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June 21, 2010

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JUN 22 2010

Federal Communications Commission
Office of the Secretary

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-A325
Washington, DC 20554

Re: **REDACTED — FOR PUBLIC INSPECTION**
In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc., for Consent to Assign Licenses or Transfer Control of Licensees, MB Docket No. 10-56

Dear Ms. Dortch:

Enclosed please find redacted copies of DIRECTV's comments in the above-captioned proceeding, including an expert economic report by Dr. Kevin Murphy entitled *Economic Analysis of the Impact of the Proposed Comcast/NBCU Transaction on the Cost to MVPDs of Obtaining Access to NBCU Programming.* Please note that redacted Confidential Information and Highly Confidential Information are designated by the symbols [[ ]] and {{ }}, respectively.

As required by the Protective Orders in this proceeding, we are also hand delivering unredacted copies of this filing, along with a highly confidential computer disk containing backup data to Dr. Murphy's report, under separate cover.

Respectfully submitted,

/s/

William Wiltshire
Counsel for DIRECTV

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

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GENERAL ELECTRIC COMPANY,	)	MB Docket No 10-56
and	)	
NBC UNIVERSAL, INC.	)	
For Consent to Assign Licenses and/or Transfer Control of Licensees	)	

COMMENTS OF DIRECTV, INC.

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June 21, 2010

OVERVIEW AND SUMMARY

The transaction proposed in this proceeding would combine the nation's largest cable operator and largest Internet service provider with two broadcast networks, over two dozen network-affiliated broadcast stations, some of the most popular cable programming available, the film library and production capabilities of Universal Studios, and many of the most important online content sites. It would create a concentration of media assets on a scope and scale previously unknown. Left unchecked, this unprecedented array of assets would give Comcast new opportunities to gain unfair leverage over rivals to the detriment of consumers – as it has done in the past.

Comcast and NBCU must demonstrate that the potential harms arising from this transaction are outweighed by the verifiable and transaction-specific benefits. They have not met that burden. DIRECTV nonetheless could support the proposed transaction – but only if the Commission achieves the proper balance by imposing targeted, pro-competitive conditions on its approval.

POTENTIAL HARMS

The integration of Comcast's and NBCU's assets will materially change the bargaining dynamic for programming controlled by the new conglomerate. As the Commission has found repeatedly, a vertically integrated programmer can much more credibly threaten to withhold programming from rival MVPDs than can a non-integrated programmer. Accordingly, the proposed transaction would enable Comcast/NBCU to use such threats to demand higher prices and more favorable terms – and withhold programming from any MVPD that failed to acquiesce. In addition, alternative delivery mechanisms (including the Internet) would give Comcast/NBCU the option to make this programming available in ways that circumvent the Commission's existing safeguards.

The proposed transaction would create anticompetitive incentives for Comcast/NBCU in three primary areas: broadcast programming, online programming, and national network programming.

***Broadcast Programming*.** As the Commission has found, network broadcast stations control "must have" programming that is critical to an MVPD service. When affiliated with an MVPD, such stations gain bargaining leverage because of their more credible threat to withhold programming – a threat on which Comcast has delivered in the past, as it has withheld Comcast SportsNet Philadelphia (home of the Phillies, Flyers, and 76ers) from rival MVPDs for over a decade. In order to prevent such anticompetitive conduct, the Commission has required commercial arbitration of retransmission consent disputes (with continued carriage pending resolution) as a condition in both recent transactions that involved a combination of broadcast and MVPD assets – even though one of those cases involved only two broadcast stations and neither involved a dominant MVPD such as Comcast.

Comcast argues that it should be treated differently, claiming that NBC (which televises the Olympic Games, Sunday Night NFL Football (and the 2012 Super Bowl), the NHL's Stanley Cup Finals, and Saturday Night Live) and Telemundo (the nation's second most popular Spanish-language network) do not offer "must have" programming. This claim is belied by nearly a decade of consistent Commission findings. It is also based on an economic analysis that (among other deficiencies) would capture only one of the two primary effects of vertical integration on NBCU's bargaining position. As the Commission has observed in the past, by focusing only on the benefits to Comcast's subscription revenues that could be achieved by withholding broadcast programming from MVPD rivals, the analysis ignores the much larger effect of vertical integration – the ability to extract higher retransmission consent rates for years going forward. Using a methodology that captures this second effect, DIRECTV demonstrates that the proposed transaction would enable Comcast to impose a significant increase in retransmission consent fees – especially in those areas where Comcast has a dominant share of the market.

Accordingly, the Commission should adopt the same condition it has twice previously imposed on broadcast/MVPD combinations, which is also similar to the condition imposed on Comcast's regional sports networks ("RSNs"):

> ***When negotiations fail to produce a mutually acceptable set of price, terms and conditions for a retransmission consent agreement with a local broadcast television station that Comcast/NBCU owns, controls, or manages, or on whose behalf it negotiates retransmission consent, an MVPD may choose to submit a dispute to commercial arbitration and continue carriage of the broadcast signal during the pendency of such arbitration.***

This will establish a neutral third party to resolve disputes regarding the fair market value of the programming at issue, and ensure that consumers will not be denied local broadcast news and entertainment while a dispute is being resolved.

Online Video Programming. The proposed transaction will also increase Comcast/NBCU's ability to deliver programming via broadband and other alternative distribution methods as a way to circumvent the protections of the Commission's program access rules. For over a decade, Comcast has used the "terrestrial loophole" to deny RSN programming to DIRECTV and others. Now that the Commission has adopted rules intended to close that loophole, Comcast could achieve similar results by, for example, migrating programming to the Internet or to mobile or on demand platforms, where Comcast could then deny it to competitors or restrict access for consumers. Broadband, in particular, has increasingly become a vehicle for "over-the-top" content delivery, a process likely to accelerate through implementation of the National Broadband Plan. The proposed transaction will give Comcast numerous new assets that could be used to exploit an "online loophole" to disadvantage its MVPD rivals and consumers.

Comcast asserts that it would have no economic motive to withhold online programming. Given Comcast's historical conduct with linear programming, this claim is disingenuous at best. The Commission cannot allow Comcast the opportunity to substitute one anticompetitive loophole for another. Accordingly, it should impose the following condition to extend its program access principles to these new media:

> ***Comcast/NBCU may not offer any programming or programming-related service on an exclusive basis to any MVPD and will make such programming and services available to all MVPDs and/or their subscribers on a non-exclusive basis and on non-discriminatory terms and conditions consistent with the Commission's program access rules within each medium or method used for delivery of such programming. Comcast also will not require any programmer to grant exclusive online rights as a condition of carriage on a Comcast cable system.***

National Network Programming. The proposed transaction will give Comcast control over a wide variety of popular national programming networks. Comcast and its economists argue that this is not problematic, but here again, the Applicants' economic analysis ignores the substantial increases in price likely to result from the proposed transaction. Moreover, even if depriving a rival MVPD of any single one of these networks might not lead to large subscriber movements, withholding several of them at once is an entirely different matter. Comcast would be able to wield its new stable of national network assets in the same manner as broadcast or RSN programming to secure higher prices or carriage of less popular programming. In light of these facts, the Commission should impose the following condition to ensure uninterrupted access to such programming on fair market terms:

> ***When negotiations fail to produce a mutually acceptable set of price, terms and conditions for carriage of a national programming network that Comcast/NBCU owns, controls or manages, an MVPD may choose to submit a dispute to commercial arbitration and continue carriage of the network during the pendency of such arbitration.***

With respect to implementation of the proposed conditions, DIRECTV believes that the sort of arbitration regime imposed by the Commission on Comcast's RSNs provides vital protections against the abuse of market power. The three key aspects of this regime are (1) "baseball style" arbitration, which should incent the parties to submit market-based offers, (2) stand-alone offers, which preclude coercive bundling of programming, and (3) continued carriage during the arbitration process, so that viewers are not harmed (and forced switching of subscribers does not occur) while disputes are resolved. This regime generally produces positive results – not the least of which is to achieve agreement in the first place. DIRECTV has nonetheless identified areas for improvement during its recent experience in arbitrating carriage disputes with Comcast. Accordingly, DIRECTV proposes several revisions to the arbitration procedures, including more targeted discovery and a model protective order, to streamline the process and better implement the Commission's original vision. These changes will make arbitration a more practical option for MVPDs facing the vertically integrated joint venture. In addition, DIRECTV proposes that existing RSN conditions be extended and finally made applicable to the Philadelphia RSN that Comcast has denied to rivals for years.

ALLEGED PUBLIC INTEREST BENEFITS

Comcast and NBCU discuss a number of benefits that they assert would result from the proposed transaction. Many of those benefits, if realized, would flow to Comcast rather than the public. Moreover, the alleged benefits are not cognizable in the Commission's public interest analysis. For example,

- Comcast promises to increase news and public affairs programming on its broadcast stations by 1000 hours per year. This constitutes an increase of less than 1% over what those stations are already doing.
- Comcast promises to carry six more channels of unaffiliated programming once it converts its cable systems from analog to digital technology. This constitutes about 1% of the increased capacity Comcast will realize through its digital conversion.
- Comcast promises to increase its carriage of Spanish-language programming. But it will do so only by carrying more of its own affiliated content.
- Comcast claims that vertical integration will allow it to secure earlier release windows for Universal Studios movies. Yet Universal Studios joined a petition by the Motion Picture Association of America two years ago designed to achieve this same result, which the Commission granted last month.

The claimed benefits of the transaction are not sufficient to offset the harms to consumers and competition that would result from the proposed transaction absent the imposition of the narrowly-tailored, pro-competitive safeguards proposed by DIRECTV. And none of the claimed benefits would be affected by those safeguards.

*　　　　*　　　　*

Comcast and NBCU assert that "past is prologue." Accordingly, as the Commission considers the proposed transaction, it should bear in mind Comcast's historic willingness to withhold programming to further its own interests. It should also take account of Comcast's assertion that a vertically integrated firm (such as the new Comcast-owned NBCU) should be allowed to refuse to deal with a rival MVPD or favor its own affiliates. This amounts to an announcement that, left unchecked, Comcast will take advantage of the opportunities to further leverage its dominant position. It is yet more evidence that the public interest would be best served by conditioning any grant of the Application in the manner DIRECTV proposes.

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COMMENTS OF DIRECTV, INC.

INTRODUCTION

In this proceeding, Comcast Corporation ("Comcast") – the nation's largest cable operator and largest Internet service provider ("ISP") – proposes to acquire the assets of NBC Universal, Inc. ("NBCU") from General Electric Company ("GE", and together with Comcast and NBCU, "Applicants"). These assets include the NBC and Telemundo broadcast networks, 26 owned and operated televisions stations ("O&Os") in major metropolitan markets, a host of the nation's most popular cable channels, the movie library and ongoing production capabilities of Universal Studios, and a growing array of online destinations. The proposed transaction would consolidate under Comcast's control the dominant multichannel video programming distributor ("MVPD" and Internet service provider ("ISP"), the regional sports network ("RSN"), and one or more network television stations in major markets such as Washington, Chicago, Philadelphia, and San Francisco – to say nothing of the additional national networks and online assets Comcast would control.

Added to Comcast's existing national cable programming and "new media" distribution capabilities, such a conglomeration of assets would be unprecedented, enhancing Comcast's already considerable market power and increasing its already formidable advantages over competing MVPDs. Moreover, all of this comes at a critical juncture in the media industry, as the Internet is reaching the capacity and ubiquity necessary to support robust video services as an alternative to or enhancement of traditional MVPD networks. The proposed transaction would give Comcast a unique capability to shape the development of this new online ecosystem – one in which neither Congress nor the Commission has yet clearly established safeguards to prevent the types of anticompetitive strategies that were familiar in more established media contexts.

Applicants assert that "past is prologue."[1] That is exactly what the Commission should recognize in considering the proposed transaction. Comcast has withheld programming from MVPD rivals in the past, and has either pursued court challenges to, or found creative ways to sidestep, rules designed to prevent anticompetitive activity. Comcast's track record demonstrates that it will aggressively exploit any gray area in the rules where doing so would create an advantage. If the Commission is to grant the pending applications, it must do so with sufficient safeguards to preclude Comcast from

[1] Applications and Public Interest Statement, MB Docket No. 10-56, at 6, 55 (filed Jan. 28, 2010) ("Application").

using the unprecedented aggregation of media assets that will come under its control to harm consumers and competition.

STANDARD OF REVIEW

Section 310(d) of the Communications Act requires the Commission to determine whether a proposed transfer of a radio license would serve the public interest, convenience, and necessity.[2] In making this determination, the Commission must weigh the potential harms to competition[3] of a transaction against the unique public interest benefits that the transaction will create.[4] Applicants must prove by a preponderance of the evidence that the probable benefits of the transaction outweigh the potential harms.[5] In particular, "[t]o find that a [transaction] is in the public interest, . . . the Commission must 'be convinced that it will enhance competition.'"[6] If Applicants cannot carry this burden, the Application must be denied or granted only with appropriate conditions.[7]

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2 47 U.S.C. § 310(d).

3 Among these harms are the enhancement of market power or slowing the decline of market power. *See NYNEX Corp. and Bell Atlantic Corp.*, 12 FCC Rcd. 19985, ¶ 2 (1997) ("*Bell Atlantic/NYNEX*").

4 *See, e.g., Adelphia Communications Corp., Time Warner Cable Inc., and Comcast Corp.*, 21 FCC Rcd. 8203, ¶ 243 (2006) ("*Adelphia/Comcast/TWC*"); *EchoStar Communications Corp., General Motors Corp., and Hughes Electronics Corp.*, Hearing Designation Order, 17 FCC Rcd. 20559, ¶ 25 (2002) ("*EchoStar HDO*"); *VoiceStream Wireless Corp., Powertel, Inc., and Deutsche Telekom AG*, 16 FCC Rcd. 9779, ¶ 16 (2001).

5 *See Adelphia/Comcast/TWC*, ¶ 23; *EchoStar HDO*, ¶ 24; *see also Media One Group, Inc. and AT&T Corp.*, 15 FCC Rcd. 9816, ¶ 8 (2000)("*AT&T/Media One*").

6 *Time Warner Inc. and America Online, Inc.*, 16 FCC Rcd. 6547, ¶ 21 (2001) (quoting *Bell Atlantic/NYNEX*, ¶ 2).

7 *See Bell Atlantic/NYNEX*, ¶ 2.

The Commission must first examine potential harms from the transaction.[8] That examination extends beyond traditional antitrust analysis and must consider a transaction's effect on the broader public interest.[9] In conducting this analysis, the Commission may consider technological and market changes, and the nature, complexity, and speed of change of, as well as trends within, the communications industry.[10] The Commission must also determine whether the transaction could frustrate implementation or enforcement of the Communications Act and federal communications policy.[11]

Where, as here, a proposed transaction demonstrably raises concerns of harm to consumers and competition, it will not suffice for the Commission merely to ensure compliance with its various structural ownership and program access rules.[12] Indeed, the Commission concluded in both the *News/Hughes* and the *Adelphia/Comcast/TWC*

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[8] DIRECTV generally agrees with Comcast's assertion that the Commission should adopt the same product market definitions used in *News/Hughes*. *See* Application at 86 ("There is no need for the Commission to define video programming markets any differently" than it did in the *News-Hughes* order.) DIRECTV also agrees that the relevant geographic market is national for national networks and regional for regional networks, and that the market for broadcast stations is the local Designated Market Area in which a broadcast station operates. *See id.* at 87. However, DIRECTV also believes that the Commission should consider the emerging market for online programming and distribution in addition to the traditional MVPD and cable programming markets.

[9] *See EchoStar HDO*, ¶¶ 26-27 (citing *Satellite Business Systems*, 62 F.C.C.2d 997, 1088 (1977), *aff'd sub nom United States v. FCC*, 652 F.2d 72 (D.C. Cir. 1980) (*en banc*), and *Northern Utilities Service Co. v. FERC*, 993 F.2d 937, 947-48 (1st Cir. 1993)).

[10] *Adelphia/Comcast/TWC*, ¶ 24.

[11] *See General Motors Corp., Hughes Electronics Corp. and The News Corporation Ltd.*, 19 FCC Rcd. 473, ¶¶ 14-16 (2004) ("*News/Hughes*").

[12] *See, e.g., News Corp., The DIRECTV Group, Inc., and Liberty Media Corp.*, 23 FCC Rcd. 3265, Appendix B, Section I (2008) (requiring severing of attributable links between DBS and cable operators in Puerto Rico despite absence of DBS/cable cross ownership rule) ("*Liberty Media/DIRECTV*"); *AT&T/MediaOne*, 15 FCC Rcd. at 9845 (rejecting the applicants' argument that their compliance with "Commission rules, such as program access, program carriage, must carry, leased access, and the channel occupancy rules [would] foreclose their ability to exert excessive programming market power").

proceedings that neither the Commission's program access rules nor the applicants' related commitments were sufficient to protect against the potential harms to consumers and competition that may result from exclusive or discriminatory programming arrangements.[13]

The Commission's legal standard is equally exacting with respect to asserted public interest benefits. The Applicants have presented a list of the "efficiencies" that they assert will be created by the transaction as well as commitments they promise to implement if the transaction is approved. The Commission must rigorously analyze the merits of these claims and the evidence proffered to support them to determine whether they are transaction-specific, verifiable, and likely to flow through to consumers.[14] Efficiencies that could be achieved by more competitively neutral means or that will occur regardless of the transaction cannot be considered pro-competitive benefits in this proceeding. Because much of the information relating to the asserted benefits is in the sole possession of the Applicants, they are required to provide sufficient supporting evidence so that the Commission can verify the likelihood and magnitude of each claim.[15] In addition, the Commission applies a "sliding scale approach" to its ultimate evaluation of benefit claims such that, where potential harms appear both substantial and likely, the Applicants' demonstration of claimed benefits also must reveal a higher degree of magnitude and likelihood than the Commission would otherwise demand.[16]

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[13] *See News/Hughes*, ¶¶ 147-49; *Adelphia/Comcast/TWC*, ¶ 140.

[14] *See Adelphia/Comcast/TWC*, ¶ 244; *EchoStar HDO*, ¶¶ 189-90.

[15] *See Adelphia-Comcast-TWC*, ¶ 244.

[16] *See id.*, ¶ 245.

DISCUSSION

As the Commission has documented on many occasions, vertical integration of programming and distribution can, if left unchecked, give the integrated entity the incentive and ability to gain an unfair advantage over its rivals. This ultimately results in higher prices and lower quality service for consumers. Comcast's own behavior with its existing programming networks confirms the Commission's findings. The vertical integration proposed here, if left unchecked, would result in three principal categories of harms.

- First, by combining Comcast's dominant cable and broadband distribution assets with NBCU's broadcast stations, the transaction would change the bargaining dynamic, giving Comcast-owned NBCU the incentive and ability to demand greater compensation for retransmission consent. This in turn would result in higher prices and potential service disruptions for consumers.
- Second, the transaction would increase Comcast's incentive and ability to use the "online loophole" to avoid existing non-discrimination and non-exclusivity requirements by delivering programming and programming-related enhancements via new media (such as the Internet or video on demand ("VOD")) – enabling it to raise prices for programming or deny it altogether to MVPD rivals or other emerging "new media" competitors.
- Third, the change in bargaining position combined with the increased horizontal concentration in national programming services would enable Comcast to secure higher prices for such services.

Applicants fail even to acknowledge some of these issues, much less address them. As for the issues they do address, Applicants largely rely on existing rules and corporate formalities to constrain anticompetitive conduct – an approach that has been recognized by the Commission as insufficient to address such concerns in previous transactions. Applicants also proffer three economic analyses. The first addresses the economics of vertical integration generally. Even putting aside its other flaws, this study focuses only on the benefits of withholding in terms of actual subscriber switching, and therefore misses the much larger effect of vertical integration – the ability to extract higher rates for years going forward based on the threat of such switching. The second discusses online programming but fails to address Comcast's ability to exploit an "online loophole" in the Commission's pro-competitive rules. And the third overstates the likelihood and significance of alleged efficiencies, which are either not verifiable, not transaction specific, or insubstantial, and therefore must be heavily discounted or ignored completely. At the same time, public interest commitments proffered by Comcast in an effort to give content to these efficiencies are insufficient to counter the harms that would result from the proposed transaction. Accordingly, if the Commission is to approve the transaction, it should – as it has in past transactions – impose behavioral constraints on Comcast/NBCU to address its increased incentive and ability to act anticompetitively. Such conditions should remain in effect until Comcast/NBCU can demonstrate that market conditions have changed in a manner that makes them no longer necessary.[17]

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[17] As Commissioner Copps has explained, the public interest is not served where the Commission finds that a transaction will give the merged entity the incentive and ability to act anticompetitively, but then imposes conditions for only a specified term of years. The "inescapable logic" of such an approach is that in a few short years, the merged entity will be able to impose precisely those burdens on the public

In the remainder of these comments, we first discuss Comcast's history of using programming to gain a competitive advantage over its rivals. We then demonstrate the harms that would arise from the proposed transaction, as well as conditions to address those harms. We also propose slight modifications to streamline the arbitration regime established by the Commission in prior transactions. Lastly, we demonstrate that the efficiencies claimed by Comcast are neither cognizable nor sufficient to offset the harm to consumers and competition that would result from the proposed transaction.

I. COMCAST HAS DEMONSTRATED ITS WILLINGNESS TO USE PROGRAMMING UNDER ITS CONTROL TO DISADVANTAGE OTHER MVPDS.

A standard assumption in modern economics is that firms seek to maximize profits. Consistent with that premise, the evidence shows that for more than a decade, Comcast has aggressively exploited loopholes and other opportunities to maximize its own value at the expense of other firms by, for example, denying them key programming or raising the prices they pay for it. While such strategies have maximized profits for Comcast, they have also raised prices and decreased competition, thereby harming consumers. As a result, Comcast's actions have regularly been cited as justification for efforts to strengthen the Commission's pro-competitive rules. It is in this context that the Commission must examine Comcast's request to control even more programming in even more distribution formats with little to no regulatory oversight.

Any such discussion must begin with Philadelphia sports programming. For over a decade, Comcast has refused to sell Comcast SportsNet-Philadelphia ("CSN-Philly")

that the Commission has identified. *See XM Satellite Radio Holdings, Inc. and Sirius Satellite Radio Inc.*, Dissenting Statement of Commissioner Michael J. Copps, 23 FCC Rcd. 12348 (2008).

programming to DIRECTV and DISH Network. It has done so openly and unapologetically, claiming that this "must have" RSN programming is exempt from the program access regime established by Congress and the Commission because it is delivered terrestrially rather than via satellite. Satellite operators repeatedly challenged the legality of this terrestrial loophole.[18] But it was not until this year – after compiling a ten-year record of severe anticompetitive effects resulting from this withholding – that their challenge was finally successful.[19]

Nothing forced Comcast to withhold Philadelphia sports programming. Comcast could have sold CSN-Philly to satellite competitors at any time, but refused to even consider doing so. As a result, DBS penetration in the Philadelphia market has been shown to be 40% lower than it would have been absent such withholding.[20] By using its RSN to weaken its chief competitors in this way, Comcast enjoyed a huge (and unfair) advantage for years. Given the integral role RSNs have played in its strategy for competing against other MVPDs, it is perhaps not surprising that Comcast consolidates

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18 *See, e.g., DIRECTV, Inc. and EchoStar Commc'ns Corp. v. Comcast Corp.*, 15 FCC Rcd. 22802, ¶ 12 (2000), *aff'd sub nom. EchoStar Commc'ns Corp. v. FCC*, 292 F.3d 749 (D.C. Cir. 2002); *see also Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Sunset of Exclusive Contract Prohibition*, 22 FCC Rcd. 17791, ¶ 78 and Appendix B (2007) ("*2007 Exclusivity Extension Order*"), *aff'd sub nom. Cablevision Systems Corp. v. FCC*, 597 F.3d 1306 (D.C. Cir. 2010); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Sunset of Exclusive Contract Prohibition*, 17 FCC Rcd. 12124, ¶ 73 (2002) ("*2002 Exclusivity Extension Order*").

19 *See Review of the Commission's Program Access Rules and Examination of Program Tying Arrangements*, 25 FCC Rcd. 746, ¶¶ 25-35 (2010) ("*Terrestrial Loophole Order*").

20 *See Adelphia-Comcast-TWC*, ¶ 149 and Appendix D; *2007 Exclusivity Extension Order*, ¶¶ 39-40 and Appendix B.

the financial performance of its RSNs with its cable systems rather than with its other programming assets.[21]

Comcast has also employed other means over the years to disadvantage rival MVPDs. It has, for example, attempted to skirt the Commission's nondiscrimination rules[22] by devising pricing strategies that are facially neutral but inevitably have discriminatory effects[23] and by requiring satellite (but not cable) operators to carry RSN programming in areas where the RSN did not have rights to show professional games.[24] Most recently, it moved teams from one RSN to another in order to increase fees.[25]

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21 *See, e.g.*, Comcast Corp., 2009 Annual Report on Form 10-K, at 1 ("Our Cable segment also includes the operations of our regional sports networks.") ("2009 Comcast 10-K") (available at http://www.cmcsk.com/secfiling.cfm?filingID=1193125-10-37551).

22 47 U.S.C. § 548.

23 One example is the pricing of its affiliated iNHD channel. Comcast sought to charge a single price for each MVPD's "digital" subscribers, knowing that *all* satellite subscribers were digital subscribers, while only a fraction of cable subscribers were digital subscribers. *See* Complaint, DIRECTV, Inc. v. iN Demand, LLC, File No. CSR-6901-P (filed June 29, 2005). Under this scheme, DIRECTV was to have paid many times what Comcast itself paid for the programming. The discriminatory impact of this pricing scheme was straightforwardly stated by iNHD's logo, which used the tag line "Only on Cable." (iNHD abandoned this discriminatory pricing structure only after DIRECTV brought a program access complaint to challenge it, before ultimately discontinuing the service in December 2008.)

24 The evolution of one such RSN, Comcast SportsNet West ("CSN-West"), is particularly instructive. When launched in 2004, the RSN carried only one men's professional sports team, the NBA's Sacramento Kings. When DIRECTV expressed interest in negotiating a carriage agreement, CSN-West responded with a proposal under which DIRECTV would be required to carry this RSN in a very expansive area, in much of which *the RSN did not have the rights to show the Kings games*. Thus, DIRECTV would have to pay a monthly carriage fee for subscribers who could not see the one professional team featured by the RSN – and such subscribers outnumbered those who could see the Kings games by two to one. As a result, the effective rate for those who could actually watch those games was shockingly high – higher than the rate DIRECTV paid for the neighboring RSN, Comcast SportsNet Bay Area ("CSN-BA"), which carried four professional teams throughout its territory.

25 Last year, Comcast unilaterally decided to migrate two teams (the San Jose Sharks and Oakland A's) from CSN-BA to CSN-West (which was then renamed CSN-California). Thus, an MVPD competing with Comcast in the San Francisco Bay area that formerly carried and paid for a single RSN to provide fans all four teams of interest now had to carry and pay for two RSNs to give fans the same sports coverage. Four small MVPDs in the Bay Area have brought a program access complaint against Comcast to challenge the effective doubling of their rates that resulted from this strategy. *See*

DIRECTV raises these issues here not to re-litigate stale claims or litigate new ones. But in a proceeding where Comcast cites its past conduct as a reason to approve the proposed transaction, it seems only reasonable to examine that conduct to predict how Comcast will act going forward. Doing so leads to two inescapable conclusions. First, to the extent the anticompetitive consequences of the proposed transaction turn on the credibility of a threat to withhold programming, no one could be more credible in that regard than Comcast. Second, if the Commission leaves a loophole for Comcast to exploit using assets newly acquired from NBCU, Comcast will surely exploit it. Indeed, Comcast practically announces that it will continue to engage in such tactics by arguing that a vertically integrated firm should be allowed to refuse to deal with a rival MVPD or favor its own affiliates if that decision is driven by efficiency considerations – defined by Comcast to include the ability of the company's different divisions to coordinate and cooperate more closely than they would if not integrated.[26] This so-called "efficiency" is exactly what Congress and the Commission put the program access regime in place to prevent. And this is the context in which the Commission must examine the specific harms that would arise from the proposed transaction.

II. Absent Conditions, The Proposed Transaction Would Give Comcast Additional Opportunities to Harm Consumers and Competition.

The Commission has repeatedly considered the economics of vertical integration and how such integration changes the bargaining position vis-à-vis unaffiliated MVPDs.

WaveDivision Holdings, LLC, et al. v. Comcast Corp., et al., Program Access Complaint, File No. CSR-8257-P (filed Dec. 23, 2009).

[26] Application at 106 n.231.

Once integrated, a programmer's potential losses from a bargaining impasse are offset to the extent subscribers lost by the foreclosed MVPD migrate to the affiliated MVPD. In extreme cases, this effect may be sufficient to allow the programmer to profitably deny the programming to the rival MVPD permanently, as Comcast has done with CSN-Philly. But in most cases, withholding is threatened or used for only a very short period, as a means to pressure the rival MVPD. The Commission has found that such temporary withholding (or even just the threat of such withholding) can be used as a tactic for securing higher prices, which is the primary goal of the programmer.[27] Moreover, an integrated programmer may only need to *threaten* to withhold programming,[28] or actually do so on very few occasions,[29] to achieve this benefit.

As discussed more fully below, the proposed transaction will change the bargaining dynamic in a way that will enable Comcast-owned NBCU to present Comcast's competitors with the no-win choice of either acceding to higher prices (which are likely to be passed along to consumers) or losing access to broadcast programming, online video, and national networks (depriving viewers of popular programming and the full benefits of MVPD competition). If the Commission is to approve the proposed

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[27] *News/Hughes*, ¶ 80 ("Specifically, by temporarily foreclosing supply of the input to a downstream competitor or by threatening to engage in temporary foreclosure, the integrated firm may improve its bargaining position so as to be able to extract a higher input price from the downstream competitor than it could have negotiated if it were a non-integrated input supplier.").

[28] The Commission found that brinksmanship alone can be sufficient to cause harm. *See, e.g., id.*, App. D, ¶ 21 (finding that an MVPD experienced a statistically significant increase in growth rate in areas "where consumers were continually being told that they were likely to be losing access to the ABC affiliate on the incumbent local cable operator").

[29] *Id.*, ¶ 80 ("[B]y temporarily foreclosing certain competitors, the vertically integrated firm may signal to other downstream competitors its willingness to foreclose, which may cause other downstream competitors to agree to a higher price without the vertically integrated firm's having to actually engage in repeated foreclosures.").

transaction, it must – as it has done with Comcast before[30] – impose substantial conditions to preclude anticompetitive conduct.

A. The Proposed Transaction Would Likely Result in Substantially Higher Prices for Retransmission Consent of NBCU Stations.

Comcast proposes to acquire control over two national broadcast networks and over two dozen O&O stations in major markets across the country. These stations and networks control programming that MVPDs simply "must have" in order to compete in the local markets where the stations operate, which (as the Commission has found) confers market power on the broadcast station owner.[31] The Commission has repeatedly concluded that combining "must have" broadcast stations with MVPD distribution enables the vertically integrated entity to raise prices and withhold (or threaten to withhold) programming, and thereby harm competition and the public interest.[32] Comcast

[30] *See Adelphia/Comcast/TWC*, App. B.

[31] *See, e.g., News/Hughes*, ¶ 202 ("At the outset, we agree with commenters who contend that carriage of local television broadcast station signals is critical to MVPD offerings."). Indeed, the Commission has found that a broadcast network operator "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." *Id.*, ¶ 201. That is because (1) the signals of local television broadcast stations are without close substitutes, and (2) entry into this segment of the video programming market is highly restricted due to the extremely limited availability of new television broadcast licenses. *Id.*, ¶ 202.

[32] Vertical integration can allow the integrated entity "to extract more compensation for its broadcast station signals from competing MVPDs than it could reasonably expect to achieve absent the transaction" by lowering the risks and costs of engaging in such foreclosure. *Id.*, ¶ 209. The Commission concluded that, when affiliated with an MVPD, "the *ability* of a television broadcast station to threaten to withhold its signal, even if it does not aetually do so, changes its bargaining position with respect to MVPDs, and could allow it to extract higher prices, which ultimately are passed on to consumers." *Id.*, ¶ 204. Such conduct results in "substantial" public interest harms, from increasing costs for rivals which are then passed along to consumers in the form of higher subscription rates, to obtaining carriage for less popular affiliated programming that crowds out content viewers would prefer to see. *Id.*, ¶ 209. In the long term, "use of market power to extract artificially high levels of compensation from MVPD rivals, or other carriage concessions, could make rival MVPDs less viable options for consumers, thus limiting consumer choice." *Id.* Moreover, to the extent a station carries through on its threat to withhold, the local television broadcast signal would become unavailable to the subscribers of competing MVPDs, which is in itself a significant public loss as

nevertheless contends that NBC and Telemundo network fare is not "must have" programming at all and therefore should not be subject to even the arbitration remedies that the Commission has applied to every other recent MVPD/broadcast combination.[33]

This is simply not credible. NBC controls the rights to the 2012 Super Bowl and the Olympic Games through 2012, and has such popular shows as 30 Rock, Sunday Night NFL Football, The Stanley Cup Finals, Law and Order, The Today Show, NBC Nightly News, The Tonight Show, The Office, Celebrity Apprentice, and Saturday Night Live.[34] For its part, Telemundo is the second largest producer of Spanish-language programming in the world and the nation's second most popular Spanish-language network, with a significant following in the Hispanic community.[35] The Commission has consistently found exactly this kind of programming to be critical to the success of any MVPD – a finding with which Applicants' own expert, Michael Katz, recently agreed.[36]

"local broadcast station signals play a very important role in terms of viewpoint diversity and localism, two of our most important Communications Act goals and policies." *Id.*, ¶ 210.

33 Application at 118.

34 A recent survey found that 52% of current pay TV subscribers would consider switching to a different MVPD if NBC broadcast programming were no longer offered by their current MVPD – the highest figure found in the survey. *See* J.P. Morgan, "J.P. Morgan Consumer Survey: Identifying 'Must Carry' Networks and Consumer Appetite For Channels A La Carte" (Apr. 20, 2010).

35 Telemundo also owns O&O stations in key Hispanic markets: just the top nine markets account for over 50% of the total Hispanic television households in the U.S., and such households comprise up to 45% of total households in those DMAs. *See* Television Bureau of Advertising Online, Market Track: Hispanic Markets (available at http://www.tvb.org/rcentral/markettrack/Top_25_Hispanic_Markets.asp).

36 Michael L. Katz, Jonathan Orszag, & Theresa Sullivan, *An Economic Analysis of Consumer Harm from the Current Retransmission Consent Regime*, at 2-3 (Nov. 12, 2009), *attached to* Letter from Neal M. Goldberg, National Cable & Telecommunications Association, to Blair Levin, Federal Communications Commission, GN Docket No. 09-47 (Dec. 16, 2009) ("Katz 2009 RTC Analysis") (stating that "[a]n MVPD that fails to obtain carriage of leading broadcast networks is at a significant competitive disadvantage relative to its MVPD rivals serving the same area" and that loss of the rights