net Neutrality Rules

After applying the FCC’s four part test, whether or not Comcast’s policy is transparent is unclear.³³ From the end-user perspective, Comcast’s policy vis-à-vis the Xfinity-Xbox app is transparent. Their online guide to using the Xfinity-Xbox app spells out very specifically who qualifies to use the Xfinity app, what features are required, what data usage is being exempted from the cap, and which data usage counts towards the cap.³⁴ This is sufficient to meet the first prong of the test.

From a technical perspective, however, Comcast has been less than forthcoming with details regarding how the data for the app is being transmitted. Initially, its claim was that the data was being carried over a “private internet” which is distinct from the public internet, and is thus exempt from net neutrality concerns.³⁵ After an outcry from bloggers and advocacy groups pointed out that the app was routing video data through the same network infrastructure as all

³⁰ See Federal Communications Commission, *Further Inquiry Into Two Under-Developed Issues In The Open Internet Proceeding*, 25 FCCR 12637 (2010).

³¹ See *Id.* at 3 (Stating that vertically integrated providers of content, applications, and services may have the ability and incentive to engage in anti-competitive conduct with respect to specialized services).

³² *Id.* at 4.

³³ See *supra* at 12.

³⁴ See Xfinity TV – FAQs (Jan. 22, 2013), available at <http://xbox.comcast.net/faqs.html>.

³⁵ Timothy B. Lee, *Net Neutrality Concerns Raised About Comcast’s Xbox On Demand Service*, ARSTECHNICA, (Mar. 1, 2013, 11:06 AM), <http://arstechnica.com/tech-policy/2012/03/net-neutrality-concerns-raised-about-comcasts-xbox-on-demand-service/>.

other data,³⁶ Comcast removed references to a private internet from its websites and subsequent press releases. Comcast instead focused on presenting the Xbox as a set-top box, not unlike the units it provides its customers for traditional broadcast viewing.³⁷ The absence of any further clarification from Comcast about its data management policy for on-demand video does not confirm that Comcast is going beyond its right to reasonable network management. It does, however, appear to be precisely the type of obfuscation that the FCC expressed concerns about in the net neutrality proceeding.

Comcast's Xbox app does not provide end-user controls for managing data usage. The only data Comcast provides unique treatment for is transmitted through the usage of its Xfinity app, which of course favors Comcast's own content. Customers may not, for example, select Netflix or any other unaffiliated service for data cap usage exemption. Comcast could reduce the likelihood that its policy will be deemed discriminatory by allowing customers to select an unaffiliated video service provider's Xbox app as their exempt service of choice; however, it is not at all likely that Comcast would voluntarily make such a concession.

The Comcast Xfinity-Xbox app policy is prima facie not use-agnostic; it exempts only data that is (1) used for viewing Comcast-provided content, (2) downloaded on the Xfinity-Xbox app, and (3) viewed using an Xbox console with a Gold membership.³⁸ This is a very use-specific form of discrimination. From a technical and marketing perspective, Comcast touts the benefits of its unique way of treating its video data; the assertion being that because the video data is packaged differently, it does not travel over the same broadband network as non-affiliated video on demand services.³⁹ While the assertion concerning how data is being routed is dubious, if in fact the assertion is accurate, it points to unique treatment of Xfinity video data, which weighs in favor of a conclusion of discriminatory treatment.

Finally, standard practice in the broadband services industry is difficult to ascertain because (1) Comcast is simultaneously in the broadband service and video-on-demand industries, and (2) the video game console app market is still nascent. While Verizon's Fios and AT&T's U-Verse broadband services use similar methods of packaging data for online transmission of video data,⁴⁰ neither of them offer an unlimited use companion app on a video game console. The smaller players in the video-on-demand industry (Netflix, Hulu, Amazon, etc.) might be more willing to compete along lines of usage pricing than AT&T and Verizon because, unlike the former Bell companies, they do not have a vested interest in maintaining high broadband internet access prices. Practically speaking, these smaller competitors are unable to create competitive pressure because of their reliance on their ISP competitors like Comcast which control prices and

³⁶ See, Bryan Berg, *Video Streaming & Net Neutrality*, BERG'D: BRYAN BERG'S TUMBLER, (Mar 1 2013, 5:13pm) <http://ber.gd/post/22374588073/video-streaming-net-neutrality>. (I.T. professional Bryan Berg conducted a series of tests which traced how data was transmitted to and from his Xbox on Comcast's network. His studies showed that while the data was packaged differently than data from other apps, it was transmitted through the same facilities as non-affiliated data).

³⁷ Tom Cheredar, *Comcast Removes Mention Of "Private Network" From Xbox App FAQ Page*, VENTUREBEAT (Mar 1 2013, 11:22AM), <http://venturebeat.com/2012/03/29/comcast-explains-xbox-faq-data-caps/>.

³⁸ See *Xfinity TV – FAQs*, XFINITY (Jan. 22, 2013), <http://xbox.comcast.net/faqs.html>.

³⁹ See Tony Werner, *The Facts about Xfinity TV and Xbox 360: Comcast Is Not Prioritizing*, COMCAST (May 15, 2012, 10:00 PM), <http://corporate.comcast.com/comcast-voices/the-facts-about-xfinity-tv-and-xbox-360-comcast-is-not-prioritizing> (Comcast Chief Technology Officer explaining that the video is delivered over neither QAM or the internet).

⁴⁰ See Ryan Lawler, *Comcast Updates Xbox FAQ, Cuts Reference To Its 'Private IP Network'*, GIGAOM (Mar. 29, 2012, 5:32 PM), <http://gigaom.com/video/comcast-xbox-faq-update> ("It's also worth noting that what Comcast is doing isn't that different from IP delivery of video via Verizon FiOS or AT&T's U-Verse.").

access to their broadband networks. Simply put, Comcast's policy creates a case of first impression to which there is no direct analogy and no precedent in either the broadband services industry or the video-on-demand industry. However, if the Xfinity-Xbox policy is allowed to be re-implemented, only large broadband service providers that also have their own content will be able to compete directly with Comcast.

If Comcast's contention is that the Xfinity-Xbox app is a Specialized Service, the above four factor test will be rendered moot in this controversy unless further action is taken by the FCC. As it stands, the Open Internet Order does not completely address the proper way to provision Specialized Services within the Net Neutrality rules. The Comcast policy is in clear conflict with the FCC's stated intent of maintaining an open and competitive internet services market. However, the Comcast policy is not currently in violation of the regulations as they were adopted in the Open Internet Order.

B. NBC-Universal Merger Orders/Conditions

1. Potential Harms Anticipated

In 2011, the FCC granted approval to Comcast to merge with NBC-Universal. Because of the unprecedented size and vertical integration of the resulting company, the FCC expressed serious concerns regarding potential harms arising from the transaction. In particular, the FCC was concerned that the newly formed entity would have the incentive and ability to hinder competition by exercising control over programming, broadband service, or set-top boxes.⁴¹ The most pertinent issue to the Xfinity-Xbox controversy is whether or not Comcast and NBC Universal unfairly use their control of broadband access to discriminate against competitors that offer programming and content, not whether discrimination exists against other broadband service providers.

2. Conditions of Merger

The FCC conducted an expansive analysis of the proposed NBC merger and established three conditions that are of particular import for the Xfinity-Xbox analysis: (1) Comcast must not prioritize affiliated internet content over non-affiliated content, (2) service offerings that include usage based pricing such as data caps shall not treat unaffiliated internet content differently than affiliated content, and (3) if Comcast offers specialized services that make content from third parties available to their customers, then it must allow any other comparable third party to be included in a similar specialized service on a non-discriminatory basis.⁴²

Regarding the first condition, it seems clear that Comcast is prioritizing their affiliated app's internet content over that of unaffiliated service providers. Comcast has made it a point to assure customers that affiliated content is not provisioned the same way as unaffiliated content.⁴³

⁴¹ See *In the Matter of Applications of Comcast Corp., Gen. Elec. Co. & NBC Universal, Inc.*, 26 F.C.C.R. 4238, 4240 (2011).

⁴² See *In the Matter of Applications of Comcast Corp., Gen. Elec. Co. & NBC Universal, Inc.*, 26 F.C.C.R. 4238, 4275-4276 (2011).

⁴³ See Tony Werner, *The Facts about Xfinity TV and Xbox 360: Comcast Is Not Prioritizing*, COMCAST (May 15, 2012 10:00pm), <http://corporate.comcast.com/comcast-voices/the-facts-about-xfinity-tv-and-xbox-360-comcast-is-not-prioritizing> (Comcast Chief Technology officer asserting that the video content is delivered over a managed network which distinguishes it from internet delivered content from Hulu or Netflix).

It seems highly unlikely that Comcast would go through the expense of packaging data separately and setting aside additional bandwidth for a service only to provide *lesser* quality and speeds than third party competitors to which it provides transmission services.⁴⁴ Furthermore it is doubtful that Comcast would take the steps necessary to replicate public internet transmission speeds over their supposed “private internet” to ensure that they provide only equivalent speeds. The only justification for this strategy that would make sound business sense—favorably assuming that the policy was not enacted solely to avoid regulatory restrictions—is to differentiate the treatment of Xfinity video content only if it were to improve the quality or efficiency of the service provided. Therefore, it can be reasonably inferred that they are transmitting their specially packaged data at higher speeds and with higher quality than competing carriers’ video data. Since non-affiliated programming providers do not have the means by which to enact competing differentiation methods, Comcast’s differentiation of its online video data packaging and delivery, coupled with charging customers less for its transmission by way of data cap exemption, is a prioritization of its internet content. By providing customers with faster transmission and higher quality, Comcast’s policy is in contravention to this prong of the NBC Universal merger conditions.

Regarding the second condition, Comcast is violating the FCC prohibition against treating unaffiliated internet content differently than affiliated content because its Xfinity broadband service is usage-priced and its video internet content is packaged and delivered differently than that of non-affiliated third parties.⁴⁵ Furthermore, exempting its video internet content from counting against Comcast data caps while counting equivalent competing companies’ programming against those same caps is also differential treatment. Unless the FCC qualifies the Xfinity application as a specialized service, and finds that those services are in fact exempt from merger conditions, Comcast will have to remove the data cap or provide an alternate equitable remedy in order to stay within the boundaries set by the merger condition.⁴⁶

Regarding the third merger condition, one of the rules found therein is that Comcast must allow any comparable third party to be included in a similar specialized service. This means that Hulu, Netflix, and other online video service providers should be able to offer their customers a similar benefit when using Comcast internet service. In this case, it is impossible for non-affiliated video providers, who are not themselves internet access providers, to offer their customer data cap exemptions without Comcast’s approval. This is because they do not control the data cap policy or the method by which data consumption is measured. The Xfinity-Xbox policy, therefore, violates the third merger condition.

3. Comcast’s Xfinity-Xbox Policy Likely Violated The NBC Universal Merger Conditions

⁴⁴ See, Bryan Berg, *Video Streaming & Net Neutrality*, BERG’D: BRYAN BERG’S TUMBLER (May 5, 2012) <http://ber.gd/post/22374588073/video-streaming-net-neutrality>. (“Comcast built an Internet video streaming service. In certain cases, it exempted that service from bandwidth caps despite evidence that those streams are actually more expensive to deliver.”).

⁴⁵ See *In the Matter of Applications of Comcast Corp., Gen. Elec. Co. & NBC Universal, Inc.*, 26 F.C.C.R. 4238, 4275 (Jan. 20, 2011), ([DEFINE USAGE BASED PRICING] data caps are considered usage-based pricing); See, Bryan Berg, *supra* note 44 at 16.

⁴⁶ Possible alternate remedies that negate the discrimination inherent in the differential treatment of Xfinity video data may include charging higher service fees only for video viewed through the Xfinity app, packaging and delivering competitive programming content using the same protocol used for Xfinity programming, and/or manufacturing a small set top device which can transmit Xfinity programming without the use of the Xbox console.

Comcast's Xfinity-Xbox policy, as it was enacted, clearly conflicted with the FCC's expressed intent of counteracting Comcast's incentive and ability to discriminate against non-affiliated data carried over its broadband network. By providing users of their Xbox app with unlimited use of only their online video service, they implicitly raise the end-user cost of using non-affiliated services. End-users who use non-affiliated online video services, which are not capable of providing similar unlimited use, were being penalized solely because of the type of content being delivered to them. This is a direct violation of the FCC condition against discrimination.

CONCLUSION

If the Comcast Xfinity-Xbox app is found to be a specialized service, the Comcast policy will be found not to be in violation of the Open Internet Order. The specialized service issue is not controlling given the current state of net neutrality law. The FCC has not yet provided definitive guidance as to how these services must be provisioned in order to remain in compliance with the net neutrality rules in the Open Internet Order. In the net neutrality rules, the FCC explicitly decided that it will allow specialized services for now, but will continue to monitor future anticompetitive conduct to determine if further action is warranted. Given the explosive rate at which online video programming is being adopted by consumers, it is imperative that the FCC reconsider its "wait and see" approach. Providing clear guidance while the industry is still in its formative stages will reduce future litigation and provide a more stable environment in which businesses can compete.

Comcast's Xfinity-Xbox app policy is in violation of the Merger Order regardless of whether or not the FCC finds its online video service to be a specialized service because the merger conditions expressly apply to specialized services. Here, Comcast is (1) prioritizing its affiliated online video service over that of non-affiliated providers through special data management, (2) doing so with its data-capped broadband access service, and (3) is not allowing its comparable competitors to offer online video services which are exempt from data cap usage. Therefore, Comcast is in violation of the Merger Order.