Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS OF AOL INC.

I. Introduction and Summary

AOL Inc. ("AOL") files these Comments to urge the Commission to guard consumers' access to the online content of their choice by placing appropriate conditions on the proposed merger between Comcast Corporation ("Comcast") and NBC Universal Inc. ("NBCU") (together, the "Applicants"). AOL is a leading global Web services company with an extensive suite of brands and offerings, providing original local and national content, advertising, and online communications services. As an independent online video programming distributor ("OVPD"), AOL must rely on access to the consumer through broadband pipelines managed by third parties such as Comcast. To distinguish itself, AOL relies on the relevance and appeal of its content and services and its ability to match content and consumers based on their interests.

The large scale and extensive tentacles of the entity resulting from the proposed merger have been commented upon by many. It would put Comcast in control of a large collection of popular and must-have content, both "linear" and online, and couple that control with the largest multi-channel video programming distributor ("MVPD") and broadband access provider in the nation. Unaffiliated content providers will have to rely on Comcast both for essential programming inputs and for access to the consumer, while at the same time providing, or at least threatening, competition to Comcast's packages, in whole or in part. In addition, Comcast will be in control of a large number of advertising platforms: broadcast networks, ad-supported cable networks, and local cable systems as well as online advertising. This conglomeration of important assets at every level of the media chain will create the potential for many types of anti-competitive behavior. To avert such harm, the Commission should impose meaningful conditions on Comcast's conduct.

Specifically, the Commission should condition its approval upon the imposition of its program access rules, currently intended to ensure fair and non-discriminatory access of multichannel distributors to Comcast's programming, for all online content. This condition would prevent Comcast from engaging in unfair practices – including discrimination, refusals to deal, and exclusivity arrangements that prevent or significantly hamper OVPDs from competing in the relevant market, with respect to any of its content, including online content. Comcast should also be barred from demanding exclusivity in its dealings with independent producers of online content. Furthermore, the Commission should prohibit Comcast from extracting exclusivity commitments from advertisers and from imposing multi-media tying arrangements on them. Such arrangements could be used to "dry up" the single largest source of funding for the development of competing content. Finally, to guard against Comcast's exercise of undue leverage over the broadband pipeline to the disadvantage of upstream content providers and consumers alike, the Commission should impose its proposed net neutrality rules, regardless of whether and when the Commission may adopt such rules in the pending rulemaking proceedings. Without these conditions, the end result will be fewer choices and higher-priced services for consumers seeking online video content.

II. The Merger Poses Potential Public Interest Harms

The Commission has long recognized that the public interest is best served when the American consumer has access to media content from a wide variety of sources reflecting a diversity of viewpoints. The consumer is further served when he or she can choose the source of the desired content from competitive offerings that differentiate themselves on price, quality, and/or service features. These goals are achieved by preventing industry players with market power from tying up popular content through exclusive or restrictive deals, from favoring in-house or affiliated content over independent programming when the same party controls the pipeline to the consumer, and from skewing the flow of advertising funds that ultimately allow competitors to produce such content.

AOL is committed to offering high quality, original content on its premium online sites. At the same time, AOL and other OVPDs can offer consumers unique online experiences by providing access to third party content, such as popular TV shows and movies, in an on-demand or other innovative fashion. Indeed, AOL's OVPD services provide consumers free access to that content, consistent with AOL's ad-supported business model. Independent OVPDs such as AOL create a competitive market for independent video programmers ("IVP"s) to market and distribute their video content through a variety of channels to provide consumers with the most diverse content. Of course, this is only possible if the consumer can also reach the online video content through a broadband connection that does not discriminate between alternative and competing online content sources.

The proposed merger will combine traditional and online video programming content with the nation's single largest MVPD and last-mile broadband access provider and network. The online properties in which Comcast will have a controlling or attributable interest will include: Comcast.net, Fandango, DailyCandy, Plaxo, Fancast, NBC.com, CNBC.com, iVillage, and Hulu. Comcast already ties certain online content to a subscription to Comcast's cable services. Independent OVPDs pose a threat to NBCU's and Comcast's online video programming distribution services, cable television subscription business, and hybrid linear/online packages, either as offered by Comcast now or as may be offered in the future. As the largest cable provider and residential ISP in the United States, after the merger Comcast will be uniquely positioned to leverage its consumer access to provide an advantage to affiliated and favored content over those of other OVPDs and IVPs. Thus, the merger is likely to harm the online video programming market by creating in the combined entity both the ability and incentive to:

- deny independent OVPDs access to Comcast-NBCU-affiliated online programming at non-discriminatory rates, including "must have" television programming and local and regional sports programming, or prevent OVPDs from accessing IVP content by entering into exclusive or restrictive agreements;
- require a cable subscription as a condition to receiving online content. The bundled content offerings will provide for an anti-competitive advantage. Comcast already ties its online content offerings with its cable service in the current Fancast XFinity service;
- unfairly skew and undermine the main funding source for competitive online programming by requiring advertisers to advertise exclusively on Comcast platforms and by tying advertising on different Comcast platforms (e.g., require advertisers to run ads on both Comcast cable services and online); and
- degrade or even block consumer access to independent OVPDs in order to promote proprietary and affiliated programming.

In discounting these threats, the Applicants' economists devote significant discussion to the question of whether online video and linear video are substitutes for, or complementary to, one another.[1] AOL does not take a position on the rigorous question of market definition. But whether or not online video is a full-fledged substitute for linear video today, it seems obvious that it can become such a substitute in the near future. Comcast's economists acknowledge repeatedly the fluid nature of business models in this area.[2] Comcast's Fancast site is a case in point. The Fancast Xfinity offerings are available only to Comcast "double-play" subscribers (subscribers to both linear cable and broadband), while other Fancast content is available to site users free of charge and supported, at least in part, by advertisers. Especially in light of this fluidity, today's complement can be tomorrow's substitute.[3] Indeed, this discussion is reminiscent of the "complement vs. substitute" debate that raged in the 1990s regarding the

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[1] Mark Israel and Michael L. Katz, *The Comcast/NBCU Transaction and Online Video Distribution* at 2-4, 6, 20-32, 36, MB Docket No. 10-56, (filed May 4, 2010) ("*Comcast Online Video Report*").

[2] *Id.* at 17, 31 ("[E]volving technology and changing consumers' tastes are driving changes in the video marketplace[.]") ("[T]he online video marketplace is evolving and can be expected to continue to change.").

[3] The phenomenon of "multi-homing" relied upon by Comcast does not negate the threat that Comcast will seek to internalize and control all platforms, so that multi-homing will come to mean no more than multiple platforms constituting parts of one package and controlled all by one provider. And the example of Viacom pulling its programming from Hulu is cited rather mystifyingly by Comcast's economists. They seem to argue that Viacom does not need Hulu, *ergo* Hulu is not a substitute for an MVPD platform. But Viacom's conduct is in fact a disconcerting premonition of conduct that Comcast may engage in, except of course that Comcast will have greater incentive to do so than Viacom, precisely because of the manifold interests to be acquired through the proposed transaction. Comcast's economists also note that Hulu added links on its website to the foreclosed Viacom programming. According to them, this means that a future victim of online content foreclosure "could potentially maintain the value of its aggregation services." But the ability to add links is not a sufficient safeguard against a Comcast attempt to disadvantage competing platforms by foreclosing full-fledged access to its content. Such a link is rather akin to a DBS distributor adding a screen advising its subscribers that they may also purchase a cable subscription.

nature of the (then nascent) Direct Broadcast Satellite ("DBS") and Direct-to-Home satellite service. Then, the cable industry, through its Primestar consortium, made a concerted effort to position and market Direct-to-Home satellite service as a complement to, rather than a substitute for, cable service.[4] This effort raised significant competitive concerns. After antitrust investigations and two consent decrees, the Department of Justice ultimately filed an antitrust complaint against Primestar in 1998.[5] The complaint was intended to prevent Primestar from gaining access to essential DBS frequencies and consigning the service to a mere complement to cable. Precisely the same concern is present here. When Comcast's economists argue that OVPDs are likely to pursue product differentiation strategies,[6] they ignore a distinct possibility: these strategies may result from lack of other options or pressure from Comcast. This merger will give Comcast both the incentive and the ability to foreclose such options and apply such pressure and consign online video to complementary status, to the detriment of consumers.

Notably, as discussed above in connection with the Primestar experiment, when Congress enacted the 1992 Cable Act, it had absolutely no foreknowledge as to whether non-cable MVPDs would pursue product differentiation strategies or would instead compete against cable on price. Yet the program access rules that Congress enacted then do not distinguish based on each MVPD's strategy and competitive posture; they protect all MVPDs. Likewise here, the Commission should condition this transaction to protect all unaffiliated OVPDs.

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[4] Commercial Mobile Radio Service is, of course, another example of a service that has traversed a considerable distance in the continuum between complement to landline service to substitute for it in recent years.

[5] Press Release, *Justice Department Sues to Block Primestar's Acquisition of News Corp./MCI's Direct Broadcast Satellite Assets*, Department of Justice, No. 98-216 (May 12, 1998).

[6] *Comcast Online Video Report* at 31-32.

Comcast's economists assume that online video can function as a substitute for MVPD service and conclude that, even in such a case, foreclosure would be highly unlikely.[7] But their conclusion seems to be based on many questionable assumptions. First, they focus exclusively on "cord cutting" as opposed to "cord shaving," where consumers do not abandon their cable provider but buy fewer services from it.[8] But the argument that NBCU does not have access to the premium content that could be used to effectuate cord-shaving discounts both the ability of NBCU to develop such content and the value of its movie library.[9]

Another important assumption of the model – that Comcast will *not* withhold programming from traditional MVPDs,[10] similarly appears to be belied by Comcast's practice of withholding its existing programming (Philadelphia sports) from satellite providers. Under the logic of Comcast's economists' model, online foreclosures would be more profitable if assisted by foreclosure of linear MVPDs; thus, abandoning that assumption should significantly impact the analysis.

Ultimately, the Comcast economists' conclusion that Comcast will not find it profitable to foreclose unaffiliated OVPDs from its content is not convincing. Foreclosure strategies appear likely and profitable. And in the presence of uncertainty, the Commission should favor the imposition of conditions. If the conditions prove unnecessary, the Commission remains able to revisit and lift them after a period of time and upon an appropriate showing. But if the

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[7] *Id.* at 41-42. .

[8] *See, e.g., id.* at 28-30, 39 n.73.

[9] *See id.* at 39 n.73.

[10] *Id.* at 41.

conditions were to prove insufficient, the resulting harm to competition would likely be irreparable.

III. The Commission Should Impose Appropriate Conditions

In order to alleviate the potential public interest harms, AOL urges the Commission to condition the proposed merger on the Applicants' adherence to a set of pro-competitive undertakings.

A. Program Access

The Commission should require Comcast to provide to OVPDs, under fair and nondiscriminatory terms and conditions, any and all video programming or programming channels in which it has an attributable financial interest. The same qualifications contemplated in the Commission's program access rules should also apply to this condition.[11]

B. Programming Nonexclusivity/Nonrestriction

Comcast should not be able to prevent programmers from distributing their content on independent OVPDs as a condition of carriage on Comcast. The Commission should therefore preclude Comcast from entering into exclusive or other arrangements with IVPs or any producer of online content that specifically or otherwise restrict an IVP or online content producer from offering its video content to other OVPDs at reasonable rates. This condition will prevent Comcast from leveraging its power as a last-mile access provider and distributor to prevent competitive OVPDs from gaining access to content available on Comcast. The Commission should also require that Comcast and NBCU deal with Hulu in an arms-length and nondiscriminatory manner.

[11] *See* 47 C.F.R. §§ 76.1000-1004.

C. Advertising

After the merger, Comcast's control of a wide array of advertising platforms will give Comcast the incentive and the ability both to tie advertising on different Comcast platforms (e.g., require advertisers to run ads on both Comcast cable services and online) and to require advertisers to advertise exclusively on Comcast platforms. Advertisers that do not acquiesce run the risk of being foreclosed from advertising in conjunction with "must have" popular content such as premium network shows. Even in the absence of an explicit exclusivity clause, the tying of media advertising platforms for ad buys could effectively force advertisers to do less (or none) of their buying from independent online sources. In addition to potentially raising antitrust concerns, such practices risk unfairly channeling industry advertising revenues to Comcast affiliated content and platforms, ultimately drying up the chief source of funds for OVPDs and IVPs. The Commission should therefore prohibit Comcast from entering into exclusive advertising deals, and further prevent Comcast from tying advertising on one medium to advertising on other Comcast platforms.

D. Nondiscriminatory Access/Net Neutrality Rules

Without last mile broadband access to the consumer, independent OVPDs such as AOL cannot compete. For online video offerings, degraded service – especially if the consumer is unaware of the reasons for such slow or spotty service – is almost the same as no service at all. There have already been examples in the industry of network "management" practices that effectively foreclosed competitive OVPDs. The Commission should therefore require Comcast to abide by the network neutrality rules recently set forth in its *Notice of Proposed Rulemaking* on the topic, regardless of the outcome of that proceeding.[12] Consumers must be able to access

[12] *Preserving the Open Internet, Notice of Proposed Rulemaking,* 24 FCC Rcd. 13064 (2009).

the lawful Internet content of their choice; run applications and use services of their choice; connect devices of their choice; and be able to reach the network services and content providers of their choice over the Comcast network. To ensure continued vibrant competition in the online video programming market, Comcast must treat OVPDs in a nondiscriminatory manner and disclose network management practices as is reasonably required for users and OVPDs to make fair use of the broadband connection.

IV. Conclusion

For the foregoing reasons, the Commission should impose meaningful, enforceable conditions on Comcast's and NBCU's post-merger conduct.

Respectfully submitted,

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