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

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

REDACTED - FOR PUBLIC INSPECTION

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

I. INTRODUCTION AND SUMMARY

Counsel for DISH Network L.L.C. ("DISH") and EchoStar Corporation ("EchoStar") file this supplement to the Petition to Deny filed by DISH and EchoStar today.[1] The purpose of this supplemental submission is to respond to the conclusion reached by the Applicants' economists that the proposed combination of Comcast Corporation and NBC Universal, Inc. ("NBCU") does not pose a significant threat that Comcast will foreclose other Multi-Channel Video

[1] This supplement cites to and contains Highly Confidential information either previously submitted or previously approved under the *Second Protective Order* in this proceeding. A redacted version of this supplement for public inspection is simultaneously being filed with the Commission.

Programming Distributors ("MVPD"s) from NBCU's owned and operated NBC network stations.[2]

To reach that conclusion, Comcast's economists apply the Commission's foreclosure model after making what they describe as "appropriate modifications" to it.[3] The purpose of the exercise is to assess whether foreclosing Comcast's competitors from NBC programming would be profitable. To do this, they compute the "critical departure rates" of subscribers leaving a competitor – *i.e.*, the minimum number of departures that must be met for foreclosure to be profitable.[4] Those critical rates then become the yardstick against which Comcast's economists compare "likely actual" departure rates.[5] They in turn estimate these rates from a number of historical foreclosure incidents, including most prominently DISH's temporary loss, over a period of six months, of the network stations belonging to Fisher Broadcasting Company.[6]

The conclusion Comcast draws from this comparison is carefully hedged to begin with:

> Although the confidence intervals around these results are large enough that they do not 'prove' that the actual departure rates are below the low-end of some of our estimated ranges for the critical departure rates, these results provide strong evidence that – even during a six-month retransmission dispute – actual departure rates were below the critical departure rate required to support profitable foreclosure. Put simply, the empirical evidence provides no support for a claim that the post-transaction NBCU would have an incentive to withhold NBC from any rival MVPD in any DMA.[7]

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[2] Mark Israel and Michael L. Katz, Application of the Commission Staff Model of Vertical Foreclosure to the Proposed Comcast-NBCU Transaction, MB Docket No. 10-56, at 81 ¶ 132 (Feb. 26, 2010) ("Israel/Katz Report").

[3] *Id.* at 4 ¶ 5.

[4] *Id.* at 43 ¶ 73.

[5] *Id.* at 78 ¶ 125.

[redacted]

[7] *Id.* at 79-80 ¶¶ 129.

In fact, a review of the Comcast economists' work does not support even this highly qualified conclusion. The critical departure rates (the bar beyond which foreclosure becomes profitable) are lower than they calculate. This is because many of the "appropriate modifications" they make to the Commission model are not in fact appropriate.[8] And, DISH's actual experience in the Fisher incident shows the historical departure rates resulting from network station foreclosures to be much higher than Comcast's economists argue based on indirect inferences.[9]

II. THE PHILADELPHIA PRECEDENT

To begin with, the suggestion that Comcast would not foreclose competitors from its new programming assets is belied by Comcast's practice with respect to the programming assets that it does control now. Comcast would not have denied DISH and DIRECTV access to its Philadelphia sports programming had it not thought that the strategy would pay. DISH's experience shows that the Philadelphia foreclosure has indeed paid richly for Comcast. [redacted] For more than a decade Comcast has found it profitable to forego not only the advertising revenues that would result from its sports channel being available on DBS, but also the very significant subscription revenue for the channel. It has foregone these revenues for the obvious reason they are more than offset by the additional revenues it receives from subscribers signing on with Comcast rather than DBS because the sports channel is only available on Comcast.

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[8] *See id.* at 4 ¶ 5. Comcast's economists seem to admit that the Commission's model, applied without the "modifications," would "substantial[ly] increase the probability that the transaction would cause anticompetitive foreclosure. *Id.* at 3 ¶ 3.

[redacted]

Importantly, there are at least two differences between NBC and the Philadelphia sports programming suggesting that, if anything, foreclosure would be even more profitable here. First, in Philadelphia Comcast had all of the upside but also all of the downside (as the sole owner of the sports programming). With respect to NBC, Comcast will still have all of the upside, while having just over half of the downside.[10]

Second, the per subscriber fees that Comcast has foregone by denying access to regional sports programming are much higher than the retransmission fees it would forego if it were to deny retransmission rights to NBC. Specifically, [redacted] which will be discussed below, the RSN foreclosure is more costly for Comcast than the NBC foreclosure would be. And if the more costly course of action is nevertheless profitable, a cheaper strategy will be more profitable still – a proverbial "no-brainer," unless checked by meaningful conditions.

III. THE ECONOMICS RELATED TO COMCAST'S PARTIAL OWNERSHIP OF NBCU

Comcast's economists do not give due weight to the disparity of Comcast's economic participation in the distribution and programming links of the vertical chain,[12] which means that

[10] Amended and Restated Limited Liability Company Agreement of Navy, LLC § 8.02, MB Docket No. 10-56 (filed Jan. 28, 2010) ("Comcast-GE NBC Operating Agreement") (providing a 51 percent distribution to Comcast and 49 percent to GE).

[redacted]

Comcast has all the upside and only half of the downside of a foreclosure strategy. Instead, rather remarkably, they seek to reverse the true implications of that fact and to parlay it into a safeguard that makes foreclosure *more* unlikely. According to them, "[o]ne critical factor is the presence of GE as an owner of NBCU following completion of the proposed transaction. GE will have contractual rights that it can invoke to protect in ensuring its commercial self-interest does not participate in a foreclosure strategy that harms NBCU while helping Comcast's cable systems."[13] But the economists do not cite any provisions of the agreement between the applicants that would give GE, as the minority shareholder of the NBCU joint venture, the veto rights necessary to forestall a foreclosure strategy. In fact, not only does the agreement omit such veto rights. Rather atypically, it also only includes very limited minority investor protections.[14] And, of course, there is no disputing that Comcast will control NBCU, both *de jure* and *de facto*.[15]

In the absence of general veto rights, Comcast's economists rely exclusively on the fiduciary duty of Comcast managers to GE. DISH does not dispute that fiduciary duty can play a relevant part in such matters. Standing alone, however, fiduciary duty is an inadequate safeguard to prevent anticompetitive behavior. This is precisely the reason why minority shareholders seek

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[redacted]

[13] *Id.* at 6 ¶ 10.

[14] Comcast-GE NBC Operating Agreement § 4.10(a). These rights are limited to (i) certain acquisitions, (ii) material expansions of Newco's scope of business of purpose, (iii) certain issuances or repurchases of equity, (iv) certain distributions to equity holders, (v) certain debt incurrences, (vi) certain loans made outside of the ordinary course of business, and (vii) a liquidation or voluntary bankruptcy of Newco.

[15] *See* 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, at 11-16 (filed Jan. 28, 2010).

veto rights – because the fiduciary duty of the managers does not ensure adequate protection. And ultimately, a non-controlling view from a minority shareholder can hardly match the restraint on Comcast's behavior that would be present if Comcast had itself all of the foreclosure's downside (*i.e.* if Comcast owned all of NBCU). If even that restraint is insufficient, as it was in the case of Philadelphia, GE's voice will be, if anything, more ineffective still.

This is all the more so because, while foreclosure is all upside for the distribution arm, it is in fact *not* all downside for the programming arm. Foreclosure doubtless has immediate costs for NBC, but it also has potential benefits: the "strong-arming" may result in NBC commanding larger fees either from the distributor that is the victim of foreclosure or from other distributors who fear the same retribution. While Comcast's economists include foregone retransmission fees on the negative side of the ledger,[16] as a cost of foreclosure, they appear to ignore the fact that foreclosure is also a technique for achieving higher fees later. If the benefit of eventual higher fees exceeds the temporary foregone fees, the minority shareholder might support the strategy enthusiastically in the first place, mooting the effect of fiduciary duty for yet one more reason.

But in any event, it is unrealistic to assume, as Comcast's economists do, that Comcast will behave as if it owns 100% of NBC even if it will own about 50%. It is true, of course, that Comcast can become sole owner of the joint venture in the future, after consummation of the initial transaction. But if and when that happens, foreclosure may already have been attempted, and its harm may already have been done irreparably.

IV. NBC RETRANSMISSION CONSENT FEES

[16] Israel/Katz Report at 38 ¶ 66.

Beyond this threshold issue, many of the modifications that Comcast's economists make to the assumptions underlying the model seem seriously flawed. Perhaps most important among them is the [redacted] in the level of NBC retransmission fees.[17] These, of course, are the fees that would be lost by NBC in a foreclosure strategy. This means that, the higher the foregone fees are, the less profitable foreclosure would be for Comcast.

[redacted] Backing this adjustment alone out of the calculations of Comcast's economists would significantly reduce the critical departure rates by showing foreclosure to be less costly.

Furthermore, to deal with the "fact" of staggered retransmission contracts, Comcast's economists assume that "the diversion ratio to each of the remaining, non-foreclosed MVPDs in the DMA would be proportional to the MVPD's share of all MVPD subscribers in that DMA."[20] In other words, Comcast's analysis discounts Comcast's benefit from the foreclosure by

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[redacted]

[20] Israel/Katz Report at 27-32 ¶¶ 49-55.

assuming that all but one of the other MVPDs would *not* be foreclosed. But again, this assumption does not appear to correspond to the facts. [redacted]

V. OTHER FLAWED OR OVERLY-OPTIMISTIC ASSUMPTIONS

In the same vein, the Comcast analysis further discounts the benefits to flow to Comcast by assuming that, in each DMA that has a telco MVPD, "the telco MVPD realizes the maximum share that any telco MVPD has achieved in a DMA to date[redacted] Here again, instead of being conservative, Comcast's economists seem unrealistically aggressive – they assume that all telco MVPDs will soon attain in each DMA where they operate the maximum penetration that any one of them has ever reached in any one DMA, however aberrant and unique this maximum share may be. This is one more significant way in which Comcast's analysis inappropriately discounts the benefits of foreclosure to Comcast.

As another example, Comcast's economists assume that other MVPDs can manipulate long-term subscriber contracts "to limit any subscriber losses that might result from loss of the NBC broadcast signal."[23] In other words, DISH could defend itself by refraining from entering into subscriber contracts that expire at around the same time as its retransmission contract with NBC. But of course, DISH offers contracts to its subscribers on a rolling basis, as customers

[redacted]

[redacted]

[23] *Id.* at 34 ¶ 59.

knock on its door. To do what Comcast assumes, DISH would likely have to close its doors and declare a moratorium on accepting new subscribers at certain times, so that the expiration dates of its subscriber agreements do not coincide with the expiration date of the NBC contract. The thought that such a defense mechanism can be engineered in real life is implausible.

VI. THE FISHER INCIDENT

Comcast's calculation of critical departure rates rests on many other questionable assumptions on which DISH will not dwell here. It is with respect to the second prong of the study – the estimation of likely actual rates – that collides most sharply with DISH's own experience. Comcast's economists estimate that the Fisher incident did not cost DISH [redacted] Comcast's economists arrive at these conclusions by inferring DISH's subscriber base changes from the changes to Comcast's base in these regions of the Fisher DMAs where Comcast had a presence, and comparing them in turn against changes to Comcast's subscriber base in "the closest unaffected region" where Comcast has a presence.[26]

There are many issues with this method. For one thing, Comcast's choice of the Fresno and Sacramento DMAs for comparison to the Fisher DMAs appears arbitrary. Among other reasons, Comcast has a different footprint in the Fresno and Sacramento DMAs, accounting for over 75 percent of all cable passed households in those two DMAs but under 70 percent in the Fisher DMAs. What is more, neither the Fresno DMA nor the Sacramento DMA is comparable

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[redacted]

[redacted]

[26] *Id.* at 61-62 ¶¶ 100.

is population to any of the Fisher DMAs. More generally, and perhaps most important, Comcast's economists do not cite any similarity between the Fisher DMAs and their choices of control DMA beyond geographic proximity, which appears to be an arbitrary criterion, standing alone.

Second, even accepting for a moment the method's soundness, it yields results that Comcast is hard-pressed to explain. [redacted]

But most important, DISH has already submitted for the record of this proceeding the Declaration of Vincent Kunz, which describes the effect of the Fisher loss on DISH's market share and churn, and estimates the subscribers that DISH lost on account of the temporary Fisher foreclosure. Among other things, Mr. Kunz concludes that: [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

These conclusions rest on directly observable evidence and are therefore more reliable than the indirect inferences drawn by Comcast from Comcast's own subscriber base.

VII. CONCLUSION

Unless properly conditioned, the transaction poses serious vertical foreclosure risks that would harm competition among MVPDs.

Respectfully submitted,

/s/

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June 21, 2010

[redacted]

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DECLARATION

I declare under penalty of perjury that the facts contained within the foregoing, 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 cag

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