Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Applications of Comcast Corporation,	)	
General Electric Company	)	
and NBC Universal, Inc.	)	
	)	MB Docket No. 10-56
	)	
For Consent to Assign Licenses or	)	
Transfer Control of Licensees	)	
	)	

COMMENTS IN OPPOSITION OF THE FAIR ACCESS TO CONTENT & TELECOMMUNICATIONS COALITION

Kevin J. Martin
Mark C. Ellison
Patton Boggs LLP
2550 M Street, NW
Washington, DC 20037
202-457-6000

June 21, 2010

EXECUTIVE SUMMARY

FACT is a coalition of organizations representing independent telecommunications providers that offer voice, data and video services - as multi-channel video providers (MVPDs) - in rural America. In some cases, they offer video through traditional coaxial cable systems while, in others they provide competitive "telco-video" services over digital subscriber lines (DSL) or fiber, often in competition with an incumbent cable operator.

The Merger would result in an unprecedented communications giant that would place an exceptional array of broadcast, linear cable, online, video-on-demand, and pay-per-view content under the control of the Nation's largest MVPD, Comcast, which serves over 24 million homes with its own cable systems, provides satellite distribution of some 280 cable channels to 2,000 other U.S. cable systems,[1] and is the largest broadband operator in the country with nearly 19 million homes served.

With ownership in such a vast inventory of content, Comcast will be positioned to deny or delay access to that content by competitive MVPDs, and/or to tie multiple channels together in mandatory "take-it-or-leave-it" offers when selling to those MVPDs, limiting shelf space for independent programmers and driving up consumer prices. NBCU has already exhibited a proclivity for such conduct, as it has imposed conditions on many of FACT's members that tie the carriage of 9 or more cable channels in order for them to purchase any channels. NBCU also mandates that carriage of all its channels must be on the most widely distributed tier of service (typically expanded basic) and the company has even obligated FACT members to commit to carriage on that level of service for a channel *that has not even been named or launched*!

[1] Digital MPEG-2 services of Comcast Media Center / H.I.T.S. discussed, *infra*.

The Venture would control many "must-have" channels, including the NBC broadcast network, USA Network (the top-rated cable channel), and the Comcast regional sports networks. An MVPD must carry those channels in order to compete. Thus, essential services would come under the control of a competitive distributor in the Merger. Having that power, the Venture can not only tie channels and dictate carriage terms, but also raise programming rates with little or no negative impact on its own cable operations as increased costs will simply be offset by increased revenue within the integrated corporate structure.

The Merger will also allow Comcast to control Internet (or online) programming, particularly with respect to the 35 digital media properties the Venture would control, including the second-most highly watched video website, Hulu.com. Within the Venture's own broadband systems it can control access to online content – permitting it, denying it, or making it exclusive only to its systems and subscribers. It will also have the ability to tie online access to a cable subscription. As discussed herein, Comcast and NBCU have both already demonstrated a willingness to restrict customer access to online video.

In the area of video-on-demand and pay-per-view, Comcast wields significant power with its controlling interest in the Nation's largest PPV / VOD service, "iN DEMAND" and its ownership of Comcast Media Center (CMC). The Merger will add all NBCU content to the iN DEMAND exclusive stable of content, including theatrical programming from United Studios and Focus Features, giving iN DEMAND even greater power and control in the PPV and VOD markets. This will also be an issue with CMC in terms of the degree of additional VOD content it will control.

The Venture will be able to tie its broadcast content to its cable content creating yet another formidable challenge to competing MVPDs. Broadcast network television remains the ultimate must-have channel for any MVPD. As the owner of NBC and Telemundo, Comcast stands to benefit – and the competition stands to lose – in two ways. Comcast can raise retransmission fees without harm to its own bottom line, while damaging competitive MVPDs, and it gains yet more essential "must-have" content that it can leverage and tie.

FACT is recommending the adoption of clear, specific and enforceable conditions to protect the interests of independent rural video and broadband distributors. The FACT Recommended Conditions are as follows:

1. A requirement, separate and apart from the Commission's existing program access rules,[2] that the Venture license all of its content, including broadcast, linear cable, VOD, PPV and online content, on fair, reasonable and non-discriminatory licensing terms and in no event less favorable than the terms on which Comcast's own cable systems license such content.
2. A prohibition against Comcast – NBCU from engaging in the forced tying of multiple channels, including a prohibition against forced bundling via pricing differentials, as a condition to acquiring any programming offered by the Venture.
3. A prohibition against the Venture from dictating, either explicitly or through punitive pricing, the channel placement of any Comcast – NBCU content (such as requiring placement on a specific tier of service, or in a designated neighborhood of channels) on an MVPD system.
4. Application of provisions of Title 47 CFR Sec. 76.1000, et seq. ("Competitive Access Rules") to all Comcast – NBCU owned channels retroactively (i.e., to contracts entered into pre- and post-merger).
5. A prohibition against the Venture from imposing conditions or requirements on any MVPD or broadband providers that limits the ability to offer online content in any market.
6. A prohibition against the Venture from requiring payment from MVPDs or broadband providers for any online Comcast/NBCU content.
7. Appropriate restrictions on the migration of sports and other programming from the NBC broadcast network to any basic or premium cable or online channels controlled by the Venture.
8. A requirement for the Venture to divest itself of ownership of iN DEMAND and CMC or, alternatively, the Venture shall be prohibited from tying content offered on iN DEMAND (e.g., MLB, NHL, and Comcast/NBCU-owned studios' films) and/or CMC as a condition of licensing either by contract requirement or pricing penalties..
9. A requirement that the NBC and Telemundo broadcast networks grant retransmission consent rights on a "most favored nation" basis to all MVPDs, and prohibit the tying of broadcast content to any other cable programming offered by the Venture.

[2] Title 47 CFR Sec. 76.1000, et seq. ("Access Rules").

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc.	)	
	)	MB Docket No. 10-56
	)	
For Consent to Assign Licenses or Transfer Control of Licensees	)	

To the Commission:

COMMENTS IN OPPOSITION OF
THE FAIR ACCESS TO CONTENT & TELECOMMUNICATIONS COALITION

The Fair Access to Content & Telecommunications Coalition (FACT), by its attorneys, hereby submits these Comments in Opposition to the Applications of Comcast Corporation (Comcast), General Electric Company (GE), and NBC Universal, Inc. (NBCU) to assign licenses or transfer control of licensees in furtherance of the proposed acquisition of fifty-one percent (51%) of NBCU by Comcast (the "Applications").[1]

[1] See "Commission Seeks Comment on Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc., to Assign and Transfer Control of FCC Licenses," Public Notice (Mar. 18, 2010) (hereinafter, the applications referred to therein, "Application" and the transaction referred to therein, the "Transaction" or the "Merger", and the proposed combined entity, the "Venture").

I. INTRODUCTION

The members of FACT are three non-profit organizations representing the interests of rural telecommunications providers. Those organizations are: the National Rural Telecommunications Cooperative ("NRTC");[2] the Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO");[3] and the Rural Independent Competitive Alliance ("RICA").[4]

FACT contends that substantial and material questions of fact exist with respect to the proposed Merger of Comcast and NBCU, particularly with respect to whether the Merger will serve the public interest unless substantial and meaningful conditions are imposed by the Commission. FACT members, as customers of Comcast and NBCU for programming content and as competitive video and broadband distributors competing with Comcast, are deeply concerned that the proposed Merger will create a mammoth vertically and horizontally integrated communications company that will place Comcast – the Nation's largest multichannel video programming distributor ("MVPD") *and* largest broadband distributor – in control of some 54 cable channels, two national television broadcast networks (NBC and the Telemundo Spanish-

---

[2] NRTC is a non-profit corporation organized as a buying cooperative and made up of some 1500 rural telephone and electric cooperatives and companies. NRTC has delivered advanced telecommunications technology to its members since 1986 including C-band television, direct broadcast service television and, more recently, Internet protocol television (IPTV) distribution rights.

[3] OPASTCO is a national trade association representing approximately 470 small incumbent local exchange carriers (ILECs) serving rural areas of the United States. Its members, which include both commercial companies and cooperatives, together serve more than 3 million customers. All OPASTCO members are rural telephone companies as defined in 47 U.S.C. §153(37).

[4] RICA is a national association of nearly 80 competitive local exchange carriers (CLECs) that are affiliated with rural ILECs and provide facilities based service in rural areas.

language network), 35 digital media properties, and the largest video-on-demand and pay-per-view provider (iN DEMAND).[5]

The proposed Merger would create an entity uniquely positioned and have the incentive to impede competition with respect to MVPD content rights, video over the Internet, and independent programming. Absent the imposition of conditions as recommended herein any purported benefits arising from the proposed Merger will be far outweighed by the anticompetitive harms that would befall the video distribution and broadband marketplaces.

The proposed Merger is unprecedented in its size, scope, and potential to hinder or block competition in the video marketplace and to impede broadband adoption. On one side is Comcast, the largest cable and broadband operator in the nation and also the dominant provider of video-on-demand (VOD) and pay-per-view (PPV) through its controlling interest in iN DEMAND. On the other side is NBCU with a vast array of broadcast and cable networks, movie studios, production facilities and digital media properties.

Furthermore, unlike past media mergers, the one now before the Commission involves a new medium that has the potential to rival cable and satellite as a source for news and entertainment: online video. The shear magnitude of this proposed Merger of media behemoths should be of great concern to the competitive marketplace as it touches on cable, over-the-air, on-demand, pay-per-view, and satellite distribution. But the concern is significantly elevated when the element of online distribution of content is taken into consideration. Additionally, those concerns are further elevated by the past conduct of the parties to the Merger.

There are material questions of fact raised by the proposed Merger that simply are not answered in the Applications. The potential impact of the Merger on competitive cable,

---

[5] A complete listing of Comcast and NBCU media properties is set forth in Appendix A hereto.

telephone (telco) delivered video, satellite and online video, and on the viewing public is enormous. These questions clearly touch on whether the Merger would cause anticompetitive harm, whether it truly is in the public interest, and whether it is consistent with the policies and goals of the Commission.

In view of these facts and questions, FACT submits that if the Commission does determine that the Applications are in the public interest and permits the transfers, conditions must be imposed that will ensure that the potential anticompetitive power that would result from the Merger is circumscribed.[6] As specified above in the Executive Summary and herein below, FACT specifically calls for the imposition of conditions on the Merger.

II. BACKGROUND

A. FACT COALITION

FACT is an informal coalition comprised of three nonprofit organizations that represent the interests of rural telephone systems and also, in the case of one member (NRTC), rural electric companies.

OPASTCO is a national trade association that has represented the interests of independently owned local exchange carriers ("LECs") for more than four decades. Approximately 75 percent of OPASTCO members provide subscription video services using a variety of technologies.

RICA represents eighty small, rural local exchange carriers who provide competitive communications services. RICA's members are all engaged in competitive video distribution and broadband services. RICA has been in existence since 1999.

---

[6] See recommended Conditions at Executive Summary, *supra*.

NRTC is a telecommunications cooperative that has over 1500 rural utility members, including electric and telephone cooperatives, independent telephone companies, and broadband service providers. NRTC and its members have been engaged in video distribution since its inception in 1987, first as distributors of C-band television programming and then as distributors of DIRECTV. NRTC is also a distributor of broadband services, providing satellite broadband through WildBlue Communications Corp., and WiMAX broadband service. Since 2005, NRTC has served as a programming content aggregator (i.e., a "buying group"[7]), providing licensing for over 300 channels of video content with rights for traditional cable and Internet protocol television ("IPTV"), which it offers primarily to rural telcos and independent broadband operators.

Nearly 600 of the companies represented by these three nonprofit organizations are rural telephone companies as defined in 47 U.S.C. §153(37), or their affiliates that are engaged in the distribution of video programming over cable, DSL technology, satellite, terrestrial wireless, and/or fiber to the home to consumers in rural America. They are multichannel video programmer distributors[8] that are, in many cases, competitive to legacy cable systems in their markets. Essentially, many are "telco video" distributors, providing competitive video service in rural America in similar manner to what AT&T's U-verse and Verizon's FiOS are doing in non-rural markets. In some cases, the telcos FACT represents have built or acquired traditional coaxial cable systems which they are operating in their markets.

FACT members are also engaged in the provision of broadband services in rural markets where they have made significant strides in delivering broadband to rural consumers through DSL, fiber, wireless, and satellite.

---

[7] See 47 C.F.R. §76.1000(c).

[8] As defined by 47 C.F.R. § 76.1000(e).

B. The Rural Cable & Telco Video Market

Many of the rural telephone companies represented by FACT's members have in recent years entered the video distribution business in order to serve as their market's cable MVPD or to compete with incumbent cable operators in their markets, and to give themselves the ability to offer the so-called "triple play" offering of voice, data and video. Many of these telco system operators have entered the video market in the second half of the current decade. In addition to the challenge of often being the third market entrant – after cable and satellite – they have faced significant challenges with respect to programming rights.

First, there is a significant hurdle in securing programming rights. In many cases, the rural telco operators are quite small, serving communities with a few hundred or a few thousand homes. It has been, therefore, a difficult task getting large programmers to pay attention to these operators and to secure the myriad distribution rights agreements needed to operate. The process can be very long and expensive.

NRTC responded to this problem by securing programming rights as a buying group, giving rural telcos offering video (including those using IPTV) a one-stop source for IPTV rights for over 300 channels. This was no small task for NRTC, even with its resources. The process of securing rights by NRTC began in 2005 and it took over two years to negotiate and conclude agreements for a viable, competitive package of services. The onerous task of obtaining programming is made more difficult by the fact that telcos are being compelled by the programmers to accept and carry far more programming than is wanted or affordable in the rural marketplace.

With few exceptions, large programmers that offer multiple channels require that the telco distributors to carry *all* of their channels… or none at all. In many cases, such tying arrangements also come with specific mandates for carriage on a designated level of service, usually the most widely distributed level of service above the basic service level (typically called "expanded basic").

Another more recent form of carriage requirement that telco video distributors are facing is that associated with the online content offered by a programmer. One major programmer has tied – either expressly or by the imposition of rate penalties – the distribution of several online channels as a condition of licensing its traditional cable channels. Specifically, the telco video operators are required to deliver and pay a fee for every broadband home the operator serves, not just video customers. Furthermore, the telco is not permitted to have a line item reflecting these costs on the customers' bills. The result of such practices is to significantly increase costs at the outset for telco video operators, making them less competitive vis-à-vis the incumbent cable operator. Ultimately, the practice will also drive up the cost of broadband access, impeding further broadband adoption.

The concerns of telco video operators regarding forced tying, channel placement and distribution of online content are what lie at the heart of FACT members' worries with respect to the proposed Merger. These consumer harms not only thwart the Congressionally-mandated policy goal of increased consumer choice in the video market, but also raise an additional barrier to broadband deployment and adoption.

C. The Broadband and Online Video Market

Rural telco video operators are often also competitive broadband providers in the markets they serve. As the Commission has correctly recognized, there is a direct connection between a provider's ability to offer video service, and to deploy broadband networks.[9] This finding is

---

[9] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB

consistent with the experiences of rural LECs that serve as both broadband providers and MVPDs. When video is offered jointly with broadband services, broadband subscription rates increase by nearly 24 percent.[10] This not only increases the number of rural consumers taking advantage of the benefits that broadband Internet access can offer, it also results in increased revenues for rural LECs. This increased revenue, in turn, provides rural ILECs with the incentive, and additional resources, needed to invest in deploying broadband services to more rural customers and to improve the quality (including speeds) of service where it is already offered. In short, access to subscription programming is a vital broadband issue.

In addition, as the foremost providers of broadband service in rural America, small telcos are keenly aware of the importance of being able to access online content by its customers. Online viewing of video content is today a small segment of video viewing, but it is growing at a rapid pace. The number of people watching video on the Internet increased by 14.8 percent in the year from the third quarter of 2008 to the third quarter of 2009,[11] and that trend is likely to increase with each passing month. The ability of consumers to access video content online increases the value of their broadband subscriptions and thus the incentive to deploy more broadband. Conversely, limitations or restrictions on the ability of consumers to access content online (such as through methods imposed by Fancast or TV Everywhere) devalues broadband subscriptions and ultimately discourages broadband deployment.

Irrespective of the market's size today, it is indisputable that a telco broadband operator would be greatly impaired if it were not able to offer whatever broadband delivered video its

---

Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5132-33, ¶62 (2007).

[10] See, NECA comments, GN Docket Nos. 09-47, 09-51, 09-137, p. 6 (filed on Dec. 7, 2009).

[11] "The Proposed Comcast-NBC Universal Combination: How it Might Affect the Video Market", Charles B. Goldfarb, Congressional Research Service, February 2, 2010.

competitors are able to offer. In addition to the 54 cable networks and the two national broadcast networks in which the Venture will have ownership interests, it will also own or control 32 online media properties. To a very significant degree, the Comcast-NBCU Venture will control vast amounts of online content and will have the ability and the incentive to impede the flow of such content over the broadband "pipes" of competitive service providers.

III. COMMENTS IN OPPOSITION

A. Enforceable Conditions Are Necessary to Prevent the Merger From Impeding Competition In the Video Market and Thwarting Broadband Adoption, Contrary to the Public Interest.

As the threshold question, the Commission is to determine whether the Applicants have met their burden[12] in demonstrating that the proposed Merger will serve the public interest, convenience and necessity.[13] The Commission must:

> ...determine whether the transaction violates our rules, or would otherwise frustrate implementation or enforcement of the Communications Act and federal communication policy. That policy is shaped by Congress and deeply rooted in a preference for competitive processes and outcomes."[14]

The public interest standard gives the Commission both the authority and obligation to determine whether the level of control that the merged entity would have over television, online and theatrical content while at the same time existing as the largest and most dominant distributor of such content via cable, Internet and on-demand media truly would be in the public interest.

---

[12] 47 U.S.C. §§ 308, 310(d).

[13] 47 U.S.C. § 310(d).

[14] General Motors Corp. and Hughes Electronics Corp and The News Corp., Memorandum Opinion and Order, 19 FCC Rcd 473, 484 ¶ 16 (2004) (internal citations omitted) (hereinafter, "News Corp.").

> The "public interest evaluation under Section 310(d) necessarily encompasses the 'broad aims of the Communications Act,' which includes, among other things, preserving and enhancing competition in relevant markets, ensuring that a diversity of voices is made available to the public, and accelerating private sector deployment of advanced services."[15]

There are, in the view of FACT and its members, four principal areas which the Commission must examine in terms of whether the Merger will meet the Public Interest requirement. Those are: (1) subscription-based distribution; (2) Internet distribution; (3) video-on-demand and pay-per-view distribution and (4) broadcast television retransmission.

1. If Approved, The Merger Should Mandate Fair, Reasonable and Non-discriminatory Licensing of All Comcast – NBCU Content To Subscription-Based MVPDs.

In order for the Commission to determine whether the Merger would serve the public interest, convenience, and necessity, the Commission would have to determine that the Merger would not result in impeded access to video content for other MVPDs. However, the magnitude of the proposed Merger is far greater than any previous marriages of content and distribution companies considered by the Commission. This Merger would combine Comcast's distribution infrastructure – the nation's largest with approximately 24 million cable homes and nearly 19 million residential broadband customers – with the vast media assets of NBCU.

The resulting new Venture would have ownership in two national broadcast networks (NBC and Telemundo), some 54 cable networks, Universal Studios, Focus Features Studios, and 26 broadcast stations around the country.

The acquisition of Universal Studios and Focus Features is notable as Comcast also owns controlling interest of "iN DEMAND," the dominant pay-per-view ("PPV") and video-on-

---

[15] EchoStar Communications Corp., Hearing Designation Order, 17 FCC Rcd 20559, 20575 ¶ 26 (2002).

demand ("VOD") distributor for the cable market.[16] The cable giants that own iN DEMAND provide cable video services to approximately 45 million of the 63 million cable homes in our nation, or some 71 percent of all cable subscribers.

Comcast's potential control of two of the largest Hollywood studios is daunting when considered with the fact that Comcast's iN DEMAND holds exclusive rights for VOD / PPV distribution of Major League Baseball ("Extra Innings"), the National Basketball League ("League Pass"), the National Hockey League ("Center Ice"), and Major League Soccer ("Direct Kick").

Stated simply, if this proposed Merger is allowed to close, the new entity would, as a group of Congressmen wrote the Commission, "control content production and content distribution at an unprecedented level."[17]

a. If the Merger is approved, the Commission should prohibit Comcast – NBCU from engaging in the forced tying of multiple channels, including a prohibition against forced bundling via pricing differentials and other conditions to acquiring any programming offered by the Venture.

In recent years, there have been numerous new entrants in the subscription-based video distribution business, most notably telcos, offering advanced technology and more competition. These companies have entered the video market to complement and help sustain voice and broadband services, and to offer an alternative to incumbent cable systems. In most cases, particularly where distributors are employing advanced technology such as IPTV, the programming rights-holders have imposed carriage conditions and costs that are far more

[16] Ownership is through a subsidiary, Comcast iN DEMAND Holdings, Inc. and the service is co-owned with two other cable operators: Cox Communications Holdings, Inc., and Time Warner Entertainment - Advance/Newhouse Partnership.

[17] Letter of Members of Congress Maurice D. Hinchey, Donna F. Edwards, Bob Filner, John W. Oliver, Fortney Pete Stark, Lynn C. Woolsey, and Carolyn McCarthy to FCC Chairman Julius Genachowski, February 4, 2010.

burdensome than those dictated for incumbent cable operators.[18] Often the practice involves forcing carriage and packaging of unpopular and unwanted programming. In some cases, popular video services have tied licensing of online content for a fee as a condition of licensing their mainstream television programming. In other cases, retransmission consent for carriage of broadcast stations is conditioned upon carriage of cable content that is under common ownership with the broadcaster.

The result of these practices has been to drive up the cost of programming for consumers – often impacting rural markets where higher costs are least affordable – and making it very difficult for the new market entrants to compete. Emerging practices are also affecting the availability and affordability of online content for consumers.

If the proposed Merger of Comcast and NBCU is approved by federal regulators, the merged entity would likely be *the* largest supplier of television programs, movies, and online content on the planet, reportedly controlling more than one out of every five television-viewing hours. With NBCU representing a large portion of entertainment content and Comcast controlling the flow of that content to cable television sets and desktops via the Internet, this concentration of power raises core competition and antitrust concerns for independent video distributors.

[18] For instance, even including large companies like Verizon and AT&T that enjoy economies of scale, telco MPVDs pay more than twice what cable MVPDs pay on a per-subscriber basis ($1.21 compared to $0.56) for broadcast retransmission consent rights. *See* American Cable Association comments, MB Docket No. 10-71 (filed on May 18, 2010), p. 6.

b. If the Merger is approved, the Commission should prohibit the Venture from dictating the channel placement of any Comcast – NBCU content (such as requiring placement on a specific tier of service, or in a designated neighborhood of channels) on an MVPD licensee's system

Combining Comcast's channels with NBC-owned channels would provide the Venture with the ability and incentive to engage in forced tying and to demand specific carriage of channels in a manner that would impair the ability of competitive distributors, including FACT members, as well as competitive independent programming sources, to serve consumers. NBCU has a history of either withholding rights to the most popular channels or offering them only at unsustainably higher priced terms unless an MVPD agrees to place those channels on mandated tiers. Furthermore, if the Merger is approved, the Venture would have the ability to demand priority or even exclusivity on a specified tier (favoring, for example, CNBC over Bloomberg TV or Fox Business News).

Forced tying of content is a concern that the Commission considered real and well-founded in the News Corp. transaction. There, the Commission concluded:

> [W]e agree with Commenters who contend that the transaction can enhance News Corp.'s incentive and ability to persuade competitors to carry its affiliated programming. Specifically, as we held above, the transaction may enhance News Corp.'s incentive and ability to extract higher compensation from competing MVPDs in exchange for carriage of its most popular programming—[Regional Sports Network (RSN)] and broadcast programming. Such compensation may include monetary compensation, but also carriage of News Corp. affiliated networks. To obtain RSN or broadcast programming from News Corp., an MVPD may accede to News Corp.'s demands to carry its affiliated cable networks, or to pay excessive rates for News Corp. programming. Absent these demands and higher costs, the MVPD might have elected to carry an independent rival network that would have expanded the sources of programming available to its subscribers.[19]

[19] News Corp., infra ¶ 271. ("[V]ertical transactions also have the potential for anticompetitive effects. In particular, a vertically integrated firm that competes both in an upstream input market

When forced tying or tiering is practiced, the public interest is at risk. If the licensee refuses tying or tiering mandates, it and its customers lose access to content. On the other hand, if the MVPD submits to the bundling/tiering requirements, higher rates are incurred which must be passed to the subscribers – even for programming the subscriber may not want.

The Commission has long recognized the adverse impacts felt by consumers when programmers tie undesired programming with "must-have" content, especially when they receive service from a small MVPD:

> When programming is available for purchase only through programmer controlled packages that include both desired and undesired programming, MVPDs face two choices. First, the MVPD can refuse the tying arrangement, thereby potentially depriving itself of desired, and often economically vital, programming that subscribers demand and which may be essential to attracting and retaining subscribers. Second, the MVPD can agree to the tying arrangement, thereby incurring costs for programming that its subscribers do not demand and may not want, with such costs being passed on to subscribers in the form of higher rates, and also forcing the MVPD to allocate channel capacity for the unwanted programming in place of programming that its subscribers prefer. In either case, the MVPD and its subscribers are harmed by the refusal of the programmer to offer each of its programming services on a stand-alone basis. We note that the competitive harm and adverse impact on consumers would be the same regardless of whether the programmer is affiliated with a cable operator or a broadcaster or is affiliated with neither a cable operator nor a broadcaster, such as networks affiliated with a non-cable MVPD or a nonaffiliated independent network. Moreover, we note that small cable operators and MVPDs are particularly vulnerable to such tying arrangements because they do not have leverage in negotiations for programming due to their smaller subscriber bases.[20]

---

and a downstream output market, such as post-transaction News Corp., may have the incentive and ability to: (1) discriminate against particular rivals in either the upstream or downstream markets (e.g., by foreclosing rivals from inputs or customers); or (2) raise the costs to rivals generally in either of the markets."

[20] See, Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition, Review of the Commission's Program Access Rules and Examination of Program Tying Arrangements, MB Docket No. 07-198, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791, 17862-17863, ¶120 (2007).

In spite of the Commission's well-founded concerns, however, this practice has grown as programmers add more and more channels to their offerings and tie those channels on a take-one take-all licensing basis. The leverage that the Venture would enjoy as a merged entity is enormous and the likelihood of even more forced tying from the combined programming sources is strong.

Telco video distributors, many of which are relatively new to the market, have been particularly harmed by tying practices of the programmers. One of FACT's members, NRTC, acts as a programming aggregator for small rural telcos. As it entered that business in 2005, it soon discovered that it could not offer the same carriage terms that competitive incumbent cable operators could offer. NRTC found that it was frequently compelled by the multichannel programmers, including NBCU, to carry all channels offered by the programmers and to carry them on the most widely distributed tier of service. The result is that NRTC's telco members have found that the packages they have to offer are not competitively priced against the incumbent cable operator, particularly in rural markets where household incomes are lower than the national average.

Due to programmer tying requirements, the NRTC-formulated expanded basic package must, at a minimum, contain 70 channels. NRTC's members then must typically sell that package at a retail price averaging approximately $50 per month per subscriber. In contrast, an incumbent rural cable system not similarly burdened with tying and tiering mandates is typically able to carry only about 50 channels in its expanded basic line-up at a retail rate of about $35 per month per subscriber.[21] A $15 retail pricing differential in the rural markets served by NRTC members is material and impedes the ability of NRTC's rural members to compete as MVPDs.

[21] Channel and pricing data supplied by FACT member companies based on actual experience.

A recent online article by the American Cable Association (ACA) clearly articulated the tying problem for smaller MVPDs:

> Therefore, by "wholesale bundling" additional channels to a desired channel, the programmer can pressure cable operators to carry and pay for numerous unwanted channels. When statistics show that in order for cable operators to secure the rights to carry the most popular channels, programmers demand that at least 60 other channels are also carried, you can begin to understand why the most widely subscribed to programming packages are both bloated with channels and costly - charges that are ultimately passed on to customers in the form of higher cable bills.
>
> While some programmers may "technically" provide cable operators with the option to purchase the desired channel on a standalone basis, or not tied to other programming distribution requirements, the per subscriber fee to offer a channel on a standalone basis is so exorbitantly high as compared to accepting a bundled package that the cable operator has no choice but to offer the bundle - or not to offer the channel at all. These standalone offers also include requirements that the channel be included in basic packages which means all subscribers would have to receive and pay for the channel, regardless of interest.
>
> Customers served by independent operators - who lack the negotiating power to command more attractive deals - face reduced choice and disproportionately higher cable costs, as the cable operators have no choice but to pass on the cost for carrying bundled channel packages in order to continue offering high demand programming. In fact, the FCC estimates that programmers could be overcharging consumers more than $100 million per year.[22]

Another aspect of the wholesale bundling / forced tiering problem is that it actually prevents competitive MVPDs such as FACT members from carrying alternative, independent programming on their expanded basic line-ups. Again referring to the experience of NRTC, it was NRTC members' desire to include rural-oriented channels such as RFD-TV and Blue Highways TV to their expanded basic channels, but because of the existing price disparity

[22] See: http://www.americancable.org/issues/page/Wholesale_Unbundling

caused by forced tying of major programmers, the rural-oriented channels were either not carried or offered only as options on higher tiers.

These practices, already engaged in by NBCU, will worsen as the Venture will have significantly more channels to bundle and even greater incentive to raise prices of its video to its telco rivals. It is thus critical that the Commission impose strict conditions prohibiting such tying.

c. If the Merger is approved, the Commission should apply provisions of Title 47 CFR Sec. 76.1000, et seq. ("Competitive Access Rules") to all Comcast – NBCU owned channels retroactively (i.e., to contracts entered into pre- and post-merger).

This Application, as it involves cable systems, requires public interest objectives that include ensuring "that no cable operator or group of cable operators can unfairly impede . . . the flow of video programming from the video programmer to the consumer;" and that "cable operators affiliated with video programmers do not favor such programmers in determining carriage on their cable systems."[23] The mere promises of the Applicants that they will abide by the provisions of the Commission's program access rules are not adequate to ensure that such public interest standard is met. The Applicants would have great incentive and the unquestionable ability to unfairly impede small MVPD's nondiscriminatory access to video programming and both Comcast and NBCU have histories of conduct indicating propensities to do so.

[23] 47 U.S.C §533(f)(2)(A), (B). See also Dish Network L.L.C. v. Comcast Corporation, et al., Arbitration Demand (Am. Arbitration Ass'n Jan. 27, 2008).

Comcast's history is filled with issues involving claims of discrimination by independent programmers and multiple program carriage complaints.[24] As noted above, NBCU has been quite aggressive in compelling the carriage of less popular channels and the forced tying of programming. The Venture, if permitted, will have even greater incentive to deny carriage for competing programming sources, to deny program access for competitive MVPDs and broadband operators, charge discriminatory rates, and to engage in forced tying.

For the reasons specified herein, FACT asks that the Commission impose the following conditions on the Merger:

- Require, separate and apart from the Commission's existing program access rules, that the Venture license all of its content, including broadcast, linear cable, VOD, PPV and online content, on fair, reasonable and non-discriminatory licensing terms and in no event less favorable than the terms on which Comcast's own cable systems license such content.

- Prohibit Comcast – NBCU from engaging in the forced tying of multiple channels, including a prohibition against forced bundling via pricing differentials, as a condition to acquiring any programming offered by the Venture.;

- Prohibit the Venture from dictating, either explicitly or through punitive pricing, the channel placement of any Comcast – NBCU content (such as requiring placement on a specific tier of service, or in a designated neighborhood of channels) on an MVPD licensee's system; and

- Apply provisions of Title 47 CFR Sec. 76.1000, et seq. ("Competitive Access Rules") to all Comcast – NBCU owned channels retroactively (i.e., to contracts entered into pre- and post-merger).

---

[24] See NFL Enters. LLC v. Comcast Cable Commc'ns, LLC, Program Carriage Complaint, File No. CSR-7876-P (May 6, 2008); TCR Sports Broad. Holding, L.L.P. v. Comcast Corp., Program Carriage Complaint, File No. 8001-P (Aug. 7, 2008).

2. The Merger Should Not Be Approved Absent Clear, Enforceable Conditions That Will Ensure Fair, Nondiscriminatory Access to Online Content

a. If the Merger is approved, the Commission should prohibit the Venture from imposing conditions or requirements on any MVPD or broadband providers that limits the ability to offer online content in any market.

The proposed Merger would also give Comcast control of or significant ownership interest in 32 digital media properties, including NBC.com, nbcsports.com, CNBC.com, MSNBC.com, hulu.com, and weather.com.[25] Two factors come into consideration when reviewing this potential online media ownership: 1) Comcast is the largest broadband operator in the nation, serving between 16 and 19 million broadband homes[26]; and 2) fair access to online video content is a critical element for broadband competition.

There is ample evidence already in the market indicating the intentions of Comcast to restrict access to online content. In June of 2009, Comcast and Time Warner announced the launch of "TV Everywhere" a service that allowed broadband customers to view popular cable programming on broadband, but *only* if those customers were authenticated subscribers to the programming service from the traditional MVPD providers.

NBC demonstrated its own propensity for restricting access to content during the 2010 Winter Olympics. NBCOlympics.com denied access to approximately 400 hours of live streaming from Vancouver to those viewers that did not subscribe to MVPDs approved in advance by NBC. Should the Merger be approved, the new Venture would be well positioned to

---

[25] See Appendix A for complete listing of Digital Media Properties.

[26] The Application states that the Comcast serves 15.3 broadband homes, but recent trade press reports place that number at 18.8 million. See DSL Reports, April 28, 2010, http://www.dslreports.com/shownews/Comcast-Continues-To-Beat-Telcos-In-Broadband-Growth

ensure that it dictates the terms under which any broadband provider is provided – or denied – access to the vast amount of content controlled by the Venture.

That danger extends beyond just the content that the Venture directly controls or in which it owns interests. Comcast, because of its position as the largest cable system and the largest broadband operator, is positioned to leverage its market power with third-party programming providers and to require prohibitions or restrictions on whether and how such programming enters the online market.

For the reasons specified herein, FACT requests that should the Merger be approved, the Commission should impose the following condition with respect to online video:

- The Venture will be prohibited from imposing conditions or requirements on any MVPD or broadband providers that limits the ability to offer online content in any market.

b. If the Merger is approved, the Commission should prohibit the Venture from requiring payment from MVPDs or broadband providers for any online Comcast/NBCU content in tying arrangements for cable programming.

While preventing or restricting access is one element of the online content issue, a correlated concern is "forced carriage" of online content, also known as "broadband tying." The foremost practitioner of forced online carriage is ESPN3 (formerly called ESPN360.com). The American Cable Association described this practice:

> ESPN forces many broadband providers who are also cable operators to pay a per subscriber fee for their entire subscriber base to receive the ESPN360 service, regardless of customer interest in the service. Moreover, ESPN360 is a service that is only available to customers of broadband providers that pay the access fee. Therefore, a customer who is interested in the ESPN360 content, but whose broadband provider opts not to pay the fee, cannot subscribe to the content directly from ESPN. Such a business model increases broadband prices for some, and decreases consumer choice for others.[27]

[27] ACA Comments, GN Docket No. 09-51 (filed on June 8, 2009), p. 5.

Making forced tying of online content even more egregious, telcos affected by this practice are required to pay the per-broadband subscriber fee even if the customer is not a cable video customer. This represents an attempt to impose the cable pricing model upon the Internet, where consumers are forced to bear the costs of programming they do not want. Thus, even before it begins serving those homes with video service, the telco faces an immediate significant cost that impedes its ability to deliver affordable video and broadband services and diminishes its ability to compete.

Because the new Comcast – NBCU venture would have ownership in 32 online digital properties as well as all of the Venture's cable and broadcast video, there is great concern among telco distributors that the practice of tying online content to traditional programming rights will be one that the venture potentially practices unless constrained by the conditions imposed on the Merger.

Online content producers have every right to charge consumers directly for access to their content, should they wish to do so. However, practices that coerce MVPDs and broadband providers into paying per-subscriber fees for all of their broadband customers to have access to this content, whether the subscriber desires it or not, raises costs and deters further broadband deployment and adoption. In consideration of the foregoing, should the Merger be approved, FACT urges the Commission to impose the following condition of the Merger:

- Comcast/NBCU shall be prohibited from requiring payment from MVPDs or broadband providers for any online Comcast/NBCU content as a condition of licensing any cable programming.

3. If the Merger Is Approved, The Commission Should Require Comcast To Divest Ownership Of iN DEMAND and CMC, or, Alternatively, The Commission Should Prohibit The Tying of Content Offered Via iN DEMAND and CMC.

Another area of concern to the members of FACT pertains to the licensing of video-on-demand (VOD) and pay-per-view (PPV) content offered by the service called "iN DEMAND," the largest VOD and PPV provider in the industry, and by CMC / H.I.T.S. iN DEMAND is 51% owned by Comcast,[28] and CMC is wholly owned. Comcast seems to have gone to great lengths to downplay such ownership in the Merger examination. However, the fact is that if the Venture gains control of Universal Studios and Focus Features Films through the Merger, it would gain great ability and incentive to impose conditions on PPV and VOD services through iN DEMAND and CMC that would be anti-competitive and harmful to consumers.

iN DEMAND already has exclusive rights to VOD and PPV programming of Major League Baseball, the National Hockey League, Major League Soccer and the National Basketball Association, and there is anecdotal evidence that iN DEMAND has attempted to leverage such rights to command a greater share of the VOD and PPV market. The concern of telco video distributors is that they may be compelled to enter into exclusive relationships with iN DEMAND for all VOD and PPV services in order to gain access to the aforementioned sports league content, the films offered by Universal Studios and Focus Features, and any other PPV or VOD content controlled by the new Venture.

[28] The other 49% of iN DEMAND is principally owned by three other large cable operators: Cox Communications, Time Warner Cable and Bright House.

CMC/H.I.T.S., a wholly-owned subsidiary of Comcast provides satellite delivery of some 280 channels of programming to over 2,000 cable systems nationwide[29], including systems owned by FACT's members' telco members. Telcos using the CMC/H.I.T.S. service have built their cable systems on such method of delivery and the service is, therefore, an essential facility that could not be abandoned in favor of any alternative system without significant capital expense. CMC/H.I.T.S. provides Comcast with a tremendous amount of leverage and potential for anticompetitive abuse that will be enhanced if Comcast is permitted to gain control of the 54 cable channels that the Venture would own.

There is also concern that the VOD and PPV programming offered by iN DEMAND and CMC could be licensed to Comcast or other cable operators on an exclusive basis in any given market (or nationally) thereby impacting telco video competition.

In view of such market power, FACT urges the Commission to impose the following condition on the Merger:

- That Comcast divest ownership of iN DEMAND and CMC or, alternatively, the Venture shall be prohibited from tying content offered on iN DEMAND (e.g., MLB, NHL, and Comcast/NBCU-owned studios' films) and/or CMC as a condition of licensing either by contract requirement or pricing penalties.

[29] See http://www.comcastmediacenter.com/company/

4. If The Merger Is Approved, the Commission Should Require the NBCU and Telemundo Broadcast Networks To Grant Retransmission Consent Rights On a "Most Favored Nation" Basis To All MVPDs, And Prohibit The Tying Of Broadcast Content To Any Other Cable Programming Offered By The Venture.

As the Commission is well aware, the existing framework for negotiations between MVPDs and broadcasters has become increasingly tenuous and adversarial in recent years. The system has moved from one where more often than not carriage of a local broadcast station by the local cable operator was on the basis of "must-carry" in which no fees changed hands, to one in which MVPDs are required to pay retransmission consent fees that are escalating at a dizzying rate. Making matters worse, as noted below, small telco MVPDs are paying twice the rate of cable MVPDs for the same content.

This sea-change from free to fee has had a particularly detrimental impact on small cable and telco video operators, which lack the subscriber base to negotiate favorable terms in a manner that is negotiated by a large cable system – such as Comcast – or DBS operators.

The American Cable Association (ACA) recently filed comments with the FCC documenting that price discrimination by broadcasters against small cable operators continues unabated, based on market analyses performed by Dr. William Rogerson, Professor of Economics at Northwestern University and former FCC Chief Economist from 1998-99.[30]

According to ACA, Dr. Rogerson's data determined that small cable operators – which often includes MVPDs operated by small rural telcos – pay at least double for retransmission

[30] In the Matter of Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent , MB Docket No. 10-71, Comments of American Cable Association, May 18, 2010. See, "ACA Calls On The FCC To Halt Broadcaster Price Discrimination", American Cable Association, at http://www.americancable.org/node/2087.

consent per-subscriber as larger MVPDs, and that the difference in the prices paid has no basis in the broadcasters' costs.

For small, independent MVPDs such as rural telcos it is often a challenge just to get the attention of the broadcasters in order to negotiate carriage rights.

A "most favored nation" provision would rectify the inequities faced by small MVPDs in the negotiating process by allowing them to request the same prices and conditions from any of the other existing retransmission consent agreements that a broadcast station has entered into with other MVPDs. This would reduce a barrier to video competition that is imposed by discriminatory pricing. Enabling small MVPDs to compete more vigorously in the video marketplace would provide more choice to consumers, as well as enhance small MVPDs' ability and incentive to expand their offerings of video and broadband services.

The proposed Merger potentially adds greater complexity and may exacerbate the already significantly unbalanced negotiating positions of small MVPDs and the NBC broadcast networks. In markets where the Venture owns the NBC or Telemundo broadcast affiliate *and* the RSNs and/or its other cable programming channels, there will be great incentive and opportunity for the Venture to tie broadcast retransmission rights to carriage of the RSN and cable programming and/or to extract higher fees on both sides of the equation. In markets where Comcast is also the incumbent cable operator, the incentive to delay granting, or grant only under discriminatory terms, the retransmission rights for NBC/Telemundo broadcasts to competitive MVPDs will be enormous. FACT therefore calls upon the Commission to impose the following as a condition of the Merger:

- Require that NBCU broadcast networks, including NBC and Telemundo, grant retransmission consent rights on a "most favored nation" basis to all MVPDs, and prohibit the tying of broadcast content to any other cable programming offered by the Venture.

B. The Need For Enforceable Conditions On The Merger Is Demonstrated By The Past Conduct Of The Applicants

The need for the conditions outlined *supra*, as well as for an effective plan to monitor the Venture's actions and take effective measures in the event the conditions are violated, is not simply an attempt to anticipate potential, theoretical harms. Rather, the conditions requested by FACT arise out of experience with the behavior of the applicants. Both have engaged in conduct that demonstrates why the Merger, absent robust conditions, would be contrary to the public interest, convenience and necessity, as well as the policy goals of enhanced consumer choice in the video market and further broadband deployment and adoption.

In terms of tying content or compelling carriage of unwanted content, NBCU has required many of FACT's members to carry as many as 10 channels on the most widely distributed tier of programming even if neither the telcos nor their subscribers desire those channels. Thus, in order for a telco video distributor to secure rights to USA Network, the number one rated cable channel, that telco must also place far less popular channels such as Syfy, Chiller, and Sleuth on the expanded basic tier, thus driving up costs for both the telcos and their customers. NBCU has even mandated that telco distributors reserve space on their expanded basic tier for a yet-to-be-launched, yet-to-be-named channel.

There is, therefore, every reason to believe that in the absence of enforceable conditions, the combined Venture will continue the practice of tying their programming, except that in the post-merger environment, the number of channels to be tied into a single contract, and thus the costs consumers must pay, will be much greater. FACT's telco members are greatly concerned that with the proposed Merger, placing as it would dozens of channels under one roof, the current problems of forced carriage and mandated tier-placement will be exacerbated.

Comcast has also left a trail of evidence indicating its true nature and intentions. Specifically, Comcast has refused or delayed the licensing of two regional sports networks, CSN Philadelphia and CSN Northwest, to DBS operators DIRECTV and DISH Network; it has engaged in efforts (successful or not) to extract equity from programmers in exchange for carriage (such as in the case involving the NFL Network);[31] it has denied access to independent programmers; it has pioneered the concept of allowing Internet access to programming only if a cable subscription is authenticated;[32] and it has impaired the ability of consumers to view video over the Internet by degrading access.[33]

Recently, Comcast's interference with content, specifically peer-to-peer file transfer systems, has heightened concerns about its potential to threaten Internet content and ISPs. It is in the public interest to promote competition from advanced technologies.[34] In view of the D.C. Circuit's recent decision in the Comcast – BitTorrent matter, it is quite clear that the Commission must impose conditions on the Merger that will prevent the Venture from impeding or preventing the delivery of content over the Internet.

FACT is deeply concerned that the Merger, if permitted to proceed without highly specific and enforceable conditions, will only exacerbate the anti-competitive behavior of the Applicants and result in greater media concentration reducing diversity of program and impacting the ability of new market entrants in cable and broadband to emerge. The Merger will

[31] NFL Enters. LLC v. Comcast Cable Commc'ns, LLC, Program Carriage Complaint, File No. CSR-7876-P (May 6, 2008)

[32] *TV Competition Nowhere: How the Cable Industry is Colluding to Kill Online TV,* Free Press, January 2010.

[33] Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010).

[34] See, e.g., Cable Television Consumer Protection and Competition Act of 1992 House Report, H.R. Rep. No. 102-628 at *25 (1992) ("A principal goal of H.R. 4850 is to encourage competition from alternative and new technologies, including competing cable system, wireless cable, direct broadcast satellites, and satellite master antenna television services.").

significantly increase the Venture's incentive and ability to discriminate and impede competition in myriad ways.

If the Commission will "analyze all relevant issues raised by the transactions that … significantly affect the public interest"[35] FACT believes that it will see the need to impose broad, clear and well-defined conditions, as recommended below.

C. Merger Conditions

1. Conditions That Augment Current Program Access, Program Carriage, And Retransmission Consent Regulations Are Necessary To Mitigate The Harms That Consumers And Small Mvpds Would Experience Should The Merger Be Approved

FACT has, throughout these Comments, set forth conditions which the members of FACT believe are reasonable and necessary to prevent anti-competitive behavior on the part of the Venture. Just as the Commission imposed specific conditions on the acquisition of DIRECTV in the News Corp. application,[36] here again express conditions, separate and in addition to the Commission's Program Access Rules, are needed.

The existing Access Rules, while beneficial to some degree, have not served as an adequate means by which MVPDs are able to redress grievances. Despite a long history of access deprivation, price discrimination, and refusal of carriage rights in the multichannel industry, very few cases have been effectively adjudicated under the Rules.[37]

---

[35] Applications for Consent to the Assignment and/or Transfer of Control of Licenses: Adelphia Commc'ns Corp., Assignors, to Time Warner Cable, Inc., Assignees, Adelphia Commc'ns Corp., Assignors and Transferors, to Comcast Corp., Assignees and Transferees, Comcast Corp., Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corp., Transferee, Memorandum Opinion and Order, 21 FCC Rcd 8203 ¶ 28 (2006) (emphasis added).

[36] See note 17, *supra*.

[37] Reportedly, only 2 cases in the 18 years since passage of the 1992 Cable Act and promulgation of the Rules have been successfully prosecuted.

The reasons for this lack of efficacy are found in the time and cost involved in prosecuting an action under the Rules, and the lack of clear pleading requirements and limitations, such as a shot-clock, in the Rules. FACT urges that the specific conditions set forth in these Comments be applied in such a manner as to ensure the achievement of the following goals:

- If the Merger is permitted, the Commission should ensure that fair and reasonable rules control the ability of the Venture to use volume discounting as a means of favoring its own operations. The volume discount loophole that exists under the Rules is significant and would provide the Venture with the means and incentive to discriminate against competitive MVPDs if not closed or tightly defined.

- If the Merger is permitted, the Commission should apply the conditions to all programming regardless of the method of distribution, whether by satellite, terrestrial fiber, cable, or broadband. Comcast has, for years, availed itself of the so-called "terrestrial loophole" that excluded its Comcast Sports Networks to avoid licensing DBS competitors.

- If the Merger is permitted, the Commission should provide clear and achievable means for ensuring compliance. These means should include a streamlined complaint process, the prohibition of mandatory non-disclosure provisions so that small MVPDs can report violations without running afoul of their contracts, and enable meaningful ongoing review and oversight by the Congress, the FCC, the Department of Justice, and any other appropriate federal agencies.

Furthermore, the Rules were not designated to cover and arguably do not cover many of the issues that may arise if the Merger is approved. Among the issues potentially not covered by the Rules are:

- Tying of multiple programming services as a condition of licensing another service
- Discriminatory or anticompetitive practices related to VOD and/or PPV services
- Practices associated with online video, such as demanding exclusivity for online rights in a market and tying online content with satellite delivered cable programming;
- Mandating channel adjacency (neighborhood) or tier placement.

FACT respectfully requests that the Commission impose the conditions recommended in these Comments as supplemental to the Rules and with the force and effect of law.

2. The Applicants' Proposed Conditions Are Inadequate, Further Demonstrating The Need For The Conditions Recommended By Fact

The Applicants have proposed 16 "Commitments" apparently intended to satisfy the kinds of concerns that are expressed by FACT in these comments. Overall, FACT finds the Applicants' Commitments to be weak, ambiguous, half-hearted and disingenuous. Very few real specifics are addressed and the Commitments do little, if anything to satisfy the concerns of MVPDs or customers.

Following are some of those Commitments and FACT's comments with respect to same:

> *"Commitment: The combined entity remains committed to continuing to provide free over-the-air television through its O&O broadcast stations and through local broadcast affiliates across the nation. As Comcast negotiates and renews agreements with its broadcast affiliates, Comcast will continue its cooperative dialogue with its affiliates toward a business model to sustain free over-the-air service that can be workable in the evolving economic and technological environment."*

FACT Comment: This is a very inadequate commitment. It does nothing to ensure that the either the NBC or Telemundo broadcast networks remain in tact with their core programming. For example, this does not ensure that NBC Sports programming will not be migrated to Versus. It fails to commit the Venture to not tying broadcast retransmission consent to the carriage of any other content owned or controlled by the Venture.

> ***Commitment:*** *Comcast currently provides approximately 15,000 VOD programming choices free or at no additional charge over the course of a month. Comcast commits that it will continue to provide at least that number of VOD choices free or at no additional charge. In addition, within three years of closing the proposed transaction, Comcast will make available over the course of a month an additional 5,000 VOD choices via its central VOD storage facilities for free or at no additional charge.*

FACT Comment: Comcast must also commit to making the VOD content that it will control available on fair, reasonable, and nondiscriminatory terms to other MVPDs and to not restricting in any way the ability of a third party licensor of content to make such VOD content available to competitive MVPDs.

> ***Commitment:*** *NBCU broadcast content of the kind previously made available at a perepisode charge on Comcast's On Demand service and currently made available at no additional charge to the consumer will continue to be made available at no additional charge for the three-year period after closing.*

FACT Comment: Comcast must also commit to making such NBCU broadcast content on fair and reasonable terms to other MVPDs on terms that enable similar availability.

> ***Commitment:*** *Comcast will commit to voluntarily accept the application of program access rules to the high-definition (HD) feeds of any network whose standard definition (SD) feed is subject to the program access rules for as long as the Commission's current program access rules remain in place.*

FACT Comment: As noted above, the program access rules cannot be relied upon in this Application. Conditions must be imposed or a commitment must be made that covers HD feeds, online content, VOD, PPV, broadcast and the other issues delineated in these Comments.

> ***Commitment:*** *Comcast will commit to voluntarily extend the key components of the FCC's program access rules to negotiations with MVPDs for retransmission rights to the signals of NBC and Telemundo O&O stations for as long as the Commission's current program access rules remain in place.*

FACT Comment: This commitment does not adequately cover the potential for anti-competitive behavior that is possible with respect to the tying of broadcast retransmission and other content rights, nor do the Rules sufficient cover the online aspect of the broadcast content.

IV. CONCLUSION

The proposed Merger will not be in the public interest absent the conditions recommended herein. Those conditions include:

- A requirement, separate and apart from the Commission's existing program access rules, that the Venture license all of its content, including broadcast, linear cable, VOD, PPV and online content, on fair, reasonable and non-discriminatory licensing terms and in no event less favorable than the terms on which Comcast's own cable systems license such content.

- A prohibition against Comcast – NBCU from engaging in the forced tying of multiple channels, including a prohibition against forced bundling via pricing differentials, as a condition to acquiring any programming offered by the Venture.

- A prohibition against the Venture dictating, either explicitly or through punitive pricing, the channel placement of any Comcast – NBCU content (such as requiring placement on a specific tier of service, or in a designated neighborhood of channels) on an MVPD system.

- Application of provisions of Title 47 CFR Sec. 76.1000, et seq. ("Competitive Access Rules") to all Comcast – NBCU owned channels retroactively (i.e., to contracts entered into pre- and post-merger).

- A prohibition against the Venture from imposing conditions or requirements on any MVPD or broadband providers that limits the ability to offer online content in any market.

- A prohibition against the Venture from requiring payment from MVPDs or broadband providers for any online Comcast/NBCU content.

- A requirement for the Venture to divest itself of ownership of iN DEMAND and CMC or, alternatively, the Venture shall be prohibited from tying content offered on iN DEMAND (e.g., MLB, NHL, and Comcast/NBCU-owned studios' films) and/or CMC as a condition of licensing either by contract requirement or pricing penalties.

- A requirement that the NBC and Telemundo broadcast networks grant retransmission consent rights on a "most favored nation" basis to all MVPDs, and prohibit the tying of broadcast content to any other cable programming offered by the Venture.

Without such conditions, the Merger will provide the Applicants with the incentive and ability to engage in anti-competitive behavior to the detriment of competitive MVPDs, competitive broadband providers, and the public in general. The Venture will favor programming channels that are owned by the merged entity and will be positioned to thwart competition with ownership in 54 cable channels. It will have greater incentive and ability to tie multiple Comcast/NBCU channels when licensing MVPDs and to demand carriage on the most widely viewed tiers of service. This will have the effect of raising consumer pricing and limiting diversity of programming.

The Merger will give Comcast the incentive and ability to increase wholesale programming prices paid by FACT members and all MVPDs, thereby raising consumer prices. Comcast may further have the incentive and ability to withhold owned and operated broadcast TV stations and its regional sports network programming, giving the Venture greater pricing and channel carriage leverage.

Comcast will have greater incentive and power to impede or halt the development of online content distribution by tying the right to view content to a Comcast cable subscription, thereby preventing competitive MVPDs from gaining access to the emerging online market. If the Venture gains control of such a great amount of video and other online content without adequate conditions, there will be a negative affect on the emerging online video business.

There is potential for harm in the PPV / VOD markets in light of Comcast's controlling interest in iN DEMAND and the Comcast Media Center. The cable ownership of iN DEMAND has already leveraged its exclusive rights in professional sports content, and in the absence of appropriate conditions, Comcast's majority stake in Universal Studios, Focus Features and other content in the Venture, that leverage will increase and have a detrimental impact on both the MVPD market and consumers.

The combination of its broadcast properties with its cable and digital media properties will provide the Venture with the ability and incentive to demand higher retransmission fees, which would not harm the Comcast cable distribution system. Furthermore, the NBC broadcast properties include must-have content that the Venture could tie and leverage to the detriment to competitive MVPD and the public, unless prevented from doing so by the Commission

In summary, without the conditions recommended herein, the Merger will impede consumer choice in the video market and hinder further broadband deployment and adoption, contrary to the public interest. The prior behavior of the Applicants demonstrates the likelihood that the Merger would result in restricted access and higher programming prices to MVPD competitors and to the public.

For the reasons stated herein, FACT respectfully requests that the Commission approve the Merger *only* if the conditions recommended herein by FACT are imposed.

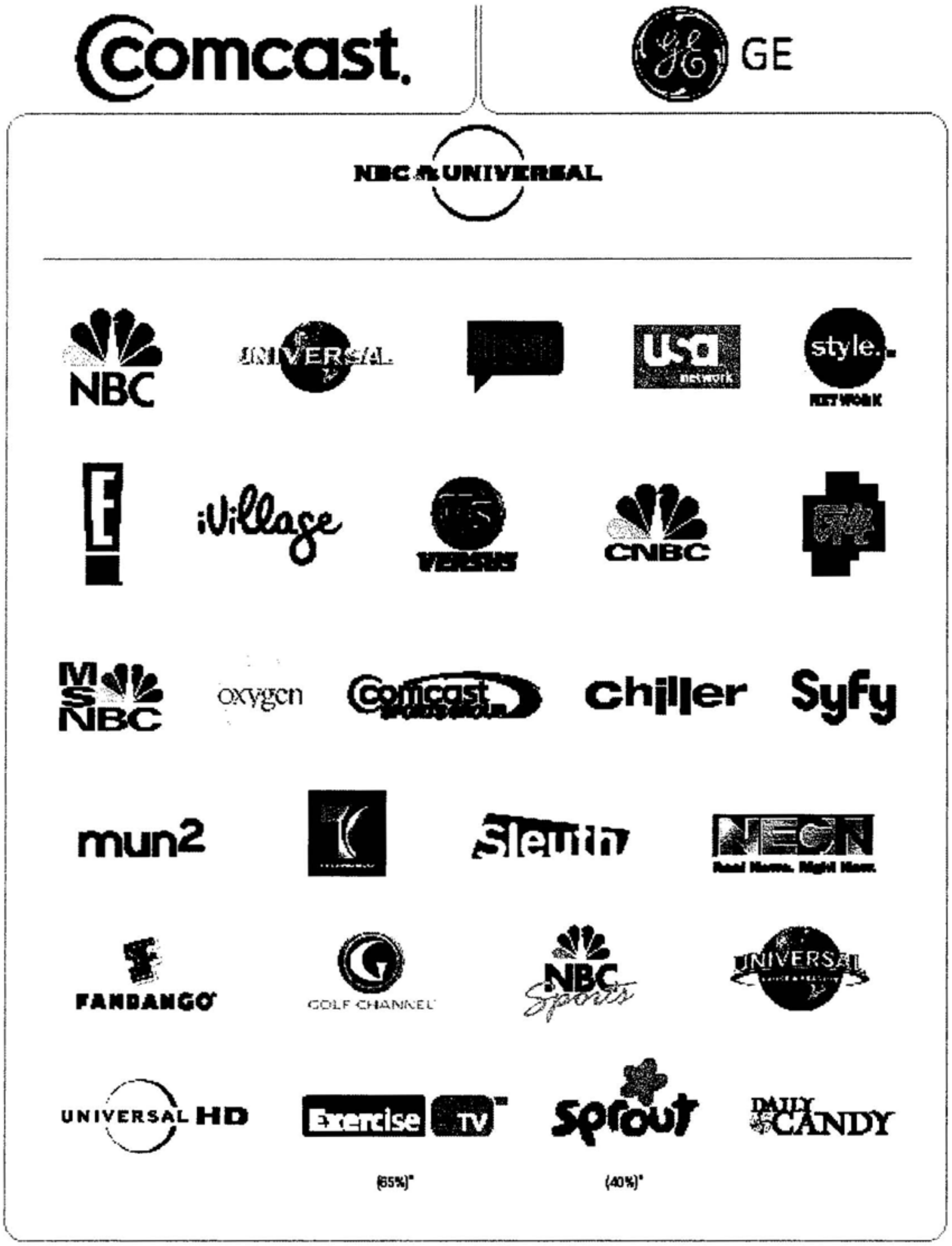
Respectfully submitted,

By: ______________________

Kevin J. Martin
Mark C. Ellison
Patton Boggs, LLP
2550 M St., NW
Washington, DC 20037
202-457-6000

June 21, 2010

APPENDIX A
COMCAST-NBCU MEDIA PROPERTIES



*partial ownership percentage

For more information please visit: www.comcast.com/nbcutransaction

APPENDIX A
COMCAST-NBCU MEDIA PROPERTIES

Comcast | GE

NBC UNIVERSAL

- World-class cable network portfolio
- A leader in multicultural programming with Telemundo Network, 15 owned and operated Telemundo TV stations, mun2, and an interest in TVOne
- NBC, one of the country's best known broadcast networks
- 234 NBC-affiliated stations; 10 owned and operated stations
- One of the world's most successful movie production studios
- A premier sports entertainment platform
- Emmy Award-winning television production studio
- Attractive online portfolio of internet properties, with more than 40 million monthly unique visitors
- Reaching audiences in about 200 countries
- Renowned theme parks in Orlando and Hollywood

Comcast 51%

GE 49%

NBC UNIVERSAL

- Managed by Comcast
- Headquartered in New York
- 5 Member Board
  - 3 Nominated by Comcast
  - 2 Nominated by GE
- CEO: Jeff Zucker

'partial ownership percentage

For more information please visit: www.comcast.com/nbcutransaction

APPENDIX A
COMCAST-NBCU MEDIA PROPERTIES

Comcast. | GE

NBC UNIVERSAL

Cable TV Networks
- USA
- Bravo
- Syfy
- Universal HD
- CNBC
- CNBC World
- MSNBC
- Chiller
- mun2
- Sleuth
- Oxygen
- E!
- Golf Channel
- Style Network
- Versus
- G4
- The Comcast Network
- Comcast Regional Sports Networks
  - CSN Bay Area (67%)*
  - CSN California
  - CSN Mid-Atlantic
  - CSN Chicago (30%)*
  - CSN MTN (50%)*
  - CSN New England
  - CSN Northwest
  - CSN Philadelphia (85%)*
  - CSS (81%)*
  - SNY (8%)* (not managed)
- New England Cable News
- Exercise TV (65%)*
- Sprout (40%)*
- ShopNBC (39%)* (not managed)
- The Weather Channel (25%)* (not managed)
- Universal Sports (8%)* (not managed)
- FearNet (33%)* (not managed)
- A&E (16%)* (not managed)
- A&E HD (16%)* (not managed)
- Biography (16%)* (not managed)
- History (16%)* (not managed)
- History International (16%)* (not managed)
- History en Espanol (16%)* (not managed)
- Military History (16%)* (not managed)
- Lifetime (16%)* (not managed)
- Lifetime Movie Network (16%)* (not managed)
- Lifetime Real Women (16%)* (not managed)
- Crime and Investigation (16%)* (not managed)
- TVOne (33%)* (not managed)
- Retirement Living TV (RL TV) (3.4%)* (not managed)

International Channels
- Syfy Universal
- Diva Universal
- Studio Universal
- Universal Channel
- 13th Street Universal
- CNBC Europe
- CNBC Asia

Broadcast Networks
- NBC
- Telemundo

NBC Television Network
- 234 NBC-affiliated stations across the country

Digital Media Properties
- CNBC.com
- iVillage.com
- NBC.com
- fandango.com
- movies.com
- dailycandy.com
- bravotv.com
- eonline.com
- thegolfchannel.com
- golfnow.com
- usanetwork.com
- oxygen.com
- style.com
- chillertv.com
- syfy.com
- versus.com
- comcastsportsnet.com
- holamun2.com
- universalhd.com
- g4tv.com
- sleuthchannel.com
- accesshollywood.com
- nbcsports.com
- nbcolympics.com
- televisionwithoutpity.com
- exercisetv.tv (65%)*
- sproutonline.com (40%)*
- universalsports.com (8%)* (not managed)
- fearnet.com (33%)* (not managed)
- msnbc.com (50%)* (not managed)
- hulu.com (27%)* (not managed)
- weather.com (25%)* (not managed)

NBC Local Media Division
- 10 NBC owned and operated broadcast TV stations
  - New York / WNBC
  - Los Angeles / KNBC
  - Chicago / WMAQ
  - Philadelphia / WCAU
  - San Jose / KNTV
  - Dallas/Ft.Worth / KXAS
  - Washington / WRC
  - Miami / WTVJ
  - San Diego / KNSD
  - Hartford / WVIT

Telemundo Stations
- 15 Telemundo owned and operated stations
  - Los Angeles / KVEA
  - New York / WNJU
  - Miami / WSCV
  - Houston / KTMD
  - Chicago / WSNS
  - Dallas/Ft.Worth / KXTX
  - San Antonio / KVDA
  - Las Vegas / KBLR
  - San Francisco/San Jose / KSTS
  - Phoenix / KTAZ
  - Fresno / KNSO
  - Denver / KDEN
  - Boston/Merrimack / WNEU
  - Tucson / KHRR
  - Puerto Rico / WKAQ
- 1 independent Spanish-language owned and operated station
  - Los Angeles/KWHY

NBC Universal Domestic & International Distribution
- Distributes NBC Universal's first-run, syndicated and library content nationally and internationally, including more than 55,000 TV episodes

Universal Studios/Production
- Universal Pictures
- Focus Features
- Universal Media Studios
- Universal Cable Productions
- Carnival
- Cattleya (18.5%)* (not managed)

Universal Studios Home Entertainment
- Distributes more than 4,000 film titles

Parks & Resorts
- Universal theme parks
- Orlando (50%)*
- Hollywood

*partial ownership percentage

For more information please visit: www.comcast.com/nbcutransaction