Before the
Federal Communications Commission
Washington, D.C. 20554

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

REPLY COMMENTS OF TIME WARNER CABLE INC.

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I. INTRODUCTION AND SUMMARY

Time Warner Cable Inc. ("TWC") offers video, voice, and broadband data services to customers in 28 different states, and currently serves approximately 14.7 million customers. In March 2009, Time Warner Inc. and TWC formally separated in a complete spin-off, leaving TWC as principally a non-vertically integrated multichannel video programming distributor ("MVPD").[1] TWC respectfully submits these reply comments as a participant with significant interest in the competitive landscape for MVPD and broadband services and in the impact that any Commission action may have on that landscape.

Many of the comments filed in this proceeding raise long-standing issues that various parties have with Comcast irrespective of the transaction with NBCU, and thus tend to implicate matters of interest to all MVPD and broadband providers.[2] The Commission's license transfer proceedings should not, however, become a forum to raise every conceivable grievance with either applicant. This proceeding must, at most, remain focused on the Commission's public interest analysis as applied to the transaction, and any conditions imposed on the applicants must be narrowly-tailored to remedy specific harms arising from it.

These reply comments respond to specific conditions proposed by commenters that are inappropriate because they lack the requisite nexus to the proposed transaction, or

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[1] Certain TWC systems offer their own local news, sports, and community affairs programming. (TWC also holds a minority interest in Sportsnet New York.)

[2] *See* Jeff Bliss & Todd Shields, *Catch-Up Time for Comcast Rivals*, Bloomberg Businessweek (July 22, 2010), *available at* http://www.businessweek.com/magazine/content/10_31/b4189031847214.htm ("As federal review of the Comcast-NBC Universal merger goes into high gear, rivals know this is 'ask-for' season and seek concessions.").

are harmful because of their potential to distort competition. Many of these proposed conditions, moreover, relate to issues of industry-wide concern that are not significantly impacted by the proposed transaction and are already the subject of Commission rulemaking proceedings. The Commission should defer, as it has many times in the past, to those rulemaking proceedings, where rules of more general applicability can be considered and, if found to be in the public interest and supported by the record, adopted. Even if the parties are willing to agree to the conditions addressed in these comments in order to expedite clearance of their transaction, the Commission should not impose conditions that lack the requisite transaction specificity, as they could serve as harmful precedents and could effectively pre-judge the outcome of pending rulemaking proceedings.

II. THE COMMISSION SHOULD DENY REQUESTS TO IMPOSE CONDITIONS THAT RESTRICT COMCAST'S ABILITY TO MANAGE ITS OWN BROADBAND NETWORK

Commenters, such as AOL, Dish Network/Echostar, and Earthlink, suggest that the Commission should, as a condition of approving the proposed transaction, impose restrictions on Comcast's ability to manage its own broadband network.[3] These suggestions are not designed to remedy transaction-specific harms, but are instead an attempt to use these license transfer proceedings to leapfrog the Commission's ongoing "net neutrality" proceedings in order to impose sweeping restrictions on a single firm. The Commission's rules governing broadband network management are of great

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[3] *See* Comments of AOL Inc. at 9-10 (June 21, 2010) ("AOL Comments"); Petition to Deny of Dish Network L.L.C. and Echostar Corporation at 28-29, 35-37 (June 21, 2010) ("Dish Petition"); Petition To Condition or Deny of Earthlink Inc. at 51-62 (June 21, 2010) ("Earthlink Petition"). Unless otherwise noted all citations to comments and other filings have been submitted in MB Docket 10-56.

industry-wide concern and should not be imposed in an *ad hoc* manner that would distort competition and circumvent the existing proceedings designed to address precisely the same issues.

A. The proposed restrictions on Comcast's broadband network management do not attempt to remedy transaction-specific harms

Under recent Commission precedent, the Commission may only act "to impose and enforce narrowly tailored, transaction-specific conditions that ensure that the public interest is served by the transaction."[4] Following that standard, the Commission "will impose conditions only to remedy harms that arise from the transaction (*i.e.*, transaction-specific harms) and that are reasonably related to the Commission's responsibilities under the Communications Act and related statutes."[5] When reviewing prior license transfers, the Commission has recognized and "discourage[d] the temptation and tendency for parties to use the license transfer review proceeding[s] as a forum to address or influence

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[4] *News Corporation and The DirecTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, 23 FCC Rcd 3265, 3279, ¶ 26 (2008) ("*DirecTV-Liberty Media Order*"); *Applications for Consent to the Assignment and/or Transfer of Control of Licenses from Adelphia Communications Corporation, Assignors, to Time Warner Cable Inc., Assignees*, Memorandum Opinion and Order, 21 FCC Rcd 8203, 8219, ¶ 26 (2006) ("*Adelphia Order*"); *Applications of Nextel Communications, Inc. and Sprint Corporation For Consent to Transfer Control of Licenses and Authorizations*, 20 FCC Rcd 13967, 13978-79, ¶ 23 (2005); *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation For Consent to Transfer Control of Licenses and Authorizations*, 19 FCC Rcd 21522, 21545-46, ¶ 43 (2004) ("*AT&T-Cingular Order*").

The transaction review standard applied in the foregoing cases, first articulated in *Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, Memorandum Opinion and Order, 12 FCC Rcd 19985, 20008-09, ¶¶ 29-36 (1997) ("*Bell Atlantic/NYNEX Order*"), should be contrasted with the more traditional analysis under Section 310(d) of the Communications Act. *See, e.g.*, *Astroline Commc'ns Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988). While TWC takes no position regarding whether the newer standard is appropriate for transactions involving major market television stations, TWC submits that the traditional Section 310(d) approach properly applies to transactions involving assignments or transfers of FCC authorizations that are not material to the applicants' business.

[5] *DirecTV-Liberty Media Order*, 23 FCC Rcd at 3279, ¶ 26; *Adelphia Order*, 21 FCC Rcd at 8219, ¶ 26 (2006).

various disputes with one or the other of the applicants that have little if any relationship to the transaction or to the policies and objectives of the Communications Act."[6]

AOL and Dish Network suggest that the Commission should impose its proposed "net neutrality" (also referred to as "Open Internet") rules on Comcast as a condition of approving the transaction.[7] The premise of their proposals is that Comcast could impede or degrade Internet content from unaffiliated content providers, particularly online video providers, that is carried on Comcast's broadband network. Even if this premise had a basis in fact – which it does not[8] – the issue presented is not transaction-specific. The transaction will not change Comcast's ability to disadvantage unaffiliated content providers because it does not affect, let alone impair, competition among broadband providers.[9] Comcast will face the same competitive landscape comprised of competitors that have their own broadband networks as well as standalone, independent Internet service providers ("ISPs") after the transaction as it did before. NBCU does not own broadband network assets nor does it operate as an ISP.[10]

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[6] *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, Memorandum Opinion and Order, 16 FCC Rcd 6547, 6550, ¶ 6 (2001) ("*AOL-Time Warner Order*").

[7] *See* AOL Comments at 9-10; Dish Petition at 28-29, 35-37.

[8] TWC, along with others, has explained in other Commission proceedings that this argument is baseless. *See generally* Comments of Time Warner Cable Inc., GN Docket No. 09-191, WC Docket No. 07-52 (Jan. 14, 2010) ("TWC Net Neutrality Comments"); Reply Comments of Time Warner Cable Inc., GN Docket No. 09-191, WC Docket No. 07-52 (Apr. 26, 2010) ("TWC Net Neutrality Reply Comments").

[9] *See Preserving the Open Internet Broadband Industry Practices*, Notice of Proposed Rulemaking, GN Docket No. 09-191, WC Docket No. 07-52, FCC 09-93, ¶ 70 (2009) (explaining that "price and quality discrimination" is more likely to have "adverse effects" when "effective competition is lacking").

[10] The transaction likewise does not materially alter Comcast's incentives to discriminate against unaffiliated Internet content providers. Comcast is already vertically integrated with its own programming content, and it already offers its own online video services through the Fancast and Fancast Xfinity platforms. But even if the Commission were to find sufficient potential risk of preferential treatment to

Earthlink requests that the Commission require Comcast to provide wholesale, unbundled broadband access to at least four independent ISPs.[11] The premise of Earthlink's proposal, like AOL's and Dish Network's, is its contention that Comcast has the ability to manage its own broadband network in a manner that impedes or degrades Internet content from unaffiliated providers. Although Earthlink proposes a different remedy, the purported harm it identifies is the same and thus suffers the same defect, *i.e.*, a lack of nexus to the transaction given that the transaction does not affect competition among broadband providers.

Earthlink models its request on the conditions imposed by the FTC (and supplemented by the Commission) in approving the transaction between AOL and Time Warner Inc.[12] The FTC's key finding to support those conditions, however, was that the transaction would harm competition by combining horizontal broadband competitors that were "two of the most significant broadband ISP competitors in Time Warner cable areas" (AOL and Time Warner's Road Runner).[13] Although Comcast is the largest provider of residential broadband access services, the transaction does not enhance Comcast's competitive position in the broadband market, unlike as alleged in AOL-Time

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warrant intervention, there are more narrowly-tailored, transaction-specific conditions to remedy the situation than the proposals to apply the full regime of proposed "net neutrality" rules on Comcast.

[11] Earthlink Petition at 51-62. Dish Network proposes a similar condition requiring Comcast to provide its broadband services at wholesale rates to other ISPs. Dish Petition at 35.

[12] Earthlink Petition at ii.

[13] *America Online, Inc. and Time Warner Inc.*, Analysis of Proposed Consent Order To Aid Public Comment, 131 F.T.C. 829, 880-81 (2001) (stating that the FTC's complaint alleges that "the relevant broadband ISP markets are or are likely to become highly concentrated as a result of the merger"); *see also AOL-Time Warner Order*, 16 FCC Rcd at 6553, 6584-87, ¶¶ 17, 85-88.

Warner. Thus, Earthlink's analogy to the AOL-Time Warner conditions is fundamentally inapposite.[14]

The Commission should deny these requests to impose exceedingly broad conditions that lack a sufficient nexus to the transaction.

B. Broadband network management is more appropriately addressed in the Commission's existing proceedings of general applicability

The Commission has repeatedly eschewed the use of license transfer proceedings to address industry-wide issues that have little or no relation to the proposed transaction and that are more appropriately addressed in the context of "a broader proceeding of general applicability."[15] "By addressing these issues in the context of a rulemaking, [the Commission is] able to develop a comprehensive approach based on a full record that applies to all similarly-situated [providers]."[16] This is a sound approach that should be adhered to in this case. Conditions imposed in the context of license transfer proceedings have the potential to become a *de facto* regulatory baseline that dictates the direction of

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[14] Moreover, market developments following the AOL-Timer Warner merger illustrate why the FCC should exercise caution and restraint when deciding whether to impose conditions on a transaction in a dynamic, technology-driven market. In that case, the feared power of AOL as an ISP never materialized, and AOL along with other major dial-up ISPs abandoned their business model in the face of technological and consumer changes. The AOL-Time Warner merger is thus a powerful demonstration that neither commenting parties nor regulators can foresee accurately how technology and consumer preferences will evolve in fast growing, technology-intensive areas.

[15] *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Telecommunications, Inc., Transferor To AT&T Corp., Transferee*, Memorandum Opinion and Order, 14 FCC Rcd 3160, 3183, ¶ 43 (1999) ("*TCI-AT&T Order*"); *see also Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18433, 18462, ¶ 55 & n.157 (2005) ("*Verizon-MCI Order*") (stating concerns raised by comments are "more appropriately addressed in our existing rulemaking proceedings") (quoting *AT&T-Cingular Order*, 19 FCC Rcd at 21592, ¶ 183); *Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, 17 FCC Rcd 23246, 23257, ¶ 31 (2002) (noting that "[t]he Commission's pending rulemaking on cable horizontal ownership is the more appropriate forum" to address certain concerns raised by commenters).

[16] *Verizon-MCI Order*, 20 FCC Rcd at 18462, ¶ 55.

pending, or future, rulemaking. Thus, industry participants, like TWC, have a keen interest to see that the Commission does not preordain rules of general applicability through its actions in reviewing this isolated transaction, irrespective of whether the parties are willing to accept certain conditions in order to obtain approval for their transaction.

The cornerstone of the comments discussing hypothetical harms arising out of Comcast's broadband network management is, in fact, a much broader grievance with the current state of the Commission's "net neutrality" rules. Those issues with the Commission's rules should be addressed in the context of the Commission's ongoing proceedings designed to resolve precisely those concerns, with the benefit of a full factual record and broad industry participation.[17] If any such rules are needed (which TWC disputes)[18] and are within the Commission's power to adopt, the public interest would best be served by uniform rules that maintain a level playing field.[19]

None of the commenters advocating restrictions on Comcast's network management practices explain why their issues could not be addressed in the Commission's "net neutrality" proceedings, or why the proposed Comcast/NBCU transaction should be singled out for unique treatment. If the Commission ultimately promulgates new regulations for "net neutrality," then Comcast will be subject to those

[17] *See Framework for Broadband Internet Service*, Notice of Inquiry, GN Docket No. 10-127, FCC 10-114 (2010); *Preserving the Open Internet Broadband Industry Practices*, Notice of Proposed Rulemaking, GN Docket No. 09-191, WC Docket No. 07-52, FCC 09-93, ¶ 70 (2009).

[18] *See generally* TWC Net Neutrality Comments; TWC Net Neutrality Reply Comments.

[19] *See TCI-AT&T Order*, 14 FCC Rcd at 3183, ¶ 43 (noting "Commission precedent" and concluding: "this is like other cases where the Commission has declined to consider, in merger proceedings, matters that are the subject of rulemaking proceedings before the Commission because the public interest would be better served by addressing the matter in a broader proceeding of general applicability").

rules and no separate obligation on the same subject is needed. If new rules are not adopted, or if the final rules differ from the Commission's current proposal, then specific conditions imposed in connection with this transaction could significantly alter the competitive playing field against a single entity, which in turn could distort competition and harm consumers.

III. THE COMMISSION SHOULD NOT IMPOSE CONDITIONS THAT IMPEDE THE DEPLOYMENT OF PARTICULAR BUSINESS MODELS FOR ONLINE VIDEO SERVICES

Commenters such as WealthTV argue that the proposed transaction will adversely affect the market for online video distribution, and request that the Commission impose various conditions, including a prohibition against Comcast requiring authentication of an existing cable subscription for online video services.[20] But these commenters fail to explain how Comcast's use of authentication presents a transaction-specific harm, or even how authentication harms the public interest. Authentication allows MVPDs to provide their subscribers with additional access to television content obtained, often at considerable cost, from programmers. This business model is a logical, pro-competitive extension of traditional MVPD services that encourages greater investment and innovation in online video content and services, and provides additional ways for MVPD customers to access services from their providers. It therefore increases, rather than decreases, consumers' viewing options.

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[20] *See* Petition to Deny of WealthTV L.P. at 21-22, 35 (June 21, 2010) ("WealthTV Petition"); *see also* Petition to Deny by Bloomberg L.P. at 67 (June 21, 2010) ("Bloomberg Petition"); Petition to Deny or in the Alternative Impose Conditions, Communications Workers of America at 55 (June 21, 2010) ("CWA Petition"); Letter from U.S. Sen. Al Franken to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56 at 10-11 (June 21, 2010) ("Franken Letter").

Like many other conditions suggested by commenters, a prohibition on the use of authentication also lacks any nexus to the transaction. WealthTV and Bloomberg nevertheless insinuate that Comcast's use of authentication may lead Comcast to impose contractual restrictions on programmers' ability to offer their content on other Internet platforms.[21] Putting aside the merits of this hypothesis, these contentions are an attack on Comcast's existing online video services that lack connection to its proposed transaction with NBCU. The Commission should not entertain this type of self-serving attempt to resolve preexisting disputes with Comcast that are wholly independent of the proposed transaction.[22]

The comments opposing Comcast's use of authentication, furthermore, fail to provide a coherent theory explaining how authentication harms the public interest, or conversely, how prohibiting authentication would benefit the public interest. A variety of evolving business models exists for online video services, and allowing these models to develop unimpeded by regulation will most effectively advance the public interest. The Commission should not use this proceeding to disrupt Comcast's existing practices by dictating a particular business model for online video services; and should not use this proceeding to introduce regulations on a burgeoning area of the video marketplace.

IV. THE APPLICABILITY OF THE PROGRAM ACCESS RULES TO OVER-THE-TOP PROVIDERS SHOULD NOT BE ADDRESSED IN THIS PROCEEDING

Several commenters ask the Commission to impose a condition on Comcast-NBCU that would allow so-called "over-the-top" ("OTT") providers, also referred to as

[21] WealthTV Petition at 21-22; Bloomberg Petition at 67.

[22] *See AOL–Time Warner Order, supra* note 6 and accompanying text.

"online video program distributors" ("OVPDs"), to utilize the program access rules with respect to Comcast-NBCU programming.[23] Like the conditions discussed above, a remedy that would provide OTT providers program access rights lacks transaction specificity.

Online video distribution is an evolving business model with wide-ranging implications well beyond the transaction at hand. The imposition of any regulation regarding online video distribution, even if imposed only on the parties to this transaction, would be unprecedented. To the extent that the FCC has jurisdiction to apply its program access regime to Internet-based entities, and to the extent there is any basis for initiating such an inquiry, the wide-range of legal issues and implications of applying the program access rules to a new form of media would best be addressed in a rulemaking with general applicability.[24]

The program access rules have never been applied to online video, and there are myriad reasons why they should not be. The underlying purpose of the program access rules is to address potential foreclosure by a programmer that is vertically integrated with an MVPD. The rules are based on the factual premises that "access to vertically integrated programming continues to be necessary in order for competitive MVPDs to remain viable in the marketplace" and that cable operators "continue to dominate the

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[23] *See* AOL Comments at 8; CWA Petition at 56; Franken Letter at 10.

[24] *See, e.g.*, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Southern New England Telecommunications Corporation, Transferor to SBC Communications, Inc., Transferee*, 13 FCC Rcd 21292, 21306, ¶ 29 (1998); *Bell Atlantic/NYNEX Order*, 12 FCC Rcd 19985, 20083, 20087-88, ¶¶ 210, 220-221 (1997).

MVPD marketplace."[25] Whatever the merit of these findings in the traditional MVPD context, they cannot be made with respect to the ability of OTT providers to compete effectively without access to any particular vertically integrated content, or the level of competition in the online video marketplace.[26]

Moreover, the vertical foreclosure theory presumes that a programmer's refusal to license to an unaffiliated MVPD is an economic sacrifice in furtherance of an anticompetitive attempt to reap greater rewards for its affiliated MVPD. But a programmer may have numerous, pro-competitive business justifications for refusing to license, or for licensing on substantially different terms, content to a particular OTT provider (*e.g.*, transmission quality and technology platform, ownership of necessary copyright licenses, available advertising revenue, and potential dilution of its content distributed elsewhere). Indeed, many content owners that are not vertically integrated with an MVPD focus their online distribution through their own websites and distribute their content on a highly selective basis to other OTT providers, or choose not to distribute online at all.

Caution is further warranted in light of the fact that OTT providers currently operate in an undefined regulatory space. A recent decision by the Media Bureau strongly suggests that OTT providers are not properly classified as MVPDs.[27] The

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[25] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 17 FCC Rcd 12124, 12130-31, ¶ 4 (2002); *see also Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791, 17816, ¶ 38 (2007).

[26] At a minimum, the record before the Commission is not adequate to find the underlying facts required to reach the conclusions necessary to support extending the program access rules to online video.

[27] *See Sky Angel U.S., LLC*, DA 10-679, ¶ 7 (MB 2010).

Bureau concluded that OTT providers do not meet the statutory definition for an MVPD because these entities fail to offer "channels" of programming as defined by Section 602 of the Communications Act.[28] Under the Bureau's initial determination that OTT providers are not MVPDs, the extent of OTT's regulatory responsibilities is unclear. For example, it is not certain whether OTT providers would have to provide closed captioning or EAS information, nor is it known whether OTT providers would have "must carry" obligations or be subject to the network non-duplication, syndicated exclusivity or sports blackout rules. To the extent these issues need to be addressed, the full range of OTT providers' regulatory responsibilities should be considered in a proceeding of industry-wide scope instead of adopting a standalone condition that would purport to give online entities rights under the program access rules.

The copyright implications of the requested remedy also are problematic. The Copyright Office clearly distinguished online programming distribution from MVPDs' linear distribution, finding that online distribution of television broadcast signals does not fall within the cable compulsory license.[29] The Copyright Office's findings are further evidence that Congressional guidance in this area is needed before the Commission proceeds, especially with respect to content distribution on the Internet. Moreover, the fact that NBCU may have obtained MVPD distribution rights for programming included

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[28] *Id.*; *see* 47 U.S.C. § 522(4), (13).

[29] *See* Register of Copyrights, *Satellite Home Viewer Extension and Reauthorization Act Section 109 Report* 187-89 (2008); *see also* Copyrighted Broadcast Programming on the Internet, Hearing Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary, 106th Cong. (2000) (statement of Marybeth Peters, Register of Copyrights), *available at* http://www.copyright.gov/docs/regstat61500.html (expressing that a statutory copyright license for Internet distribution was inappropriate).

on its broadcast or cable networks does not necessarily give NBCU the authority to license such content for Internet distribution.[30]

In sum, the public policy, legal, and factual issues surrounding proposals to force video programmers to license content to emerging (and rapidly evolving) online distribution platforms go far beyond the scope of the Commission's review of the Comcast/NBCU transaction, as well as the established rationale for the existing program access rules. The Commission should not use this transaction as a basis to impose new rules uniquely on a single entity, particularly where – as here – such action could not only distort the marketplace and undermine competition, but could prejudice the Commission's ability to address these complex and wide-ranging issues in a more comprehensive fashion.

V. MODIFICATIONS TO THE COMMISSION'S PROGRAM CARRIAGE COMPLAINT PROCEDURES ARE MORE APPROPRIATELY ADDRESSED IN THE PENDING GENERAL RULEMAKING

A. The Commission should reject proposals that would impose revised program carriage complaint procedures on the applicants

Opponents of the Comcast/NBCU transaction propose sweeping changes to the procedures governing program carriage complaints, including a revised standard for establishing a *prima facie* case, a shift in the burden of proof, and an artificial timetable for decisions. The Commission should reject these proposals because they are not specific to the transaction under review in this proceeding and are presently the subject of

[30] Comcast Corporation, General Electric Company, NBC Universal, Inc., Opposition to Petitions to Deny and Response to Comments at 202-203 (July 21, 2010) ("Comcast-NBCU Opposition").

an industry-wide general rulemaking proceeding.[31] That rulemaking is the appropriate forum in which to address these matters as they apply to the entire cable industry.[32]

TWC and others have demonstrated in the pending rulemaking proceeding that no changes, either procedural or substantive, to the program carriage rules are warranted, and TWC incorporates its comments in that proceeding herein by reference.[33] TWC is further concerned that any action the Commission takes in this license transfer proceeding with respect to rules governing program carriage complaints may have spillover effects on the pending rulemaking. Nevertheless, should the Commission determine that the proposed conditions relating to the program carriage rules warrant consideration as part of its review of this transaction, the discussion below provides additional reasons for deciding against their adoption here.

B. The Commission should not dilute the *prima facie* standard

The Commission's program carriage rules were designed principally as a safety valve to ensure that the public was not denied access to diverse sources of programming.[34] Among other things, the rules prohibit MVPDs from engaging in conduct that unreasonably restrains the ability of an unaffiliated programmer to compete

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[31] Moreover, assuming the rules as currently framed are lawful, all of these proposals would clearly violate due process and the First Amendment by compelling speech based merely on presumptions, without requiring any proof of wrongful conduct.

[32] *Implementation of Section 612 of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992 and Section 616 of the Cable Television Consumer Protection and Competition Act of 1992*, Notice of Proposed Rulemaking, 72 Fed. Reg. 39370 (July 18, 2007).

[33] *See* Comments of Time Warner Cable Inc., MB Docket No. 07-42 (Sep. 11, 2007); Reply Comments of Time Warner Cable Inc., MB Docket No. 07-42 (Oct. 12, 2007).

[34] The source of the Commission's statutory authority to regulate program carriage agreements is Section 616 of the Communications Act, as amended by the 1992 Cable Act. 47 U.S.C. § 536.

fairly by discriminating on the basis of affiliation in the selection, terms, or conditions for carriage. Under the procedures adopted by the Commission, the Media Bureau is required to make an initial determination as to whether the complainant submitting a program carriage complaint has established a *prima facie* case of a violation and to dismiss immediately complaints that fail to meet this test.[35] In order to make out a *prima facie* case, a complaint must be supported by "documentary" evidence or testimony and "may not merely reflect conjecture or allegations based only on information and belief."[36]

WealthTV nonetheless proposes that the Commission modify the *prima facie* standard as applied to the applicants so that a complainant would meet its initial burden merely by alleging the elements of the discrimination offense.[37] WealthTV's proposal would essentially read the *prima facie* threshold out of the program carriage rules. Applying the approach proposed by WealthTV to program carriage complaints involving the applicants (and, indeed, any program carriage complaint) would allow virtually any program carriage complaint that claims a denial of carriage to proceed to the hearing stage and would result in an enormous waste of resources for both the Commission and for the parties to the complaint.

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[35] Successfully making out a *prima facie* case does not end the matter in the complainant's favor. Rather, it simply means that the case can proceed to discovery (to the extent deemed necessary) and a full consideration of both sides' arguments. *Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report and Order, 9 FCC Rcd 2642, ¶ 24 (1993) ("*Program Carriage Order*").

[36] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage,* Memorandum Opinion and Order, 9 FCC Rcd 4415, ¶ 33 (1994).

[37] WealthTV Petition at 35.

C. The burden of proof in program carriage disputes should remain with the complainant

The Tennis Channel proposes conditions that would shift the burden of proof to Comcast/NBCU to prove by a preponderance of the evidence that a decision to carry an affiliated network on different terms and conditions than a competing unaffiliated network is based "entirely" on factors unrelated to affiliation or non-affiliation.[38] This proposal turns on its head the general rule that complainants bear the burden of proof, which "has historically been the case in American jurisprudence."[39]

No party has explained why the Commission should consider adopting the proposed burden shifting condition in this proceeding, particularly since Comcast itself is currently a party to an adjudicatory proceeding involving WealthTV in which the proper allocation of the burden of proof is squarely at issue.[40] Absent a compelling reason to do so, it would be highly inappropriate for the Commission to short-circuit the review process in the WealthTV proceeding, which also affects other cable operators named as defendants in that case, by singling out Comcast for a condition that would depart from

[38] Comments of the Tennis Channel, Inc. at 17 (June 21, 2010) ("Tennis Channel Comments").

[39] *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, Report and Order, 24 FCC Rcd 9543, ¶ 20 (2009) ("[T]he Commission always requires the petitioner to produce sufficient evidence and analysis to warrant granting the relief sought"); *see also Gross v. FBL Fin. Servs., Inc.,* 129 S. Ct. 2343, 2351 (2009).

[40] Specifically, WealthTV currently is seeking Commission review of the decision of the Administrative Law Judge ("ALJ") in WealthTV's program carriage case against, among others, Comcast. Among the aspects of the decision being contested by WealthTV is the ALJ's determination that the complainant in a program carriage case bears both the burden of proceeding with the introduction of evidence and the burden of proof with regard to each and every element of its claim of discrimination and its proposed remedy. *Herring Broad., Inc. d/b/a WealthTV v. Time Warner Cable Inc., et al.*, MB Docket No. 08-214, Order, FCC 08M-44 at 2 (ALJ rel. Oct. 23, 2008) (assigning WealthTV "both the burden of proceeding with the introduction of evidence and the burden of proof"); *see also* Mem. Op. and Order, FCC 08M-47 at 3 (ALJ rel. Nov. 20, 2008) (WealthTV must "present, and prove" its case), *modified by erratum* (ALJ rel. Nov. 21, 2008).

"the usual practice of requiring that the party seeking relief by Commission order to bear the burden of proving that the violations occurred"[41] and that raises substantial constitutional issues.[42]

D. Arbitrary deadlines for review of program carriage complaints would violate due process

WealthTV, the Communications Workers of America ("CWA"), and Senator Franken urge the Commission to establish specific timetables for resolution of program carriage disputes involving the merged entity.[43] The Commission should reject these proposals because the establishment of an artificially truncated process would result in a denial of due process and is likely to produce results contrary to the public interest.

Indeed, in its initial rulemaking implementing the program carriage rules, the Commission expressly rejected a proposal that it adopt a 90-day complaint resolution deadline, finding that such an artificial deadline was not "practicable or advisable" in light of "the complexity of the issues that may be raised in [program carriage disputes]."[44] Rather than imposing burdensome constraints on the process, the

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[41] *See, e.g., Schaffer* v. *Weast*, 546 U.S. 49, 56 (2005) (noting that where the statute is silent the "ordinary default rule [is] that plaintiffs bear the risk of failing to prove their claims").

[42] Although the ALJ did not address the issue in the Recommended Decision, inverting the burden of proof would be fundamentally incompatible with cable companies' First Amendment rights. Saddling defendants with the burden of disproving discrimination by showing in each instance a legitimate, non-discriminatory justification would result in most instances in a defendant being found liable based on the exercise of its legitimate editorial discretion. In so casually overriding the editorial choices of cable operators who are driven by competition to respond to viewers' interests, programming choices would instead be made by, and limited by, arbitrary burden-shifting rules. The statute and implementing regulations must be applied in a manner that gives due deference to cable companies' First Amendment rights and avoids chilling cable operators' speech.

[43] CWA Petition at 57; Franken Letter at 10; WealthTV Petition at 34-36.

[44] *Program Carriage Order*, 9 FCC Rcd at 2655, ¶ 32 n. 52.

Commission simply directed the staff, including ALJs, to "resolve all program carriage disputes as expeditiously as possible."[45]

There is no justification for departing from this approach in cases involving Comcast/NBCU. It is noteworthy that the Media Bureau's attempt to impose a 60-day deadline for completion of a hearing in the WealthTV case was rejected by two different ALJs as well as the Commission based on fairness and due process concerns.[46] The Commission's sensitivity to such matters is no less appropriate to cases involving the merged entity than it was in the WealthTV case. Therefore, the Commission should reject proposals to establish arbitrary program carriage complaint deadlines as a condition to its approval of the proposed transaction.

VI. THE COMMISSION SHOULD NOT PLACE RESTRICTIONS ON NBC'S ABILITY TO LICENSE PROGRAMMING DIRECTLY TO MVPDS

Subsequent to the filing of the Application, Comcast and the NBC Television Affiliates Association ("NBC Affiliates") entered into an "agreement" pursuant to which Comcast committed to take certain actions to address concerns raised by the NBC Affiliates regarding the proposed transaction.[47] The NBC Affiliates then signaled in their initial comments that they would support Commission approval of the proposed

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[45] *Id*.

[46] Judge Steinberg recognized that "it would be impossible to develop a full and complete record and afford the parties their due process rights" within this 60-day timeframe. *Herring Broad., Inc. d/b/a WealthTV v. Time Warner Cable Inc., et al.*, Mem. Op. and Order, MB Docket No. 08-214, FCC 08M-47, ¶ 7 (ALJ rel. Nov. 20, 2008). After he assumed responsibility for the case, Judge Sippel reaffirmed Judge Steinberg's decision. Pre-hearing Conference Transcript, MB Docket No. 08-214 (Nov. 25, 2008), at 104. The Commission itself later adopted these ALJ rulings. *Herring Broad., Inc. d/b/a WealthTV* v. *Time Warner Cable Inc., et al*., Order, 24 FCC Rcd 1581, ¶ 2 (2009).

[47] Letter from Michael H. Hammer, Willkie Farr & Gallagher LLP, Counsel for Comcast Corporation, and David H. Solomon, Counsel for NBC Universal, Inc. to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56 (June 23, 2010).

transaction provided that the Commission adopts as conditions the terms of this "agreement" and Comcast has replied that it has no objection to such action by the Commission.[48]

The fact that Comcast and the NBC Affiliates have agreed to specific conditions does not relieve the Commission of its duty to determine whether the adoption and implementation of those conditions would serve the public interest. Because the public interest would not be served by the adoption of a proposed "affiliate market integrity" condition that would bar NBCU from licensing a Comcast cable system to transmit a "same-day linear feed" of NBCU network programming in the event the local NBC affiliate "withdraws its consent in the course of a retransmission consent dispute,"[49] the Commission should reject this particular condition.

When Congress gave broadcasters the option of electing retransmission consent instead of mandatory carriage in 1992, its goal was to promote the public's interest in the "universal availability" of broadcast television.[50] According to Congress, cable carriage of local broadcast signals was "necessary to serve the goals contained in section 307(b) of the Communications Act of 1934 of providing a fair, efficient, and equitable distribution of broadcast services."[51] Moreover, Congress fully expected that market conditions, as

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[48] *See* Comments of the NBC Television Affiliates at 14 (June 21, 2010) ("NBC Affiliates Comments"); Comcast-NBCU Opposition at 21-24.

[49] NBC Affiliates Comments at A-4. This condition would remain in effect until the later of ten years after consummation of the Transaction or the date on which any one of the other "big four" networks (CBS, ABC, or FOX) offers a direct, same-day linear feed of its network programming for transmission by a "major" cable operator on systems located in markets served by affiliates of the network. *Id*.

[50] See 138 Cong Rec. S667 (Jan. 30, 1992) (Sen. Inouye).

[51] Cable Television Consumer Protection and Competition Act of 1992, § 2(a)(9), Pub. L. No. 102-385, 106 Stat 1460 (1992).

they existed at the time must carry/retransmission consent was established, would ensure that these goals were met and that retransmission consent would not saddle consumers with runaway price increases or with threatened or actual service disruptions.

However, the recent surge in the cost of retransmission consents and in the number of retransmission consent negotiating impasses reveals that the system is no longer working the way Congress expected and that the retransmission consent regime now works against the purposes Congress created it to serve.[52] A broad coalition of MVPDs and consumer groups, supported by federal, state, and local officials, have called on the Commission to update and reform its rules governing the exercise of retransmission consent.[53] But regardless of what regulatory measures the Commission adopts to protect consumers, it should not erect additional barriers that would increase broadcasters' ability to misuse the retransmission consent process.

To the extent broadcast networks are willing to directly license their programming to MVPDs, the ability of broadcast stations to misuse the retransmission consent process would be reduced. If anything, the Commission should promote the availability of alternate sources for network programming; and under no circumstances should it foster attempts – such as the condition proposed by the NBC Affiliates that would restrain NBC from directly licensing its programming to MVPDs and thereby maintain those affiliates

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[52] *See, e.g.*, Letter from Senator John Kerry to Julius Genachowski, Chairman, FCC (March 3, 2010) (noting that "a lot has changed" since 1992 and expressing fear that recent retransmission consent disputes are "evidence that the retransmission consent regime has become outdated"). A copy of Senator Kerry's letter was appended as Exhibit A to the Petition for Rulemaking filed by TWC et al. in MB Docket No. 10-71.

[53] *See* generally MB Docket No. 10-71 and comments filed therein.

as the sole source of NBC network programming in local markets – to prohibit any network from increasing such competitive alternatives.

If the Commission were to impose this condition, it would in effect create a horizontal restraint under which a pair of potential sellers (NBCU and the NBC Affiliates) of the same product (NBC programming) to the same customer (Comcast) agree not to compete for that customer's business. Such a condition would inevitably drive up prices and encourage, rather than deter, further acts of negotiating brinksmanship on the part of NBC-affiliated stations. Consequently, the Commission's duty to put the public interest ahead of the private interests of Comcast and the NBC Affiliates dictates that the proposed condition be rejected. Moreover, the effects of this restraint would likely be broader, as the ability of NBC to license directly to any MVPDs would be curtailed if it were prohibited from entering into such arrangements with the nation's largest distributor.

VII. CONCLUSION

For the foregoing reasons, TWC requests that the Commission reject proposals to impose the aforementioned conditions on the applicants.

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