REDACTED – FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Applications for Consent to the Transfer of Control of Licenses	)	MB Docket No. 10-56
	)	
General Electric Company, Transferor,	)	
	)	
to	)	
	)	
Comcast Corporation, Transferee	)	

PETITION TO DENY OF DISH NETWORK L.L.C. AND ECHOSTAR CORPORATION

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SUMMARY

This transaction poses grave threats to the continued expansion and vibrancy of what is arguably the most important development in video markets today – online video – as well as to the competitiveness of the multi-channel video distribution market. The proposed merger of Comcast and NBCU is a troubling vertical integration of a long-standing distributor and a traditional content provider. But in addition, and contrary to the assertions of the Applicants, it is a horizontal combination of two leading providers of a new product altogether – online video – who together would reduce competition, particularly from an industry that has driven competition in video and related markets for over a decade: Direct Broadcast Satellite ("DBS").

An essential question raised by the transaction is its implications for the availability of online video, meaning either (a) video that has been delivered via a broadband platform, such as a video-on-demand movie delivered to a set-top box over a broadband connection, or (b) a streamed or downloaded video product on a fixed or mobile screen, such as a live sporting event viewed on a living room television, personal computer, or handheld device. The DBS industry must provide a seamless product combining the best of traditional, linear video with online video in order to remain competitive, drive innovation and investment, and impel its competitors to do likewise. The combination of Comcast and NBCU poses a direct threat to the DBS industry's ability to offer a competitive product.

DISH Network and EchoStar offer online video to their subscribers today and are expanding such offerings, as evidenced by DISH On Demand, Sling, Google TV, and DISHOnline. Each such component of the online video experience is critical to maintaining DISH Network's and EchoStar's competitiveness, and is dependent on the subscriber's ability to access from a third-party provider an open, non-discriminatory broadband connection to the Internet.

The merged Comcast–NBCU would have a greater incentive and ability to discriminate against competitors in the online video and multichannel video programming distribution ("MVPD") markets than does either company pre-merger. Both Comcast and NBCU are significant market participants in online video today and each has displayed examples of a propensity to leverage its power to thwart competitors. The combination of these major online video providers, however, would give the combined entity a much greater incentive to protect existing and future revenue streams and a significantly heightened ability to reduce competition from the DBS industry and other would-be providers of online video services. A combined Comcast–NBCU would have the incentive and ability to take anticompetitive action against DISH Network's online video products by giving Comcast unique visibility into Hulu; combining Comcast's broadband gatekeeper position and NBCU's key role in video-on-demand; blending Comcast's broadband traffic management power and NBCU's online video content; joining Comcast's and NBCU's ability to interfere with EchoStar's "Sling" place-shifting technology; and leveraging the combined companies' ability to offer a multi-platform advertising product.

The Applicants claim that they do not compete with one another today – that there are separate product markets for linear multichannel video distribution and online content distribution. In documents filed at the Securities and Exchange Commission, however, Comcast has stated that its cable systems face the risk of competition from "online services that offer Internet video streaming, downloading and distribution of movies, television shows, and other video programming" and suggests that it faces direct competition from Hulu, Google, Joost, Amazon.com, and others.

The threat to future competition posed by the proposed merger of Comcast and NBCU should lead the Commission to reject the proposed transaction or, at the very least, impose strict conditions (listed in the Appendix) that would sufficiently prevent anticompetitive effects in the online video market. The ongoing competitiveness of the DBS industry is at stake.

A combined Comcast–NBCU also would threaten competition in the traditional MVPD market by leveraging the retransmission consent rights of the NBC owned-and-operated stations against Comcast's MVPD competitors, including DISH. The Commission's findings and remedial conditions in the News Corp.–Hughes merger are directly applicable here. Just as News Corp. had an incentive to delay or deny retransmission consent agreements for the FOX networks with unaffiliated MVPDs in order to drive subscribers to DIRECTV, a combined Comcast–NBCU would similarly have an incentive to delay or deny retransmission consent agreements between NBC and unaffiliated MVPDs in order to drive subscribers to Comcast. The Commission should impose exactly the same condition here that it did in the News Corp.–Hughes transaction: baseball-style arbitration with a standstill (*i.e.*, neither party may take down programming) for all NBC owned-and-operated stations negotiating retransmission consent with MVPDs.

Finally, a combined Comcast–NBCU would threaten competition in the MVPD market by granting exclusive distribution of NBCU content to Comcast customers or otherwise discriminating against competitors. Some exclusive deals and discriminatory conduct of this nature are already prohibited by the Commission's program access rules, but these rules are not sufficient and certainly do not preclude creative attempts at circumventing them. Comcast has used its control over "must have" content to reduce competition from its rivals in the past. It takes little imagination to envision how a company that behaves this way with respect to its current content holdings will behave after it acquires NBC and other flagship, must-have content. Comcast's ability to discriminate against its competitors will be greatly enhanced, as will its incentive to do so. Comcast–NBCU should not be allowed to deny key programming assets to its distribution competitors. To mitigate these harms, the Commission should apply all program access rules, as well as baseball arbitration, standstill, and "à-la-carte" requirements, to Comcast–NBCU's online video content; prohibit any exclusive content arrangements for any Comcast-affiliated content; clarify what ought to be clear by now – that the program access rules extend to video on demand and interactive programming; and close the "terrestrial loophole" for Comcast–NBCU as a condition in this proceeding by extending the conditions to all programming, no matter how delivered, regardless of the outcome of the Commission's recent rulemaking on that subject.

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PETITION TO DENY OF DISH NETWORK L.L.C. AND ECHOSTAR CORPORATION

DISH Network L.L.C. ("DISH") and EchoStar Corporation ("EchoStar") oppose the horizontal consolidation in the online video market and the vertical consolidation in the MVPD market that would result from General Electric Company transferring to Comcast Corporation ("Comcast") a controlling interest in NBC Universal, Inc. ("NBCU").[1] The Federal Communications Commission ("Commission") has a statutory mandate to protect consumers and competition in emerging video markets and prevent future foreclosure of innovative new

[1] *See* Public Notice, Federal Communications Commission, Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. to Assign and Transfer Control of FCC Licenses, DA 10-457 (rel. Mar. 18, 2010); Applications for Consent to the Transfer of Control of License, General Electric Company to Comcast Corporation, Applications and Public Interest Statement, MB Docket No. 10-56 (filed Jan. 28, 2010) ("Application"). Comcast and General Electric are hereinafter referred to as "Applicants." DISH is a competitor in the MVPD market with Comcast, a purchaser of content both from NBCU and from Comcast, and a competitor in the online video market with NBCU and Comcast. EchoStar, too, competes in the online video market – among other things, it owns Sling Media. For these and other reasons described herein, both DISH and EchoStar are, therefore, parties in interest under Section 309(d)(1) of the Communications Act. 47 U.S.C. § 309(d)(1).

communications platforms, such as online video. It should do so in this proceeding. Moreover, the anticompetitive effects in the MVPD market of combining Comcast and NBCU closely resemble those found by the Commission in similar merger proceedings and should lead the Commission to take preventative action here – either by denying the application or imposing strict conditions.

I. COMCAST–NBCU WOULD REDUCE COMPETITION IN THE ONLINE VIDEO MARKET AND UNDERMINE THE DIRECT BROADCAST SATELLITE INDUSTRY'S COMPETITIVENESS

Video distribution no longer occupies discrete silos such as Multichannel Video Programming Distributors ("MVPDs") or websites offering video clips. The current video marketplace instead is an amalgamation of multiple distribution methods reaching multiple devices. It is rapidly evolving to allow consumers to watch what they want, when they want, where they want over multiple signal paths to a great many devices. Against this backdrop, DISH and EchoStar, as major participants in the Direct Broadcast Satellite ("DBS") industry, already an engine of competition benefiting millions of American video consumers, must offer a video product that combines traditional, point-to-multipoint linear television with the interactivity and choice afforded by the online experience.

Comcast and NBCU ("Applicants") attempt to define the relevant product market in this proceeding as two separate, distinct markets – traditional MVPD service, on the one hand, and video available on the Internet, on the other. But their analysis sidesteps an issue of the first importance: the availability to all MVPD competitors of online video, meaning either (a) video that has been delivered via a broadband platform, such as a video-on-demand ("VOD") movie delivered to a set-top box over a broadband connection, or (b) a streamed or downloaded video product on a fixed or mobile screen, such as a live sporting event viewed on a living room television, personal computer, or handheld device.[2] That is, in addition to functioning as a stand-alone product and possibly as a competitive substitute, online video functions as an indispensable complement to linear video channels. The DBS industry must provide a seamless product combining the best of traditional, linear video with online video in order to remain competitive, drive innovation and investment, and impel its competitors to do likewise. The combination of Comcast and NBCU poses a direct threat to the DBS industry's ability to offer a competitive product.

A. Direct Broadcast Satellite Relies on an Unfettered Online Video Market to Stay Competitive

DISH and EchoStar offer online video to their subscribers today and are expanding such offerings, as evidenced by DISH On Demand, Sling, Google TV, and DISHOnline. Each such component of the online video experience is critical to maintaining DISH's competitiveness and is dependent on the subscriber's ability to access an open, non-discriminatory broadband connection to the Internet. The DBS industry does not have a proprietary, retail consumer broadband product and therefore must rely on third-party high-speed Internet ("HSI") access providers.[3]

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[2] Given the changes sweeping through the video distribution business, this proceeding may prove to be the first opportunity for the Commission to make a detailed analysis of these matters relating to online video.

[3] DISH partners with WildBlue, a leading provider of satellite broadband access to homes and businesses, to offer high-speed Internet access to customers. WildBlue is a two-way satellite service that provides an always-on, high-speed data connection with speeds up to 30-times faster than dial-up. *See* Press Release, DISH Network, EchoStar Rolls out High-Speed Internet Service (Oct. 19, 2006), *available at* http://dish.client.shareholder.com/releasedetail.cfm?ReleaseID=243331.

DISH On Demand. DISH must offer a compelling VOD experience in order to remain competitive, as consumption of VOD content is growing rapidly. DISH On Demand[4] is a critical offering for DISH as cable, telco-TV, and satellite operators are expanding their on-demand offerings and VOD consumption has increased 38% in two years.[5] Given DBS' point-to-multipoint architecture and the limited caching ability of the set-top box ("STB"), the DBS industry relies on third-party broadband providers for downloading video files to the STB and providing return-path functionality.[6] A DISH customer attaches the STB to a broadband connection and, through the user interface on the television screen, selects movies, television shows, or other video content cached on distant servers and delivered to the STB via a broadband connection.[7] DIRECTV offers VOD using a similar, broadband-dependent architecture.[8]

Sling. Sling Media, a subsidiary of EchoStar, brings the home television experience to the computing and mobile device screens by creating a point-to-point connection between the STB in the home and a computing device anywhere in the world. This "place-shifting" technology depends on an open, unfettered broadband connection to the STB, which in turn allows the subscriber to view her home television on a computer screen, iPhone, or other device;

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[4] *See* DISH Network, Watch what you want, when you want, http://www.dish-systems.com/products/ondemand.php (last visited June 18, 2010) ("Watch the TV shows you want, when you want with DISH Network TV Entertainment On Demand").

[5] Declaration of Roger J. Lynch ¶ 8 ("Lynch Declaration").

[6] Declaration of Mark Jackson ¶¶ 7, 13, 25 ("Jackson Declaration").

[7] *Id.* ¶ 13.

[8] *See* What Is DIRECTV On Demand?, http://support.directv.com/app/answers/detail/a_id/1989/related/1 (last visited June 18, 2010) ("DIRECTV on DEMAND video service gives you access to thousands of hit shows and movies-including the latest blockbusters in stunning 1080p HD. The titles you select are downloaded to your DIRECTV Plus® HD DVR and available to watch whenever you want. It's like having a library of the best TV entertainment at your fingertips!").

change channels; operate the Digital Video Recorder ("DVR"); and otherwise have the home television experience on any portable or stationary broadband-enabled computing device.[9]

Google TV. The Google TV–DISH product, recently developed by the two companies, brings the Internet video and search experience to the home television, creating a seamless, integrated user experience between linear television programming and online video and other content. DISH and Google recently announced the service, the industry's first integration of multichannel television and rich web media content. With Google TV, DISH subscribers will be able to perform a unified search covering the listings in the program guide, the subscriber's DVR and the Internet, including by voice using an Android phone, as well as bringing many applications to the TV, such as Pandora and YouTube.[10] As the CEOs of Google and DISH stated at the launch of the new service,

> Google TV [will be] an open platform that seamlessly integrates multichannel television with rich web media content . . . [bringing] the full power of the Internet to the television viewing experience [and merging] traditional TV programming with the wide amount of content on the web, allowing viewers unprecedented access, control, and flexibility over all forms of digital content [such as searching] for content across DISH Network, the Internet and their DVRs [and overlaying] online content related to television shows, movies, actors and more; and also hyperlink web content back to multichannel TV.[11]

[9] Jackson Declaration ¶¶ 8-9; *see also* Sling Media Whitepaper, Placeshifting: Set Your TV Free (April 9, 2010) ("Placeshifted content can be live or recorded (DVR) programming, and can be enjoyed on the home network or away from home over the Internet. Most consumers do both – placeshifting in and around their home where they do not have a TV, as well as away from their home – at work, at a café, or in their hotel room while travelling. Consumers' TV subscription service and associated content follows them wherever they have an Internet connection.").

[10] *See* Lynch Declaration ¶¶ 3-4; Jackson Declaration ¶¶ 10-11.

[11] *See* Press Release, Google, Inc. & DISH Network, Google and DISH Network Collaborate to Develop Integrated Multichannel TV and Web Platform (May 20, 2010), *available at* http://www.google.com/press/pressrel/20100520_googletv-dishnetwork.html.

DISH's CEO, Charlie Ergen, noted that his company's "integration of Google TV marks the next evolution in television."[12] The Google TV experience is dependent on an open, unfettered broadband connection to the STB, enabling two-way high-speed access to the Internet.[13]

DISHOnline and Sling.com. Dishonline.com gives DISH subscribers a single destination on the Internet to access network television content; view authenticated cable network content (*e.g.*, a DISH subscriber to Showtime can access Showtime movies and TV shows online); control the DVR (*e.g.*, to record a program from anywhere in the world); and, with Sling technology, watch programs from their TV or DVR online.[14] Sling.com also offers aggregated video content.[15] The subscriber needs to access Dishonline.com and Sling.com over an open, unfettered broadband connection.

B. Direct Broadcast Satellite Must Make All Forms of Online Video Available to Its Subscribers to Stay Competitive

The aforementioned DISH and EchoStar online video experiences mirror a larger, industry-wide trend as online video becomes an integral part of any competitive pay-TV service. Online video is experiencing explosive growth. By the end of 2010, the total number of Internet-connected TVs will reach approximately 10 million, and revenues generated from Internet-connected video service will reach near $1 billion.[16] Furthermore, "[a]dvanced Internet video (3D and HD) will increase 23-fold between 2009 and 2014 . . . . [and] comprise 46 percent of

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[12] *Id.*

[13] Jackson Declaration ¶¶ 10-11.

[14] *See* Lynch Declaration ¶ 5; Jackson Declaration ¶¶ 5-6.

[15] *See* Sling Home Page, www.sling.com (last visited June 18, 2010).

[16] *See* Diane Mermigas, *The Walmart-Vudu Match Up: An End-Run Around Cable*, BNET, Feb. 23, 2010, http://industry.bnet.com/media/10006752/walmart-vudu-match-up-is-an-end-run-around-cable/.

consumer Internet video traffic."[17] Pay-TV services continue to evolve at a rapid pace and providers increasingly are integrating their vast offerings of linear channels with online content.[18] Almost 40 percent of "consumer broadband household respondents want a combination of linear TV and on-demand TV," nearly 75 percent want all of their video content to come from their pay-TV provider, and consumers specifically desire Internet video as a part of their TV offerings.[19]

Online video is a "must have" item. As illustrated in Figure 1, below, every major MVPD offers an online video service in addition to linear channels offered over wireline or satellite connections. Although VOD content[20] has been available for years, MVPDs also are

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[17] *See Cisco Systems, Cisco Visual Networking Index: Forecast and Methodology, 2009-2014* (June 2, 2010), *available at* http://www.cisco.com/en/US/solutions/collateral/ns341/ns525/ns537/ns705/ns827/white_paper_c11-481360.pdf.

[18] *See, e.g.*, Nat Worden & Sam Schechner, *Comcast Rolls Out Web-TV Service*, Wall Street Journal, Dec. 16, 2009; Rob Pegoraro, *Verizon Adding Widgets, Web Video to Fios TV*, WashingtonPost.com, July 15, 2009, http://voices.washingtonpost.com/fasterforward/2009/07/verizon_adding_widgets_web_vid.html; *see also Nielsen Media Research, Television Audience 2008* (finding that the average U.S. household received over 130 channels in 2008, up from 61 in 2000).

[19] *See* Press Release, In-State, Consumers Want the Best of Both Worlds: Pay TV and Over-the-Top Video (Mar. 10, 2010), *available at* http://www.instat.com/press.asp?ID=2757&sku=IN1004654CM.

[20] *See, e.g.*, Press Release, Comcast Corp., Comcast Kicks Off the New Year with More Choices Anytime (Dec. 28, 2009), *available at* http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=950 (announcing recent enhancements to Comcast's existing online video service, including new release movies available the same day as DVD release and expanded HD offerings); Press Release, AT&T, AT&T U-verse Expands Video On Demand Library With HD VOD Titles (Sept. 5, 2008), *available at* http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=26059 (describing enhancements to AT&T U-Verse VOD service to include expanded library of HD movies); Press Release, DIRECTV, DIRECTV On Demand Now Available Nationwide (June 30, 2008), *available at* http://dtv.client.shareholder.com/releasedetail.cfm?releaseid=318983; Press Release, Cablevision, Cablevision Significantly Expands Free Video On Demand Lineup with Programming from Eight Popular Networks (July 7, 2009), *available at* http://www.cablevision.com/about/news/article.jsp?d=070709; Press Release, Suddenlink, Video On Demand to Launch in West Texas (Sept. 18, 2008), *available at* http://suddenlinkfyi.com/2008/09/18/video-on-demand-to-launch-in-west-

beginning to offer their subscribers online access to certain content available in the linear channel lineup.[21]

Finally, online video will dominate the video market generally, if trends among young Americans portend how their generation will consume video in future years. Adults 18-29 years old are the heaviest users of online video today, with almost 90% of them consuming online video at some point in a given time period.[22] Online video must be a component of any successful video product in the future.

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texas/ (announcing new Suddenlink VOD service offering thousands of viewing choices, including movies, sports, news, music, and shows from popular cable networks).

[21] *See, e.g.*, Posting of Scott McNulty to The Official Comcast Blog, Fancast XFINITY TV National Beta Launch: A Guide to Get Started (Dec. 15, 2009), http://blog.comcast.com/2009/12/fancast-xfinity-tv-national-beta-launch-a-guide-to-get-started.html (announcing release of Fancast XFINITY TV national beta, which gives Comcast customers access to "thousands of hours of cable programming, most of which has never been available online before for no additional cost"); Press Release, Verizon, Verizon Launches Trial of FiOS TV Online, Extending Multi-Screen Leadership (Aug. 27, 2009), *available at* http://newscenter.verizon.com/press-releases/verizon/2009/verizon-launches-trial-of.html (announcing a trial to bring television programming online to FiOS TV subscribers); Press Release, AT&T, AT&T Launches AT&T Entertainment Website Featuring Online TV Content and Movies (Sept. 10, 2009), *available at* http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=27102 (announcing launch of AT&T Entertainment, a new Web site that offers subscribers access to "thousands of streaming TV shows and movies on your PC").

[22] *See* Pew Research Center, Pew Internet and American Life Project: The State of Online Video (June 3, 2010), *available at* http://www.pewinternet.org/Reports/2010/State-of-Online-Video.aspx.

Figure 1: Survey of Online Video Services Offered by Pay-TV Companies

Pay-TV Company	Online Video Service	Vertically-Integrated Broadband Providers
AT&T U-Verse	AT&T Entertainment	✓
Cablevision	PC to TV Media Relay	✓
Comcast	Fancast Xfinity	✓
DirecTV	DirecTV on DEMAND	X
DISH	DishOnline	X
Time Warner Cable	TWondemand	✓
Verizon	FiOS TV Online	✓

C. Comcast and NBCU Each Have Demonstrated the Ability and Propensity to Discriminate and Abuse Their Market Power in the Online Video Market

As established above, online video is a necessary ingredient to the competitiveness of the DBS industry. The anticompetitive effects of a combined Comcast–NBCU therefore come into sharp focus in the case of a DISH subscriber who must rely on the Applicants for a broadband connection to the Internet. This is especially true in light of the market power Comcast and NBCU each hold in the online video market today and the incentive and ability that the combined entity would have to reduce competition from the DBS industry post-merger.

Comcast

Comcast has demonstrated already a behavioral propensity to use its gatekeeper function as a dominant residential broadband provider to discriminate against certain forms of online video content. It dominates residential broadband access in the relevant geographic markets at issue in this proceeding and in many markets faces minimal, and ever diminishing, competition.

- *Local Market Dominance*

DISH and EchoStar, as stated above, view online video as an integral add-on to linear MVPD offerings. But the online video experience depends crucially on non-discriminatory broadband access. In that respect, the self-portrait of a benign Comcast disciplined by the foment of a competitive market in HSI services ignores the reality at the block-by-block level of a dominant gatekeeper at work.

Applicants correctly agree with the Commission's conclusion that the relevant geographic market for HSI service is local[23] but also claim that they lack market power by citing – curiously – their market share in HSI services nationally, apparently including areas where Comcast does not have any operations.[24] The Commission has made clear that the relevant geographic market for analyzing HSI access service is local.[25] This is especially true in the case of a DISH subscriber who must rely on Comcast for her STB's broadband connectivity.

[23] "[T]he Commission concluded that the relevant geographic market for high-speed Internet services is local . . . ." Application at 87-88; *see also* Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee, *Memorandum Opinion and Order*, 16 FCC Rcd. 6547, 6578 ¶ 74 (2001) ("*AOL-Time Warner Order*"); Applications for Consent to the Transfer of Control of Licenses from Comcast Corp. and AT&T Corp., Transferors, to AT&T Comcast Corp., Transferee, *Memorandum Opinion and Order*, 17 FCC Rcd. 23246, 23295-96 ¶ 128 (2002) ("*Comcast-AT&T Order*").

[24] *See, e.g.*, Application at 124-25 ("Comcast lacks the market power in high-speed Internet service [to make a] foreclosure strategy successful [because it] currently provides service to only about 20 percent of HSI customers in the United States . . . .").

[25] *See AOL-Time Warner Order*, 16 FCC Rcd. at 6578 ¶ 74 ("The relevant geographic markets for residential high-speed Internet access services are local. That is, a consumer's choices are limited to those companies that offer high-speed Internet access services in his or her area, and the only way to obtain different choices is to move. While high-speed ISPs other than cable operators may offer service over different local areas (e.g., DSL or wireless), or may offer service over much wider areas, even nationally (e.g., satellite), a consumer's choices are dictated

For the DISH subscriber who depends on Comcast for broadband to power her DISH online video services, it often is untenable to consider switching to a different HSI provider. First, as the Commission this year observed, in many local markets customers often have limited options for HSI service, and providers' sale of other services, such as voice and video, leads the providers' interests to diverge from those of their subscribers.[26] Second, as the Commission also observed, practical experience rebuts the notion that the ability to switch providers disciplines HSI providers:

> [E]ven if there is competition among broadband Internet access service providers, once an end-user customer has chosen to subscribe to a particular broadband Internet access service provider, this may give that broadband Internet access service provider the ability, at least in theory, to favor or disfavor any traffic destined for that subscriber.[27]

Finally, in stark contrast to Applicants' description of a fully competitive HSI market in every relevant local area, Wall Street analysts portray a much different story, with a growing trend toward cable dominance of the HSI market, as DSL slips in consumer appeal. "Cable is winning the broadband wars," declared Craig Moffett this year, and "Comcast's quarterly

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by what is offered in his or her locality.") (emphasis added); *see also Comcast–AT&T Order*, 17 FCC Rcd. at 23305 ¶ 149 (2002) (the relevant geographic market for the provision of broadband Internet access is local).

[26] Preserving the Open Internet, *Notice of Proposed Rulemaking*, 24 FCC Rcd. 13064, 13067 ¶ 7 (2009) ("*Open Internet NPRM*") ("In many parts of the United States, customers have limited options for high-speed broadband Internet access service. Moreover, broadband providers generally sell other services – such as voice and video – that face competition from content and applications offered by others over the Internet. As a result, broadband providers' interests in maximizing profits may not always align with the interests of end users and the public.").

[27] *Id.* at 13094 ¶ 73.

subscriber total is actually 16% higher than the sum total of Verizon and AT&T *combined*, on a footprint less than half as large."[28]

- *Ability to Discriminate*

Comcast has the technical ability to discriminate between, and offer preferential treatment to, certain types of content. Comcast can discriminate against certain Internet Protocol packets using deep packet inspection, jitter, port-blocking, and other means. The communication protocols used on the Internet describe how packets contain source and destination addresses. Source addresses can be linked to a specific website or a specific video service, such as DISH Online. Comcast can block specific ports used by devices for remote access on broadband, such as a Sling-enabled DISH STB, resulting in the end user's inability to remotely access her home television programming.

Additional information contained in the data stream and the packets themselves can be used to determine what kind of data is carried, and in some cases which customer application will be used. With this information, Comcast can choose to prefer or to delay certain packets over others. The servers for VOD, for example, will be at well-known IP addresses, making it easier for Comcast to slow or block access to those services.[29]

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[28] *See* Craig Moffett, *Bernstein Research Flash*, at 1 (Apr. 30, 2010) ("The DSL business is now shrinking. AT&T's non-U-Verse DSL base shrank by 307K subscribers in 2009. Verizon's DSL business contracted by 405K customers last year. Cable is winning the broadband wars. Over the past three years, the TelCos' share of 'Big Four' broadband net additions – including fiber – has fallen from 57% to just 38% as measured on a trailing twelve month basis. Comcast and TWC are collectively capturing 62% of Big Four growth."); Craig Moffett, *Bernstein Research Flash*, at 1 (Apr. 28, 2010) ("Cable is – once again – unmistakably taking share in the broadband market. Consider that Comcast's quarterly subscriber total is actually 16% higher than the sum total of Verizon and AT&T *combined*, on a footprint less than half as large. Last year, their broadband total was only slightly larger than half their combined total.").

[29] Jackson Declaration ¶ 15.

Comcast can divide its broadband pipe into discrete "lanes" to which it may direct packet traffic, rendering some lanes slower due to congestion, over-promise, or whim. Comcast can specifically direct certain types of traffic based on message headers, devices' MAC addresses, or payload type to be delivered to the consumer at lower priority (as opposed to the open Internet's typical equal priority) or on a slower "lane," causing delay in timely video packets delivery. Such methods cause video stall and audio breaks, resulting in significant disruption to the end user's TV watching experience.[30]

The Commission acknowledges the ability of broadband access providers like Comcast to engage in such behavior, given that "[t]ools that enable network operators to prioritize or degrade transmissions of particular content, applications, and services are increasingly available and widely deployed."[31] These technical tools give Comcast the ability to differentiate based on service and price.[32]

- *Propensity to Discriminate*

Comcast has engaged in blatant discrimination against certain types of online video and end-use applications. In a well-known case, Comcast covertly interfered with the connections of

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[30] *Id.* ¶ 16.

[31] *Open Internet NPRM*, 24 FCC Rcd. at 13067, 13087 ¶¶ 8, 57 ("A broadband Internet access service provider can also differentiate among different packet streams or classes of traffic by scheduling the transmission of certain packets waiting in a buffer ahead of others, determining by algorithm which packets in a buffer are dropped (*i.e.*, discarded and not transmitted), blocking an entire packet stream by means of an admission control algorithm, transmitting data of more (or less) efficient routing, redirecting traffic to another site, or blocking traffic entirely.").

[32] *See id.* at 13087 ¶ 57 ("As Internet infrastructure and the content, applications, and services delivered over the Internet have evolved, network equipment makers have also responded with new technologies, including more sophisticated routers that enable network operators to distinguish among different classes of traffic and offer different qualities of service to different traffic (service differentiation), which enables charging different prices for different traffic (price differentiation).").

certain peer-to-peer applications used to download online video.[33] The Commission characterized Comcast's network management as "invasive and outright discriminatory," including Comcast's failure to disclose its practices to consumers.[34]

In DISH's direct experience, Comcast also has tried to withhold key products in order to undermine DBS competition. Prior to the Commission's recent action to close the so-called terrestrial loophole, Comcast withheld key sports programming from DISH, DIRECTV, and other MVPDs. In Philadelphia, where Comcast holds ownership stakes in professional sports teams, the local arena, the local regional sports network ("RSN"), and the local cable system, the company deliberately and systematically withheld local sports – a textbook example of must-have content – from DISH and other competitors, to the detriment of competition and consumers.[35] Comcast's abuse of its market power had a significant impact on competition from

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[33] Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, *Memorandum Opinion and Order*, 23 FCC Rcd. 13028, 13028 ¶ 1 (2008) ("*Comcast Network Management Practices Order*").

[34] *Open Internet NPRM*, 24 FCC Rcd. at 13078-79 ¶ 37; *Comcast Network Management Practices Order*, 23 FCC Rcd. at 13033-44, 13051 ¶¶ 12-27, 42. The Commission concluded that Comcast's failure to disclose its practices misled the public. *See id.* at 13030-32 ¶¶ 6-9 ("When first confronted with these press reports, Comcast – the nation's second largest provider of broadband Internet access services – misleadingly disclaimed any responsibility for the customers' problems. For example, a Comcast spokesman stated: 'We're not blocking any access to any application, and we don't throttle any traffic.' . . . . The Associated Press subsequently conducted several nationwide tests to investigate the allegations that Comcast was interfering with its customers' use of peer-to-peer applications, including BitTorrent . . . Following these tests, Comcast changed its account and admitted that it targets peer-to-peer traffic for interference.").

[35] *See* Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements, *First Report and Order*, 25 FCC Rcd. 746, 766 ¶ 30 (2010) (footnotes omitted) ("*Terrestrial Loophole Order*") ("Comcast has withheld [SportsNet Philadelphia], which carries regional professional sports programming in Philadelphia, from DBS firms."); *see also* DIRECTV, Inc. v. Comcast Corp., 13 FCC Rcd. 21822 (1998); *EchoStar Commc'ns Corp. v. Comcast Corp.*, 14 FCC Rcd. 2089 (1999), *aff'd sub nom., DIRECTV, Inc. and EchoStar Commc'ns Corp. v. Comcast Corp.*, 15 FCC Rcd. 22802 (2000), *aff'd sub nom.,E choStar Commc'ns Corp. v. FCC*, 292 F.3d 749 (D.C. Cir. 2002).

the DBS industry within the local Philadelphia market.[36] Such actions spurred the Commission to amend its rules in the *Terrestrial Loophole Order* and prohibit Comcast and other cable operators from circumventing program access principles by withholding key content. This transaction would enhance Comcast's stranglehold over Philadelphia by adding to its arsenal NBC's owned-and-operated station in that market, WCAU TV-10.

NBC Universal

NBCU has likewise demonstrated a behavioral propensity to use its ownership of must-have content, including in the online video market, to mitigate competition and drive consumers to preferred providers. It is an online video distributor in its own right, and has already sought to leverage not only its key content but also its ownership stake in an online distribution platform to maintain its position of strength.

- *Market Power*

NBCU controls must-have programming assets and distributes those assets online. As the owner of a "Big 4" broadcast network, among other properties, NBCU controls programming that any competitive video distribution platform needs in order to compete. DISH and other MVPDs could not offer a substitutable, competitive product, inclusive of online video, without the NBC Network, NBCU non-broadcast networks, and Universal Studios movies.[37] NBCU

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[36] *See Terrestrial Loophole Order*, 25 FCC Rcd. at 768 ¶ 32 (concluding that "Comcast's withholding of the terrestrially delivered Comcast SportsNet Philadelphia RSN from DBS operators caused the percentage of television households subscribing to DBS in Philadelphia to be 40 percent lower than what it otherwise would have been [providing] evidence that unfair acts involving terrestrially delivered, cable-affiliated programming can have the effect in some cases of significantly hindering MVPDs from providing satellite cable programming and satellite broadcast programming").

[37] *See* Declaration of Dave Shull ¶¶ 6, 10 ("Shull Declaration"); Lynch Declaration ¶ 8; *see also* General Motors Corp. and Hughes Electronics Corp., Transferors and The News Corp., Transferee, for Authority to Transfer Control, *Memorandum Opinion and Order*, 19 FCC Rcd. 473, 564-66 ¶¶ 202-04 (2004) (footnotes omitted) ("[C]arriage of local television broadcast

uses multiple online video distribution platforms in which it holds a proprietary interest to deliver its content, including Hulu.com, NBC.com, and others. By its own admission, NBCU views the online video market as an important and increasingly critical one for the distribution of NBCU content.[38]

- *Propensity to Discriminate*

NBCU currently is engaged in the online distribution of its key programming assets and leverages its control over must-have programming to diminish competition among online video providers. Several examples illustrate this phenomenon. First, [redacted]

Second, [redacted] NBCU downgrades the quality of the video experience on DISH's online video platforms in comparison to NBCU's proprietary online video platforms, such as Hulu.com and NBC.com.[40] This appears to be an effort to drive online video users away from non-NBCU online video distribution platforms and towards NBCU's own properties.

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station signals is critical to MVPD offerings [and] DBS penetration has increased more rapidly in markets where local-into-local service is available."); *EchoStar Satellite L.L.C. v. Viacom, Inc.*, 2004 WL 439984 (N.D. Cal. Jan. 16, 2004) (issuing temporary restraining to require Viacom to continue to provide CBS programming for carriage on the DISH Network, finding that EchoStar would be immediately and irreparably injured if the programming were withdrawn); *see also* Complaint, *EchoStar Satellite L.L.C. v. Viacom, Inc.*, 2004 WL 439984 (N.D. Cal. Jan. 16, 2004).

[38] Letter from Jeff Zucker, President and CEO, NBC Universal, et al., to Kevin Martin, Chairman, FCC, et al., MB Docket Nos. 06-189, 07-42, at 1 (Nov. 20, 2007).

[39] [redacted].

[40] Shull Declaration ¶ 12; Lynch Declaration ¶ 6; Jackson Declaration ¶ 21.

Third, by virtue of its ownership stake in Hulu.com, NBCU seems to have taken a number of steps to throttle back the effectiveness of its online video competitors. Hulu requires the use of its proprietary online video player by DISH and other competitors in the online video market, diminishing the ability of online video competitors to use better video player software technology and restricting to Hulu owners access to all consumer metrics. It does not allow competitors' use of full metadata, such as show availability notes. It prohibits content distribution using new platforms and formats, such as the Apple iPad or HTML5. It controls all advertising inventory, diminishing, for example, DISH's ability to offer an advertising product comparable to its online video competitor's.[41] All these practices reveal a desire to hobble the effectiveness of online video competitors to NBCU and the other owners of Hulu.

Applicants claim that their 32% ownership interest in Hulu is not attributable since it is non-controlling.[42] We disagree. NBC, with FOX, is the largest investor in Hulu. Its stake is many times the 5% threshold for attribution under the Commission's program access rules.[43] For all the reasons described above, NBCU's ownership stake in Hulu gives it great power in the online video market and visibility into Hulu's operations, thereby guiding NBCU with respect to online video and its communications with fellow "Big 4" network owners in the development of industry-wide practices.

Even absent NBCU's ownership interest in Hulu, the company's behavior in the online video market reveals a propensity to withhold key online content in order to favor certain distributors. NBC restricted access to online coverage of the Winter Olympic Games, to which it

[41] Jackson Declaration ¶ 21.

[42] Application at 95 ("Hulu's percentage [ownership] should not – under applicable antitrust principles – be attributed to the combined company, since the new firm will hold only a minority, non-controlling interest in Hulu.").

[43] *See* 47 C.F.R. §§ 76.1000(b), 76.501.

held the distribution rights, only to subscribers of certain cable or satellite service.[44] As U.S. Senate Antitrust Subcommittee Chairman Herb Kohl (D-WI) stated, the increasing importance of online video and its promise of increasing competition in video raises questions as to whether NBC's handling of online Winter Olympic Games content "may have the effect of limiting the prospects of such competition."[45] Senator Maria Cantwell (D-WA) agreed, arguing at a Senate Commerce, Science, and Transportation Committee hearing that NBC's behavior portends additional "mischief" in the context of this proposed merger.[46]

Applicants claim that availability "of professional video content for online distribution . . . does not constitute a barrier that places new entrants at a disadvantage relative to incumbent online video distributors."[47] As the above examples illustrate, NBCU's own behavior in the online video market undermines that contention.

D. The Merged Comcast–NBC Would Have a Greater Incentive and Ability to Discriminate Against Competitors in the Online Video Market than Does Either Company Pre-merger

The online video market, encompassing broadband-enabled VOD, video streaming to a STB or computing device, and place-shifting applications, presages the future of video and is critical to the continued competitiveness of the DBS industry. Both Comcast and NBCU are significant market participants in online video today and each has displayed a propensity to

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[44] *See* Bruce Watson, *NBC Wipes Out on Its Olympic Strategy*, Daily Finance, Feb. 19, 2010, http://www.dailyfinance.com/story/media/nbc-wipes-out-on-its-olympics-strategy/19364519/.

[45] *See* Letter from Sen. Herb Kohl to Jeff Zucker, President and CEO, NBC Universal, at 2 (Feb. 26, 2010).

[46] *See* Consumer, Competition, and Consolidation in the Video and Broadband Market: Hearing before the S. Comm. on Commerce, Science, and Transportation (Mar. 11, 2010) (statement of Sen. Maria Cantwell), *available at* http://commerce.senate.gov/public/index.cfm?p=Hearings&ContentRecord_id=b6c5fd27-eb69-417f-9075-54712a42e1cc&ContentType_id=14f995b9-dfa5-407a-9d35-56cc7152a7ed&Group_id=b06c39af-e033-4cba-9221-de668ca1978a&MonthDisplay=3&YearDisplay=2010.

[47] Application at 98.

leverage its power to thwart competitors. The combination of these major online video providers, however, would give the combined entity an even greater incentive to protect existing and future revenue streams, and a significantly heightened ability to reduce competition from the DBS industry and other would-be providers of online video services.

- *Comcast–NBCU's VOD Content*

The increasing volume and importance of VOD to video providers presents the combined Comcast and NBCU with a heightened ability and incentive to undercut the DBS industry's and other competitors' provision of broadband-enabled VOD services. A DBS subscriber who uses Comcast for broadband connectivity to the STB and who, by definition, would download NBCU content as part of her DISH service, would present an attractive target. Comcast would have an incentive to degrade the speed and quality of NBCU VOD content delivered to the DISH subscriber compared to the experience of a Comcast subscriber.[48] NBCU would win either way, receiving revenue from the DISH subscriber who chooses to stay with a degraded service, or from the former DISH subscriber who switched to Comcast. Comcast would have a strong incentive to drive DBS subscribers away from DBS and towards Comcast. Thus, by using NBCU's critical VOD content, Comcast would have the ability to reduce competition from the DBS industry and others.

- *Comcast's–NBCU's Online Video Content*

Comcast and NBCU would have the incentive and ability to enhance the quality of NBCU online video content on both companies' online video distribution platforms, relative to that of competing online video providers. They could make NBCU content on Fancast/Xfinity more attractive than on DISHOnline. Comcast's ability to divide its broadband service into

[48] Lynch Declaration ¶ 8.

"lanes" for fast traffic and other "lanes" for slow traffic, combined with its incentive to make NBCU content more attractive on its platform than on competing platforms, likely would lead it to place NBCU content in the preferred traffic category for Comcast video subscribers, but relegate that same NBCU content to the "slow lane" for DISH subscribers who rely on Comcast for their STB's broadband connectivity.[49]

Similarly, Comcast could impose a usage cap on all of its HSI subscribers, ensuring that NBCU content would not count against that cap for subscribers to Comcast's video service, while, for DBS subscribers who rely on Comcast HSI service, the NBCU content would count against the usage cap.[50] Thus, Comcast and NBCU could diminish competition from the DBS industry and other competitors by differentiating the quality of online video content. As in the case of VOD, NBCU would win either way, gaining revenue from either the Comcast or non-Comcast subscriber, while Comcast would benefit from every DBS subscriber, for example, driven to Comcast.

- *Comcast and Hulu*

The combination of Comcast and Hulu, through NBCU's ownership interest, would enhance Comcast's ability to diminish the DBS industry's competitiveness. Comcast would gain valuable insight into future platforms that Hulu intended to support (*e.g.*, Adobe Flash, HTML5, Silverlight, Apple, Google, RIM, or Microsoft applications) and use that information to guide the development of Comcast features, including ways to make content on Hulu of higher quality to Comcast subscribers than to non-Comcast subscribers. Comcast also would gain valuable insight into Hulu's content distribution and monetization efforts, including business models for

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[49] Jackson Declaration ¶¶ 16-17.

[50] Preserving the Open Internet, GN Docket No. 09-191, WC Docket No. 07-52, Reply Comments of DISH Network L.L.C. 8-10 (filed April 26, 2010).

ad-supported and subscription revenue generators, cost per thousand impressions ("CPMs") and sell-through rates for online advertising, and user metrics for Hulu as compared to DISHOnline and other sites. This information would give Comcast a unique ability to improve the competitiveness of its online video services, such as Fancast/Xfinity, relative to its rivals' online video platforms, like DISHOnline.[51]

Thus, by using NBCU's interest in Hulu, Comcast would have the ability to diminish competition against its core and online video revenue streams by reducing competition from the DBS industry and others. We agree with Chairman Kohl that NBCU's relationship to Hulu raises grave concerns.[52]

- *Comcast–NBCU and Place-shifting*

Comcast would have every incentive to degrade the performance of, or prohibit altogether, Sling functionality on STBs that rely on Comcast HSI service. Comcast could block specific ports used by Sling devices for remote access, preventing consumers from accessing their home television programming remotely.[53] By combining with NBCU, it would have a much greater ability to do so. NBCU, as a distributor of online video in its own right, might make certain online video available only on select platforms and not on its core service used by DISH subscribers to "sling" content over the Internet to another device. Just as NBCU restricted online video coverage of the Winter Olympic Games to a limited subset of pay-TV customers, it could limit the online video platforms it used to distribute content in such a way that DISH subscribers could not "sling" the content to, say, an iPad, but Comcast subscribers could do so

[51] Jackson Declaration ¶ 22.

[52] *See* Letter from Sen. Herb Kohl, to Christine Varney, Assistant Attorney General, and Julius Genachowski, Chairman, FCC, at 3, 6 (May 26, 2010) (noting that Hulu competes directly with Comcast and seeking conditions on the transaction related to Hulu).

[53] Jackson Declaration ¶ 15.

using a technology other than place-shifting (*e.g.*, an authenticated interface on a website serving mobile devices). Thus, the combined Comcast–NBCU could systematically undermine Sling and, therefore, its competitiveness in the online video market.

- *Comcast–NBCU and Advertising*

As multiplatform advertising becomes more important, Comcast–NBCU also would be able to leverage the combined companies' advertising inventory to make their suite of advertising products more attractive than their competitors. Today, Comcast and NBCU compete against one another for advertising dollars. Post-merger, Comcast–NBCU would have access to advertising inventory on Comcast's linear video service; NBCU's and Comcast's proprietary content distributed on DISH, DIRECTV, and others; Hulu and all its distribution sites (*e.g.*, DishOnline, Sling.com, AOL, MSN, Yahoo!); websites that use Comcast's Internet advertising business; and all Comcast–NBCU owned-and-operated websites (*e.g.*, nbc.com, usanetwork.com, eonline.com).[54] Comcast–NBCU thus would have an enhanced ability post-merger to lead advertisers away from competing platforms and towards Comcast–NBCU's advertising products.

These are only some of the anticompetitive effects in the online video market that likely would result from a combined Comcast–NBCU, regardless of the Applicants' assurances to the contrary.[55] The combined entity's incentive and ability to reduce competition through leveraging its online video market position flows directly from a dynamic the Commission recently identified in a related proceeding:

[54] *Id.* ¶ 24.

[55] *See* Application at 97 ("Comcast's TV Everywhere online platform and Hulu are more complementary than competitive services."); *id.* at 99 ("[T]here is no basis to conclude that the proposed transaction will increase concentration in the future by curtailing 'potential competition' between NBCU's online video distribution business and Comcast's MVPD business.").

> By providing a user's broadband connection to the Internet, a broadband Internet access service provider serves as a gatekeeper to the content, applications, and services offered on the Internet. Broadband Internet access service providers have an incentive to use this gatekeeper role to make it more difficult or expensive for end users to access services competing with those offered by the network operator or its affiliates. For example, *a broadband Internet access service provider that is also a pay television provider could charge providers or end users more to transmit or receive video programming over the Internet in order to protect the broadband Internet access service provider's own pay television service. Alternatively, such a broadband Internet access service provider could seek to protect its pay television service by degrading the performance of video programming delivered over the Internet by third parties.* The result may be higher prices or worse service for some content and applications and inefficiently low investment in some content and application markets.[56]

In this proceeding, however, not only is the existing HSI provider, Comcast, incented to reduce competition from the DBS industry and would have the ability to do so through its broadband access gatekeeper characteristics, but in combination with the emerging online video competitor, NBCU, the anticompetitive opportunities and the desire to engage in them would significantly increase.

E. Applicants' Relevant Product Market Definition Obscures a Key Issue – the DBS Industry's Reliance on Online Video to Remain Competitive

Applicants claim that their proposed merger is a benign "vertical" integration between a distributor, Comcast, and a content provider, NBCU.[57] They argue that the sale of linear multichannel content is a distinct product market from the sale of online content;[58] that Comcast

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[56] *Open Internet NPRM*, 24 FCC Rcd. at 13094 ¶ 72 (emphasis added).

[57] *See* Application at 2 ("[T]he proposed transaction is primarily a *vertical* combination of NBCU's content with Comcast's multiple distribution platforms."); *see also* Application at 78 ("[T]he proposed transaction presents no 'horizontal' competitive concerns: The competitive overlaps between Comcast's and NBCU's businesses are very limited, and the combined company will continue to face vigorous competition in each market in which the parties' activities arguably overlap.").

[58] *See* Application at 88 (attempting to bifurcate the online video market into "upstream" and "downstream" markets, with online video content divorced from online video distribution).

and NBCU do not compete with one another in these markets;[59] and therefore the merger would not result in reduced competition.[60]

This notion of separate markets may be at odds with Comcast statements in other contexts. In documents filed at the Securities and Exchange Commission, for example, Comcast has stated that its cable systems face the risk of competition from "online services that offer Internet video streaming, downloading and distribution of movies, television shows, and other video programming"[61] and suggests that it faces direct competition from Hulu, Google, Joost, Amazon.com, and others.[62]

This broader product market definition would mean there is a greater reduction in future competition between Comcast and its would-be online video distribution rival, NBCU, than Comcast acknowledges. As described above, NBCU already is engaged in online video distribution, including through its ownership interest in Hulu and the visibility into this important

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[59] *See* Application at 99 ("[O]nline video does not compete directly with MVPD service."); *see also id.* at 100 ("[T]o adopt a market definition that encompasses both Comcast's MVPD business and NBCU's online video distribution assets would be inconsistent with, among other things, the Commission's recognition that cable distribution and over-the-air broadcast distribution are in separate product markets.").

[60] *See id.* at 1 ("Given the intensely competitive markets in which Comcast and NBCU operate, as well as existing law and regulations, this essentially vertical transaction presents no cognizable risk of harm in any market or to the public interest.").

[61] *See* Comcast Corp., Annual Report (Form 10-K) at 6 (Feb. 23, 2010), *available at* http://files.shareholder.com/downloads/CMCSA/716386522x0xS1193125%2D10%2D37551/1166691/filing.pdf.

[62] *See* Comcast Corp., Current Report, (Form 8-K) at 16 (Dec. 22, 2009) (describing an employee's non-compete obligations and stating, "Employee agrees that the following companies . . . are among those engaged in competitive video programming distribution as of the date hereof: **Amazon.com, Inc.; Apple Inc.;** AT&T Inc.; Bright House Networks; Cablevision Systems Corp.; Charter Communications, Inc.; Cox Communications, Inc.; DirecTV, Inc.; DISH Network Corporation; EchoStar Holding Corporation; Everest; **Facebook, Inc.; Flixster, Inc; Google, Inc. (including YouTube); Joost Operations S.A.**; Knology Holdings, Inc.; Microsoft Corporation (including Xbox); **N-F NewSite, LLC d/b/a hulu.com**; Qwest Communications International, Inc.; RCN. . . .") (emphasis added), *available at* http://files.shareholder.com/downloads/CMCSA/765068790x0xS950103-09-3354/1166691/950103-09-3354.pdf.

online video distribution platform that such an interest provides. Comcast's current revenue stream from subscription video and its emergence into alternative online video distribution platforms such as Fancast and Xfinity increasingly would be threatened by the rising power of NBCU as an online video competitor.

But in any event, Applicants' definition of the relevant product market is a distraction from a key issue – the importance to MVPDs such as DISH of online video, including (a) video that has been delivered via a broadband platform, such as a video-on-demand movie delivered to a set-top box over a broadband connection, or (b) a streamed or downloaded video product on a fixed or mobile screen, such as a live sporting event viewed on a living room television, personal computer, or handheld device.

It is in light of online video's importance that the efforts of companies like DISH to enter the online video market in order to remain a competitive force in video likely would be impinged by the merged entity. Using techniques described in detail above, along with others not yet imagined, a merged Comcast–NBCU would have the incentive to reduce competition from an industry that has proven to be a tough rival, and the ability to do so by applying the combined synergies of the merged companies in the online video market. So long as DBS subscribers must rely on Comcast for broadband connectivity to the STB and NBCU for online video functions and features, the temptation to reduce competition from the DBS industry probably will prove too great for Applicants to resist.

As for broadband access, the assertion that Comcast faces sufficient competition in the HSI access market to eliminate any concerns about Comcast's market power in that market flies in the face of both market data, showing a precipitous decline in competition from DSL,[63] and

[63] *See supra* at 10-11.

practical consumer behavior.[64] Applicants appear to have failed to accurately portray current market trends, and future implications, of cable's increasing dominance in residential HSI service.

Online video is a present-day market phenomenon and likely will be the driving force of video markets in the future. To ignore it fails to grasp the anticompetitive implications of the proposed merger between Comcast and NBCU, including, in particular, the threat to a competitive DBS industry.

F. The Commission Should Deny the Application or, in the Alternative, Apply Strict Conditions to Preserve the Vibrancy of the Online Video Market and the Competitiveness of the DBS Industry

The threat to future competition posed by the proposed merger of Comcast and NBCU should lead the Commission to reject the proposed transaction or, at the very least, impose strict conditions that would sufficiently prevent anticompetitive effects. The ongoing competitiveness of the DBS industry is at stake.

Congress and the Commission have recognized the importance of a vibrant, competitive DBS industry for the benefit of all video consumers. From the enactment of the program access regime in 1992[65] to this year's enactment of the Satellite Television Extension and Localism

[64] *See supra* at 11.

[65] *See* 47 U.S.C. § 548(a) ("The purpose of [the program access provision] is to promote the public interest, convenience, and necessity by **increasing competition and diversity** in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies.") (emphasis added); *see also* H.R. Rep. No. 102-862, at 93 (1992) (Conf. Rep.), *reprinted in* 1992 U.S.C.C.A.N. 1231, 1275 ("The conferees intend that the Commission shall encourage arrangements which promote the development of new technologies providing facilities-based competition to cable and extending programming to areas not served by cable."); S. Rep. No. 102-92, at 28 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1161 ("To encourage competition to cable, the bill bars vertically integrated, national and regional cable programmers from unreasonably refusing to deal with any multichannel video distributor or from

Act,[66] Congress has placed a premium on infusing the video market with competing providers, chief among them the DBS industry.

The Commission similarly recognizes the importance of maintaining strong competition from the DBS industry. It has recognized that competition from the DBS industry fuels investment not only from the satellite providers themselves, but from their competitors, and that consumers benefit from this healthy rivalry.[67] Given the importance of maintaining the competitiveness of DBS, and the critical role that online video will play in maintaining that competitiveness, the Commission should take action in this proceeding to ensure that Comcast and NBCU will not have the ability to abuse their market power and reduce competition.

The Commission has adopted forward-looking conditions in merger proceedings where the combination of firms threatened to foreclose future competition in emerging markets. In fact, the Communications Act requires the Commission to take such preventative measures when

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discriminating in the price, terms, and conditions in the sale of programming if such action would have the effect of impeding retail competition.").

[66] *See* H.R. Rep. No. 111-349, at 8 (2009) ("[C]onsumers are selecting DBS carriers for pay television service at an increasing rate, and as of mid-2006 (the most recent data available) DBS carriers had garnered nearly 30% of the MVPD market.").

[67] *See* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Thirteenth Annual Report*, 24 FCC Rcd. 542, 545 ¶ 6 (2009) ("Cable operators have responded to the growth of DBS and its competitive service offerings by, among other things, expanding their channel line-ups and bundling video service with other service offerings, such as high-speed Internet access service or telephone service. The number of cable subscribers selecting digital tiers and advanced services not offered by DBS continues to grow. DBS operators have responded by offering local broadcast channels, additional sports and international programming, and advanced set-top boxes with digital video recorder ("DVR") capabilities."); *see also Terrestrial Loophole Order*, 25 FCC Rcd. at 747 ¶ 1 ("Our existing program access rules have been a boon to such competition, and we anticipate that the rules we adopt today will have similar pro-competitive effects. Our efforts to spur competition in the marketplace for video programming are also aimed at increasing consumer benefits, including better services, innovations in technology, and lower prices. Moreover, we believe broadband adoption to be a further benefit from increased competition and diversity in video programming distribution.").

confronted with a merger that threatens to foreclose future competition.[68] In AOL–Time Warner, the Commission was faced with a very similar transaction to the one proposed in this proceeding, where the combination of an HSI access provider and a service that had been competing with it for subscribers threatened to foreclose the development of future competitive markets. The Commission imposed preventative conditions to preserve and enhance future competition.[69]

Similarly, in this proceeding, the combination of Comcast and NBCU threatens to foreclose competition in the emerging online video market and particularly the competitiveness of the DBS industry. Just as it adopted forward-looking conditions in the AOL–Time Warner proceeding, the Commission in this proceeding should adopt conditions to mitigate the potential harm posed by a combined Comcast–NBCU. To that end, DISH and EchoStar recommend that the Commission, should it not block the transaction altogether, adopt the following conditions (described in detail in the Appendix):

- To prevent discrimination against online video traffic destined for DBS subscribers and other users of online video services not provided by Comcast–NBCU, apply the Commission's proposed open Internet rules to Comcast–NBCU and prohibit all forms of discriminatory conduct on Comcast's broadband network, including those described herein.

- To prevent anticompetitive bundling of Comcast-NBCU's HSI access service with other Comcast–NBCU products, require (a) the sale of a stand-alone retail HSI product; and (b) provide consumers with the ability to use third party ISPs, so

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[68] *See AOL–Time Warner Order*, 16 FCC Rcd. at 6555 ¶ 21 ("While an antitrust analysis . . . focuses solely on whether the effect of a proposed merger 'may be substantially to lessen competition,' the Communications Act requires the Commission to make an independent public interest determination, which includes evaluating public interest benefits or harms of the merger's likely effect on future competition.").

[69] *See id.* at 6611 ¶ 150 ("[T]o promote the policies of the Communications Act, we may 'plan in advance of foreseeable events instead of waiting to react to them.' We may therefore examine and place conditions on a merger to ensure that it will not impede the development of future competition but will, in fact, enhance competition.").

that DBS subscribers and other users of online video services not provided by Comcast–NBCU may have sufficient choice and competition within the online video and related markets.

- Require Comcast–NBCU to make transparent its network management practices and the operation of its broadband network, so that pernicious behavior can be promptly detected by the Commission and the public.

II. COMCAST–NBCU WOULD THREATEN COMPETITION IN THE MVPD MARKET BY LEVERAGING THE RETRANSMISSION CONSENT RIGHTS OF THE NBC OWNED-AND-OPERATED STATIONS AGAINST COMCAST'S MVPD COMPETITORS

MVPDs like Comcast and DISH must negotiate with broadcasters of "Big 4" network programming to acquire key content and remain competitive pay-TV providers. The combination of an MVPD and an owner of one of those key networks invite anticompetitive behavior. While Comcast's economists attempt to downplay this threat, in this case, Comcast would have both the incentive and ability to use its control over NBC to drive MVPD subscribership away from competing providers and towards Comcast's core linear video service.[70]

The Commission recognized exactly that threat in a transaction where the owner of FOX, a "Big 4" broadcast network, sought to acquire control of a major MVPD, DIRECTV.[71] The

[70] *See* Highly Confidential Supplement to the Petition to Deny of DISH Network L.L.C. and EchoStar Corporation, Vertical Foreclosure Threats Posed by the Proposed Comcast–NBC Transaction, MB Docket No. 10-56 (filed June 21, 2010) (explaining the vertical foreclosure threats posed by the transaction and how Comcast's economists inappropriately downplay these very serious risks). The supplement is being filed separately, consistent with the *Second Protective Order* in this proceeding, so as more efficiently to protect the highly confidential information that it contains.

[71] *See* General Motors Corporation and Hughes Electronics Corporation, Transferors And The News Corporation Limited, Transferee, For Authority to Transfer Control, *Memorandum Opinion and Order*, 19 FCC Rcd. 473, 565 ¶ 201 (2004) ("*News Corp.–Hughes Order*") ("We find that News Corp. currently possesses significant market power in the DMAs in which it has the ability to negotiate retransmission consent agreements on behalf of local broadcast television stations. Local broadcast station programming is highly valued by consumers, and entry into the

Commission's findings and remedial conditions in that News Corp.–Hughes merger are directly applicable here. Just as News Corp. had an incentive to delay or deny retransmission consent agreements for FOX owned-and-operated networks with unaffiliated MVPDs in order to drive subscribers to DIRECTV,[72] Comcast–NBCU would have an incentive to delay or deny retransmission consent agreements between NBC and unaffiliated MVPDs in order to drive subscribers to Comcast.

A broadcast television station group the size of NBC's has the ability to drive subscribers away from an MVPD by taking down network programming. The recent take-down of a much smaller broadcast station group carrying "Big 4" network programming, Fisher Broadcasting, directly impacted DISH's subscribership in relevant markets. DISH's churn and market penetration rates, key measures of its competitiveness, suffered relative to other markets in the same time period where no such take-downs occurred.[73] A take-down of NBC's broadcast station group would have a much more detrimental anticompetitive effect.

In this proceeding, Applicants should not be allowed to abuse the retransmission consent rights of its NBC broadcast television stations to drive subscribership for Comcast. The Commission should impose exactly the same condition here that it did in the News Corp.–Hughes transaction: baseball-style arbitration with a standstill (*i.e.*, neither party may take down

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broadcast station market is difficult [and] absent conditions, News Corp.'s acquisition of DirecTV will enhance this market power, which could result in several public interest harms.").

[72] *See id.* at 565 ¶ 203 ("News Corp.'s existing control of MVPDs' access to a large number of local broadcast stations airing highly popular Fox network programming, when combined with ownership of a nationwide DBS platform, will likely increase News Corp.'s incentive and ability engage in temporary foreclosure strategies aimed at increasing its programming fees thereby having the effect of raising rival MVPDs' costs by lowering the costs to News Corp. of engaging in such behavior.").

[73] *See* Declaration of Vincent Kunz, MB Docket No. 10-56, ¶ 6 (June 7, 2010) ("Kunz Declaration").

programming pending resolution of the dispute) for all NBC owned-and-operated stations negotiating retransmission consent rights with non-Comcast MVPDs.[74]

After the Commission adopted that condition in the News Corp.–Hughes merger proceeding, DISH became the first MVPD to invoke it. The condition worked. First, not a single DISH subscriber lost key FOX programming due to a take-down; there was no market disruption for the consumer. Second, two of the biggest rivals in the video business [redacted] Baseball-style arbitration requires each side to submit its best and final proposal and the arbitrator must choose one proposal in its entirety. This tends to eliminate gamesmanship. Finally, [redacted]

The threat to competition posed by Comcast-NBCU gaming retransmission consent procedures to gain market share is obvious. Fortunately, so is the solution. The Commission should apply the baseball-style arbitration condition to all NBCU retransmission consent negotiations.

III. COMCAST–NBCU WOULD THREATEN COMPETITION IN THE MVPD MARKET BY GRANTING EXCLUSIVE DISTRIBUTION OF NBCU CONTENT TO COMCAST CUSTOMERS

As described above, when given the opportunity, Comcast will use its control over must-have content to reduce competition from its rivals. In Philadelphia, for example, where Comcast owns not only the cable system but also the RSN, sports arena, and professional teams, the company systematically used this control to withhold key sports programming from the DBS

[74] *News Corp.–Hughes Order* 19 FCC Rcd. at 676-82, Appendix F.

industry and other competitive MVPDs, with the effect of reducing the competitiveness of its rivals in Philadelphia. Comcast has withheld or delayed DISH's access to key Comcast programming in other contexts, as well, including the delay or denial of key RSNs in other markets.[75]

It takes little imagination to envision how a company that behaves this way with respect to its current content holdings will behave after it acquires NBC and other flagship, must-have content. Comcast's ability to discriminate against its competitors will be greatly enhanced, as will its incentive to do so. DISH believes that the existing program access regime has not been sufficient to prevent abuses by Comcast and has not been updated to account for emerging platforms such as online video.

The Commission's recent order closing the terrestrial loophole will be a positive step but remains untested because the rules only took full effect today and are being challenged in court.[76] Moreover, the current program access regime has been inadequate to thwart Comcast's discriminatory treatment and would be even less effective in governing a combined Comcast–NBCU. Applicants claim that they would lack sufficient market power to restrict competition,[77] but their behavior with the DBS industry and the Commission's decision to take action in related proceedings suggest otherwise.

Comcast–NBCU should not be allowed to deny key programming assets to its distribution competitors. First, the Commission should apply all program access rules to all

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[75] Shull Declaration ¶ 16.

[76] *See generally Terrestrial Loophole Order*, 25 FCC Rcd. at 798 ¶ 81. *See also* Public Notice, FCC, MB Docket No. 07-198, Notice of Effective Date of Program Access Complaint Rules, DA 10-1099 (rel. June 21, 2010).

[77] *See* Application at 9 ("[A] vertical combination cannot have anticompetitive effects unless the combined company has substantial market power in the upstream (programming) or downstream (distribution) market, and such circumstances do not exist here.").

Comcast–NBCU's affiliated content, including, but not limited, to online video content, and should clarify in that respect that the current program access rules already apply, no matter if the qualified programming in question happens to be VOD or interactive television. Second, the Commission should prohibit any exclusive content arrangements between Comcast and NBCU. Third, the Commission should close the terrestrial loophole for Comcast–NBCU as a condition in this proceeding, simply by extending the condition to all content, no matter how it is delivered, and regardless of the outcome of the Commission's recent rulemaking.[78] Fourth, the baseball arbitration and standstill requirements, discussed above in connection with NBC's owned-and-operated stations, should also apply to all disputes over the availability of any Comcast-affiliated content, including online content. Fifth, Comcast should be barred from tying purchase of one type of content onto purchase of another type, and that "à-la-carte" requirement, too, should extend to all Comcast-affiliated content.[79]

IV. CONCLUSION

For the foregoing reasons, the Commission should deny the proposed transaction absent meaningful commitments from the Applicants to ensure that consumers and the online video market are not adversely affected.

[78] *Compare* Appendix, *infra*, *with* Letter from Sen. Herb Kohl, to Christine Varney, Assistant Attorney General, and Julius Genachowski, Chairman, FCC, at 4-6 (May 26, 2010).

[79] In determining what constitutes affiliated content, the conditions should use the attribution threshold of a 5% interest, whether voting or not, that is contemplated by the Commission's program access rules. *See* 47 C.F.R. §§ 76.1000(b), 76.501. Moreover, all affiliations, no matter how circuitous and indirect, should be covered.

Respectfully submitted,

/s/

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APPENDIX:

Broadband Conditions to Protect Competition in the Online Video Market

1. Comcast–NBCU shall comply with the proposed rules set forth in Section 8.1 to Section 8.23 of the Commission's Notice of Proposed Rulemaking, Docket 09-93 (the "Open Internet Rules").

2. Within 90 days of the merger closing date, and continuing until such time as Comcast–NBCU sufficiently demonstrate to the Commission that this condition no longer is necessary in the public interest, Comcast–NBCU will offer on a stand-alone basis to retail customers, who are not currently subscribed to Comcast's HSI service, a broadband Internet access service equal in speed and quality to Comcast's then-existing HSI service, and as such service may from time to time be changed by Comcast–NBCU.

3. Within 90 days of the merger closing date, and continuing until such time as Comcast–NBCU sufficiently demonstrate to the Commission that this condition no longer is necessary in the public interest, Comcast–NBCU shall provide broadband services at reasonable non-discriminatory wholesale rates to other service providers that want to offer a competitive bundle of services.

4. Comcast–NBCU shall not restrict the ability of any current or prospective ISP customer(s) to select and initiate service from any unaffiliated ISP which has made its service available over Comcast's cable plant.

5. Notwithstanding anything to the contrary in the Open Internet Rules, Comcast–NBCU shall not discriminate against the services of its competitors that are sent over Comcast's broadband network. Examples of discriminatory conduct include dropping packets, indirectly routing content, increasing the number of hops, imposing artificial time delays, increasing jitter, blocking, limiting investment in upgrade of routers and network technology at interconnection points, and using a reserved portion of Comcast's cable plant to deliver VOD services. This also includes economic discrimination (*e.g.*, Comcast–NBCU cannot exclude its own content as counting towards monthly download caps, if any).

6. Notwithstanding anything to the contrary in the Open Internet Rules, Comcast–NBCU shall not prioritize or guarantee a higher quality-of-service for its own VOD services and/or its online offerings (*e.g.*, Xfinity/Fancast) over those services provided by Comcast–NBCU's competitors, which are sent over Comcast's broadband network.

7. Comcast–NBCU shall submit to random audits, including by Commission field engineers, to determine compliance with these broadband conditions, and the results of any audits should be made public.

8. Within 90 days of the merger closing date, and continuing until such time as Comcast–NBCU sufficiently demonstrate to the Commission that this condition no longer is necessary in the public interest, Comcast–NBCU shall make available to the public tools that would (a) monitor bandwidth usage and speed of delivery of its broadband network; (b) monitor points of network congestion in real time; (c) determine whether certain content, applications or services are being degraded over similar content, applications or services; and (d) detect packet injection and spoofing by Comcast–NBCU with software capable of comparing two packet captures and identifying potentially forged, dropped, or mangled packets.

9. Within 90 days of the merger closing date, and continuing until such time as Comcast–NBCU sufficiently demonstrate to the Commission that this condition no longer is necessary in the public interest, Comcast–NBCU must permit the installation of automated monitoring agents to be placed at its national headends and at the edge of its network to track latency and jitter. The moving averages can be updated at reasonably discrete time intervals within a day. Results of monitoring agents should be posted promptly on publicly available websites. Comcast–NBCU shall cover the costs of implementing the monitoring agents.

10. Comcast–NBCU shall not require third-party programmers to grant exclusive online rights to Comcast as a condition of carriage on its cable system.

Enforcement of Broadband Conditions

1. Any party aggrieved by conduct that it believes constitute a violation of the above conditions may commence an adjudicatory proceeding at the Commission to obtain enforcement of the conditions through the filing of a complaint.

2. Any party that intends to file a complaint with the Commission based on actions alleged to violate one or more above conditions must first notify Comcast–NBCU. The notice must be sufficiently detailed so that Comcast–NBCU can determine the specific nature of the potential complaint. The potential complainant must allow a minimum of ten (10) days for Comcast–NBCU to respond before filing a complaint with the Commission.

3. In a case where recovery of damages is sought, the complaint shall contain a clear and unequivocal request for damages and appropriate allegations in support of such claim. Damages will not be awarded upon a complaint unless specifically requested.

4. Comcast–NBCU shall answer the complaint within twenty (20) days of service of the complaint, unless otherwise directed by the Commission.

5. Within fifteen (15) days after service of an answer, unless otherwise directed by the Commission, the complainant may file and serve a reply which shall be responsive to

matters contained in the answer and shall not contain new matters.

6. The complainant will be able to obtain discovery as of right.

7. Upon completion of such adjudicatory proceeding, the Commission shall order appropriate remedies, including, if necessary, the imposition of damages, the award of reasonable attorneys' fees, and/or the entry of a permanent injunction enjoining Comcast–NBCU from engaging in the conduct that is the subject of the complaint. Such order shall set forth a timetable for compliance, and shall become effective upon release. The above remedies are in addition to, and not in lieu of, the sanctions available under Title V or any other provision of the Communications Act.

8. At the time the complaint is filed or anytime thereafter, the complainant may also file a petition for an order preliminarily enjoining Comcast–NBCU from engaging in the conduct that is the subject of the complaint (the "Petition"). Comcast–NBCU shall have ten (10) days to respond to the Petition, and the complainant has seven (7) days to file a reply, unless otherwise directed by the Commission. Within thirty (30) days after the filing of the reply, the Commission shall grant the Petition if the stay standard applied by the Commission is satisfied. If the Petition is granted, Comcast–NBCU shall be required to pay the complainant's reasonable attorneys' fees in bringing the Petition.

DECLARATION OF MARK JACKSON

I, Mark Jackson, being over 18 years of age, swear and affirm as follows:

1. I make this declaration based upon personal knowledge, information, and belief, and in support of the confidential submission of DISH Network L.L.C. ("DISH") and EchoStar Corporation ("EchoStar") to the Federal Communications Commission ("FCC") in connection with the FCC's review of Comcast Corporation's proposed purchase of a controlling interest in NBC Universal.

2. I am currently President of EchoStar Technologies L.L.C., a subsidiary of EchoStar. I previously served as the President of EchoStar Technologies Corporation from June 2004 through December 2007, and Senior Vice President from April 2000 until June 2004.

3. EchoStar operates two primary business units: digital set-top box business and satellite services business. Our digital set-top box business designs, develops and distributes digital set-top boxes and related products, including our Slingbox place-shifting technology, primarily for satellite television service providers, telecommunication and cable companies and directly to consumers' through retail outlets. EchoStar's digital set-top box business also provides digital broadcast operations, including satellite uplinking/downlinking, satellite operations management, transmission services, signal processing, conditional access management and other services primarily to DISH. Our satellite services business uses EchoStar's owned and leased in-orbit satellites and related FCC licenses to lease capacity on a full time and occasional-use basis to enterprise, broadcast news, government, and other organizations.

4. In my current role as President, I oversee all day to day operations of EchoStar's digital set-top box and video equipment business throughout the world.

5. Sling Media Inc. (Sling), a subsidiary of EchoStar Technologies, brings the home television experience to the computing and mobile device screens. Today, Sling's Slingbox and SlingPlayer technology are available as stand-alone products for purchase at retail outlets, as well as to DISH subscribers when integrated into certain satellite receivers. The SlingPlayer software connects users on all types of computing platforms (including PC and Mac laptop and desktop computers, and iPhone, iPad, Blackberry, and Android mobile devices) to their Slingbox using a broadband connection, audio/video inputs and infrared (IR) set-top box controllers. The Slingbox then gives customers the ability to watch and control almost any audio/video device including analog cable, a digital cable box, satellite receiver, digital video recorder, a DVD player or even a video camera. For example, when connected to a typical cable box or satellite receiver with DVR functionality, the Slingbox user may watch live television, change channels, watch previously recorded programs, watch video on demand and pay per view offerings, and manage DVR recordings, all using his or her computer or mobile phone either remotely (WAN) or within the home (LAN).

6. Sling also currently operates its own Internet video aggregation portal at the URL www.sling.com ("Sling.com"). Further, Sling develops, operates and maintains for DISH both a video portal at the URL www.dishonline.com (DISHOnline) and a web-based, next-generation TV guide called Dish Remote Access (DRA). Both Sling.com and DISHOnline aggregate premium short- and long-form video for anyone to watch on a free, ad-supported, on-demand, streaming basis (FOD) from providers such as ABC, NBC, Fox, CBS, A&E, Discovery, National Geographic, the Comcast Networks (E!/Style, G4, VS, and Golf Channel) and many others. In addition, DISHOnline combines this FOD content with the capability for DISH subscribers to do

some or all of the following, depending on their subscription tier and satellite set-top box: (i) watch additional authenticated video content, streaming and on-demand based on each user's specific DISH subscription (e.g., DISH users that subscribe to Showtime may login and obtain access to Showtime content that is not available to non-subscribers); (ii) set, delete and otherwise manage DVR recordings on their home satellite receiver via a direct Internet connection (rDVR); and (iii) rent and, if necessary, download (via Internet) movies directly to their home satellite receiver, with any charges appearing on their DISH bill. DRA combines rDVR functionality with TV search and recommendations features for DISH subscribers that may be used with supported mobile devices like the iPhone in addition to PC and Mac-based web browsers.

7. In order to offer rDVR functionality on an EchoStar set-top box, like the functionality currently available with DISHOnline and DRA, the set-top box must be connected to the Internet via an open, reliable broadband connection. That is because this functionality requires a return path. The web-based or mobile application client must communicate to the set-top box (e.g., a request to set a recording, or a request for the list of current programs scheduled to be recorded) and receive a response from the set-top box (e.g., a confirmation that the recording was properly set, or the list of programs scheduled to be recorded).

8. In order to be fully functional, a Slingbox (or Slingbox-enabled set-top box) must be connected to the Internet via an open, reliable broadband connection. A customer who is interested in watching their video source from their home will connect over the Internet to their Sling-enabled set-top box from wherever they are located. This connection will carry real-time video from the customer's home, and must offer a reasonable, known, and clearly indicated quality of service to that customer.

9. Place shifted TV experience requires reliable broadband connection, with sustained throughput, minimal throttling, minimum jitters and preferably a QOS scheme giving higher priority to streaming video traffic

10. DISH and Google recently launched Google TV - the industry's first integration of multichannel television and rich web media content. This product augments the satellite TV experience with a full web based search and content display engine based on the broadcast content being displayed. This combined experience relies heavily on a high bandwidth connection to the internet including searching, shopping, news/entertainment and streaming media that is not throttled or impeded in any way.

11. The Google TV/DISH product brings the Internet video and search experience to the home television. This box allows for intelligent searching of content related to the current programming including streaming video. Without a reliable high speed connection to the internet, this rich experience will be incomplete.

12. DISH customers will now have access to multichannel television and the web on their home TV in one platform using their existing DISH HD DVR receivers and a Google TV device. This is an integrated solution using a coordinated user interface and single remote control to provide this experience. DISH's customers have come to expect very high service availability. The levels of integration provided by this web connectivity mean that even the highly reliable satellite experience will be degraded if the web connectivity is degraded, because much of the enhanced user interface for satellite content relies on data supplied *via* the Internet.

13. DISH On Demand and DIRECTV OnDemand replicate the cable Video-on-Demand experience by using broadband to download files *via* the Internet to the set-top-box. A

DISH network customer uses their set-top box to connect over the Internet to a catalog of available content. The customer selects the content that interests them, agrees to the relevant commercial terms, and a file is downloaded to their set-top box. When the customer has a reliable and predictable internet connection, in some cases they can begin watching the file before it has completed transfer. If a customer has chosen to pay for a higher-speed internet connection, the file transfer will take less time, and the customer will be able to watch their content sooner. This is an innovative and growing business that will only continue to expand and become more important as users are more broadly able to preview, select, rent and purchase such content seamlessly and remotely via interfaces like DISHOnline and DRA. Content delivery *via* satellite is point to multi-point distribution and is broadcast in nature. For long tail content that is only of interest to a small number of people, the only efficient way to deliver this content is *via* an internet connection. Both services rely heavily on being an over the top content supplier to our STBs *via* the customers existing internet connection. This is legally provided and fully protected content being delivered to the set-top box. For video in particular, the content are huge files that if throttled in any way would disrupt the service. Should the content be streamed, adding significant jitter would disrupt the service as well.

14. In order to continue to compete with Comcast (Xfinity/Fancast), other multichannel video program distributors (MVPDs), and other online video providers (e.g., Netflix, Amazon, Hulu, and YouTube), DISH must be able to continuously offer and expand the capabilities of DISHOnline. A competitive DISHOnline offering requires: (a) access to a vast library of premium content; (b) the ability to deliver such premium content to "three screens" (TV, mobile and laptop/desktop computer); (c) the ability to deliver such content as early as

possible, for the longest duration possible and in the highest quality possible; (c) innovation around such content, allowing users to interact with such content and each other in compelling ways; and (d) DISH subscribers to have an open, reliable broadband connection to facilitate all of the foregoing.

15. Comcast can discriminate against certain Internet Protocol packets using deep packet inspection, jitter, port-blocking, and other means. The communication protocols used on the Internet describe how packets contain source and destination addresses; source addresses can usually be linked to a specific website or a specific video service, such as DISH Online. Additional information contained in the data stream and the packets themselves can be used to determine what kind of data is carried, and in some cases which customer application intends to use the data. With the information available from inspecting and analyzing their customer's communications, Comcast can choose to prefer or to delay certain packets over others, and thus, certain streams of content or certain applications over others. Some of the methods Comcast can use to discriminate against place shifted TV and Video On Demand over IP using Sling Technology through inspection of MAC addresses of devices, protocol type, message headers, payload type, etc. Comcast can block specific ports used by Sling devices for remote access on broadband Customer Premise Equipments (CPE) resulting in inability by end users to remote access their home television programming. The servers for video on demand will be at well known IP addresses, so easily blocked if there was a desire to do so.

16. Comcast can divide its broadband pipe into discrete "lanes" into which it may direct packet traffic, rendering some lanes slower due to congestion, over-promise, or whim. Comcast can specifically direct certain type of traffic based on MAC address of devices,

message header, payload type at lower priority (as opposed to equal priority) or on slower network causing delay in timely video packets delivery of place shifted TV. Such methods cause video stall, audio breaks resulting in significant end user's TV watching experience. These methods are well known; document and equipment to perform these functions are readily available.

17. Comcast, as the network operator, is the sole arbiter of which lane may proceed, and at what speed. If network management were the responsibility of an unaffiliated 3rd party, such a neutral party might be entrusted to perform such a task fairly. Unfortunately, Comcast itself is the source for much of the online video content passing over their network, and may be expected to manage overall traffic to Comcast's overall advantage. In other words, in the case when Comcast's network provisioning to a specific customer can't meet that customer's needs, and then when given a choice between delaying a content stream sourced from Comcast and delaying an identical stream sourced from DISH, if Comcast delays their own stream, they will deal with the costs of commensurate customer contact concerning the delay. If they delay DISH's stream, that customer will contact DISH instead.

18. Comcast has engaged in blatant discrimination against certain types of online video and end-use applications, and has hindered its subscribers' access to other websites.

19. Comcast's stated terms of service render moot any attempt by DISH to innovate and use distributed set-top box networks to provide commercial content to DISH's customers.

20. Comcast has discriminated against third parties with respect to the distribution of the online video it controls *via* the networks E!/Style, G4, Golf Channel and Versus.

21. NBC (both directly, and via its ownership interest in Hulu) has discriminated against third parties with respect to the distribution of the online video it controls. Hulu is a joint venture of NBC, ABC and Fox. Except for websites owned and operated by NBC, ABC and FOX (e.g., nbc.com, fox.com and abc.com), all other websites that want to distribute content controlled by NBC, FOX or ABC (or their affiliates) must deliver that content using Hulu's proprietary, Flash-based video player. This limitation has enabled NBC to discriminate against unaffiliated third party distributors like DISH (*via* DISHOnline) in the following ways: (a) the video quality of NBC content provided to the distributor is lower as compared to when it is viewed on Hulu and NBC.com because the bit-rate is intentionally capped by NBC at a lower value; (b) 100% of the video ad inventory is controlled by Hulu, NBC, ABC or FOX, as applicable, and none is controlled by the distributor; (c) Hulu does not share all available metadata relating to the content with its distributors or end-user customers (e.g., show availability notes); (d) it is impossible for the distributor to deploy technical innovations in connection with its distribution of the video (e.g., video clipping, improved adaptive streaming, video post-processing, video-based search, etc.); (e) the content may not be distributed using new formats and platforms (e.g., the Apple iPad via HTML5 streaming) unless and until Hulu decides to do so; and (f) Hulu knows more about how users interact with its content on its distributors' websites than the distributors themselves because Hulu controls the analytics in its proprietary video player.

22. Comcast/NBC's stake in Hulu would allow it to unfairly compete against EchoStar and DISH with respect to the distribution of online video, and Comcast/NBC would have an incentive to do so. Comcast would gain valuable insight into future platforms that Hulu

intended to support (e.g., Adobe Flash, HTML5, Silverlight, and Apple, Google, RIM or Microsoft application stores), while simultaneously using that information to guide its own development efforts and shaping Hulu's future distribution in a way that best suits Comcast's own businesses. Comcast would also gain valuable insight into Hulu's content distribution and monetization efforts, including the success of ad-supported and subscription models, cost per thousand impressions (CPMs) and sell-through rates for online advertising, number of unique users and user behavior on Hulu versus distribution sites like DISHOnline, and top third party referral sites. This information would give Comcast a unique ability to improve and expand the reach and profitability of its Fancast/Xfinity services. Finally, Comcast would have the ability to influence Hulu's dealings with third party distributors, and ensuring that its Fancast/Xfinity services received favorable treatment similar to or better than that currently received by NBC, FOX and ABC's properties (e.g., access to the broadest possible content library, better video quality, control of ad inventory, hosting and serving video assets into Comcast's own video player, access to more distribution platforms, and access to the most robust and complete metadata).

23. The consolidation of an additional CableLabs/MPAA membership will more closely bind the industries together in the areas of content availability *via* new technologies. It is likely that technical architectures and business models will be developed to deliver commercial content that prefer cable distribution over alternate paths.

24. Comcast/NBC would be able to unfairly compete in the video advertising market as multiplatform advertising becomes more and more important. Currently, there are generally accepted industry standards among MVPDs and television networks regarding the allocation of

advertising inventory in linear, multichannel programming, with the MVPD receiving some minutes of advertising inventory per hour of programming and the television network controlling the rest[First, with linear TV everyone is beholden to Nielsen ratings today. That measurement is finally starting to extend beyond the TV, with any viewing of a program (live, DVR, streamed online, etc.) being counted by Nielsen if viewed within 3 days of the live airing. So, during that 3 day window, it's going to be very important that the same ads run against programming whether it's viewed online (on any and every destination) or on linear TV. Second, it's more valuable to advertisers to be able to buy a package for a show or genre of content that includes advertising placement both online and on linear TV, regardless of when someone is watching the show (inside or outside the 3 day window). Third, advertising is most valuable when the advertiser has a large amount of reporting and metrics on the campaigns they buy (again, regardless of whether those ads are online or linear, and regardless of when they're viewed). Fourth, advertisers like to buy in bulk and gain access to millions of impressions (e.g., an ad spend of even just $100,000 at a $30 CPM would require the distributor like Comcast, DISH or Sling to deliver over 3 million impressions). As can be seen, Comcast/NBC would have access to (i) inventory on all channels through Comcast's cable distribution of linear TV (as an MVPD); (ii) inventory on Comcast, DISH, DirecTV, and other MVPDs linear TV through its ownership of E!, G4, Golf Channel, Versus, NBC, Bravo, USA, etc.; (iii) inventory on hulu.com and all hulu distribution sites (like DishOnline, Sling.com, AOL, MSN, Yahoo!, IMDB, DailyMotion, etc. (http://www.hulu.com/about/distropartners)) with respect to any Comcast-controlled content; (iv) inventory on all websites enabled by Comcast's Internet advertising business (http://www.comcastspotlight.com/advertising-solutions/online); and (v) all inventory on

Comcast/NBC's owned and operated sites, such as nbc.om, usanetwork.com, eonline.com, g4tv.com, versus.com, bravotv.com, etc. They would be able to wield incredible power in the ad market, especially when combined with their other existing assets and ad relationships.

25. Direct Broadcast Satellite (DBS) technology is optimized for point-to-multipoint communications and relies on third-party providers for return-path enabled, point-to-point communications because it lacks a return path. A return path *via* satellite is possible, but an extremely inefficient use of spectrum as it is point to point. Historically, satellite STBs have relied on a telephone modem for the required return channel for such things as reporting pay-per-view events, limited interactivity and security measures. As customers' expectations for interactivity expand, our STBs need alternate methods to establish this return channel connectivity. The logical choice for this is internet connectivity. This can be used for both the low bandwidth reporting that historically was handled over telephone modems as well as the high bandwidth operations like long tail content, web enhanced video, place shifting, and whatever other new technologies become available in the next few years.

26. Unlike cable, DBS cannot cache content at neighborhood nodes or centrally. Satellite broadcast by nature is a nationwide service. Some localization can be provided using spot beams, but this must be of interest to only the viewers in that local area such as local programming. For content that is less popular, but still of interest across a wide geographic area, such technologies do not work. For this class of content, a satellite broadcaster must rely on local terrestrial connections for a point to point connection.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on June 17, 2010.

Mark Jackson
President of EchoStar Technologies

The foregoing was subscribed and sworn to before me on this 17th day of June 2010.

My commission expires: May 4, 2013

Notary Public
Witness my hand and official seal

NOTARY PUBLIC
RANELL L. POWERS
STATE OF COLORADO

REDACTED – FOR PUBLIC INSPECTION

DECLARATION OF ROGER J. LYNCH

I, Roger J. Lynch, being over 18 years of age, swear and affirm as follows:

1. I make this declaration based upon personal knowledge, information, and belief, and in support of the confidential submission of DISH Network L.L.C. ("DISH") and EchoStar Corporation ("EchoStar") to the Federal Communications Commission ("FCC") in connection with the FCC's review of Comcast Corporation's proposed purchase of a controlling interest in NBC Universal.

2. I am currently Executive Vice President, Advanced Technologies of EchoStar, and also serve as Executive Vice President, Advanced Technologies at DISH. Prior to joining EchoStar and DISH, I served as Chairman and CEO of Video Networks International, Ltd., an IPTV technology company in the United Kingdom from 2002 until 2009.

3. DISH and Google recently launched Google TV - the industry's first integration of multichannel television and rich web media content. With Google TV, DISH subscribers will be able to perform a unified search covering the listings in the program guide, the subscriber's DVR and the internet. There are also many other features such as voice search using an Android phone, as well as bringing many applications to the TV, such as Pandora and Youtube.

4. The Google TV/DISH product brings the Internet video and search experience to the home television. Subscribers will be able to search for content across the program guide, their DVR and the internet. For instance, a search for "State of the Union" might bring up CNN's State of the Union program from the program guide, a recorded copy of the State of the Union address on the subscriber's DVR, and a transcript of the State of the Union address from whitehouse.gov. Today, viewers have to go to multiple devices (a PC and their TV) to get an

experience like this. In the future, viewers will be able to access almost any content on almost any connected device. They will lose patience for services and devices that only provide a small sampling of the content they want. With all of this choice comes the need for sophisticated navigation and search capabilities, such as Google TV.

5. Dishonline.com gives DISH subscribers one place to go on the internet where they can: access to network television content (NBC, ABC and Fox content comes from Hulu and CBS content from tv.com); access authenticated cable network content (for example, if you subscribe to a DISH package that includes Showtime you can get Showtime movies and TV shows online); control their DVR (set their DVR to record a program from anywhere in the world); and, with Sling technology, actually watch programs from their TV or DVR online. Dishonline.com delivers on the promise of TV Everywhere.

6. NBC content accessed via dishonline.com is deliberately degraded relative to the same content on Hulu. Hulu's own website offers NBC content in three video quality levels: 480p (highest, consistent with DVD resolution); 360p; and 288p (much lower quality video resolution). The reason they offer three quality levels from the hulu.com website is that it enables customers with very low speed broadband (500-600Kbps) to still be able to stream their content, albeit at a lower quality, while customers with higher speed broadband (1-2Mbps) are able to stream their content at very high quality levels. Hulu only provides NBC and other network television content to dishonline.com at the lowest 288p quality level.

7. Comcast has hindered its subscribers' access to other websites.

8. DISH Network cannot be competitive with cable operators in the future if DISH Network customers do not have a reliable, open broadband connection to their set-top boxes. The

amount of content consumers are viewing on demand is increasing dramatically. All cable, telco TV and satellite operators are working to expand their on demand offerings. According to Rentrak, in 2009, U.S. MSOs reported 6.9 billion VOD transactions, covering 3.1 billion hours of VOD content viewed. This represents a 38% increase in two years. These VOD offerings are becoming critical to the success of these businesses and any pay-TV operator that is unable to provide on demand content via IP to STBs will be unable to compete as viewership moves from linear broadcast channels to on demand viewing. The ability of a cable or telco competitor to favor their own video offering over another pay-TV operator's video offering by affecting the quality of service over their broadband network would significantly reduce competition in the pay-TV marketplace by in effect only making viable pay-TV services that are purchased with the operator's own broadband offering.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on June 14, 2010.

Roger J. Lynch
Executive Vice President, Advanced Technologies
DISH Network Corporation and
EchoStar Corporation

The foregoing was subscribed and sworn to before me on this 14th day of June 2010.

My commission expires: 01/30/2012

Kimberly Lynn Berridge
Notary Public
Witness my hand and official seal

KIMBERLY LYNN BERRIDGE
NOTARY PUBLIC
STATE OF COLORADO

DECLARATION OF DAVE SHULL

I, Dave Shull, being over 18 years of age, swear and affirm as follows:

1. I make this declaration based upon personal knowledge, information, and belief, and in support of the confidential submission of DISH Network L.L.C. ("DISH") to the Federal Communications Commission ("FCC") in connection with the FCC's review of Comcast Corporation's proposed purchase of a controlling interest in NBC Universal.

2. I am currently the Senior Vice President of Programming at DISH.

3. DISH is a multi-channel video provider, offering video, audio and data services to customers throughout the United States, Puerto Rico, and the U.S. Virgin Islands via a Direct Broadcast Satellite ("DBS") system. DISH uses high-powered satellites to broadcast movies, sports and general entertainment programming services to members of the public who have been legally authorized to receive its programming after payment of a subscription fee.

4. In my role as DISH's SVP of Programming, I oversee DISH's satellite and internet based programming platforms, including: identifying, evaluating and securing content; negotiating programming rights and affiliation agreements, marketing, pricing and packaging the content for DISH subscribers; and operational execution.

5. DISH Network provides an online web portal, DishOnline.com ("DishOnline") wherein DISH customers and others can access and view broadcast and cable network programming.

6. In order to be competitive with Hulu, Comcast and others, DishOnline must provide content from the major broadcast and cable networks.

7. NBC, Fox and ABC are owners of Hulu and have entered into agreements with Hulu granting Hulu the exclusive right to the online distribution and syndication of the content created and/or distributed by the Hulu owners.

8. It is important that DishOnline receive content as so called "mezzanine files" so that DishOnline can innovate, provide the best possible user experience to its end users and have control over its own website.

9. [redacted]

10. DISH Network would not offer a competitive product without the NBC Network; NBC-Universal non-broadcast networks; and Universal Studios movies.

11. [redacted]

12. NBC content accessed via DISH Online is deliberately degraded relative to the same content on Hulu.

13. DISH Network cannot remain competitive if it does not offer broadband-enabled video-on-demand products and online content both to the television and to computing devices.

14. The take-down of Fisher Broadcasting's network programming signals directly impacted DISH Network subscribership in relevant markets.

15. Comcast provides certain content online exclusively to its own subscribers.

16. Comcast-owned or controlled Regional Sports Networks ("RSNs") are necessary for DISH Network to offer a competitive product, and Comcast has withheld or delayed licensing the carriage of such RSNs to DISH Network.

17. [redacted]

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on June 17, 2010.

Dave Shull
Senior Vice President, Programming
DISH Network Corporation

The foregoing was subscribed and sworn to before me on this 17th day of June 2010.

My commission expires: 10/25/10

Elizabeth J Williams
Notary Public
Witness my hand and official seal

ELIZABETH J WILLIAMS
NOTARY PUBLIC
STATE OF COLORADO
My Commission Expires 10/25/10

REDACTED – FOR PUBLIC INSPECTION

DECLARATION

I declare under penalty of perjury that the facts contained within the foregoing Petition to Deny and its appended material, except for those facts for which official notice may be taken and those that other parties have submitted to the Federal Communications Commission confidentially under the protection of the *Protective Orders* in MB Docket No. 10-56, are true and correct to the best of my information, knowledge and belief.

Executed on June 21, 2010.

Jeffrey H. Blum

Jeffrey H. Blum
Senior Vice President & Deputy General Counsel
DISH Network L.L.C. and EchoStar Corporation

CERTIFICATE OF SERVICE

I, Christopher R. Bjornson, hereby certify that on this 21st day of June 2010, I caused true and correct copies of the foregoing Petition to Deny (Redaction – For Public Inspection version) to be served by hand to:

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/s/
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