"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

[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

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[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

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[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

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[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 reeent 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.

REDACTED – FOR PUBLIC INSPECTION

Respectfully submitted,

/s/

R. Stanton Dodge, Executive Vice President,
General Counsel & Secretary
DISH Network L.L.C. and EchoStar Corporation
9601 S. Meridian Blvd.
Englewood, CO 80112
(303) 723-1000

Jeffrey H. Blum, Senior Vice President
& Deputy General Counsel
Alison Minea, Corporate Counsel
DISH Network L.L.C. and EchoStar Corporation
1110 Vermont Avenue, NW, Suite 750
Washington, D.C. 20005
(202) 293-0981

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.

<u>Enforcement of Broadband Conditions</u>

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.