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

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

REPLY TO OPPOSITION TO PETITION TO CONDITION OR DENY

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TABLE OF CONTENTS

APPENDICES

Appendix 1: Reply Report of Professor Simon J. Wilkie, Economic Analysis of the Proposed Comcast-NBCU-GE Transaction

Appendix 2: Proposed Condition: Wholesale Standalone Broadband Access

Appendix 3: Declaration

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REPLY TO OPPOSITION TO PETITION TO CONDITION OR DENY OF EARTHLINK, INC.

EarthLink, Inc., by its attorneys and pursuant to the FCC's Public Notices,[1] hereby files this Reply to the Opposition of Comcast Corporation ("Comcast"), General Electric Company ("GE") and NBC Universal, Inc. ("NBCU") (the "Applicants")[2] to the EarthLink Petition to Condition or Deny[3] the application of Applicants to assign or transfer control of certain licenses (the "Transaction").

INTRODUCTION AND SUMMARY

The Applicants' Opposition to the EarthLink Petition ignores the growing threat that Comcast's multichannel video programming distributor ("MVPD")[4] business faces from online

[1] *Commission Seeks Comment on Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. to Assign and Transfer Control of FCC Licenses*, Public Notice, DA 10-457, MB Dkt. 10-56 (rel. Mar. 18, 2010); DA 10-636 (rel. May 5, 2010).

[2] Opposition to Petitions to Deny and Response to Comments of Comcast, GE and NBCU, MB Dkt. 10-56 (filed Jul. 21, 2010) ("Opposition").

[3] Petition to Condition or Deny of EarthLink, Inc., MB Dkt. 10-56 (filed Jun. 21, 2010) ("EarthLink Petition").

[4] *See* EarthLink Petition, at v. EarthLink incorporates the definition of "MVPD" from the Glossary of Terms.

video programming distributors ("OVPDs")[5] and the increasing likelihood that Comcast will engage in foreclosure strategies in response. While Applicants are correct that there are challenges facing OVPDs, these hurdles are no more fundamental or unalterable than those of any new technology that disrupts a settled market. Indeed, the fact that multiple OVPDs have already made significant inroads into the market shows online video is not likely to remain solely a complement to traditional linear video.

While Applicants insist the Transaction does not give rise to any incentives to engage in harmful actions, this is not the case. Contrary to the merger approval standard the Commission follows, this Transaction will enhance Comcast's incentives to act in ways that will not further the public interest. As explained in Professor Wilkie's reply report attached hereto, acts such as the degradation/blocking of unaffiliated content and raising prices of standalone broadband access are more likely to occur as a result of the profit-maximizing incentives the Transaction brings. The Transaction will also diminish significantly the benefits of competitive online video distribution and consumers' ability to obtain affordable standalone broadband services.

The Applicants have conceded that Comcast has the ability to engage in vertical foreclosure, including through its broadband network management practices. Comcast's claim, that competitive choices prevent Comcast from engaging in this behavior by giving consumers the opportunity to switch to another provider when such activities occur, is not supported by the facts. According to the most recent FCC data, most high-speed Internet consumers lack competitive choices of provider.

[5] *See id*. EarthLink incorporates the definition of "OVPD" from the Glossary of Terms.

To address these concerns, the Commission should approve the proposed Transaction only if it requires Comcast to provide nondiscriminatory standalone wholesale broadband access as described in the EarthLink Petition. Similar conditions have been proposed and endorsed by several other parties to this proceeding. The condition is straightforward, pro-consumer and has a proven ten-year track record. Adoption of this condition will ensure the Transaction furthers the public interest by addressing a significant potential harm presented by the Transaction, providing broadband consumers with a choice for broadband access service, allowing consumers to "breaking the bundle" and encouraging broadband investment and adoption.

I. THE FACTS SHOW THAT OVPD SERVICES OFFER SIGNIFICANT COMPETITION TO MVPD SERVICES

A. The OVPD Market Presents an Increasingly Competitive Threat to Comcast's MVPD Business

Applicants and EarthLink agree that the OVPD market is dynamic[6] and "that the characteristics of the OVPD market differ from the MVPD market in pricing, technology and other important ways."[7] Likewise, EarthLink agrees with Applicants that the "online viewing of video. . . is new and evolving."[8] Participants in the OVPD product market include Comcast (*e.g.*, Fancast XFinity), NBCU (*e.g.*, Hulu.com), and many other unaffiliated OVPDs (*e.g.*, AOL, Vimeo, Sony, YouTube, Netflix).

Numerous parties commenting on the proposed Transaction have confirmed that OVPD services are emerging as more than just complements to MVPD video services. As described by DISH Network, "[the current video marketplace] is rapidly evolving to allow consumers to

6 *See* Opposition, at 84-85

7 EarthLink Petition, at 15; Opposition, at 85-86.

8 Opposition, at 202. *See also* EarthLink Petition, at 12-14 (describing the emerging OVPD market).

watch what they want, when they want, where they want over multiple signal paths to a great many devices."[9] Similarly, the Communications Workers of America confirm that "[v]ideo programming delivered via the Internet is a significant threat to all MVPD distributors."[10] Though this paradigm shift is incomplete today, its disruptive impact is as inescapable as the move from horse-based transportation to automobiles and commercial trucking.[11] Online video is emerging as the next generation content delivery platform, underscoring the flaw in Applicant's position that OVPDs do not (and will not) compete with traditional MVPD fare.[12]

[9] Petition to Deny of DISH Network, L.L.C and EchoStar Corporation, at 2, MB Dkt. 10-56 (filed Jun. 21, 2010) ("DISH Petition"). DISH notes that "online video will dominate the video market generally, if trends among young Americans portend how their generation will consumer video in future years" and that "[a]dults 18-29 years old are the heaviest users of online video today." *Id.* at 8 (*citing The State of Online Video*, Pew Internet and American Life Project (Jun. 3, 2010), *available at* http://www.pewinternet.org/~/media//Files/Reports/2010/PIP-The-State-of-Online-Video.pdf). *See also* Petition to Deny of Public Knowledge, at 9, MB Dkt. 10-56 (filed Jun. 21, 2010) ("Public Knowledge Petition") ("As broadband access increases in its ubiquity and its importance to consumers, the distinction between [over-the-top] and MVPD distribution will diminish. . . [and] the different types of distribution services will increasingly be competing directly for the same consumers.").

[10] Petition to Deny or in the Alternative Impose Conditions of Communications Workers of America, at 39, MB Dkt. 10-56 (filed Jun. 21, 2010) ("CWA Petition"). CWA quotes comments filed by Comcast in the FCC's most recent video competition proceeding: "Many networks have jumped head-first into Internet video, providing consumers with an interactive alternative to traditional TV-set viewing." Comments of Comcast, at 29-30, MB Dkt. 06-189 (filed Nov. 29, 2006). "All of these modalities of communications. . . compete with traditional and not-so-traditional video distribution technologies for time, attention, and dollar." *Id.* at 59. *See also* Comments of DIRECTV, Inc., at 31, MB Dkt. 10-56 (filed Jun. 21, 2010) ("DIRECTV Comments"); EarthLink Petition, at 27-28; Comments of Fair Access to Content & Telecommunications Coalition, at 8, MB Dkt. 10-56 (filed Jun. 21, 2010).

[11] *See, e.g.*, Joe Flint, *Desire of Pay TV Distributors to be Gatekeepers to Broadband and Tablets Could Increase Programming Costs*, Los Angeles Times Company Town Blog (Aug. 13, 2010), *available at* http://latimesblogs.latimes.com/entertainmentnewsbuzz/2010/08/desire-of-pay-tv-distributors-to-be-gatekeepers-to-broadband-and-tablets-could-increase-programmings.html ("One of the biggest fears among pay-television distributors is that as more content becomes available on new platforms, consumers will cut the cord to their cable and satellite suppliers.").

[12] *See* Sam Schechner, *Cable Firms Eye Tablet Space*, WSJ.com (Aug. 13, 2010), *available at* http://online.wsj.com/article/NA_WSJ_PUB:SB10001424052748704407804575425503120348756.html (stating that the development of applications for new tablet devices (*e.g.*, the Apple iPad) by subscription TV providers "come as pay-TV providers wrestle with how to keep people paying big monthly subscription fees, despite growing traction from Web-video services like Netflix. . . . The new applications arrive as media companies and new upstarts have been aggressively exploiting the Web to

Trends underscore that online video programming is likely to grow rapidly. Evidence in the record demonstrates the increase of entrants into the OVPD market[13] and the growing numbers and escalating rate of customers who are "cutting the cord."[14] Indeed, recent reports indicate that the number of U.S. households subscribing to MVPDs' paid television services has declined for the first time,[15] countering the claims of Applicants' economists that "even as online video usage has increased dramatically over the last several years, the number of MVPD subscribers has continued to grow."[16] A just-released report also demonstrates the competitive impact OVPDs are having on the MVPD market, finding the OVPD market "represents a new

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offer programming directly to consumers, while paid television providers' Web offerings have often lagged behind.")

[13] *See* Petition to Deny of Consumer Federation of America, Consumers Union, Free Press and Media Access Project, Declaration of Dr. Mark Cooper and Adam Lynn ("Cooper/Lynn Declaration"), at 57-58, n. 103, MB Dkt. 10-56 (filed Jun. 21, 2010) ("CFA, et al. Petition") (quoting Time Warner Cable Programming Chief Melinda Witmer describing the threats to traditional cable, "We wake up every day and there is some new competitor out there – a Roku or a Boxee"); CWA Petition, Declaration of Hal J. Singer, at 74 (describing the rise of video content online from "the growing libraries of services like Apple's iTunes, Amazon's Unbox, and Netflix"). *See also id.* at 40-41; DIRECTV Comments, at 31-32; DISH Petition, at 3, 6; Public Knowledge Petition, at 7.

[14] *See* David Goldman, *One in Eight to Cut Cable and Satellite TV*, CNN Money (April 30, 2010), *available at* http://money.cnn.com/2010/04/30/technology/dropping_cable_tv/ (citing a recent study by Yankee Group that found that despite the fact that cord-cutting is a "small phenomenon now," in 2010 a projected "one in eight consumers will eliminate or scale back their cable, satellite or other pay-TV service," because of the rising costs of Pay-TV and the growing availability of online video alternatives). *See also* EarthLink Petition, at 29-31*;* CWA Petition, at 40; DIRECTV Comments, at 31, n. 83 *citing* Gerry Kaufhold, *The Digital Entertainment Revolution*, The Diffusion Group, at 10-11 (Feb. 2010), *available at* http://www.instat.com/promos/10/dl/IN1004828WHT_nacha3Ra.pdf) ("[o]ne analyst estimates that the number of U.S. broadband households regularly viewing professional TV programs from an online service will be about 59.0 million in 2013"). *See also* Comments of American Cable Association, at 34-35, MB Dkt. 10-56 (filed Jun. 21, 2010); CFA, et al. Petition, Cooper/Lynn Declaration, at 57 and n. 99.

[15] Cable, Communications Daily, Item No. 25 (Aug. 18, 2010) (quoting Citigroup analyst Jason Bazinet: "This isn't good news for the sector.").

[16] *See* Opposition, Exhibit 2: Mark Israel and Michael L. Katz, *Economic Analysis of the Proposed Comcast-NBCU-GE Transactions*, ¶ 194, MB Dkt. 10-56 (filed Jul. 20, 2010) ("Israel/Katz").

distribution channel for digital entertainment."[17] Revenue from online video content is expected to grow from $2 billion in 2009 to $17 billion in 2014, according to the report.[18] The report also finds that by 2014, 57 million broadband households will be viewing full-length online video programming and the number of households that own devices capable of viewing online media is projected to almost triple, from 38 million in 2009 to 98 million in 2014.[19] Pressure from independent programming sources introducing new content and OVPD providers attracting new customers with innovative offerings can also be expected to drive OVPD services to develop into a full-fledged competitive video-watching alternative.[20]

Regardless of how today's OVPD market is characterized,[21] it is in Applicant's ongoing interest to ensure the OVPD market does *not* become a substitute for the Comcast MVPD service.[22] Applicants' own description of the benefits of complementary online video services

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[17] *See Web-to-TV Video Content Revenue Will Reach $17 Billion by 2014*, In-Stat (Aug. 17, 2010), *available at* http://www.instat.com/press.asp?ID=2837&sku=IN1004655CM ("In-Stat Press Release"). *See also* Keith Nissen, Web-to-TV Gaining Momentum in the US, In-Stat (rel. Aug. 2010) ("In-Stat Web-TV Report); Internet, Communications Daily, Item No. 14 (Aug. 18, 2010).

[18] *See* In-Stat Press Release.

[19] *See* In-Stat Web-TV Report, at Table 11.

[20] *See, e.g.*, Comments of AOL Inc., at 5, MB Dkt. 10-56 (filed Jun. 21, 2010) ("whether or not online video is a full-fledged substitute for linear video today, it seems obvious that it can become such a substitute in the near future.").

[21] Though Comcast urges the FCC to state that the OVPD market be defined to include sub-markets of Internet content and Internet distribution (*See* Opposition, at 85), it fails to explain how or why this deconstruction would change or counter the premise of EarthLink's position – that online video is increasingly competing with traditional MVPD video.

[22] This is not to say that the market for OVPD services does not pose any competitive threat today. Despite Applicants' assertions to the contrary, Opposition, at 86, public statements made by Comcast management also make evident that the OVPD market is viewed as an encroaching competitive threat. *See*, *e.g.*, EarthLink Petition, at 27-29 (citing Comcast's COO Steven Burke, who explained the company's fear that an increase in free content available online would demolish the company's business model, therefore posing a competitive threat to the traditional MVPD service); CFA et al. Petition, at 26 and at Cooper/Lynn Declaration, at 54, n. 93 ("it is clear that Comcast views these nascent [online] services as its biggest future competitor"); DISH Petition (quoting Comcast's SEC filing as evidence that

demonstrates that it has every reason to ensure online programming serves only a complementary function: "consistent with the complementary nature of online video and linear MVPD service, the joint venture would in fact seek to promote views of its content online in order to generate increased interest in it its linear network programming in the hopes of increasing linear ratings."[23]

The viability of unaffiliated providers in the OVPD market is critically dependent on Comcast's high-speed Broadband Access Service,[24] the essential access link between the provider and the potential customers/users in Comcast regions. Comcast's control over Broadband Access Service allows Comcast to limit the level of competition in the developing OVPD market, as well as limit the level of substitution that consumers will engage in between the products offered in the MVPD and the OVPD markets.

EarthLink agrees with Public Knowledge that "[i]n such an emerging market, the Commission must even more carefully scrutinize the efforts of major media incumbents to leverage that incumbency into the new market."[25] The Commission regularly considers the impact on future competition and potential entrants when considering the effect of a transaction

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the company faces direct competition from online programming). *See also* Dawn Chmielewski, *Comcast Launches Web TV Service*, Los Angeles Times Company Town Blog (Dec. 16, 2009), *available at* http://articles.latimes.com/2009/dec/16/business/la-fi-ct-fancast16-2009dec16 (Comcast's motive for creating the Fancast Xfinity TV service was a "defensive move" that was not based on fear that customers would switch cable programming providers, but rather "the threat was subscribers giving up pay TV subscriptions altogether and moving exclusively to the Internet.").

[23] Opposition, at 185. While Applicants argue they "would have no enhanced incentive to foreclose unaffiliated online video distribution," this does not account for content that is available online only, which would not result in the same benefits to the Applicants because there is no corollary programming on the MVPD system for it to "complement."

[24] *See* EarthLink Petition, at v. EarthLink incorporates the definition of "Broadband Access Service" from the Glossary of Terms.

on competition.[26] The Commission should undertake the same forward-looking review here and recognize the competitive threat the OVPD market presents to Comcast.

B. Technology, Pricing and Content Rights Will Not Prevent OVPDs from Becoming Substitutes to Traditional Video

Applicants assert that "[o]nline video is likely to remain complementary to MVPD services for the foreseeable future because online video distributors attempting to replace, rather than supplement, MVPD services would face substantial impediments related to technology, price, and rights."[27] Upon closer inspection, the facts of the OVPD market are different and the very existence of OVPDs in the marketplace today contradicts these assertions of impediments.

i. Technological Impediments

Applicants argue that "substantial technological impediments," including network capacity constraints, limit the ability of television watchers to view the same amount of programming as currently viewed over MVPD services and "would cause serious congestion and disruption to the Internet."[28] Therefore, Applicants argue, an OVPD could not "position itself as

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[25] Public Knowledge Petition, at 4.

[26] *See Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., to AOL Time Warner Inc.*, Memorandum Opinion and Order, 16 FCC Rcd. 6547, ¶ 21 (2001) (when the FCC evaluates a merger, it must look to public interest benefits or harms and the transaction's effect on future competition); *Applications for Consent to the Assignment and/or Transfer of Control of Licenses; Adelphia Communications Corp., to Time Warner Cable Inc.; Adelphia Communications Corp., to Comcast Corp., Comcast Corp., to Time Warner Inc.; Time Warner Inc., to Comcast Corp*., Memorandum Opinion and Order, 21 FCC Rcd. 8203, ¶ 25 (2006) (stating the FCC must look at whether a transaction will impact the market power of dominant firms and the "transaction's effect on future competition"). The FCC also often looks to future competition and the development of new technologies when making decisions outside the scope of merger reviews. *See also Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 14853, ¶ 50 (2005) (citing the emergence of new competitive technologies including broadband over power lines, satellite and wireless that must be taken into account when analyzing the dynamic nature of the broadband marketplace).

[27] Opposition, at 93.

[28] *Id.* at 93.

an attractive alternative to traditional MVPD services."[29] Applicants frame such potential capacity constraints as inescapable due to the lack of development of broadband networks when, in fact, such capacity constraints are entirely within the control of Comcast as the provider of Broadband Access Service.

These technological "limits" cannot be taken at face value because Comcast has the ability to design its emerging DOCSIS 3.0 transmission functionality to reserve higher capacities for its IPTV initiative, while limiting the capacity assigned to its broadband access service.[30] Control over the broadband access network enables Comcast to implement and devise such network capacity constraints, allowing it to limit the ability of OVPDs to provide service options that are competitive substitutes to Comcast's traditional cable television offerings. Since a competitive OVPD market is likely to threaten Comcast's cable profits, the Transaction also increases Comcast's incentives to engage in capacity and throughput restrictions and interfere with the development of the OVPD market.[31]

Applicants assume incorrectly that all users of OVPD service would have the same "default on" TV usage pattern and watch the same amount of online video as linear TV. This assumption is contradicted by Comcast's own statements that online video users are "default off" users: "whereas online video viewing is sporadic and 'default off' (*i.e.*, consumers go online only to seek on demand programming), television viewing is 'default on' (*i.e.*, consumers leave the

[29] *Id.* at 94.

[30] Recently, Comcast described its ability to increase broadband bandwidth available to consumers. *See* Letter from Michael H. Hammer, Counsel, Comcast Corp., to Marlene H. Dortch, Secretary, FCC, at 2, MB Dkt. 10-56 (filed Aug. 13, 2010).

[31] *See* EarthLink Petition, at 27-29, 32-34.

television on and change channels to find something to watch)."[32] Applicants' technological argument also assumes a static state of compression and that emerging video technology cannot resolve current technical limitations. These assumptions are dubious, at best, given the history of technological changes that have already expanded Internet broadband capacity[33] and the number of technology companies devoting significant resources to resolving online video constraints.

ii. Pricing and Rights Impediments

Applicants also argue that significant pricing impediments will ensure OVPDs remain a complement to traditional MVPD services.[34] Applicants' position is wholly speculative. For instance, Applicants assert that competitive OVPDs "may face high content-acquisition costs," while they also concede that content owners may well approach licensing differently for online distribution.[35] Online distribution has already spawned experiments with various economic

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[32] Opposition, at 88; Mark Israel and Michael Katz, *The Comcast/NBCU Transaction and Online Video Distribution*, at 20-26 MB Dkt. 10-56 (May 4, 2010) (noting, for example, that market research indicates consumers who watch traditional television currently spend more time watching programming than consumers who watch online video, that peak times of viewing are different, and that online viewing is more sporadic than television viewing). *See also* Jon Gibs, *Do We Watch the Web the Same Way We Watch TV? Not Really*, NeilsonWire (Feb. 4, 2010), *available at* http://blog.nielsen.com/nielsenwire/consumer/do-we-watch-the-web-the-same-way-we-watch-tv-not-really/ (a 30-day analysis of consumer behavior on online video sites demonstrated there are "more differences than similarities when it came to viewing behavior, demographics, and even ad effectiveness" between online video and traditional television).

[33] According to the FCC's recently released OBI Technical Paper on Broadband Performance, "[s]ince 1997, consumer-purchased broadband connection speeds have doubled roughly every four years, with advertised fixed broadband download speeds growing at a 20% annual rate." FCC OBI Technical Paper # 4, Broadband Performance, at 4 (rel. Aug. 16, 2010), *available at* http://download.broadband.gov/plan/fcc-omnibus-broadband-initiative-(obi)-technical-paper-broadband-performance.pdf. Further, "this speed increase has continued as strongly in the last few years as it did with the introduction of widespread broadband in the late 1990s." *Id.*, at 11.

[34] *See* Opposition, at 96-98 ("Any potential switching from the MVPD dual-revenue stream model to one that generates less revenue for the same video content jeopardizes the ability of programmers to invest in expensive, high-quality programming, and thus there is limited if any incentive on their part to encourage such development in the future.").

[35] *Id.* at 96.

models. As such, it would be unreasonable to accept and act on an assumption that pricing issues cannot and will not be resolved. As new economic models for online video distribution are tested and succeed, OVPDs are likely to see their growth and competitive posture further propelled.[36]

The asserted impediments to the rights to distribute content[37] will also change as the OVPD market grows and new models for online distribution develop. Despite these claimed challenges to obtaining distribution rights,[38] there is evidence that OVPDs currently are able to successfully negotiate and obtain distribution rights from various content owners. For instance, Netflix has already proven that access to content rights is not a significant impediment to the development of a competitive OVPD business.[39] Other OVPDs, such as VUDU and Sezmi, have

[36] Even traditional broadcast networks such as NBC are being forced to change practices and think of new ways to price content. *See* Sam Schechner, *Free Content Isn't a Right, nor is His Job, CEO Says*, WSJ.com (Aug. 2, 2010), *available at* http://online.wsj.com/article_email/SB10001424052748703787904575403211895349200-lMyQjAxMTAwMDEwMTExNDEyWj.html (quoting NBC CEO Jeff Zucker, "We have to figure out how we are going to pay for this quality content." Zucker also referenced recent changes in broadcast economics due to the payment of retransmission fees, noting that "[t]wo years ago, that wasn't clear that that [retransmission fee payment] was going to happen.")

[37] Opposition, at 98-101.

[38] *Id.*

[39] *See* Damon Darlin, *Always Pushing Beyond the Envelope*, NEW YORK TIMES (Aug. 8, 2010), *available at* http://www.nytimes.com/2010/08/08/business/08every.html ("Netflix, meanwhile, keeps cutting deals with movie studios to get more films and television shows online"). *See also* Brian Stelter, *Netflix to Stream Films from Paramount, Lions Gate, MGM*, New York Times Media Decoder (Aug. 10, 2010), *available at* http://mediadecoder.blogs.nytimes.com/2010/08/10/netflix-to-stream-films-from-paramount-lionsgate-mgm/?scp=2&sq=netflix&st=cse (describing Netflix' recent deal with Epix for distribution rights to films from Paramount, Lions Gate, and MGM); Ben Fritz, *Netflix Challenging HBO and Showtime as it Signs Distribution Deal with Relativity Media*, LA Times Company Town Blog (Jul. 6, 2010), *available at* http://latimesblogs.latimes.com/entertainmentnewsbuzz/2010/07/netflix-challenging-hbo-showtime-as-it-signs-distribution-deal-with-relativity-media.html (describing recent deal with Relativity Media for rights to distribute Relativity films).

also overcome this hurdle.[40] Going forward, it is reasonable to assume that additional OVPDs will also be able to negotiate access to content rights successfully, setting the stage for even greater expansion of competitive OVPDs.

II. COMCAST HAS NUMEROUS INCENTIVES TO STIFLE THE GROWTH OF THE OVPD MARKET

As described by EarthLink, the proposed Transaction raises both vertical and horizontal impacts on competition in the OVPD market that undermine the public interest.[41] Among other impacts, the Transaction raises the risk that Comcast will be able to use its market power to stifle growth and innovation of online video and other broadband content as it increases Comcast's incentives and ability to interfere with the ability of unaffiliated OVPDs and programmers to compete. Further, the Transaction increases Comcast's incentives to maximize its profits with the acquired NBCU content, to undermine the emergence of OVPD offerings that currently compete or may compete in the near future with its cable services, to ensure OVPDs remain only a complement to its cable television business, and to prevent consumers from "breaking the bundle," which best promotes choice by ensuring consumers are not forced to subscribe to and pay for services they do not want.

A. Comcast's Incentives to Raise the Price for Standalone Broadband Access Service are Increased by the Transaction

In his initial report, Professor Wilkie explained how the proposed Transaction increases Comcast's incentive to keep consumers from "breaking the bundle" or "cutting the cord" by

[40] *See VUDU Now Has 3000 HDX Titles, the Largest HD Collection Anywhere*, VUDU Blog (Jan. 27, 2010), *available at* http://blog.vudu.com/?p=357 (VUDU library has more HDX titles than any other collection, including Blu-ray and iTunes); *What's on Sezmi?*, Sezmi.com (2010), *available at* http://www.sezmi.com/whats-on-sezmi/index.php (content available on Sezmi includes media from 20th Century Fox, Bravo, Animal Planet, TLC, Warner Brothers, Universal, TBS, and many others).

[41] *See* EarthLink Petition, at 21-25.

raising the price of standalone Broadband Access Service.[42] While Israel/Katz argue that Professor Wilkie's analysis of this claim "is based on incomplete and misleading analysis" and attempt to demonstrate a "proper analysis,"[43] Professor Wilkie explains his analysis is sound.[44]

Israel/Katz rest their critique of Professor Wilkie's pricing model on a counterexample that "hinges on certain, implicitly assumed, tie-breaking rules" (*i.e.*, that if a consumer is indifferent between buying a bundled product versus by standalone broadband service, then a consumer will buy the bundle).[45] Israel/Katz fail to recognize that additional tie-breaking rules could be applied and that the more neutral choice (*i.e.*, a consumer would purchase either with equal probability). would support the original analysis.[46] Professor Wilkie explains:

> [U]nder the most likely scenarios as described in my initial report, 'at the margin, the post merger Comcast entity will have the incentive to raise the prices of stand-alone broadband service absent other competitive pressures.' Sufficient competitive choice from a neutral provider, such as an independent ISP like EarthLink, would serve to discipline Comcast's ability to raise prices and would mitigate the harm to consumers who desire broadband service at lower, competitive prices.[47]

Thus, it is clear that "the Israel Katz counterexample is inapt"[48] and that the proposed Transaction increases the incentives of Comcast to raise the price for standalone Broadband Access Service.

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[42] *See* EarthLink Petition, Appendix 2: Report of Professor Simon J. Wilkie, *Consumer Sovereignty, Disintermediation and the Economic Impact of the Proposed Comcast/NBCU Transaction*, ¶¶ 38-40 ("Wilkie Initial Report") (attached hereto).

[43] *See* Israel/Katz, at ¶¶ 88-93.

[44] *See* Appendix 1, Reply Report of Simon J. Wilkie, *Economic Analysis of the Proposed Comcast-NBCU-GE Transaction,* ¶¶ 6-15 ("Wilkie Reply Report").

[45] *Id.* at ¶ 7.

[46] *Id.* at ¶ 11-13.

[47] *Id.* at ¶15 (*citing* Wilkie Initial Report, at ¶ 39).

[48] Wilkie Reply Report, at ¶ 15.

B. Comcast Has the Ability and the Incentives to Degrade the Signals of Unaffiliated Content on Comcast's Broadband Access Service

Professor Wilkie explained in his initial report that the Transaction would increase Comcast's incentive to degrade the signals of unaffiliated content on Comcast's Broadband Access Service.[49] Israel/Katz counter that Professor Wilkie's discussion is "highly misleading."[50] The Israel/Katz response, however, appears to be based on a misunderstanding of the basic point of Professor Wilkie, which is that Comcast's history demonstrates its ability to engage in discriminatory conduct: "The fact that Comcast has the *ability* to selectively degrade online video content [is] demonstrated by the fact that is has done so in the past via signal compressions, discrimination and otherwise."[51] Israel/Katz imply that since Comcast does not denote NBCU content from non-NBCU content currently, that such a parameter could not be added post-merger. Again, Professor Wilkie points out that it is the ability of Comcast to engage in such activity that is significant.

It is also clear, as described in detail in Professor Wilkie's initial report, that the Transaction also increases Comcast's incentives to engage in discriminatory signal degradation.[52] For example, "the merged firm will have incentives to discriminate in favor of its own programming and services, to block access or degrade rivals' online products, and to engage in anticompetitive signal degradation."[53] Thus, Professor Wilkie concludes that the Transaction

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[49] *See* Wilkie Initial Report, at ¶¶ 17-18.

[50] Israel/Katz, at ¶¶ 187-88.

[51] Wilkie Reply Report, at ¶ 20.

[52] Wilkie Initial Report, at ¶¶ 13-24.

[53] Wilkie Reply Report, at ¶ 19.

would give Comcast "both the incentive and the ability to discriminate against competitors in the emerging online market for video services."[54]

C. A Wholesale Standalone Broadband Access Condition Will Address the Harm to Consumer Welfare

Further, Professor Wilkie asserted that the highly uncertain parameters used in the online foreclosure model presented by Israel/Katz increase the probability that the proposed transaction will harm consumer welfare.[55] Israel/Katz claim this is "false as a matter of logic and fact."[56] Professor Wilkie disagrees with Israel/Katz primarily because their analysis is predicated on an extreme assumption – complete foreclosure – while ignoring the more likely alternative, that "partial foreclosure or the threat of complete foreclosure would be used by the merged entity to raise prices and harm consumers."[57] Partial foreclosure can take many forms and one possible foreclosure strategy – for the merged entity to increase retransmission rates – was described in detail by DIRECTV's economist, Professor Kevin Murphy.[58] Professor Wilkie correctly notes that "[i]f Comcast/NBCU is likely to increase retransmission rates in the MVPD market, so too will it engage in similar foreclosure strategies in the OVPD market."[59]

Israel/Katz failed to Professor Wilkie's recommendation that, due to the nascent nature of the OVPD market, the FCC should "take a cautious approach and [] explore low cost remedies

[54] *Id.* at ¶ 20.

[55] *See* Wilkie Initial Report, at ¶¶ 35-37.

[56] Israel/Katz, at ¶ 219.

[57] Wilkie Reply Report, at ¶ 22-23.

[58] DIRECTV Comments, Professor Kevin Murphy, *Economic Analysis of the Impact of the Proposed Comcast/NBCU Transaction on the Cost to MVPDs of Obtaining Access to NBCU Programming*.

[59] Wilkie Reply Report, at ¶ 24.

that could effectively eliminate the outcomes that would be detrimental to consumer welfare."[60] Further, Israel/Katz did not address Professor Wilkie's finding that "EarthLink's proposed structural remedy is an efficient, low cost (or no cost) structural remedy that would provide safeguards against likely harm to consumers."[61]

To address the potential detriments to consumers, Professor Wilkie finds that the structural solution proposed by EarthLink will mitigate these harms and ensure that consumers benefit from the Transaction. He concludes that "[a]llowing consumers to have a choice of ISPs will (1) let consumers 'break the bundle,' (2) promote competition and discipline Comcast's pricing, and (3) protect the development of the nascent online video market."[62] Professor Wilkie concludes that additional benefits will also stem from the wholesale standalone broadband condition:

> In order to compete, an independent ISP will provide the best service in order to win customers. Competitive choice will also give consumers access to the content of their choosing without fear of degrading or blocking activities that would hobble the development of the OVPD market. . . . 'Regardless of whether particular online video *content* is a substitute or a complement in relation to Comcast/NBCU broadcast and/or cable products and/or services, the provision of Internet service by an independent ISP is *always a substitute* for the provision of Internet service by Comcast.' Thus, ISPs with no content assets will have no incentives to discriminate against content in the same way a vertically integrated firm like Comcast would and will have no incentive to favor one distribution channel over another.[63]

[60] Wilkie Initial Report, at ¶35.

[61] Wilkie Reply Report, at ¶ 27.

[62] *Id.* at ¶ 29.

[63] *Id.* at ¶ 33.

III. COMCAST HAS NOT SHOWN IT CANNOT OR WILL NOT ENGAGE IN VERTICAL FORECLOSURE OF THE EMERGING OVPD MARKET

Comcast does not counter the majority of arguments made by EarthLink that Comcast has the ability to stifle the development of online video programming and distribution. Indeed, Comcast cannot dispute that it owns and operates one of the largest broadband transmission networks and is the largest facilities-based provider of Broadband Access Service in the United States. As the EarthLink Petition set forth in detail, Comcast does not rebut that it has the technical ability to block and degrade all traffic flowing to and from Comcast broadband subscribers, and it manages and allocates bandwidth for broadband Internet access use.[64] Comcast also does not deny that it has taken such actions by engaging in traffic degradation and manipulation, including in the *BitTorrent* case and in the case of selectively applying recompression techniques to HDTV signals. As Professor Wilkie replies, "Israel and Katz did not disagree that the FCC formally ruled that Comcast had illegally throttled BitTorrent traffic or that Comcast was a competitor to parties whose content it was throttling."[65]

Comcast's sole argument is that it lacks sufficient market power to foreclose the OVPD market.[66] In this vein, Comcast argues that foreclosure of the OVPD market using its ability to block or degrade access to online content is not possible because it holds only a portion – 20% – of broadband access market nationwide.[67] This ignores the realities of the broadband Internet access market and Comcast's gateway control over broadband access in individual households.

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[64] *See* EarthLink Petition, at 37-39.

[65] Wilkie Reply Report, at ¶ 16.

[66] *See* Opposition, at 182-83.

[67] *See* Opposition, at 191-92.

As Comcast concedes, the high-speed Broadband Access Service market is local.[68] Thus, Comcast's percentage of broadband customers nationally is irrelevant. If foreclosure is profitable for Comcast (and, it is, for the reasons discussed in Professor Wilkie's reports), then blocking and degrading within Comcast regions would be fully consistent with its strategic goal to stop in-region customers from switching off from cable and on to OVPDs, regardless of whether that foreclosure is effective outside of Comcast's region. Simply put, a nationwide dominance in high-speed Broadband Access Service is not necessary for Comcast to engage in vertical foreclosure successfully against OVPDs because Comcast can leverage its regional dominance in this market to block and degrade OVPDs, and thereby protect its current and future regional cable revenue streams.[69]

Comcast also argues that foreclosure of OVPD market would not be economical for Comcast because consumers would drop Comcast's Broadband Access Service, resulting in a loss of broadband services subscribers and profits.[70] Comcast offers no data to support its contention that consumers in Comcast regions have robust competitive substitutes for Comcast's Broadband Access Service and the available FCC data contradict Comcast's claims.[71] The data

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[68] *Id.* at 84.

[69] *See, e.g., General Motors Corporation and Hughes Electronics Corporation, And The News Corporation Limited, For Authority to Transfer Control*, 19 FCC Rcd. 473, ¶ 148 (2003) (finding vertical foreclosure on a regional basis would be possible where the applicant "currently possesses significant market power in the [regional] geographic markets").

[70] *See* Opposition, at 187, 193.

[71] *See* FCC Report, *High-Speed Services for Internet Access: Status as of December 31, 2008* (rel. Feb. 6, 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296239A1.pdf. Charts 11, 13 and Table 6 show that more than one-half of high-speed consumers have service at or above 3 Mbps downstream, but cable and incumbent telephone companies hold a clear duopoly at those speeds. At services with 6 Mbps or more, cable takes a dominant position in the marketplace, with over 96% of the market for services between 6 and 10 Mbps and substantial dominant positions with even higher speed services. *Id*. at Chart 11, at 14. Above 1.5 Mbps services, wireless holds little to no market share.

show a lack of a robustly competitive Broadband Access Service market today, especially for higher-speed Broadband Access Services that are likely to be subscribed to by potential OVPD customers, *i.e.*, users of online video. Specifically, high-speed consumers with service at 3 Mbps downstream face a duopoly between cable modem service and the incumbent telephone company's DSL service, with little to no competitive offerings from wireless providers.[72] At services with 6 Mbps or more (the speeds and capacity likely best for services such as real-time online video), the FCC data show cable takes a clear dominant position in the marketplace, with over 96% of the market for services between 6 and 10 Mbps and with substantial dominant market share at even higher-speed services.[73] With customer premise equipment costs and charges and early termination fees, Comcast customers also face extremely high switching costs even if a high-speed Broadband Access Service alternative were available. Therefore, it is highly doubtful that Comcast would be harmed in the marketplace if it engaged in foreclosure activity contrary to consumers' preferences.[74]

Finally, Comcast claims the GE-Comcast joint venture agreement limits its ability to engage in vertical foreclosure actions because such actions would be unprofitable to the joint venture and, therefore, prohibited.[75] This claim is faulty for several reasons. First, a contractual limit on the use of NBCU programming would not prevent Comcast from engaging in

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[72] *Id.* at Charts 11, 13, and Table 6.

[73] Moreover, the fact that Verizon FiOS or AT&T U-Verse may offer in some limited markets a competitive Broadband Access Service alternative offering at 6 Mbps or greater cannot obviate the fact that, for the majority of Comcast customers, a competitive option is not available.

[74] Further, as was evident in the *BitTorrent* case, consumers may not even be aware that the degraded service issues are being caused by Comcast. *See Formal Complaint of Free Press and Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, Memorandum Opinion and Order, 23 FCC Rcd 13028, ¶¶ 52-53 (2008).

[75] *See* Opposition, at 185.

foreclosure in other ways, such as through its network practices or via Comcast's own "must see" sports programming assets. Moreover, Comcast has failed even to allege that the use of NBCU assets in a vertical foreclosure strategy – such as keeping NBCU content behind a cable "paywall" – would necessarily be unprofitable to GE's interests in the joint venture. In any case, the joint venture limitation applies only for as long as the joint venture is in place, and does nothing to protect the public after the joint venture terms expire or are modified or if Comcast subsequently purchases GE's remaining interest in the joint venture.

IV. EARTHLINK'S PROPOSED CONDITION IS A STRAIGHTFORWARD STRUCTURAL REMEDY

EarthLink's proposed condition is a cost-effective solution to the demonstrated harms the merger will create in the emerging online video marketplace and for American consumers.[76] The proposal, which substantially follows the FTC and FCC AOL-Time Warner merger condition, has proven itself over the past decade to be a success. Applicants do not seriously dispute these points. Instead, the Applicants ask the Commission to reject the EarthLink condition as a matter of policy by asserting that "the market has decidedly moved on" and "[t]he Commission chose to encourage facilities-based competition."[77]

EarthLink's proposed condition is not offered for the purpose of debating the policy virtues of intermodal or intramodal competition. The condition is proposed as a remedy that addresses some of the specific public interest harms of the proposed Transaction. Just as Applicants chide against turning this merger proceeding into a referendum on industry-wide

[76] *See* Appendix 2, "Proposed Condition: Wholesale Standalone Broadband Access" (attached hereto).
[77] *Id.* at 199.

policy choices available to the Commission,[78] the interjection of Applicants' policy positions is no basis to reject summarily the merger-specific harms raised by EarthLink or to discount EarthLink's proposed condition. Despite Comcast's views on the relative benefits of facilities-based versus wholesale competition, as a legal matter, the Communications Act expresses no preference for the basis of competition.[79] Rather, the National Broadband Plan and recent Commission orders recognize the importance of intramodal competition and wholesale services in the context of a competitive broadband marketplace.[80] A recent New York Times article describes the success found by other countries that have required wholesale access to broadband transmission networks.[81] Benefits consumers in these countries have seen include choice among multiple broadband providers, faster and less expensive Internet access, and the availability of the commercial remedy of switching broadband providers if service is not satisfactory.[82] Thus, intramodal competition can and does have a positive role in policy decisions aimed at ensuring

[78] *Id.* at 196 (net neutrality and other ISP obligations "are most appropriately considered in industry-wide proceedings such as those the FCC now has underway").

[79] *See AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 392-93 (1999) (finding the Telecommunications Act of 1996 does not impose a facilities ownership requirement, and therefore "that the Commission's refusal to impose a facilities-ownership requirement was proper").

[80] *See* Federal Communications Commission, *Connecting America: The National Broadband Plan* at 9, 47-48, GN Dkt. 09-51 (rel. Mar. 16, 2010). *Applications Filed by Frontier Communications Corporation and Verizon Communications, Inc. for Assignment or Transfer of Control*, Memorandum Opinion and Order, 25 FCC Rcd 5972, ¶ 27 (2010) ("Ensuring robust competition not only for American households but also for American businesses requires particular attention to the role of wholesale communications markets, through which providers of broadband and other services secure critical inputs from one another.").

[81] *See* Eric Pfanner, *A Better Way to Keep the Net Open and Accessible*, New York Times Media Cache Blog (Aug. 15, 2010), *available at* http://www.nytimes.com/2010/08/16/technology/16iht-CACHE16.html?_r=1&ref=technology (While European customers thrive in a robustly competitive broadband market, American consumers face far less choice among providers because "U.S. regulators, unlike their counterparts elsewhere, have not generally required broadband providers to open their networks to competitors").

[82] *Id.*

the public interest is best met, and broadband competition and adoption is enhanced.

Applicants also do not acknowledge that the proposed condition will provide greater incentives to invest and innovate. Even Applicants admit, however, that the promotion of OVPD offerings would have a "positive impact. . . on Comcast's [Broadband Access Service] business" and "would increase consumer demand for broadband services."[83] While these financial incentives do not overcome Comcast's overriding incentives to engage in vertical foreclosure against OVPDs, it is significant Applicants acknowledge the rise of an OVPD market would have a positive effect on Comcast's deployment of broadband. By allowing OVPDs to obtain access to consumers without interference from the ISP, EarthLink's condition would promote broadband investment and adoption throughout the Internet ecosystem, including by Comcast, OVPDs, independent ISPs, and online content providers.

Finally, EarthLink notes that several parties have agreed that online services are harmed by this Transaction and likewise endorse a wholesale standalone broadband condition, including DISH Networks, Public Knowledge, and the New Jersey Division of Rate Counsel.[84]

[83] Opposition, at 186-87.

[84] *See* DISH Petition, Appendix, at 35; Public Knowledge Petition, at 15; Reply Comments of New Jersey Division of Rate Counsel, at 42, MB Dkt. 10-56 (filed Jul. 21, 2010).

CONCLUSION

It is well established that, to be approved, the Transaction must affirmatively advance the public interest. For the foregoing reasons, and as stated in the EarthLink Petition, the Commission should approve the Transaction only if it includes a wholesale standalone broadband condition that ensures vibrant broadband ISP competition for consumers.

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August 19, 2010

APPENDIX 1

REPLY REPORT OF PROFESSOR SIMON J. WILKIE

ECONOMIC ANALYSIS OF THE PROPOSED COMCAST-NBCU-GE TRANSACTION

August 19, 2010

I. INTRODUCTION

A. Assignment

1. I have been asked by EarthLink to review and critique, where necessary, the reply of Professors Mark Israel and Michael L. Katz to my initial analysis and findings on the effects of the proposed Comcast/NBCU transaction.[1] In my initial report,[2] I analyzed possible anti-competitive consequences of such a transaction on the emerging online video market and Internet service providers ("ISPs"). I concluded that under the structure of the proposed transaction, Comcast will have clear business incentives that are not aligned with consumer interests and that EarthLink's proposed structural remedy would protect consumer interests. This conclusion was supported by the fact that Comcast has a history of

[1] *See* Economic Analysis of the Proposed Comcast-NBCU-GE Transaction, Mark Israel and Michael L. Katz (Jul. 20, 2010) ("Israel and Katz").

[2] *See* EarthLink Petition, Appendix 2: Report of Professor Simon J. Wilkie, *Consumer Sovereignty, Disintermediation and the Economic Impact of the Proposed Comcast/NBCU Transaction* (Jun. 21, 2010).

punitively limiting the bandwidth of competitors and the fact that the acquisition of NBCU by Comcast would not only increase Comcast's incentives to act anti-competitively, but would give it a natural set of content to promote, further increasing Comcast's ability to act anti-competitively. In addition, EarthLink's proposed pro-competitive structural remedies would offer a low-cost solution and allow market-based competition to protect consumer welfare.

B. Outline of Report

2. Section II discusses the Israel and Katz critique of my economic analysis and illustrates the flaws in their critique. Having analyzed their critique, I conclude that should the proposed merger of Comcast and NBCU be consummated, Comcast likely will have the incentive and ability to raise the price of standalone broadband service. Section III addresses the Israel and Katz critique of my use of signal compression data in my analysis. Israel and Katz appear to have misunderstood my basic point that Comcast's past history demonstrates that they have the ability to engage in discriminatory conduct. Section IV addresses the implications of the uncertainty inherent in the Israel and Katz application of the Commission Staff model and highlights an important missing element of the Israel and Katz analysis – partial foreclosure of the online video market. Section V explains why the proposed wholesale stand-alone broadband access

condition is pro-competitive and will address consumer harms caused by the proposed merger. Section VI contains my conclusion.

II. CRITIQUE OF WILKIE MODEL

3. In the model presented in my original report, I constructed a "two goods model" in which a firm offers standalone units of either of the two goods (broadband and cable) and a bundle consisting of a unit of each. (¶¶ 38-41) Consumers are represented by their valuations of broadband and cable, given by a joint density function. Situations before and after the merger are distinguished by an increase in advertising revenues per video-subscriber that the vertically-integrated entity receives post-merger. My model demonstrated that it will be profitable for the merged entity to raise the standalone price of broadband service, to the detriment of consumers. The profitability of the raise depends both on the per-subscriber advertising revenue and the distribution of consumers' valuations.

4. Israel and Katz attempt to invalidate my analysis by means of a contrived counterexample.[3] The counterexample is singularly fragile: their construction of the counterexample hinges on certain, implicitly assumed, tie-breaking rules. The tie-breaking rules they assume are by no means the most natural for the problem, and the selection of a different tie-breaking rule yields results that are consistent with my initial analysis. As

[3] The unconventional distribution of consumers in the table below is also worth noting.

demonstrated below, their counterexample is not robust and their argument is consequently self-defeating.

5. Israel and Katz propose the following counterexample, which they claim demonstrates a situation in which the standalone price of broadband decreases following the merger between Comcast and NBCU:

Number of Consumers	Value of Broadband (x)	Value of Cable (y)
5	6	8
50	8	6
10	6	6
200	0	10

6. Israel and Katz claim that before the merger, the profit-maximizing prices are p_x=8, p_y=10, and p_B>14. They claim that the profit-maximizing prices after the merger are p_x=6, p_y=10, and p_B=12.

7. I will call the consumer represented in the *i*th row of the table the "type-*i*" consumer. For example, a consumer in the 2nd row of the table is a "type-2 consumer" who values a unit of broadband at 8 and a unit of cable at 6 (and there are 50 such consumers). Consider the situation after the merger: If the post-merger prices are p_x=6, p_y=10, and p_B=12, then either option yields a surplus of 2 for the type-2 consumer and a surplus of 0 for the type-3 consumer.

8. Thus, if one is to deduce that the profit maximizing prices are p_x=6, p_y=10, and p_B=12, then one must be relying on the "tie-breaking" rule that if a consumer is indifferent between buying the bundle and a standalone unit of broadband, then it will choose to buy the bundle. This is a significant

point: the Israel and Katz claim that they have constructed a counterexample to my model rests entirely on this particular tie-breaking rule. Israel and Katz do not, however, address the two additional tie-breaking rules that could possibly apply for this scenario:

(1) a consumer indifferent between buying the bundle and buying only a standalone broadband unit will buy either with equal probability;

(2) a consumer indifferent between buying the bundle and buying only a standalone broadband unit will buy only broadband.

9. It is clear that the tie-breaking rule described in (1) above (*i.e.*, indifferent consumers will buy either option with equal probability) is the only neutral choice. In fact, ties result when surpluses from choosing any of the options equal each other. The only assumption on ties that I make in my model is that if buying yields a surplus of zero, then the consumer chooses to buy rather than not to buy. I make no a further assumption on the choice. Instead, my model assumes that if more than one of the three options involving a purchase (buying only broadband, buying only cable, buying the bundle) yields the highest surplus (possibly zero), then each of these options is exercised with equal probability.

10. When this is the case before the merger, the monopolist will set the profit maximizing price of broadband arbitrarily close to 8. After the merger, though, it is optimal for the monopolist to set prices in such a way that consumers are incentivized away from buying only broadband.

Specifically, the monopolist will price its offerings in such a way that customers of type-1, 2 and 3 buy the bundle and the type-4 customers buy only cable. In particular, broadband is priced above 6, so that no consumer buys it as an individual unit. This conclusion contradicts the Israel and Katz results, which state that the price of standalone broadband decreases to 6. Indeed, setting p_x=6 post-merger as Israel and Katz propose is suboptimal for the monopolist, who prefer not to have type-2 and type-3 consumers indifferent to the standalone offering of the broadband and the bundle.[4] Formally, the Israel and Katz argument breaks down when natural tie-breaking rules are invoked. Consequently, the Israel and Katz counterexample is inapt.

11. In general, it is extremely difficult to characterize the optimal prices for a multiple product firm that sells its products both on a stand-alone basis and as a bundle. Progress on this problem has been made in an important paper by Manelli and Vincent.[5] The nature of the solution depends on the distribution of customers' values for the products on a stand-along basis and as a bundle. The firm's optimal prices may involve randomized allocations of its products being sold on a stand-alone or bundled basis. However, if we have (1) an initial interior optimum (*i.e.*, the firm sells its products both on a stand-alone and bundled basis); (2) either the "neutral"

[4] Under the assumptions of Israel and Katz, these consumers would simply buy the bundle.

[5] R. Manelli and D. Vincent (2006), "Bundling As An Optimal Selling Mechanism For A Multiple-Good Monopolist," *Journal of Economic Theory*, vol. 127, pp. 1-35.

tie breaking rule for discrete distributions or a continuous distribution of customer types; and (3) at the initial optimum the profit per customer on the bundle is higher than the profit on standalone broadband, then my conclusion stands. The Israel and Katz example involves the firm switching from one corner solution to another, *i.e.*, from a situation in which the firm only sells its products on a stand-alone basis to a circumstance in which it only sells its products on a bundled basis. Given the nature of the current market (*i.e.*, we are not at a corner solution and the bundle is more profitable per subscriber than standalone broadband), I conclude that my original analysis of marginal changes to an interior optimum is the relevant case.

12. It follows that, under the most likely scenarios as described in my initial report, "at the margin, the post merger Comcast entity will have the incentive to raise the prices of stand-alone broadband service absent other competitive pressures." (¶39) Sufficient competitive choice from a neutral provider, such as an independent ISP like EarthLink, would serve to discipline Comcast's ability to raise prices and would mitigate the harm to consumers who desire broadband service at lower, competitive prices.

III. Critique of Signal Compression

13. In my initial report I described Comcast's historical anti-competitive degradation of rivals' online products. (¶¶25-27) Israel and Katz did not disagree that the FCC formally ruled that Comcast had illegally throttled

BitTorrent traffic or that Comcast was a competitor to parties whose content it was throttling

14. Israel and Katz did criticize the additional evidence of intentional degradation via Comcast's recompression signals. They argue that Comcast's "systems…optimize the degree of signal compression as a function of the characteristics of content being aired and the set of high-definition networks sharing common bandwidth on its fiber backbone at the time…".[6] They conclude that the Comcast systems "do *not* set different quality levels for different networks based on the identity of the network owner" and "hence, no inference of selective or discriminatory 'degrading' can be made based on differential bitrates across high-definition networks at a point in time."[7]

15. My initial report recognizes that these degradations of network quality "may have been done for legitimate network management reasons." (¶27) This acknowledgment, however, certainly does not refute my conclusion that "post-merger Comcast will be operating with a new and powerful incentive to favor NBCU content over non-NBCU content in the online distribution channels." (¶17)

16. As described in detail in my initial report (¶¶13-24), Comcast's economic incentives will be changed when it becomes vertically integrated with NBC; the merged entity will have incentives that will differ from

[6] Israel & Katz, p. 145.
[7] *Id.*

Comcast's incentives today. For example, the merged firm will have incentives to discriminate in favor of its own programming and services, to block access or degrade rivals' online products, and to engage in anti-competitive signal degradation.

17. That Comcast may have legitimate reasons for degrading network quality today does not change the fact that Comcast has the *ability* to selectively degrade online video content, demonstrated by the fact that it has done so in the past via signal compressions, discrimination and otherwise. (¶17) Further, Israel and Katz imply that, because the current automated systems which Comcast uses to control signal quality do not contain a parameter which denotes NBCU content from non-NBCU content, such a parameter could not be added post-merger. Comcast's *ability*, however, to make such a determination is the significant point. The merged firm with its change in incentives would now have both the incentive and ability to discriminate against competitors in the emerging online market for video services.

IV. IMPLICATIONS OF THE UNCERTAINTY IN THE COMMISSION STAFF MODEL

18. Israel and Katz also critique the claim in my original report that, due to the highly uncertain parameters in their foreclosure model, "there is a substantial probability that the proposed transaction will harm consumer welfare." (¶29) Given this uncertainty, I suggested the most prudent course is for the FCC to take a cautious approach and to explore low cost

remedies that could effectively eliminate the outcomes that would be detrimental to consumer welfare. (¶35) Israel and Katz responded that they had "performed sensitivity analyses in which we evaluated the online foreclosure model under a broad range of parameter values" which did not yield results in which foreclosure was profitable.[8]

19. I disagree with Israel and Katz critique for two reasons. First, the parameters of their analysis of the likelihood of consumer harm were predicated on complete foreclosure, an extreme assumption. Second, their analysis ignores the possibility of local or regional foreclosure.

20. Israel and Katz assume that parameters used to judge consumer harm should be isolated to complete foreclosure only. This assumption is faulty. This position is not only extreme, but does not consider the more likely alternatives, that partial foreclosure or the threat of complete foreclosure would be used by the merged entity to raise prices and harm consumers.

21. Partial foreclosure could take many forms. As detailed in the report of Professor Kevin Murphy, one possible partial foreclosure strategy would be for the merged Comcast/NBCU to increase retransmission rates.[9] The potential for partial foreclosure through an increase in retransmission rates, however, is ignored by Israel and Katz. The analysis by Prof. Murphy, however, can also be applied to Comcast's online behavior,

[8] Israel & Katz Report, p. 165 (July 20, 2010).

[9] This far more likely possibility was explored in the June 21, 2010 report of Professor Kevin Murphy, on behalf of DIRECTV.

including the partial foreclosure of the OVPD market. If Comcast/NBCU is likely to increase retransmission rates in the MVPD market, so too will it engage in similar foreclosure strategies in the OVPD market.

22. In addition, Israel and Katz do not address foreclosure of local programming and sports. They focus on the "full set of NBCU content," noting explicitly that, "[a]mong the Commission's stated reasons to focus on broadcast networks has been the importance of sports and local programming to traditional MVPDs…. It is less clear that such programming would be important to an online MVPD, which would likely have a broad geographic footprint and possibly face constraints on the streaming of live events, among other differences."[10]

23. Israel and Katz argue that Comcast/NBCU would not find complete foreclosure profitable when the merged firm must sacrifice nationwide revenues by foreclosing access to all NBCU content in order to maintain or increase subscribers in their geographic footprint. However, Israel and Katz neither address nor refute the economic argument that the merged firm would find it profitable to foreclose access to selected programming, such as local programming and sports.[11] In such a scenario lost revenues would only stem from local or regional foreclosed programming. This would be offset by the ability of Comcast to reduce competition between

[10] Israel & Katz Report, p. 41 FN77 (May 4, 2010).

[11] Because of the personalized nature of the delivery of internet content the merged firm's incentive to foreclose access to localized content likely would be greater.

Comcast and emerging OVPDs who, while able to provide national programming, would be unable to provide local programming and sports. It is implausible to suggest that because prospective OVPDs would have "broad geographic footprint[s]" they would be unwilling or unable to provide local content. This line of reasoning is akin to suggesting that national websites such as Yelp.com, Craigslist.com, Monster.com or Google Maps could not offer, or would not be interested in offering, localized content because of their national footprint. Similar arguments that current constraints associated with broadcasting live events over the Internet would impose a significant barrier to future online MVPDs are equally untenable.

24. While Israel and Katz critique my claim that their parameters are uncertain, they do not address the next sentence in my report, which points out that because of the nascent nature of the market it is sensible "to take a cautious approach and explore remedies that would effectively eliminate those albeit uncertain outcomes that would be harmful to consumer welfare." (¶35) In fact, at no point do Israel and Katz counter my findings that EarthLink's proposed structural remedy is an efficient, low cost (or no cost) structural remedy that would provide safeguards against likely harm to consumers.[12]

[12] This is true even if one assumes, *arguendo*, Israel and Katz conclusions that the probability of substantial consumer harm is low.

V. WHOLESALE STANDALONE BROADBAND ACCESS IS A PRO-COMPETITIVE REMEDY

25. The critiques offered by Israel and Katz do not undermine my economic analysis, which shows that the proposed merger will increase the ability and incentives of the merged firm to engage in anti-competitive behavior. Moreover, their critiques do not invalidate my conclusion that the structural solution proposed by EarthLink will mitigate the potential harms to consumers.

26. Allowing consumers to have a choice of ISPs will (1) let consumers "break the bundle," (2) promote competition and discipline Comcast's pricing, and (3) protect the development of the nascent online video market.

27. First, currently consumers have limited ISP choice in most of the United States and consumers often bundle broadband service with MVPD service. In Comcast's region, the EarthLink remedy will expand consumer choice of ISPs and allow consumers to drop the MVPD service in favor of OVPDs, if desired (*i.e.*, "break the bundle").

28. Second, by enabling consumer choice, if the merged entity were to engage in discriminatory behavior, consumers would have the option of changing ISPs. The ability of consumers to choose among ISPs will promote competition and will allow market forces to discipline the merged firm's behavior, including pricing of services.

29. Third, giving consumers a choice of ISPs will protect the development of the nascent market for online video services. In particular, the EarthLink remedy will protect the development of online video programming by ameliorating the ability of Comcast/NBCU to discriminate against unaffiliated distribution competitors. The profitability of such discrimination would be reduced because consumers would have a viable economic option to switch to a competitors ISP by imposing a marketplace "penalty," (*i.e.*, dissatisfied customers can switch to an alternative ISP).

30. In order to compete, an independent ISP will provide the best service in order to win customers. Competitive choice will also give consumers access to the content of their choosing without fear of degrading or blocking activities that would hobble the development of the OVPD market. As I explained in my initial report, "[r]egardless of whether particular online video *content* is a substitute or a complement in relation to Comcast/NBCU broadcast and/or cable products and/or services, the provision of Internet service by an independent ISP is *always a substitute* for the provision of Internet service by Comcast." Thus, ISPs with no content assets will have no incentives to discriminate against content in the same way a vertically integrated firm like Comcast would and will have no incentive to favor one distribution channel over another.

31. A wholesale standalone broadband access condition would also serve as a check on Comcast's ability to raise prices for its own standalone broadband access service. If Comcast raises retail prices, customers will have the competitive options stemming from the wholesale access condition.

VI. CONCLUSION

32. My previous conclusion, that the proposed Comcast/NBCU transaction will provide the post-merger Comcast with strong incentives and abilities to interfere with emerging online video services and affect broadband pricing in a manner that is harmful to consumer welfare, remains unchanged after reviewing the Israel and Katz critique. Based on my foregoing analysis and my analysis to date, it is clear that EarthLink's proposed structural remedy as a condition of merger approval will be a low-cost and effective mechanism to improve significantly the public welfare results of the Transaction.

APPENDIX 2

PROPOSED CONDITION:
WHOLESALE STANDALONE BROADBAND ACCESS

Within ninety (90) days after the effective date of the order approving the proposed transaction with conditions ("Order") and prior to closing the transaction, Comcast shall enter into a Wholesale Standalone Broadband Access Service Agreement ("Agreement") with at least four (4) national unaffiliated Internet Service Providers ("ISPs").

The requirements of the Agreement shall be as follows:

REQUIRED TERMS	DESCRIPTION
Prior Approval	FCC approval of the Agreement required prior to execution.
Term	The Agreement shall be for a term of at least five (5) years with a reasonable customer transition period upon termination.
Rates	Wholesale standalone broadband access service shall be provided at reasonable rates, which shall be at least 40% less than the current advertised retail rates for Comcast's broadband access services, including any promotional discounts and bundled rates [or at the imputed cost of such service]. If Comcast offers free installation and/or modem equipment or other services, either to its retail consumers or to any other party, the unaffiliated ISPs shall obtain such services/equipment as part of the wholesale rate.
Geographic Scope	Wholesale standalone broadband access service shall be made available in 100% of Comcast's nationwide footprint. The number of customers provisioned using wholesale standalone broadband access service shall not be limited.
Access/Ordering	Reasonable terms of access, including without limitation reasonable ordering and provisioning, shall be established. Comcast shall provide the unaffiliated ISPs: (i) access to systems and tools necessary for the ISPs to offer Tier 1 customer support, or Comcast shall provide the Tier 1 support; (ii) a prequalification system that allows the unaffiliated ISPs to determine accurately the serviceability of a customer through a real-time API, or Comcast shall provide all serviceable addresses in a file updated daily; (iii) prequalification data which shall include whether a customer will be rejected due to owed balance or credit issues; and (iv) APIs for trouble reporting, ticket creating, ticket updates, and network outages. Comcast shall provide Tier 2 support, and shall report network outages promptly to the ISPs. Customers will not be required to purchase any other Comcast product or other service as a condition of service from the unaffiliated ISPs.
Billing	ISPs may have a direct billing arrangement with their customers. Comcast may offer a billing service to any ISP, but shall not require any ISP to purchase this service as a condition of obtaining access.

Services	If Comcast makes available different levels of broadband access service (including, but not limited to, quality of service guarantees, maximum and minimum throughput capacity, and byte consumption per customer) to any Comcast broadband access service customers, Comcast shall make those levels of service available to the unaffiliated ISPs with whom it has contracted for access. Comcast shall include in the wholesale service all telephony or video features that Comcast provides as part of its own stand-alone broadband access service.
Ordering	Comcast shall allow customers to select an ISP by a method that does not discriminate in favor of Comcast's affiliates on the basis of affiliation, including when the customer chooses a Comcast bundled offering. At a minimum, Comcast shall allow customers to obtain a list of unaffiliated ISPs by calling their local Comcast customer service representative and requesting such a list. Whenever a customer requests a listing of unaffiliated ISPs, Comcast shall provide the list in a reasonable and timely manner. Such list shall not discriminate in favor of Comcast's affiliates.
Network Usage	Comcast shall not interfere or discriminate in any way, directly or indirectly, with content passed in either direction along the bandwidth contracted for and being used by any ISPs with whom Comcast has an Agreement. Comcast shall make available to the unaffiliated ISPs any network flow monitoring data (regarding data transport between the ISPs' connection point to the broadband network and a customer's location) or usage accounting that is available to Comcast's personnel. The Agreements shall contain a clause warranting that, to the extent Comcast provides any Quality of Service mechanisms, caching services, technical support customer services, multicasting capabilities, address management and other technical functions of the broadband network that affect customers' experience with their ISP, Comcast shall provide them in a manner that does not discriminate in favor of Comcast's affiliated ISP on the basis of affiliation.
Marketing	The unaffiliated ISPs shall be permitted to market their services to Comcast broadband access service customers and Comcast shall be prohibited from restricting the ability of any current or prospective Comcast customers to select and initiate service from any ISP with whom Comcast has an Agreement. The unaffiliated ISPs shall not be required to include any content or provide marketing as a condition of obtaining broadband access service. Comcast shall not solicit the customers of the unaffiliated ISPs based on information in Comcast's records (*e.g.*, prequalification, ordering, or repair information) to purchase or switch to Comcast's service.
Dispute Resolution	The FCC shall be permitted to hear and resolve disputes that arise from any of the mandated merger conditions.

Confidentiality — The Agreement shall not prevent the unaffiliated ISPs from disclosing the terms of the contract or facts relating to any dispute to the FCC under the FCC's confidentiality procedures.

ENFORCEMENT: Disputes concerning Comcast's compliance with this condition shall be adjudicated by the FCC through the filing of a formal complaint and such disputes shall be resolved within sixty (60) days of the filing of the complaint.

APPENDIX 3

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

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

DECLARATION

I, Samuel R. DeSimone, Jr., General Counsel and Secretary, EarthLink, Inc. hereby declare that the facts contained in the EarthLink Reply to Opposition to Petition to Condition or Deny, filed with the Federal Communications Commission on August 19, 2010, are true and correct to the best of my knowledge and belief.

Samuel R. DeSimone, Jr.

August 19, 2010