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

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

REPLY COMMENTS OF
ALLBRITTON COMMUNICATIONS COMPANY

August 19, 2010

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Summary

The proposed transaction would create a joint venture between the cable network assets of Comcast, the nation's largest multichannel video programming distributor ("MVPD") as well as the nation's largest broadband service provider, and the assets of NBCU, which owns and operates two national television broadcast networks (a Big 4 network, NBC, and a Hispanic language network, Telemundo) with local television station broadcast affiliates throughout the country, 10 NBC Network owned and operated television stations located in some of the nation's largest media markets, Telemundo Network owned and operated stations throughout the country, and a major television program and movie production studio, as well as certain online content assets. The resulting Comcast/NBCU media enterprise would possess extraordinary market power in local television markets throughout the nation.

Of particular concern to Allbritton is the potential for Comcast to use its newly concentrated market power in the Washington, D.C. market in a way that would threaten the existence of NewsChannel 8, Allbritton's award-winning, independent, local cable news channel, which is dependent on cable carriage for its survival. Ongoing negotiations between Allbritton and Comcast recently have highlighted the post-merger entity's ability and incentive to "tie" carriage of NewsChannel 8 to retransmission consent for Allbritton's local broadcast television stations in a way that will devalue subscriber fees paid for NewsChannel 8 by spreading those fees over retransmission consent rates for Allbritton's unrelated broadcast stations in distant markets and in other states. The devaluation of NewsChannel 8 would have direct financial benefits for Comcast's local NBC television station in the Washington market.

Comcast's ability to insist on tying carriage of NewsChannel 8 to retransmission consent for Allbritton's broadcast television stations is only one of several ways in which the post-merger entity will be positioned to use its unprecedented market power to disadvantage NewsChannel 8.

Post-merger, Comcast will have both the market power and the incentive to discriminate against NewsChannel 8 in such significant terms of carriage as channel placement and service tier, in order to favor WRC-TV (or a competing cable news channel of Comcast's own creation). Indeed, if the proposed transaction is consummated, Comcast will have no incentive at all to carry NewsChannel 8 and every incentive to remove it as a competitive threat in the Washington market by denying it the carriage via Comcast that is critical to its existence—in order to clear the way for Comcast to package NBC's national and local news content with Comcast's CN8 news service to create its own monopoly local news channel. The resulting anticompetitive benefits to Comcast are obvious, as is the potential harm to consumers in the Washington market, who would lose a longstanding and highly regarded source of local news and public affairs information.

The proposed transaction will also position Comcast to leverage its combined assets in the Washington, D.C. market, which will include virtually unfettered control over broadband distribution facilities in markets throughout the country, to engage in discriminatory sales and marketing practices to the detriment not only of NewsChannel 8, but also of Allbritton's political and public policy-oriented print news publication, *POLITICO*, and its associated website, POLITICO.com, Allbritton's recently launched Washington, D.C. local news website TBD.com, and other affiliated websites. And for many of the same reasons, the merger threatens harm to NewsChannel 8 (and other programmers) in the Washington market for local video advertising. Post-merger, the combined entity will control close to 40 percent of the relevant market and will have every incentive to engage in exclusionary conduct against independent video programmers, like NewsChannel 8, that rely upon Comcast and NBCU for distribution of their programming.

In short, post-merger, Comcast will be positioned to use its market power to suppress NewsChannel 8's ability to disseminate news, public affairs, and non-entertainment informational programming in the Washington market, to the competitive advantage of the combined Comcast/NBCU enterprise—and to the detriment of consumers in the Washington market who have long relied on NewsChannel 8's exceptional local news, public affairs, and informational programming. For these reasons, Allbritton opposes Commission approval of the transaction in the absence of binding conditions that will protect the existence of NewsChannel 8 in direct competition with NBC's owned and operated station.

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REPLY COMMENTS OF ALLBRITTON COMMUNICATIONS COMPANY

I.
Preliminary Statement

In response to the Public Notice, DA 10-457 (released March 18, 2010), in the above-referenced proceeding, Allbritton Communications Company ("Allbritton") submits these comments in reply to various comments and *ex parte* submissions filed in connection with the applications for consent to transfer of control of various licenses held by General Electric Company and NBC Universal, Inc. (collectively, "NBCU") to Comcast Corporation ("Comcast").

Allbritton owns and operates the award-winning, 24/7, local news programming service, NewsChannel 8, in the Washington, D.C. market and, through subsidiaries and affiliates, television stations affiliated with the ABC Television Network in seven markets: WJLA-TV, Washington, D.C.; WHTM-TV, Harrisburg, Pennsylvania; WSET-TV, Lynchburg, Virginia; WCIV, Charleston, South Carolina; WJSU-TV, Anniston, Alabama; WCFT-TV, Tuscaloosa, Alabama (WJSU-TV and WCFT-TV simulcast programming to the Birmingham market); KATV, Little Rock, Arkansas; and KTUL, Tulsa, Oklahoma. In addition, Allbritton and its affiliated stations each provide news and information through websites, including the recently launched local news site in Washington, D.C., TBD.com. A commonly-owned entity provides targeted political and public policy-oriented news and information through the print publication *POLITICO* and the associated website, POLITICO.com.

The proposed transaction would create a new media enterprise of unprecedented market power consisting of the cable network assets of Comcast, the nation's largest multichannel video programming distributor ("MVPD") as well as the nation's largest broadband service provider, and the assets of NBCU, which owns and operates, among other things, two national television broadcast networks (a Big 4 network, NBC, and a Hispanic language network, Telemundo) with local television station broadcast affiliates throughout the country, 10 NBC Network owned and operated television stations located in some of the nation's largest media markets, Telemundo Network owned and operated stations throughout the country, and a major television program and movie production studio. The transaction would arm the new Comcast/NBCU media enterprise with an extraordinary degree of market power in local television markets in various regions of the country. Numerous parties have voiced concern about the anticompetitive consequences of the merger, both downstream (in the video programming distribution marketplace) and upstream (in the retransmission consent marketplace). *See, e.g.,* Petition to Deny of Bloomberg, L.P. (June 21, 2010) ("*Bloomberg Petition*"); Petition to Deny of DISH Network L.L.C. and EchoStar Corp. (June 21, 2010); Petition to Deny of the National Coalition of African American Owned Media (June 21, 2010).

Allbritton shares those concerns. In particular, the potential for use by Comcast of its concentrated market power in the Washington, D.C. market threatens the very survivability of NewsChannel 8. Allbritton is concerned that Comcast will abuse its market power to suppress, for competitive reasons, the ability of NewsChannel 8 to disseminate news, public affairs, and non-entertainment informational programming in the Washington market. Comcast, plainly, would have both the incentive and ability to do so. Whatever other issues the Commission must address in this proceeding,[1] the continued viability of NewsChannel 8 (and other similarly situated channels) raises special public interest concerns because the fundamental policy issue here involves fair competition in the dissemination of *news*, *public affairs*, and *public interest programming*. These concerns are squarely within the province of this Commission. Ensuring the public's continued access to independent and diverse sources of *news* and *information* programming from Commission licensees is a basic responsibility of this Commission, and it has, historically, been a matter of special concern and interest to the Commission. *See, e.g., Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Time Warner, Inc. and Its Subsidiaries, Assignor/Transferor to Time Warner Cable, Inc. and Its Subsidiaries, Assignee/Transferee*, Memorandum Opinion and Order, 24 FCC Rcd 879, 885 ¶ 11 (2009) (The Communications Act embodies "a deeply rooted preference for preserving and enhancing competition in relevant markets . . . [and] ensuring a diversity of information sources and services to the public") (citations omitted); *FCC Launches Examination of the Future of Media and Information Needs of Communities in a Digital Age*, Public Notice, 25 FCC Rcd 384, 384 (2010) (establishing as the Commission's objective in this proceeding "to assess whether all

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[1] Several commenters have observed that the proposed transaction stands to affect Comcast's downstream competitors (that is, other MVPDs) as well as the upstream market for retransmission consent and carriage of network stations and have proposed conditions to ameliorate potential effects of the merger both downstream and upstream. Allbritton takes no position with respect to the potential anticompetitive effects of the proposed transaction in the downstream market for distribution of programming but shares the concerns expressed by various commenters about the potential anticompetitive effects of the proposed transaction in the upstream market for retransmission consent and carriage of broadcast stations.

Americans have access to vibrant, diverse sources of news and information that will enable them to enrich their lives, their communities and our democracy"); *Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order and Third Further Notice of Proposed Rulemaking, 23 FCC Rcd 5922, 5924 ¶ 2 (2007) ("'[I]t has long been a basic tenet of national communications policy that the widest dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.'") (quoting *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 663-64 (1994)); *Review of the Commission's Regulations Governing Television Broadcasting*, Memorandum Opinion and Second Order on Reconsideration, 16 FCC Rcd 1067, 1068 ¶ 2 (2001) (describing "fostering competition in the markets in which broadcast stations compete" and "preserving a diversity of information sources, especially at the local level" as "two of [the Commission's] most fundamental goals in broadcast ownership"); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 567 (1990) ("Safeguarding the public's right to receive a diversity of views and information over the airwaves is . . . an integral component of the FCC's mission."), *overruled in part on other grounds, Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

Moreover, the ability of Comcast to leverage its combined assets in the Washington, D.C. market to engage in discriminatory sales and marketing practices will adversely affect, not only NewsChannel 8, but also Allbritton's POLITICO.com, TBD.com, and other affiliated websites to the extent that Comcast/NBCU retains unfettered control over broadband distribution facilities in the Allbritton markets. Accordingly, Allbritton opposes Commission approval of the transaction in the absence of imposition by the Commission of binding conditions that will protect the existence of NewsChannel 8 in direct competition with NBC's owned and operated station.[2]

II.
Binding Conditions Are Required To Protect NewsChannel 8 Against Certain Anticompetitive Consequences Of The Proposed Transaction

Allbritton provides original television programming in the Washington, D.C. local television market on two channels: WJLA-TV (ABC) and NewsChannel 8, a 24-hour local cable news channel. Both channels depend heavily on cable carriage for their survival. Because the proposed transaction stands (among other things) to alter dramatically the distribution of news programming in the Washington market, Allbritton is particularly troubled by the potential anticompetitive effects of the proposed transaction on its locally-owned, independent cable news channel, NewsChannel 8. Although Comcast notes the speculative nature of Allbritton's allegations, that is the precise reason for *prior* investigation—to ensure that harm is avoided *before* it occurs.

In an Agreement dated June 21, 2010 with the ABC, CBS, and Fox Television Affiliates Associations, Comcast agreed to protect (at least temporarily) Allbritton's Washington station, WJLA-TV, an ABC affiliate, from loss of carriage in favor of the local NBC owned and operated

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[2] Allbritton's participation in this proceeding at this time is specifically tied to and a function of its negotiations with Comcast for renewal of the NewsChannel 8 carriage agreement. In the only other carriage negotiation for NewsChannel 8 with Comcast in 2002, the process extended over two years. As the resulting 10-year affiliation agreement was expiring within that same negotiation window, Comcast and Allbritton began renewal discussions in February 2010. In fact, those discussions were ongoing until after Comcast filed its July 21, 2010 responses in this proceeding. As negotiations progressed, it became evident that Comcast was unyielding in its efforts to package NewsChannel 8's renewal with retransmission consent negotiations for all other Allbritton-related broadcast stations. That effort signaled to Allbritton that Comcast would have the incentive and ability to use its market power to NewsChannel 8's detriment. It was that action that prompted Allbritton to comment in this proceeding at this time.

station (WRC-TV). Conspicuously absent from that agreement is any provision that would protect local or regional *non-broadcast* program competitors such as NewsChannel 8. Absent the imposition by the Commission of appropriate regulatory conditions, Comcast will be able to use its new combination of media assets in the Washington, D.C. market to undermine the economic viability of NewsChannel 8, to the significant detriment of the viewing public in the Washington television market.

A. NewsChannel 8 Provides Unique And Valuable Programming To Consumers In The Washington Market

Allbritton launched NewsChannel 8 in 1992. It was the first independent, all-local cable news channel in the nation. In combination with WJLA-TV, NewsChannel 8 produces an average of ***18 hours*** of live, local, original programming every day, ***13 hours*** of which are produced solely for NewsChannel 8. In comparison, the average network-affiliated station provides approximately 3.5 to 4 hours per day of live, local televised programming. Among many other offerings, NewsChannel 8 provides the ***only*** daily, televised, local political talk show, business show, federal news program, sports program, and community talk show in the Washington market, along with a variety of specialty programs. But its programming services do not end there: NewsChannel 8 provides hyper-local zoned service with separate programming feeds for Washington, D.C., Virginia, and Maryland. Since its launch in 1992, NewsChannel 8 has provided more than 12,000 unique local news packages, an average of 650 per year. It should come as no surprise, then, that in its 18+ years of telecasting, NewsChannel 8 has become a mainstay of local news and public affairs content in the Washington, D.C. market. Whether it is coverage of multiple local political candidate debates, countless interviews with community leaders and officials, or extended reporting of emergencies, NewsChannel 8 has gained the justified reputation as the premier local news channel in the country, with ratings equal to or exceeding those of CNN, FoxNews, Headline News, MSNBC, and CNBC.[3]

B. NewsChannel 8's Survival Depends On Cable Distribution

At its inception, NewsChannel 8 was carried by nine local cable operators in the Washington market pursuant to ten-year affiliation agreements.[4] Because of extraordinary consolidation in cable system ownership, those nine systems now are controlled by only two MSOs: Comcast and Cox Communications ("Cox"). Cox has subscribers only in Fairfax County, Virginia and a small portion of the Washington market in and around Fredericksburg, Virginia; the remainder of the cable market in the Washington area is controlled by Comcast. Comcast has approximately 853,000 subscribers, while Cox has 180,000.[5] Even considering satellite pay TV distributors, Comcast controls a dominating 41 percent of pay TV services in the Washington market.[6]

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[3] NewsChannel 8 is unique both in the Washington market and nationwide. Virtually no other *independent* local cable news channels remain; apart from NewsChannel 8, nearly all are owned by Multiple System Operators ("MSOs"). Those channels in "partnership" with broadcast stations simply re-loop the broadcast stations' over-the-air news product.

[4] Comcast renegotiated the initial ten-year term in 2002, as it was on its way to becoming the largest MSO in the nation as a consequence of its acquisitions of TCI and AT&T. The renewal agreement will expire on December 31, 2011, just over 16 months from now.

[5] The Washington Designated Market Area ("DMA") has approximately 2,335,000 Households, of which 91% (2,172,000) are pay television subscribers. Five much smaller systems also operate in the Washington market; they represent roughly 86,000 subscribers altogether, nearly one-tenth the number of Comcast subscribers. One "overbuilder," Verizon FiOS, serves 380,000 subscribers, but notably, Comcast serves as the exclusive sales agent for Verizon FiOS in the Washington DMA.

[6] DirecTV has approximately 390,000 subscribers (19% of the Washington DMA), and DISH Network has approximately 145,000 subscribers (7%), neither of which nor both together

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Comcast's control of the Washington pay TV market is particularly significant for NewsChannel 8 because it has been deprived by cable's demands of access to satellite pay TV distribution. When Allbritton launched NewsChannel 8 in 1992, it was compelled to accede to the demands of the then-monopoly local MSOs that the news channel be an *exclusive cable-only* service, unavailable to satellite or other distributors, including over-the-air distribution via a broadcast subchannel.[7] Accordingly, Allbritton is prohibited from allowing DISH or DirecTV to provide NewsChannel 8 to their subscribers. Put simply, NewsChannel 8 cannot exist without the local distribution of Comcast.

C. The Proposed Transaction Threatens The Continued Distribution Of NewsChannel 8—And, Thus, Its Viability

The proposed transaction would result in the horizontal integration of Comcast's substantial cable network assets and certain online content assets with NBCU's television broadcast station assets, broadcast network assets, cable network assets, and online content assets. If the proposed transaction is consummated, Comcast will control an entity that owns and operates, among other assets, all of Comcast's cable network assets, 26 broadcast stations (including 10 NBC stations in the nation's largest media markets), most of the online content of the two parties, and the NBC Television Network and Telemundo Television Network themselves.

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can provide a distribution service for NewsChannel 8 equivalent to Comcast even if the exclusivity provision that prevents carriage on DBS were to be eliminated.

[7] Legal challenges by terrestrial distribution competitors prompted Comcast and Cox to waive their exclusive rights to carry NewsChannel 8. As a result, the channel is carried by both RCN Starpower and Verizon FiOS in the Washington market.

Allbritton has already experienced the potential consequences of that aggregation of power for NewsChannel 8. With the expiration of the current ten-year affiliation agreement on the horizon, Allbritton has attempted to negotiate with Comcast for an extension of the NewsChannel 8 carriage agreement. Comcast has indicated a willingness to negotiate for renewed carriage, but its nominal "willingness" offers little reassurance, given Comcast's insistence on "tying" carriage of NewsChannel 8 with retransmission consent to carry *all* of the Allbritton television stations—even those in other markets and other states.

Allbritton's concern, of course, is that Comcast will use its market power in the D.C. market to deny carriage of NewsChannel 8 unless Allbritton acquiesces in "below market" retransmission consent terms for Allbritton's various television stations. Accordingly, Allbritton has asked Comcast not to tie these negotiations and to conduct negotiations for carriage of NewsChannel 8 separate and apart from negotiations for retransmission of its broadcast television stations. Comcast refused to do so.

Comcast's position is that it cannot "accede to Allbritton's demand that Comcast pay a premium price for NewsChannel 8 that indisputably includes the value of retransmission consent for Allbritton's broadcast stations…."[8] That critically misstates the facts. Although Comcast may in fact—for its own internal accounting purposes—believe that the subscriber fees paid for NewsChannel 8 are somehow imputed as consideration for one or more Allbritton-related broadcast stations, they are not. The affiliation agreement for carriage of NewsChannel 8 reflects consideration paid exclusively for NewsChannel 8; no portion of those fees is explicitly or implicitly provided, received, or accounted for any broadcast station.

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[8] *See* Letter from Michael H. Hammer, Counsel for Comcast Corporation, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56 (Aug. 18, 2010) ("*Hammer Letter*") at 4.

Importantly, this reflects both the state of retransmission consent negotiations in 2002 when the NewsChannel 8 carriage agreement with Comcast was negotiated *and* the independent value of NewsChannel 8 when it was launched ten years earlier. With the very rare exception, cable MSOs did not pay subscriber fees for broadcast retransmission consent for well past the first decade of the Must-Carry/Retransmission Consent regime that began in 1993. Only with the growth of alternate MVPDs including satellite and telco systems did monthly cash subscriber fees become more common. That situation did not exist in 2002. Comcast provided carriage for the various Allbritton broadcast stations, but did not pay fees.

Subscriber fees were, however, paid for NewsChannel 8 in the Washington market based upon the initial value ascribed to the service when it was first launched in 1992. ***Before*** there was a retransmission consent regime, the initial MSOs that carried NewsChannel 8 paid a fee that escalated annually. Comcast, in acquiring those systems, continued to pay those fees and renegotiated them in 2002 with continuing modest escalation. Those fees could not have been "indisputably" provided for the value of retransmission consent, since the concept did not then exist. The value attributed to NewsChannel 8 reflects its critical importance in the market and the high costs of providing such a robust local news channel. Contrary to Comcast's suggestion,[9] other MVPDs in the Washington market do, in fact, pay subscriber fees for WJLA-TV and separate fees for NewsChannel 8.

Comcast's tying of carriage of Allbritton's unrelated media assets would have anticompetitive consequences for NewsChannel 8, and obvious and direct financial benefits for Comcast's local NBC television station in the market. Tying negotiations for NewsChannel 8

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[9] *Hammer Letter* at 3.

with retransmission consent negotiations for Allbritton's television stations would enable Comcast to devalue subscriber fees paid for NewsChannel 8 by spreading those fees over retransmission consent rates for unrelated broadcast stations in distant markets. The true independent value of NewsChannel 8 in the market would be diluted, with serious adverse consequences for the economic viability both of NewsChannel 8 and of the broadcast stations—and to the direct and substantial benefit of Comcast's competing NBC station in the Washington market.

The devaluation of NewsChannel 8 would only be the beginning of the harm that the combined Comcast/NBCU entity would be in a position to cause. Comcast would be able to exercise its market power to discriminate against and marginalize the viability of NewsChannel 8 by artificially manipulating NewsChannel 8's channel placement and the service tier on which it is placed.[10] Comcast's ability to control channel line-up and place a channel in a "Siberian" service tier, coupled with its post-merger incentive to assign NewsChannel 8 to a less desirable channel position to favor WRC-TV, its affiliated station (or Comcast's own cable news channel that it could quickly create with WRC-TV news facilities), would place NewsChannel 8 at an insurmountable competitive disadvantage.

In fact, post-merger, Comcast will have no incentive to carry NewsChannel 8 at all and every incentive to remove it as a local competitor in the Washington market. If NewsChannel 8 were no longer able to provide local news (and the vast, robust array of other local public interest and public affairs programming services it presently provides), both viewers and advertisers

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[10] The Petition to Deny submitted by Bloomberg, L.P. explains in detail the importance of channel position, "neighborhooding," and tier placement, both to networks and to consumers, as well as the anticompetitive harms visited upon stations disfavored in channel placement and other terms of carriage. *See Bloomberg Petition* at 29-37.

would have no choice but to turn elsewhere for that programming. Comcast/NBCU would be positioned to package the WRC-TV existing news product with Comcast's CN8 news service to create Comcast's own local monopoly cable news channel. Put simply, given the extensive array of NBC's national and local news content combined with Comcast's exceptional and far-reaching control over channels of distribution, Comcast/NBCU will have both the ability and the incentive to eliminate NewsChannel 8 as a competitive threat.

Yet another problem that the combined Comcast/NBCU entity will likely cause for Allbritton (and its related POLITICO and TBD websites) would arise from its unfettered control over the broadband pipeline. For many of the same reasons the combined entity would have both the ability and incentive to discriminate against NewsChannel 8 in favor of its Washington TV station, WRC-TV, and/or potential cable news channel, it would similarly be both positioned and motivated to favor its own web content over content provided by the Allbritton offerings.[11]

The resulting anticompetitive benefits to Comcast are obvious, as is the potential loss to Washington viewers of NewsChannel 8. Denied carriage via Comcast, and with no other substantial carriage alternative in the Washington market, NewsChannel 8 would simply cease to exist.[12] Consumers would lose a longstanding source of news and public affairs information.

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[11] Whatever plans Comcast may have to launch a local news channel in Washington on its "CN8" service or otherwise on a digital subchannel, it is evident that the NBCU side of the merged company (WRC-TV) is actively pursuing that plan currently. Eliminating or financially crippling NewsChannel 8 would inure to the direct benefit of Comcast's newly acquired broadcast owned and operated station.

[12] Allbritton's DTV "Doug Hill/Accuweather" subchannel, which competes directly with WRC's "Weather Now" subchannel, could be lost to the viewing public as a result of the same misuse of market power that would threaten the existence of NewsChannel 8.

That news source would be replaced by a new one—controlled entirely by Comcast. Both consumers and competition would suffer.

D. Appropriate Conditions Are Necessary To Ensure That Comcast/NBCU Will Not Use Its Market Power To Discriminate Against NewsChannel 8

The anticompetitive harm the proposed transaction threatens to impose on NewsChannel 8 can be addressed by a carefully tailored condition that will protect NewsChannel 8's viability in the Washington market. To that end, Allbritton respectfully requests that the Commission impose a condition on the transaction that either (1) forces divestiture of NBC owned and operated stations in markets where Comcast has significant, market-affecting control (*e.g.*, in excess of 30%[13] over channels of distribution), or (2) prohibits Comcast from discriminating against NewsChannel 8 in terms of carriage, service tier, channel placement, and rates for carriage, using current rates as an indication of prevailing market rates, along with prohibitions against Comcast from tying negotiations for carriage of NewsChannel 8 with carriage of Allbritton's television stations. Absent this type of condition, NewsChannel 8 will be entirely without protection against the unchecked media market power of a combined Comcast/NBCU enterprise. The demise of NewsChannel 8 is inevitable without the imposition of the requested conditions—and the resulting loss will not be that of Allbritton, but the residents of the

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[13] Although the Commission's 30% subscriber limit was recently vacated by the D.C. Circuit, the Commission has long held that a cable operator serving more than 30% of subscribers poses a danger to programming networks. *See The Commission's Cable Horizontal and Vertical Ownership Limits*, Fourth Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 2134, 73 Fed. Reg. 11,048 (2008) *vacated by Comcast v. FCC*, 579 F.3d 1 (D.C. Cir. 2009). There can be no clearer example of the opportunity and incentive to harm a programmer where the distributor in these circumstances serves over 40% of all pay television subscribers in the market.

Washington, D.C. market who rely on NewsChannel 8 for its award-winning local news, public interest, and public affairs programming.[14]

III.
Joint Sales And Marketing Practices

The proposed transaction also threatens harm in the markets for local video advertising where Comcast and NBCU are horizontal competitors. For example, in the local Washington, D.C. video advertising market—where Comcast and NBCU's owned and operated local affiliate are the *two largest competitors*—Comcast accounts for approximately 19% of the local video advertising market and NBCU's owned and operated local broadcast television station, WRC-TV, accounts for approximately 19%. Any combination of horizontal competitors that results in a single company controlling close to 40% of a relevant market is troublesome.[15] Here,

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[14] Indeed, Comcast's reference to Allbritton's 2007 comments (*Hammer Letter* at 5) made before a Congressional Oversight hearing involving the FCC's ownership rules ***supports*** the concerns in this proceeding. Those comments noted that the threat of domination by one information provider is no longer a viable concern. That, of course, assumes that information providers are, in fact, carried by distributors. This merger presents Comcast with the unique ability and incentive not to carry those information providers. It is a cynical argument at best to suggest there are multiple voices and at the same time reserve the power to reduce those voices unilaterally.

[15] Advertising revenue (2009) for each television station in the Washington, D.C. market was obtained from BIA/Kelsey, as was total advertising revenue (2009) for cable in the Washington, D.C. market. The relative cable advertising share was estimated as follows: Comcast and Verizon FiOS, since Comcast sells local advertising for Verizon FiOS in the Washington, D.C. market, was estimated to be 87%, the next largest MVPD was estimated to be 8%, and all others were aggregated and estimated to total 5%. The latter two estimates are immaterial in the combined television/cable local advertising marketplace. Local Internet video advertising is estimated to be small and is excluded from the analysis. The shares for WRC-TV and Comcast/Verizon FiOS were then determined by examining each company's share of total video advertising revenues in the relevant market. Within the broader market for local video advertising, there may be narrower markets where the transaction will result in even higher shares and greater levels of concentration. The local video advertising market in Washington, D.C. is concentrated even prior to the transaction. Based on the above, Allbritton calculates that

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however, the combination of Comcast and NBCU also creates substantial harm to programmers—like NewsChannel 8—that divert advertising revenue from the consolidated entity. In particular, as discussed below, the combined entity has a greater incentive to engage in exclusionary conduct against these programmers.[16]

Ownership of WRC-TV and its news operation will give Comcast an additional incentive to exclude or to weaken competitors who otherwise would be viewed as an attractive alternative to Comcast's own, captive news programming alternatives (where Comcast receives all of the revenue and profits from local video advertising). Because NewsChannel 8 relies upon Comcast for distribution of its programming, NewsChannel 8 is particularly susceptible to exclusionary acts that would diminish its presence or eliminate it altogether from the Washington market. For example, Comcast and NBCU could enter into joint advertising sales, marketing, and promotion combinations that exclude NewsChannel 8; selectively provide detailed viewership and audience research data derived from set-top boxes only for their owned and operated programs; enter into exclusive deals with advertisers; offer discounts that accrue only when an advertiser purchases a certain percentage of its video advertising from the combined entity; and engage in other forms of exclusionary conduct aimed at harming independent programmers.

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the estimated concentration levels (as measured by the Herfindahl-Hirschman Index) will increase significantly, from more than 1600 to nearly 2500, as a result of this transaction. These levels indicate that the market is "highly concentrated." Such a level falls within the range of concentration that typically results in close scrutiny of a transaction by the Department of Justice under the current Horizontal Merger Guidelines.

[16] It has long been a concern that a firm with market power in an advertising market may use that power to inhibit rivals' access to advertisers. *See Lorain Journal Co. v. U.S.*, 342 U.S. 143, 149-50 (1951).

The incentive for Comcast to do so with a 20% post-transaction market share was mitigated somewhat by the threat that such exclusionary conduct would drive advertisers to the other 80% of the market.[17] If the proposed transaction is cleared in its present form, however, the combined Comcast/NBCU entity will have nearly 40% of the local advertising market and the incentive and ability to force advertisers to its owned and operated programming.[18] Moreover, the risk of the transaction to programmers like NewsChannel 8 is clear because the combined Comcast/NBCU entity would no longer view such independent programming as a complement. Rather, where the dominant cable company has an owned and operated channel whose news operation directly competes with an independent cable news channel, as here, NewsChannel 8's offering will be viewed as a competitive threat for which Comcast will have an incentive and the ability to diminish or squelch following the transaction.

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[17] Advertising on uniquely localized stations such as NewsChannel 8 may constitute a separate local advertising market of its own—in which case concentration levels as a result of this transaction are even more troubling.

[18] Comcast has already used its power in the past to limit the availability of NewsChannel 8, such as blocking NewsChannel 8 from distribution by satellite providers (DirecTV and DISH Network). While it continues to have an incentive to block distribution, the transaction now incentivizes Comcast to diminish or to eliminate independent programming like NewsChannel 8 in favor of owned and operated programming.

Conclusion

For the foregoing reasons, Allbritton respectfully requests that the Commission impose the binding conditions in Attachment A in any order approving the proposed transaction.

ALLBRITTON COMMUNICATIONS COMPANY

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August 19, 2010

Attachment A

Proposed Conditions

Condition*:* *In any Designated Market Area (as defined by A.C. Nielsen or equivalent ratings entity) in which Comcast/NBCU owns or controls, directly or indirectly, distribution to in excess of 30% of the MVPD subscribers in that DMA and in which Comcast/NBCU owns or controls, directly or indirectly, the over-the-air broadcast station supplying NBC Network programming to the DMA, Comcast/NBCU shall divest either the broadcast station or the distribution capability to those subscribers in excess of 30% of MVPD subscribers in the DMA.*

Alternative

Condition*:* *With respect to all matters relating to carriage, including, but not limited to, signal quality, channel position and tier of carriage, EAS service messages and interruptions, and new technologies, Comcast/NBCU shall not treat a local/regional programming channel or service any less favorably than Comcast/NBCU treats the NBC-owned or controlled station in the same television market and subscriber fees for such local/regional programming channels shall be established at marketplace rates using the existing rates as a reference base without incorporating, directly or indirectly, the terms and conditions for carriage of any related over-the-air broadcast station co-owned, directly or indirectly, with the local/regional programming channel or service.*