Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
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Applications for Consent to the Transfer of Control of Licenses	)	MB Docket No. 10-56
	)	
General Electric Company, Transferor,	)	
	)	
to	)	
	)	
Comcast Corporation, Transferee	)	

REPLY OF DISH NETWORK L.L.C. TO COMCAST AND NBCU'S OPPOSITION TO PETITIONS TO DENY AND RESPONSE TO COMMENTS

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Summary

The proposed transaction presents a clear and present danger to the ongoing competitiveness of multichannel video programming distributors ("MVPDs") and online video programming distributors ("OVPDs") who challenge the dominance of Comcast. The Commission should reject the proposed transaction or adopt narrowly crafted, merger-specific conditions to address the immediate and future threats to competition in the video market posed by the transaction.

This proceeding reveals two very different views of the video market. The first, espoused by Comcast and NBCU, posits that the market for video services is defined by the past, a market in which consumers primarily watch TV offered by traditional platforms such as broadcast, cable and satellite. Under this view, the proposed transaction between Comcast and NBCU is nothing more than a standard, vertical acquisition of a content producer by a content distributor. Indistinguishable from a broadcaster buying a production house or a movie theatre chain acquiring a studio, this transaction—the Applicants would have us believe—is innocuous and will not fundamentally change the way video markets operate in the United States. This is a tall order to begin with. It is hard to downplay the "triple-whammy" vertical effects of a transaction that will unite entities with dominant positions over three different links of the modern media chain—video distribution, content, and broadband access. But equally important, Comcast and NBCU rely on a backward-looking methodology to support their contention that Americans have consumed video in essentially the same way over the last decade or more, despite the advent of the Internet, and probably will continue to do so.

DISH and many other parties espouse a different view of the video market, one defined by the present and the future. Accordingly, the proposed transaction requires the Commission to

consider carefully certain crucial questions. What do current trends in terrestrial, wireless, and mobile broadband usage portend for the way people will consume media? What do Americans under the age of 21 years old prefer and what might that mean for the communications platforms of tomorrow? What developments in media consumption will allow innovations that we cannot yet imagine to take root?

With these questions in mind, DISH and many transaction opponents have already established how increasingly robust technological features in the video marketplace—blended linear channels and on-demand, online video—have changed and will continue to change the video market. Moreover, video providers—including Comcast, DISH and many others—may leverage any number of different technological platforms as part of their delivery of content. In response to these developments, Comcast and NBCU confine themselves to arguing that online video is merely a complement to, not a substitute for, linear video. This misses the mark for two reasons. First, while it is true that online video today is a complement, the point is that it is an increasingly indispensable complement for MVPDs such as DISH. Comcast does not address satisfactorily the risks to MVPD competition from foreclosing or hampering access to that crucial component.

The Direct Broadcast Satellite ("DBS") industry, arguably the strongest engine of competition to date in the MVPD market, increasingly relies on its subscribers' ability to attach a broadband connection to their set-top boxes in order to enjoy a suite of services, such as video-on-demand or place-shifting technologies such as Sling, which preserves and enhances the competitiveness of DBS as an alternative to cable TV. These types of services would be put at risk by the proposed transaction, where Comcast would have every incentive and ability to degrade the quality of service experienced by a DBS subscriber as opposed to a Comcast subscriber. History shows that firms with significant market power will forgo revenue in the short term in order to gain competitive advantage over disruptive competitors and technologies.

Second, the question of whether online video is a perfect and total substitute for linear video is not the right one to ask. The question, rather, is whether it poses a threat to dominant MVPD distributors such as Comcast, and whether online video promises to be a close substitute for linear video in the near future. That it does. The proposed transaction constitutes a fundamental reordering of competition within the media landscape, one that should motivate the Commission to act decisively in order to maintain a vibrant and rapidly evolving marketplace. Multiple parties to this proceeding, including DISH, employ a forward-looking analysis to show that online video, an innovative, disruptive new distribution platform—which includes NBCU and its online properties, including its ownership interest in online video service Hulu—is being neutralized and rendered less of a threat to its incumbent acquirer, Comcast. The attached report of Professor Wilkie demonstrates that under well-established economic and antitrust principles, the reduction or elimination of what otherwise might be a disruptive force to a dominant market player is ample grounds for regulatory intervention in order to prevent future foreclosure of technological innovation and competition. The horizontal effects within the online video market could be missed unless the Commission rejects the Applicants' view that online video is at most a discretionary complement to traditional MVPD service and not a significant factor in the proposed transaction.

The Commission should reject the proposed transaction or, in the alternative, adopt narrowly crafted, merger-specific conditions to address the immediate and future threats to competition in the video market posed by the transaction. These should include applying to the merged entity (1) robust broadband conditions to protect competition in the online video market;

(2) rules that ensure competing video providers can obtain access to the post-transaction entity's affiliated content, including baseball arbitration and standstill requirements; and (3) wholesale broadband requirements such that consumers can purchase, and third parties can resell, a stand-alone broadband product.

Comcast and NBCU claim that these proposed conditions have no place in a merger proceeding and instead should be the subject of ongoing rulemakings. This from a company, Comcast, that appealed the Commission's decision in court after it was found to be covertly blocking access to certain websites, resulting in the evisceration of the Commission's authority over broadband issues. This from a company, Comcast, that argues in multiple proceedings against any general rule preserving the open nature of the Internet. This from a company, Comcast, that flouts Commission orders and refuses to sell key sports programming to its competitors. And this from a company, NBCU, that provides a higher quality of service for its own online video product than for those of its competitors. The Commission should reject the "trust us" defense and impose the merger-specific conditions proffered by DISH and multiple other parties to this proceeding.

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Attachment B: **Comcast/NBCU Advertisement Published in COMMUNICATIONS DAILY, July 21, 2010**

Attachment C: **Letter from Amy B. Cohen, Vice President and Associate General Counsel, Comcast SportsNet, to Dave Shull, Senior Vice President, Programming, DISH Network L.L.C., July 23, 2010**

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DISH Network L.L.C. ("DISH") and a large number of other parties oppose the harmful concentration and future foreclosure of competition in the video market, including online video and traditional Multichannel Video Programming Distributor Service ("MVPD") service, that would result from General Electric Company transferring to Comcast Corporation ("Comcast") a controlling interest in NBC Universal, Inc. ("NBCU") (collectively, the "Applicants").[1] The Commission should reject the Applicants' attempt to deflect attention from the threat to the emerging online video market and to MVPD competition posed by the proposed transaction.

[1] *See* Public Notice, Federal Communications Commission, Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. to Assign and Transfer Control of FCC Licenses, DA 10-457 (rel. Mar. 18, 2010); Applications for Consent to the Transfer of Control of License, General Electric Company to Comcast Corporation, Applications and Public Interest Statement, MB Docket No. 10-56 (filed Jan. 28, 2010) ("Application").

I. APPLICANTS FAIL TO ADDRESS THE IMPORTANCE OF ONLINE VIDEO TO COMPETITION IN THE OVERALL VIDEO MARKET

In their reply, Applicants continue to insist that there are separate markets for MVPD services, video programming, and high-speed Internet service, and that Internet content and online video distribution are distinct from (though a complement to) MVPD services.[2] This backward-looking assessment fails to account for the fact that online video plays an increasingly important role in the overall video market today and will shape the future of video consumption. Regardless of whether online video is currently a complement or a substitute today, it is clear that online video programming distributors ("OVPDs") offer an indispensable input, either as a component of a traditional linear offering or as an emerging substitute for it. This fact has critical implications both at the present time and in the near future. The proposed transaction immediately threatens the ability of Direct Broadcast Satellite ("DBS") providers, the most important and only historically proven competitor to cable, to complement linear pay-TV packages with robust online and on-demand video offerings. In the near future, the proposed transaction will harm or foreclose altogether the emergence of online video providers as substitutes for traditional MVPD video products.

Once the Commission accepts a future-oriented, realistic definition of the relevant product market for video, which must include online video, the anti-competitive harms presented by a Comcast–NBCU transaction are manifest. The combination of Comcast and NBCU will harm the online video market in at least three ways.

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[2] *See* Comcast Corporation, General Electric Company, and NBC Universal, Inc., Opposition to Petitions to Deny and Response to Comments, MB Docket No. 10-56, at 80-84 (July 21, 2010) ("Opposition").

First, in vesting Comcast with the substantial wealth of "must have" content currently owned by NBCU, Comcast will be able and willing to withhold such content from other MVPDs and OVPDs, harming competitors that want to offer a robust and competitive online video product and causing anti-competitive horizontal effects.

Second, because the transaction will expand Comcast's online video market power, Comcast will have heightened incentives to block or degrade access to competitive third-party online video sources when that content rides on top of Comcast's High Speed Internet ("HSI") service, such as in the case of the DBS subscriber.

Third, it will mean that two large online video distributors combine their programming assets and distribution platforms, thus reducing competition among online video distributors and perhaps eliminating a disruptive innovator from the market.

A. Online Video Is a Crucial Component of Any Video Offering for Today's MVPDs

1. Expert economic analysis and the comments of multiple stakeholders demonstrate that online video is a key means of video delivery

Video is video, regardless of the technological platform through which it is delivered. Online video means not only Internet-delivered video provided by innovative new OVPDs but online video-on-demand ("VOD") and other products provided by DISH and other MVPDs.[3] As Professor Wilkie asserts, Applicants' compartmentalized view of linear and online video fails to

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[3] Professor Wilkie notes that "there are numerous models for media distribution, including online broadcaster controlled content (e.g. full length television episodes offered by NBC.com, CBS.com, etc.), online content aggregators (e.g. full length episodes and movies offered by Hulu.com, TV.com, Netflix, etc.), and full service providers who both aggregate content and provide the distribution infrastructure (e.g. broadcast and cable offerings of traditional MVPD service providers, as well as newer products offered by AT&T U-verse, Verizon FiOS, etc.)." *See* Report of Professor Simon J. Wilkie, *Competition and the Impact of the Proposed Comcast/NBCU Transaction*, August 19, 2010, ¶ 9 ("Wilkie Report"), attached as Attachment A.

capture the fact that the video "product" being delivered today includes all forms of video delivery.[4] The landscape of MVPD services has changed significantly over the last decade, and consumer choice in terms of how and when traditional television programming is delivered has increased rapidly.[5] The proliferation of digital television, smart phones, tablets, wireless Internet devices, and laptop computers, combined with increasing broadband access to the Internet, has hastened the proliferation of online content as a fundamental part of video offerings.[6] Consumers want to consume video wherever and whenever they like, and video providers may leverage any number of different technological platforms as part of their delivery of content. "Must have" video programming will retain its "must have" nature, regardless of the distribution platform that delivers it.[7]

In fact, Professor Wilkie argues, consumers no longer consider their video needs to be met by traditional MVPD distribution platforms alone. The post-transaction entity, he concludes, will compete with other MVPDs "by offering viewing packages that differ according to programming and ubiquity of access modes."[8] MVPDs can differentiate themselves by what kind of access platforms they offer, including a wide range of online video options, from

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[4] Wilkie Report ¶ 8.

[5] *Id.* ¶ 6.

[6] *Id.* ¶ 8.

[7] *See* American Cable Association Comments at 35; *see also* Communications Workers of America Petition to Deny at 39 (noting that the recent increase in the quantity of video programming available online and hardware and software advances are moving online video towards being a substitute for traditional television viewing); DIRECTV Comments at 31-32 (agreeing that both Comcast and NBCU are online video providers); Public Knowledge Petition to Deny at 3-4 (urging the Commission to carefully scrutinize the efforts of major media incumbents to leverage that incumbency as they enter the online video market).

[8] Wilkie Report ¶ 8.

watching a television show on an iPhone to place-shifting a movie from a digital video recorder ("DVR") to a laptop. An MVPD's chances of success today depend critically on the ability to offer compelling content across a wide variety of platforms, including online. DISH incorporates online video with traditional linear programming, including Sling place-shifting technology; "Google TV," which creates a seamless television/web and search functionality; DISH Online video portal service; and broadband-enabled VOD.[9] Given the ever-increasing importance of online and on-demand video services incorporated into traditional MVPDs' product packages, the Commission should closely evaluate the implications of the transaction for the availability of this critical input.

2. Applicants' product definition analysis fails to consider how the proposed transaction threatens current MVPDs, especially DBS providers, that rely on online video to remain competitive.

Once the Commission defines online video as, not only a discretionary complement to, but an indispensable component of any multichannel video package, it will be able to assess the significant potential harm and foreclosure strategies posed by the transaction to the video programming distribution industry's competitiveness. Applicants' picture of the video market today fails entirely to acknowledge that DBS providers' ability to compete depends on their ability to offer online video offerings in addition to linear channels.[10] Specifically, Applicants' continued insistence that the relevant product markets include traditional MVPD service and HSI service, and that the merged entity will not have market power in either,[11] is beside the point

[9] *See* DISH/EchoStar Petition to Deny at 3-4; *see also* Wilkie Report ¶ 10.

[10] DISH and DIRECTV are the nation's second and third largest MVPDs.

[11] Opposition at 80-86 (listing the relevant product markets as MVPD services, video programming, High-Speed Internet Services, and Internet content and distribution).

here: it simply misses the example of a DISH subscriber whose service functionality relies on an open, unfettered broadband connection for delivery of DISH's substantial online video offerings.

Critically, Comcast's incentives to harm DBS's competitiveness exist regardless of whether online video products are *complementary*, as the Applicants claim,[12] or both complementary and *competitive*, as DISH and others posit. The issue is not, as Comcast suggests,[13] only whether content will be blocked or withheld in a classic distribution/content vertical foreclosure scenario, but whether the performance of competitors' technology in the delivery of such services will be discriminatorily curtailed and competition reduced. Comcast even unwittingly makes this point in Applicants' reply. When extolling the virtue of its early efforts to introduce VOD, Comcast points out that, for the DBS industry, "VOD has presented significant technological challenges."[14] Precisely. The DBS industry addresses those challenges by allowing subscribers to attach a broadband connection to their set-top boxes, through which online video applications deliver a VOD experience via the Internet to the subscriber.

The problem, unfortunately for consumers, is that the proposed transaction heightens Comcast's incentive to use technological means to block or degrade the online video offerings of its competitors. As Professor Wilkie observes, "if online services are truly complementary to traditional MVPD services," then the Commission must appreciate the critical fact that the post-transaction entity would control both the "pipeline" through which online video is delivered as well as key, "must have" content that flows over that pipeline.[15] As a result, Comcast will have

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[12] Opposition at 86-92.

[13] *Id.* at 191-200.

[14] *Id.* at 78.

[15] Wilkie Report ¶ 14.

the incentive and ability to downgrade both the access to content and the quality of the broadband connection's performance for DBS and other competing MVPD platforms, thereby causing a direct, adverse horizontal effect as competition between video distributors is undermined.[16] As demonstrated by the BitTorrent case, Comcast is willing and able to engage in blatant discrimination against certain types of online video and end-use applications.[17] Professor Wilkie also cites anecdotal evidence that Comcast reportedly has applied recompression to high definition TV signals to affect viewing quality, demonstrating Comcast's ability to selectively degrade online video content.[18]

More generally, the post-transaction entity's market power will also likely cause it to resist disruptive technological innovations launched by competing video providers. As Professor Wilkie concludes, firms with significant market power tend to resist change, particularly technological innovations used by competitors that cannibalize the incumbent's monopoly rents.[19] A merged Comcast–NBCU would have an incentive to slow or prevent innovative new measures by the DBS industry, a principal competitor in the video market, to retain existing and attract future customers through innovative online and on-demand video products. NBCU will

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[16] *Id*.

[17] *See* DISH/EchoStar Petition to Deny at 13-14.

[18] Wilkie Report ¶¶ 24-25 (citing reports that in order to add channels to its lineup, Comcast is squeezing three HD channels into each 38.8Mbps quadrature amplitude modulation ("QAM") rather than its previous practice of allowing a maximum of two HD channels per 38.8Mbps QAM).

[19] *Id.* ¶ 16.

win either way, receiving revenue from the DBS subscriber who chooses to stay with a degraded service, or from the former DBS subscriber who switches to Comcast.[20]

Many other parties to this proceeding agree that Comcast's acquisition of control over NBCU, coupled with its TV Everywhere strategy, will increase Comcast's incentive to degrade or block consumers' access to competing online video providers.[21] EarthLink argues that "the merged entity will have an incentive to promote online distribution of its own content, from which it receives revenues, over that of others. Comcast could achieve this by selectively degrading the transmissions of non-affiliated distributors on its infrastructure network."[22] The public interest commenters agree that "Comcast's acquisition of NBCU increases its content holdings, and thus heightens its incentive to favor its affiliated content and to degrade consumer access to competing online video providers and content."[23]

3. The transaction would undermine video competition by restricting access to "must have" content for OVPD and MVPD competitors.

Post-transaction, the combined Comcast–NBCU can further harm competition in the video market by choking off "must have" content for online video distribution. Comcast has

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[20] DISH/EchoStar Petition to Deny at 19.

[21] *See, e.g.*, *id.* at 12 (noting that "Comcast has the technical ability to discriminate between, and offer preferential treatment to, certain types of content" by, among other things, discriminating "against certain Internet Protocol packets using deep packet inspection, jitter, port-blocking, and other means"); *see also* Public Knowledge Petition to Deny at 5 ("Comcast's ability to control users' access to content means that it can unfairly discriminate against non-NBCU content, either by refusing to connect users to the online video content of established competitors, or, more likely, simply de-prioritizing or throttling the bandwidth available to these competitors versus NBCU content.").

[22] EarthLink Petition to Deny, Wilkie Decl. at 9-10.

[23] *See* Consumer Federation of America, Consumers Union, Free Press and Media Access Project Joint Petition to Deny at 29.

every incentive to withhold key products in order to undermine competition from other pay-TV providers, as it has done in the past and continues to do today.[24] Remarkably, even while the proposed transaction is under review, Comcast persists in its anticompetitive withholding of key sports programming from its competitors. On July 23, 2010, Comcast sent a one-page letter denying DISH Network's request for access to Comcast's SportsNet Philadelphia network, citing "longstanding business policy" to withhold such programming from DBS providers.[25] In spite of the Commission's *Terrestrial Loophole Order*, which creates the presumption that withholding regional sports networks harms competition,[26] Comcast persists in its withholding strategy. Comcast's well-demonstrated propensity to restrict "must have" content from its competitors poses an enormous threat to present and future MVPD and OVPDs.[27]

Post-transaction, Comcast–NBCU can be expected to continue the trend of withholding key programming, and will have even greater amounts of "must have" or marquee programming to leverage than does either party today. This fact will, among other things, disadvantage the online video products of competing MVPDs and emerging OVPDs alike. Professor Wilkie concludes that "[i]ntegrated firms, such as the proposed Comcast/NBCU, will enhance their existing market power as result of their content and infrastructure control by restricting output (in

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[24] DISH/EchoStar Petition to Deny at 14 (stating that Comcast has "deliberately and systematically" withheld key sports programming from DISH, DIRECTV, and other MVPDs).

[25] *See* Letter from Amy B. Cohen, Vice President and Associate General Counsel, Comcast SportsNet to Dave Shull, Senior Vice President, Programming, DISH Network L.L.C. (July 23, 2010), attached as Attachment C.

[26] *See* Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements, *First Report and Order*, 25 FCC Rcd. 746, 750-51 (2010).

[27] *See also* Highly Confidential Supplement to the Reply of DISH Network L.L.C. (filed August 19, 2010).

terms of both content and quality), raising prices, or both."[28] Post-transaction, Comcast will have an incentive to restrict output in such a way as to favor the revenue-maximizing distribution of its owned content,[29] even if that means forgoing potential revenues to be gained from licensing NBCU content to other MVPDs and to emerging online video distributors. Even if the Commission believes that Comcast will not withhold NBCU content from competing MVPDs because in so doing it would forego profitable online distribution deals, Comcast could still raise the price for such programming above competitive levels. The merged entity wins either way—it either receives higher profits from raising programming costs or secures new customers for Comcast's video services when customers cannot get the programming at fair prices from other MVPDs.

Applicants nonetheless promise that the post-transaction entity will not withhold online content from other MVPDs, and even if it did, there are ample other sources of valuable content.[30] These promises are hollow. As Professor Wilkie puts it, Comcast's acquisition of "must have" programming in both the online and linear modes will give it the incentive and ability to raise prices for those inputs to its MVPD competitors or deny those inputs altogether, a classic vertical foreclosure scenario.[31] There are other examples of incumbents eliminating innovative competitive threats, which further support this theory.[32] The post-transaction entity

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[28] Wilkie Report ¶ 12.

[29] *Id*.

[30] Opposition at 160.

[31] Wilkie Report ¶ 14.

[32] For example, the online video service Intertainer failed when studios denied access to content. "At the time of Intertainer's inception studios had a pecuniary interest in pay-for-view content distribution, thereby making an online video format unattractive." *Id.* ¶ 15.

will likely withhold its content from competing video providers, thereby stifling adoption of new distribution methods and reducing consumer utility from alternative distributors.

B. In the Near Future, Online Video Will Become a Substitute for Traditional MVPD Service, and the Commission Must Consider How the Transaction Threatens a Future Market in Which MVPDs and OVPDs Will Compete With Each Other

Not only will the transaction have the immediate effect of damaging the ability of DISH to supplement its traditional pay-TV offerings with robust online and on-demand video, it has the potential to foreclose future competition between MVPDs and OVPDs in the very near term.

1. Applicants' argument about online video being merely complementary to traditional MVPD services fails to consider the danger of future foreclosure.

DISH disagrees with Applicants' opinion that online video need not be considered within the relevant product market due to a lack of evidence that consumers substitute traditional MVPD service for online video.[33] In their typical backward-looking frame of reference, Applicants assert that "[v]iewers generally utilize online video to supplement their viewing of traditional television," and for this reason the Commission need not consider any such online video within the relevant product market. In so arguing, Applicants fail to recognize that the Commission can and must consider the effect of a transaction on competition in a *nascent* market. Although Applicants' experts tried to establish that the relatively inchoate nature of the markets for online video distribution and programming means that the Commission should proceed with great caution,[34] Professor Wilkie reaches the opposite conclusion. In the near future, he argues, it is probable that OVPD and MVPD distribution platforms will become

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[33] *See* Opposition. at 86.

[34] *See id.* at 200-01.

competitors in a single horizontal market.[35] The "nascent nature of the markets makes it more—not less—important for the Commission to take actions to prevent likely anti-competitive effects."[36]

The grave threat to the emerging online video market posed by the transaction is due in part to the aforementioned resistance of dominant firms to the introduction of new technology that cannibalizes their existing monopoly rents: "the pre-invention monopoly power acts as a strong disincentive to further innovation."[37] With the acquisition of key NBCU content resulting from the proposed transaction, Comcast will emerge as a dominant force in the online video market and have every incentive to stifle would-be competitors.

Opponents of the transaction agree that online video is an emerging market, and the inability of existing and future online video providers to obtain and distribute the most popular content[38] will crush competition.[39] The Commission can and must examine the potential for foreclosure of a future market for robust OVPD competition that is threatened by the proposed transaction. Just as online video emerges as a viable competitor to traditional cable distribution,

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[35] Wilkie Report ¶ 22.

[36] *Id.* ¶ 31.

[37] *Id.* ¶ 16 (internal quotations omitted), *citing* Kenneth J. Arrow, "*Economic Welfare and the Allocation of Resources for Invention*," in THE RATE AND DIRECTION OF ECONOMIC ACTIVITIES: ECONOMIC AND SOCIAL FACTORS (Richard Nelson, ed. 1962).

[38] DISH/EchoStar Petition to Deny at 15-16 (observing that the merged entity will control the NBC Network, NBCU non-broadcast networks, and Universal Studios movies, as well as Regional Sports Networks owned by Comcast).

[39] *See, e.g.*, EarthLink Petition to Deny, Wilkie Decl. at 6; Consumer Federation of America, Consumers Union, Free Press and Media Access Project Joint Petition to Deny at 27; DIRECTV Comments at 6; Public Knowledge Petition to Deny at 2; American Cable Association Comments at 35; National Telecommunications Cooperative Association Petition to Deny at 10; Communications Workers of America Petition to Deny at 40-44; *see also* Letter from Senator Al Franken to Federal Communications Commission at 10 (June 21, 2010) ("Franken Letter").

Comcast has the chance to "choke off in its infancy the first truly effective source of competition in the video marketplace."[40] EarthLink agrees that the proposed transaction "is likely to have a negative impact on horizontal competition in the OVPD market" due to the combination of Hulu.com, numerous NBCU properties, and Comcast's Fancast Xfinity.[41] Moreover, "[t]he horizontal integration of NBCU traditional Video Programming (e.g., Bravo, CNBC, NBC Sports, Oxygen, USA Network, Weather Channel, etc.) . . . materially harms the emerging OVPD market" because "these important sources of programming will now be directed and distributed to align with Comcast, which best maximizes Comcast's cable profits by limiting emerging OVPD competition and restricting content to ensure it remains only a complement to Comcast's cable television service."[42] If anything, the emergence of online video is a more tangible threat today than the potential entry of telephone companies into each other's territory was 10 or 15 years ago. The Commission was seriously and appropriately concerned with safeguarding that potential for competition in dealing with the telephone company mergers of the last fifteen years, and should be even more concerned with the foreclosure risk looming in this transaction.[43]

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[40] *See* Consumer Federation of America, Consumers Union, Free Press and Media Access Project Joint Petition to Deny at 22; *see also id.* at 25 ("By adding control of NBCU feature films and other branded content, as well as its one-third interest in Hulu, Comcast will wield a powerful mechanism to retain its video services revenue stream by killing-off emerging Internet-based competition before it can even get off the ground.").

[41] *See* EarthLink Petition to Deny at 24.

[42] *See id.* at 24-25.

[43] *See* Applications of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, *Memorandum Opinion and Order*, 15 FCC Rcd. 14032, 14087 ¶ 98 (2000) ("The transitional markets framework set forth in the Bell Atlantic/NYNEX Order identifies as 'most significant markets participants' not only firms that already dominate transitional markets, but also those that are most likely to enter in the near future, in an effective manner . . . ."); Applications of Ameritech

Here, Comcast's strategic acquisition of NBCU and its affiliate Hulu will effectively neutralize a potential "maverick" competitor in the online video market. Where a disruptive technology would be taken out of the market and not allowed to upend the structure of the video market by challenging existing incumbents, horizontal concentration results and consumers are harmed.[44] The Department of Justice has moved to block mergers that would have eliminated cross-platform video competition from new technological platforms. According to Professor Wilkie, the proposed transaction bears striking similarities to the failed Primestar transaction, where incumbent cable operators attempted to use a strategic acquisition to neutralize cross-platform competition. In that case, dominant cable television providers sought to take control of an emerging threat—satellite TV—to their core business. There, as here, future innovations by competitors posed a plausible threat to the market dominance of the incumbent providers.[45]

Much like the consortium of cable operators in the Primestar case, this transaction will effectively eliminate a "maverick" innovative competitor in the market for online video. As noted in the Horizontal Merger Guidelines, "[a]gencies may consider whether a merger is likely

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Corp., Transferor, and SBC Commc'ns Inc, Transferee, *Memorandum Opinion and Order*, 14 FCC Rcd. 14712, 14742-43 ¶ 60 (1999) ("The merger will lead the merged entity to raise entry barriers that will adversely affect the ability of rivals to compete . . . , thereby reducing competition and increasing prices for consumers of those services."); Applications of Nynex Corp, Transferor, and Bell Atlantic Corp., Transferee, *Memorandum Opinion and Order*, 12 FCC Rcd. 19985, 20055 ¶ 139 (1997) ("[W]e note that the record contains sufficient evidence of potential harm to competition . . . , including evidence of likely entry and de-concentrating effect in the relevant markets, that we cannot, in the absence of pro-competitive conditions, conclude that Applicants have met their burden of demonstrating that the merger is in the public interest."); *see also* Applications of SBC Commc'ns Inc., Transferor, and BellSouth Corp., Transferee, *Memorandum Opinion and Order*, 15 FCC Rcd. 25459, 25468 ¶ 19 (2000) (analyzing the potential for "entry into the mobile data sector" post-transaction).

[44] A maverick competitor or a smaller competitor is key in preserving the incentive of a dominant firm with market power to innovate. Wilkie Report ¶ 18.

[45] *Id.* ¶ 18.

to diminish innovation competition by encouraging the merged firm to curtail its innovative efforts below the level that would prevail in the absence of the merger."[46] Among other things this "curtailment of innovation" could result where "at least one of the merging firms is engaging in efforts to introduce new products that would capture substantial revenues from the other merging firm" or "if at least one of the merging firms has capabilities that are likely to lead it to develop new products in the future that would capture substantial revenues from the other merging firm."[47] Here, Comcast will have an incentive to neutralize the threat from Hulu, in an effort to protect its Fancast and pay-TV products.

2. Comcast itself has admitted that online video poses a competitive threat to its own traditional MVPD business.

In spite of Applicants' attempt to downplay the competitive threat posed by online video, Comcast's own marketing campaigns tout the proposed transaction as expanding the combined entity's ability to "bring you the best programming—the way you want it, wherever you are" by delivering content to subscribers "on your TV, mobile device, and **whatever comes next.**"[48] If Applicants, in their own paid-for advertising campaign to secure government approval of this transaction, promise that it will enhance their ability to offer the most popular content through new distribution channels, including most critically the online platform, the Commission must not ignore the impact of the proposed transaction on online video. Comcast has acknowledged the intensifying impact of online video on its business model, expressing fear that the Internet

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[46] Horizontal Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission § 6.4 (issued August 19, 2010).

[47] *Id.*

[48] *See* Comcast–NBCU advertising published in COMMUNICATIONS DAILY, July 21, 2010, at 3 (emphasis added), attached as Attachment B.

could render MVPDs the next "newspaper business."[49] And Comcast's analysis understates the effects of so-called "cord-shaving." Buying less linear video because of the emergence of online video alternatives may be less than total displacement, but it is a significant threat nevertheless.

In addition, the Commission should take note of Applicants' self-contradictory statements regarding the significance of online video to the overall video market. On the one hand, Comcast and NBCU assert with great conviction that online video is merely a complement, not a competitor, to MVPD services and will remain such.[50] This premise forms the linchpin of Applicants' argument that the Commission need not consider the harm to online video competition posed by the transaction. Applicants, however, have elsewhere *admitted* that online video is a competitive threat to traditional MVPD service. In particular, Applicants' reply fails to justify Comcast's assertions in Securities and Exchange Commission ("SEC") filings that online video poses a bona fide risk to the future competitiveness of traditional cable TV service. As noted in DISH's Petition to Deny,[51] for example, Comcast has stated that its cable systems face the risk of competition from "online services that offer Internet video streaming,

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[49] *See* Jeff Baumgartner, *Comcast Nears 'TV Everywhere' Launch*, *LR Cable News Analysis*, Sept. 9, 2009, http://www.lightreading.com/document.asp?doc_id=181548&site=lr_cable&print=yes ("'We have the exact same interests that the content providers have in making sure that we get ahead of the steamroller that is the Internet,' Burke said. 'So many other businesses in the media space . . . didn't get ahead of it. Whether it is music or newspapers or radio, [they] didn't have a model that protected their core business, and then, boom, here comes the Internet as this destroyer of wealth.'").

[50] Opposition at 86-87, 92 (citing an absence of sufficient "cord cutting" to indicate product substitution).

[51] DISH/EchoStar Petition to Deny at 24.

downloading and distribution of movies, television shows, and other video programming"[52] and has suggested that it faces direct competition from Hulu, Google, Joost, Amazon.com, and others.[53]

Comcast attempts to downplay this self-contradiction by arguing that it merely listed online video among a group of "Other Competitors" which included telco and DBS, and that this "catch-all" was broad enough to include even local broadcast stations, which the Commission considers not to be within the relevant product market for MVPD service.[54] Comcast's reasoning appears to be that because it grouped online video with other "possible" competitors, including over-the-air broadcast TV, the Commission need not view any of these various emerging platforms as more threatening to future competitive innovations than is traditional broadcast television today. However, the fact that broadcasters are listed along with online video providers means nothing as to the relative competitive risk posed to Comcast by online video providers.[55] Moreover, the SEC's disclosure standard is materiality. Under that standard, public

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[52] *See* Comcast Corp., Annual Report (Form 10-K) at 6 (Feb. 23, 2010), *available at* http://files.shareholder.com/downloads/CMCSA/716386522x0xS1193125%2D10%2D37551/1166691/filing.pdf.

[53] *See* Comcast Corp., Current Report, (Form 8-K) at 16 (Dec. 22, 2009) (describing an employee's non-compete obligations and stating, "Employee agrees that the following companies . . . are among those engaged in competitive video programming distribution as of the date hereof: Amazon.com, Inc.; Apple Inc.; AT&T Inc.; Bright House Networks; Cablevision Systems Corp.; Charter Communications, Inc.; Cox Communications, Inc.; DirecTV, Inc.; DISH Network Corporation; EchoStar Holding Corporation; Everest; Facebook, Inc.; Flixster, Inc; Google, Inc. (including YouTube); Joost Operations S.A.; Knology Holdings, Inc.; Microsoft Corporation (including Xbox); N-F NewSite, LLC d/b/a hulu.com; Qwest Communications International, Inc.; RCN . . . .") (emphasis added), *available at* http://files.shareholder.com/downloads/CMCSA/765068790x0xS950103-09-3354/1166691/950103-09-3354.pdf.

[54] Opposition at 90-91.

[55] Standard Instructions for Filing Forms Under the Securities Act of 1933, Securities Exchange Act of 1934, and Energy Policy and Conservation Act of 1975, Regulation S-K (requiring that

companies must disclose the most significant risk factors and omit risks that are so general as to apply to any issuer. If the threat from online video were trivial, or if it were not a risk specific to Comcast's business, Comcast would not disclose it. Finally, the threat from broadcast television is perhaps an outdated one, whereas that from online video is as up-to-date as can be. Just because it listed the serious competitive threat of today together with a toothless one from yesterday, Comcast cannot avoid its own admission that online video poses a viable risk to its core MVPD product.

3. Applicants also fail to address the specific concerns about Comcast's acquisition of an ownership stake in Hulu.

Applicants fail to dispel concentration concerns arising from the combination of their existing online video distribution platforms, including most critically Comcast's indirect acquisition of a stake in Hulu. As DIRECTV correctly argues, both Comcast and NBCU are online video providers.[56] "The [transaction] would reduce direct competition between NBCU and Comcast," according to the public interest commenters, as "NBCU content is available online in a variety of forms and on different websites and services," including Hulu, and the combination of these and Comcast's online properties means the "[transaction] eliminates this nascent, head-to-head competition between NBCU and Comcast in the emerging online video

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companies disclose "the **most significant factors** that make the offering speculative or risky" and cautioning that the discussion must not be so broad as to "present risks that could apply to any issuer or any offering.") (emphasis added).

[56] DIRECTV Comments at 31-32 ("NBC programming (including additional features not available over the air) is already available online at the NBC web site and through Hulu . . . Comcast itself launched its FearNet horror movie network, not as a linear channel, but solely using VOD and online access – a strategy that Comcast's President of Emerging Networks described as 'a new model.' Comcast also is forging ahead with its Fancast Xfinity TV initiative that promotes online programming, which its subscribers access through Fancast and other online properties Comcast controls.").

market."[57] As Professor Wilkie notes, post-transaction, Comcast could decline to collaborate, or increase the cost of collaborating, with other MVPDs or OVPDs on projects similar to Hulu, which enables Comcast to eliminate nascent competitors.[58]

Applicants claim that NBCU's ownership interest in Hulu carries no control rights and therefore is immaterial to any market concentration analysis[59] but then fail to rebut DISH's detailed expert testimony explaining exactly how Comcast's acquisition of an ownership interest in Hulu would give it new-found inside information and technology advantages, including through the performance quality of the video player software and other means.[60] In stating that NBCU's ownership of Hulu is irrelevant to the analysis, Comcast seems to rely on the fact that its stake falls short of *de jure* control, but this reliance is misplaced and inconsistent with the Commission's attribution standards. Under the program access rules, which are particularly pertinent to the foreclosure concerns raised by Hulu, the attribution threshold used by the Commission is 5%, whether voting or not.[61] Even such a small stake held in a programmer by a cable operator is enough to bring the programmer within the ambit of the rules. Comcast's stake in Hulu should be no less troubling.[62]

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[57] *See* Consumer Federation of America, Consumers Union, Free Press and Media Access Project Joint Petition to Deny at 22-23; *id.*, Cooper/Lynn Declaration at 17; *see also* Communications Workers of America Comments at 46 ("Through its acquisition of NBCU, Comcast will gain ownership of 32 online properties, including several marquee Web sites. Key among them is NBCU affiliate Hulu.com, a Web site that offers free, advertising-supported streaming video.").

[58] Wilkie Report ¶ 15.

[59] Opposition at 114.

[60] *See* DISH/EchoStar Petition to Deny, Declaration of Mark Jackson.

[61] *See* 47 C.F.R. § 76.1000(b).

[62] DISH/EchoStar Petition to Deny at 20-21.

Moreover, despite Comcast's claims that evidence of Hulu downgrading its service on competing sites such as DISHOnline is "inaccurate and misleading,"[63] Comcast in the same breath underscores DISH's point: Hulu, Comcast says, licenses its downgraded product to Comcast, DISH, and others, seeking "to draw traffic to its own website" through a higher-resolution service.[64] The fact that Comcast's online properties are among those standing to lose traffic does not matter when Comcast and Hulu would fall under the same ownership structure post-transaction. The combination of Comcast and NBCU (with its interest in Hulu) clearly threatens to diminish competition between Hulu and Comcast's online video properties, while directing traffic away from Comcast's competitors. This is a dangerous reduction of competition in the video market.

II. THE COMMISSION SHOULD IMPOSE NARROWLY CRAFTED CONDITIONS TO ADDRESS MERGER-SPECIFIC HARMS POSED BY INCREASED CONCENTRATION AND THE THREAT TO ONLINE VIDEO

The Commission should reject the proposed transaction or, in the alternative, adopt narrowly crafted, merger-specific conditions to address the immediate and future threats to competition in the video market posed by the transaction. These should include: (1) robust broadband conditions to protect competition for consumer eyeballs, regardless of the platform used; (2) rules that ensure competing video providers can obtain access to the merged entity's affiliated content, including baseball arbitration and standstill requirements; and (3) wholesale broadband requirements such that consumers can purchase, and third parties can resell, a stand-

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[63] Opposition at 117 n.368.

[64] *Id.*

alone broadband product.[65] The Commission's intervention at this stage is critical: the very future of the video distribution market is at stake, and once the proposed transaction occurs, the eggs cannot be "unscrambled."[66] Rather than hope that *post hoc* regulatory and antitrust enforcement will be sufficient to curb Comcast's incentive and ability to harm its MVPD and OVPD competitors, the prudent course is to put strong safeguards in place now.

A. Broadband Conditions

DISH submitted several broadband conditions in its Petition to Deny to address the merger-specific harms to DBS providers and to the video market generally.[67] All of the proposed conditions are needed because Comcast's existing dominance in local HSI markets, combined with its acquisition of control over NBCU, will increase Comcast's incentive to degrade or block consumers' access to complementary online video products offered by MVPDs like DISH. These conditions will also help protect OVPDs that are trying to break into the pay-TV market. Broadband conditions like those DISH proposed ensure not only that today's online video applications have a chance to compete with, and complement, linear video packages, but also prevent future foreclosure of unknown, next-generation video services. The Commission employed similar reasoning in the AOL-Time Warner merger when it adopted a condition relating to anticompetitive use of the instant messaging function.[68]

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[65] *See* DISH/EchoStar Petition to Deny, Appendix: Broadband Conditions to Protect Competition in the Online Video Market.

[66] *See* Wilkie Report ¶ 29.

[67] *See* DISH/EchoStar Petition to Deny, Appendix: Broadband Conditions to Protect Competition in the Online Video Market.

[68] 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

Nothing in Applicants' reply decreases the urgent need for the broadband conditions DISH proposed. Remarkably, Applicants revert to a variation of the "trust us" argument with regard to anti-competitive behavior. In their reply, Applicants state that Comcast "supports an open Internet and has consistently done so," reversing its Internet blocking actions once it "came to understand the level of concern" by consumers.[69] This is cold comfort to a DISH subscriber who must rely on Comcast broadband connectivity to make her video service function optimally. Professor Wilkie cautions that any selective blocking or degrading of a DISH online video service riding on top of a Comcast broadband Internet connection would be difficult to monitor and "[e]ven if a household were to successfully detect discriminatory behavior, the costs of seeking recourse are too high for the household to bear individually."[70] Even if discrimination could be detected and proven, no regulatory backstop exists to constrain any such behavior by Comcast with respect to its HSI service. The decision by the D.C. Circuit in *Comcast v. FCC* leaves the Commission with inadequate authority to prevent anti-competitive online practices.[71] DISH agrees with other commenters that, as a result, "Comcast is free to use its control of its high speed Internet service to block or impede content that it finds in any way competitive with its own content."[72]

Warner Inc., Transferee, *Memorandum Opinion and Order*, 16 FCC Rcd. 6547, 6618 ¶ 166-67 (2001).

[69] Opposition at 193-94.

[70] Wilkie Report ¶ 27.

[71] *Comcast Corp. v. FCC*, No. 08-1291 (D.C. Cir. April 6, 2010); *see also* Comments of DISH Network L.L.C., Framework for Broadband Internet Service, GN Docket No. 10-127 at 2.

[72] *See, e.g.*, Franken Letter at 4.

The record reflects broad support for strong broadband conditions, including but not limited to a voluntary agreement to abide by the Commission's proposed *Open Internet* rules,[73] in order to address the post-transaction heightened ability to block or degrade content from unaffiliated MVPDs and OVPDs.[74] Professor Wilkie concurs, arguing that Comcast will leverage its control over last-mile broadband Internet access facilities to downgrade the quality of broadband connection for DBS and competing MVPD platforms, such as the Slingbox.[75] EarthLink observes that "Comcast/NBCU will have an incentive to degrade the quality of all rival online video products, not necessarily just those that do not license NBCU content."[76] Unless third-party online video products can be accessed and viewed with comparable quality to Comcast's affiliated online video offerings, consumers will likely be artificially steered to Comcast's bundled offerings.[77]

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[73] *See* Preserving the Open Internet, *Notice of Proposed Rulemaking*, 24 FCC Rcd. 13064 (2009).

[74] *See, e.g.,* AOL Comments at 2 (the Commission "should impose its proposed net neutrality rules, regardless of whether and when the Commission may adopt such rules in the pending rulemaking proceedings"); Public Knowledge Petition to Deny at 14 (arguing that "the Commission must impose strict non-discrimination rules that prevent the entity from interfering with the distribution of non-affiliated content through filtering, blocking, or degrading distribution"); *see also* Franken Letter at 10 (arguing that, for 5 years, "Comcast/NBCU should be required not to favor its own programming on the Internet, as if net neutrality regulations were in place"). *But see* EarthLink Petition to Deny at 44 (arguing that, "even if the FCC were to impose open Internet rules, it is likely that Comcast would still have the ability to use its broadband network and content assets to undermine the development of the OVPD market and harm consumers").

[75] Wilkie Report ¶ 14.

[76] EarthLink Petition to Deny, Wilkie Decl. at 11.

[77] *See id.* at 14 ("In order for online video content to become a truly competitive force in the market, it must not be discriminated against, in part or in whole, in terms of distribution and distribution quality, so that it is a truly equal-quality substitute in the market.").

B. Program Access Rules Applied to Online Content

DISH proposed a variety of program access-related conditions in its Petition to Deny to, among other things, promote and preserve competition for online video:[78]

- Apply all program access rules, as well as baseball arbitration, standstill, and "à-la-carte" requirements, to Comcast–NBCU's online video content.
- Prohibit any exclusive content arrangements for any Comcast-affiliated content.
- Clarify that the program access rules extend to video on demand and interactive programming.
- Close the "terrestrial loophole" for Comcast–NBCU as a condition in this proceeding by extending the conditions to all programming, no matter how delivered, regardless of the outcome of the Commission's recent rulemaking on that subject.

Professor Wilkie's conclusions support the need for these conditions: Comcast's acquisition of key NBCU content, including online content, will create incentives for the combined entity to raise prices for those inputs to its MVPD competitors or deny access to those inputs altogether.[79] Some exclusive deals and discriminatory conduct of this nature are already prohibited by the Commission's program access rules, but these rules will not protect the online video market.[80] Comcast has used its control over "must have" content to reduce competition

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[78] *See* DISH/EchoStar Petition to Deny, Appendix: Broadband Conditions to Protect Competition in the Online Video Market.

[79] Wilkie Report ¶ 19 (noting that program access rules prevent dominant incumbents locking down access to essential programming, which would foreclose competition and stop innovation).

[80] 47 C.F.R. §§ 76.1000-1004.

from its rivals in the past,[81] and there is no reason to believe it will change its practices as OVPDs seek access to more and more "must have" content.

Applicants erroneously describe the proposed online program access condition as "extraneous"[82] and claim that it would be a threat to innovation in an evolving market.[83] To the contrary, the proposed condition specifically addresses the threat to the ongoing vibrancy of the online video market posed by the transaction; Senate Antitrust Subcommittee Chairman Herb Kohl (D-WI) agrees.[84] The proposed transaction places control of the NBCU library and ongoing programming in the hands of the largest cable company, which "imbues Comcast with the ability to stop innovation by denying competitors access this content through alternative and emerging access platforms."[85] Absent a strict prohibition, Comcast has every incentive to lock up NBCU programming behind a TV Everywhere pay-wall so that it is only available to subscribers of Comcast's bundled services, and to ensure that such programming is not available for distribution on third party online video platforms.[86]

Numerous other parties agree that if the Commission approves the transaction, it should impose program access conditions to prevent the merged entity from exploiting any "online

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[81] *See, e.g.*, DISH/EchoStar Petition to Deny at 14-15; Consumer Federation of America, Consumers Union, Free Press and Media Access Project Petition to Deny at 35-37; National Telecommunications Cooperative Association Petition to Deny at 9.

[82] Opposition at 14.

[83] *Id.* at 204 n.698.

[84] Letter from Senator Herb Kohl, to Assistant Attorney General Christine Varney and Chairman Julius Genachowski, FCC (May 26, 2010), *available at* http://fjallfoss.fcc.gov/ecfs/document/view?id=7020500832.

[85] Wilkie Report ¶ 21.

[86] EarthLink Petition to Deny at 24.

loophole." The transaction enhances Comcast's incentive and ability to create an "online loophole" to "avoid existing non-discrimination and non-exclusivity requirements by delivering programming and programming-related enhancements" via the Internet or set-top box-powered VOD.[87] Joint public interest commenters and their economist agree that Comcast will tie "the traditional MVPD service that it dominates to Internet delivery of TV programming, [and thereby] can dramatically reduce the size of the audience any new entrant will be able to capture. This underscores the threat of Comcast–NBCU withholding programming to diminish the quality of the product that Internet competitors can offer."[88] The success of the online video business model depends critically on access to online content, and strict conditions on the transaction would be necessary to thwart any foreclosure attempts by Comcast–NBCU.[89] Some commenters also believe that divestiture of Hulu could further mitigate these clear harms by ensuring the ability of consumers to access certain popular broadcast content online.[90] DISH agrees that the ownership interest in Hulu poses competitive concerns, but divestiture alone is not enough to

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[87] DIRECTV Comments at 6; *see also id.* at 30 ("Comcast could migrate a portion of [popular programming] to the Internet, where it would be available only to authenticated subscribers – and then deny authentication to DIRECTV and other rival MVPDs or charge exorbitantly high prices for access by their subscribers.").

[88] *See* Consumer Federation of America, Consumers Union, Free Press and Media Access Project Petition to Deny at 27 (citing Cooper/Lynn Declaration at II(A)(2)).

[89] *See e.g.*, Communications Workers of America Petition to Deny at 44.

[90] National Telecommunications Cooperative Association Petition to Deny at 10; *see also* WealthTV Petition to Deny at 21 ("Comcast's and NBCU's predisposition to restricting online access to video content and/or tying of internet programming to a cable subscription creates significant barrier to entry in the video distribution market for Internet video distributors. There is every reason to believe that Comcast will continue this predatory conduct post-Merger, particularly since Comcast will acquire a 27 per-cent interest in Hulu.com, NBCU's online video provider and the second most popular video website on the Internet in the United States.").

eliminate all anti-competitive ills posed by the transaction. There must be ongoing program-access type rules governing the merged entity's online content distribution.

Similarly, the Commission should reject Applicants' argument that no online program access condition is needed because DISH and DIRECTV currently make available some NBC content in their online video products.[91] The fact that DISH has participated in NBCU online authentication does not detract from the incentive and ability of a combined Comcast–NBCU to change the terms and conditions of such authentication, or to cease allowing it altogether. Because of the clear threat to current future development of a robust market for video services, DISH agrees that the Commission must impose a condition to ensure program access for online video platforms.

C. Wholesale Broadband

A wholesale broadband access condition, which was proposed by DISH, EarthLink, Public Knowledge, and the New Jersey Division of Rate Counsel, could remedy two likely harms to competition in the MVPD market.[92] First, it would ensure that consumers who want to subscribe to DBS video services can easily obtain a standalone broadband connection to power the DBS provider's online video offerings. Second, it would reduce Comcast–NBCU's

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[91] Opposition at 163.

[92] *See* DISH/EchoStar Petition to Deny, Appendix: Broadband Conditions to Protect Competition in the Online Video Market; EarthLink Petition to Deny, Appendix 1 (proposing that "[w]ithin ninety (90) days after the effective date of the order approving the proposed transaction with conditions . . . 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[.]"); Public Knowledge Petition to Deny at 15; New Jersey Division of Rate Counsel Reply Comments at 42-43.

incentives to block or degrade unaffiliated online video offerings, because consumers could switch to another broadband access provider that did not engage in such practices.

DISH agrees that, post-transaction, Comcast–NBCU would have the incentive to raise the price of standalone broadband access, which could harm the online video market by limiting the ability of consumers to access the over-the-top video products of their choice.[93] Alternatively, Comcast could impose a usage cap on all of its HSI subscribers, ensuring that NBCU content would not count against that cap for subscribers to Comcast's video service, while, for DBS subscribers who rely on Comcast HSI service, the NBCU content would count against the usage cap. EarthLink's proposed condition ensures that consumers can obtain standalone broadband access,[94] consistent with the condition called for by DISH requiring that Comcast–NBCU "provide broadband services at reasonable non-discriminatory wholesale rates to other service providers that want to offer a competitive bundle of services."[95] Public Knowledge agrees, observing that the "newly merged entity should be required to offer wholesale broadband access services to unaffiliated ISPs," which will "impose a valuable check on any anticompetitive impulses."[96]

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[93] *See* Wilkie Report ¶¶ 36-37; *see also* EarthLink Petition to Deny, Wilkie Decl. at 22 ("[T]he post [transaction] Comcast entity will have the incentive to raise the price of stand-alone broadband service absent other competitive pressures.").

[94] EarthLink Petition to Deny, Wilkie Decl. at 25 ("The structural solution proposed by EarthLink ensures that, if Comcast engages in discriminatory activity that degrades consumer welfare, consumers will have the option to switch to another ISP that does not have the same incentives to discriminate against specific content because they do not have the same content-integrated structure as the Comcast/NBCU entity.").

[95] DISH/EchoStar Petition to Deny, Appendix.

[96] Public Knowledge Petition to Deny at 15.

The Commission should not be deterred from imposing a wholesale broadband condition on Comcast based on Applicants' erroneous reliance on national, rather than local market-by-market, relevant geographic market definitions for HSI.[97] As an initial matter, Comcast–NBCU already acknowledged in their Application that the Commission regards the relevant geographic market in any HSI concentration analysis to be local, and DISH agrees.[98] More importantly, though, for the DISH subscriber who relies on stand-alone Comcast broadband connectivity to power her online video service, the relevant local geographic market may offer very few alternatives to Comcast's HSI service. This will threaten DISH's ability to remain competitive to the extent that its subscribers cannot easily obtain broadband access from another supplier that will not downgrade DISH's online video offerings. The Commission should reject Applicants' assertion that telephone companies are improving their competitiveness against cable broadband in the HSI market,[99] because evidence points to the opposite. As DISH already noted, telephone companies have limited ability to challenge cable in the HSI market at present.[100] Comcast's

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[97] *See* Opposition at 191 ("Comcast lacks the market power necessary to implement [a broadband access] foreclosure strategy. Even though Comcast is one of the largest broadband ISPs in the country, the fact remains that it accounts for only about 20 percent of broadband ISP customers nationwide.").

[98] *See* DISH/EchoStar Petition to Deny at 10 ("Comcast lacks the market power in high-speed Internet service [to make a] foreclosure strategy successful [because it] currently provides service to only about 20 percent of HSI customers in the United States . . . .") (*citing* Application at 124-25).

[99] Opposition at 192.

[100] *See* DISH/EchoStar Petition to Deny at 11-12, ("The DSL business is now shrinking. AT&T's non-U-Verse DSL base shrank by 307K subscribers in 2009. Verizon's DSL business contracted by 405K customers last year. Cable is winning the broadband wars. Over the past three years, the TelCos' share of 'Big Four' broadband net additions – including fiber – has fallen from 57% to just 38% as measured on a trailing twelve month basis. Comcast and TWC are collectively capturing 62% of Big Four growth.") (citing Craig Moffett, *Bernstein Research Flash* at 1 (Apr. 30, 2010)); Craig Moffett, *Bernstein Research Flash*, at 1 (Apr. 28, 2010)

assurances regarding “continuing improvements” of DSL and wireless broadband[101] are erroneously based on national subscriber numbers for DSL, rather than relying on the more appropriate local geographic market test.

D. Transaction Opponents’ Recommended Conditions are Entirely Appropriate Merger-Specific Remedies

It is widely accepted that the Commission should apply merger-specific remedies to transaction-related harms. Comcast asserts that the remedies proposed by many parties belong in ongoing rulemaking proceedings rather than this review.[102] Comcast adds that the “issues of net neutrality and an open Internet affect all ISPs and all participants in the Internet ecosystem, and are most appropriately considered in industry-wide proceedings such as those the FCC now has underway.”[103] To the contrary, opponents of this transaction have demonstrated a wide range of harms to competition and consumers that are a direct result of the combination of Comcast and NBCU, and which will require proactive steps by the Commission to remedy.

Applicants attempt to distract the Commission by citing DISH’s comments in the “AllVid” proceeding (in which DISH states that the Commission should ‘first, do no harm’ to an emerging market), which is misleading at best.[104] This transaction proceeding, unlike “AllVid,” is not a rulemaking. It is a merger review occurring because Comcast and NBCU propose a

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(“Cable is – once again – unmistakably taking share in the broadband market. Consider that Comcast’s quarterly subscriber total is actually 16% higher than the sum total of Verizon and AT&T *combined*, on a footprint less than half as large. Last year, their broadband total was only slightly larger than half their combined total.”).

[101] Opposition at 192.

[102] *Id.* at 196.

[103] *Id.*

[104] *Id.* at 182 n.616.

transaction. The Commission can and must devise conditions to address the specific harms at issue in this proceeding, as detailed by DISH, and other parties to the proceeding. Moreover, despite its characterizations to the contrary, Comcast has fought the Commission's very authority to enforce open Internet rules and opposes the FCC's proposed rules in the *Open Internet* proceeding.[105] In sum, Comcast's arguments are a thinly veiled attempt to avoid any open Internet principles, consistent with the posture it has taken in federal courts and before the Commission.

[105] *Comcast Corp. v. FCC*, No. 08-1291 (D.C. Cir. April 6, 2010); Comments of Comcast Corp., Preserving the Open Internet; Broadband Industry Practice, GN Docket No. 09-191 (filed Jan. 14, 2010); Comments of Comcast Corp., Framework for Broadband Internet Service, GN Docket No. 10-127 (filed July 16, 2010).

III. CONCLUSION

For the foregoing reasons, the Commission should deny the proposed transaction absent meaningful commitments from the Applicants to ensure that consumers and the online video market are not adversely affected.

Respectfully submitted,

_________*/s/*_______________

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August 19, 2010

DECLARATION

The foregoing Reply of DISH Network L.L.C. to Comcast and NBCU's Opposition to Petitions to Deny and Response to Comments has been prepared using facts of which I have personal knowledge or upon information provided to me. I declare under penalty of perjury that the foregoing is true and correct to the best of my information, knowledge and belief.

Executed on August 19, 2010.

R. Stanton Dodge
Executive Vice President,
General Counsel & Secretary
DISH Network L.L.C.

ATTACHMENT A

Report of Professor Simon J. Wilkie, *Competition and the Impact of the Proposed Comcast/NBCU Transaction*, August 19, 2010

REPORT OF PROFESSOR SIMON J. WILKIE

COMPETITION
AND THE ECONOMIC IMPACT OF THE
PROPOSED COMCAST/NBCU TRANSACTION

August 19, 2010

I. INTRODUCTION

A. Qualifications

1. My name is Simon J. Wilkie. I am the Chairman of, and a Professor in, the Department of Economics at the University of Southern California, as well as the Executive Director at the Center for Communication Law and Policy at the University of Southern California Law School and a (Courtesy) Professor of Communication. Prior to joining the faculty at the University of Southern California, I was a Senior Research Associate in Economics at the California Institute of Technology. From 1990 to 1994, I held the position of Member of the Technical Staff at Bell Communications Research, (Bellcore), the research arm of the Bell Operating Companies. From 2007 through 2009, I sat on the program committee of the Telecommunications Policy Research Conference (TPRC). I currently

serve on the editorial board of the International Journal of Communication. I have also been an Affiliated Scholar of the Milken Institute, and a Visiting Assistant Professor of Columbia University.

2. From 2002 to 2003, I served as Chief Economist at the Federal Communications Commission ("FCC" or "Commission"). In that capacity, I oversaw the economic analysis performed by the Commission staff and advised the Chairman and Commissioners on issues involving economic analysis. Major items before the Commission during my tenure included the EchoStar/DirecTV transaction, the Comcast/AT&T Broadband transaction, the Triennial Review of Unbundling Obligations, and the Biennial Review of Media Ownership rules.

3. Over the past nineteen years, my academic research has focused on the areas of mechanism design, regulation, and game theory, with a particular emphasis on the telecommunications industry. I received a Bachelor of Commerce degree in Economics from the University of New South Wales, and M.A. and Ph.D. degrees in Economics from the University of Rochester.

B. Assignment

4. I have been asked by DISH Network L.L.C. ("DISH") to review, from an economic perspective, the additional effects of the proposed

Comcast/NBCU transaction.[1] More specifically, I have been asked to analyze possible anti-competitive consequences of such a transaction on the emerging online video distribution methods and Multichannel Video Programming Distributor ("MVPD") competitors such as DISH. Under the structure of the proposed transaction, Comcast will have clear business incentives that are not aligned with vigorous market based competition or consumer interests. In addition, Comcast has a history of punitively limiting the bandwidth of competitive content, which raises obvious anti-competitive concerns. 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.

C. Summary of Conclusions

- The nascent market for online video programming distributor services ("OVPD"), including the provision of broadcast and cable content, is rapidly growing and developing.
- Whether OVPD services are complementary to or substitutable for traditional MVPD services, the fact remains that they are both a part of the market for the distribution of video content.
- DISH has begun to aggressively promote Slingbox which is a pro-consumer innovation that allows greater access to consumer's video content. These innovations are responsive to increasing demand on the part of consumers for alternative

[1] This transaction would give Comcast a significant broadcasting services and programming portfolio in addition to its considerable service provision infrastructure and its already existing programming assets. Thus, Comcast will control not just the consumer access point, but also a considerable portion of the content that arrives through that access point.

access to their choice of video content and highlight the competitive importance in being able to provide such innovations to consumers.

- The merged Comcast/NBCU entity will have strong incentives not only to discriminate in favor of its own programming, but to impede competitors, such as DISH, from providing pro-competitive online video services.
- The incentives for the merged Comcast/NBCU entity to discriminate exist whether online video is a substitute or a complement.
- The nascent nature of this market makes it important for the Commission to take actions to prevent likely anti-competitive effects.

D. Outline of Report

5. Section II explores the current state of online video services and the relevant market for consideration. Section III discusses and analyzes the immediate and near-term incentives to discriminate against DISH and unaffiliated online distributors that would result from the Comcast/NBCU merger. Section IV explores the role of antitrust and regulation within these nascent competitive markets. Section V examines the application of the Commission Staff model to the Comcast/NBCU merger. Section VI explores the impact of the merger on pricing, as well Comcast's dubious claims of efficiencies.

II. ONLINE VIDEO SERVICES AND THE RELEVANT MARKET[2]

A. The Growth of Online Video

6. The landscape of MVPD services has changed significantly over the last decade. Advancements in technology and access to information continue to bring consumers more targeted and individually-specific media content. Consumer choice in terms of how and when traditional television programming is delivered has increased rapidly. In the home, digital video recorders ("DVRs") give consumers the ability to isolate and time-shift traditional MVPD content, but Internet speeds have increased sufficiently to make watching television online, ostensibly anytime and anywhere, a viable option for most consumers. Indeed, widening access to broadband Internet has led many consumers to question the need for traditional content intermediaries, such as MVPD service providers unless these providers, too, enrich their classic linear offerings.

7. The desire to acquire specific content coupled with high speed Internet access to media makes alternative formats increasingly attractive to consumers. This past year the FCC Media Bureau Chief William Lake stated in public that the separation of the TV and the

[2] At the highest level, I am distinguishing online video services from traditional MVPD services in the same way that consumers currently do. Namely, whether broadcast and/or cable content is delivered via a broadband Internet subscription. Consumers of online video services, therefore, would include every individual household with access to broadband Internet.

Internet is “coming to an end” and expressed the general view that the convergence of broadband and television is approaching.[3] This is seen in the more than 800,000 US households that have moved from traditional MVPD service to receiving their video programming online over the last two years, and another 800,000 that are estimated to do the same in 2010.[4] While online video distribution and programming are rapidly growing and developing, it is considered a nascent market in the sense that it is still small in comparison to traditional MVPDs and there is still quite a bit of uncertainty about the future structure of this market.

B. The Relevant Market

8. Consumers are not primarily concerned with the technology platform that delivers content to them; they are largely concerned with acquiring and viewing content. The proliferation of digital television, smart phones, wireless Internet devices, and laptop computers combined with increasing access to broadband Internet has hastened the proliferation of online content as a complementary, and slowly increasingly competitive, means to access video content. Currently MVPD service providers compete by offering viewing packages that differ according

[3] Eggerton, J. “FCC’s Bill Lake: Time of Separate TV and Net is Ending”, *Broadcasting & Cable*, (11/18/09).
[4] Schonfeld, E. “Estimate: 800,000 U.S. Households Abandoned Their TVs For the Web”, Techcrunch.com, (4/13/10).

to programming and ubiquity of access modes. Therefore, regardless of whether online video is currently a substitute or a complement, it is clear that online video distributors and MVPD are in the same market, namely the distribution of video content.

9. Currently, there are numerous models for media distribution, including online broadcaster controlled content (*e.g.* full length television episodes offered by NBC.com, CBS.com, etc.), online content aggregators (*e.g.* full length episodes and movies offered by Hulu.com, TV.com, Netflix, etc.), and full service providers who both aggregate content and provide the distribution infrastructure (*e.g.* broadcast and cable offerings of traditional MVPD service providers, as well as newer products offered by AT&T U-verse, Verizon FiOS, etc.).[5] Taken independently, these models of media distribution will compete for both consumer and advertising revenues. Online content providers and aggregators have powerful economic incentives to cooperate with independent Internet Service Providers ("ISPs") to develop substitute online video services platforms to compete with traditional MVPD services.[6] For their part, full service providers, such as traditional MVPDs like DISH, will have a strong incentive to

[5] These categories by no means capture all forms of online video distribution. For example, Sezmi combines online video distribution with an over-the-air tuner.

[6] For example, Netflix offers online content delivered by ISPs that can directly compete with broadcast and/or cable content provided by MVPDs. This is true of any website or Internet application offering broadcast and /or cable content.

collaborate with online content providers or will attempt to directly provide video content to their subscribers online. As the move towards multi paths of access to video content continues, these incentives will only intensify. This is true regardless of how quickly the transition away from more traditional media delivery formats takes place or which new type of format establishes itself in the coming years.

10. DISH currently offers its Sling service specifically to address the growing consumer demand for multi-mode access to video content. Sling-loaded set-top boxes that allow DISH subscribers to watch their live television programming anywhere they have access to a computer with broadband Internet or almost any Smartphone, and more recently Apple's iPad.[7] These innovations are not only pro-consumer, but highlight the competitive importance of the Internet and alternative/complementary modes of access to video content for DISH and other MVPDs.

III. COMCAST'S POTENTIAL FOR ANTI-COMPETITIVE BEHAVIOR

A. Comcast's Immediate and Near-Term Incentives To Engage In Anti-Competitive Behavior

11. When firms integrate, their economic incentives can change dramatically. Firms will often merge when they believe a single decision making body will align their interests in a way that would be

[7] http://www.slingbox.com/

difficult to achieve through independent negotiations. Therefore, the merged entity will have different combined incentives than if each firm were operating independently. The resulting entity would develop pricing policies, distribution methods, and overall firm strategy in order to efficiently reposition itself in the market. However, it is not necessarily the case that the incentives of the merged entity will align with consumer welfare.

12. Integrated firms, such as the proposed Comcast/NBCU, will enhance their existing market power as result of their content and infrastructure control by restricting output (in terms of both content and quality), raising prices, or both. In the current case, Comcast will have an incentive to restrict output in such a way as to favor the revenue-maximizing distribution of its owned content. This favoritism can take the form of content exclusionary practices, as is addressed by Drs. Israel and Katz, or more subtle content discrimination through transmission degradation or even outright blocking.

13. A merged Comcast/NBCU entity will have strong incentives to discriminate in favor of its own programming regardless of the future or current structure of the online video content market. This is true regardless of whether online video is a complement or substitute for traditional MVPD services. If, as Drs. Israel and Katz would have us believe, online video programming and MVPD services are, and will

continue to be, complements, Comcast/NBCU may not want to foreclose access of online providers to content entirely, but they will still have incentives to behave anti-competitively.[8]

14. It is important to note that if online services are truly complementary to traditional MVPD services, then important implications must follow. Namely, the merged entity would control both the pipeline through which online video is delivered as well as acquire control over a key complement for any MVPD, NBCU and its online programming. This will create incentives for Comcast/NBCU to raise prices for those inputs to its MVPD competitors and to selectively degrade the transmissions of complementary services of rival MVPD competitors, such as DISH, or non-affiliated distributors on its infrastructure network.[9] The effects of signal degradation on Direct Broadcast Satellite ("DBS") and other competing MVPD platforms, such as the Slingbox, would cause a direct, adverse horizontal effect.

15. Such an enhancement of market power on the part of Comcast/ NBCU would increase its ability to materially impact its competitors,

[8] Several MVPDs, including Comcast, are currently working to position online video services and programming as a complementary service, such as TV Everywhere. This augments, but does not necessarily replace, traditional MVPD services. Clearly, Comcast has an incentive to promote online video programming as a complement that would not replace profit generating MVPD services. Based on this market structure, Israel and Katz argue that Comcast/NBCU would not find it profitable to engage in exclusionary conduct relative to programming content. Israel and Katz focus on only one type of exclusionary conduct, namely the refusal to license NBCU content to competitors in an attempt to thwart the development of online video programming.

[9] This could be achieved by discriminatory network management, such as selective capacity allocation.

and retard the development of online video distribution as a complementary service of their competitors or as a substitute service of emerging OVPDs. This could be accomplished not just through discriminatory price increases and/or signal degradation, but through delaying new technology or standards. For example, it could be achieved by not collaborating, or increasing the cost of collaborating, with other MVPDs or OVPDs on projects similar to Hulu (of which NBCU currently is a partial owner). Instances of collusion in an attempt to eliminate nascent competitors are hardly unheard of. For example, the company Intertainer was a pioneer in the online delivery of video content.[10] In a lawsuit against the studios, it alleged that Intertainer failed when studios denied it access to their content after they established a competing platform, Movielink.[11] At the time of Intertainer's inception, studios had a pecuniary interest in pay-for-view content distribution, thereby making an online video format unattractive. If the facts were as alleged, this is a clear example of vertical control of content leading to foreclosure and a horizontal competitive harm.

16. While strong consumer preferences towards online video access may eventually force the development of such services by Comcast/NBCU, it is likely that post-merger these pro-consumer innovations would be

[10] *See* http://www.intertainer.com/timeline.html
[11] *See* http://news.cnet.com/2100-1023-965194.html

significantly delayed. Firms with significant market power tend to be adverse to change and the introduction of new technology that cannibalizes their existing monopoly rents as “the pre-invention monopoly power acts as a strong disincentive to further innovation.”[12] This conclusion also follows quite logically from the very structure of a monopoly or a market dominated by one or a few firms. A firm with market power extracts rents precisely because of a lack of substitutes within a market, allowing for supra-competitive pricing. As Arrow points out, this means that a monopolist who innovates is “replacing itself” in the market and so has to forgo its current steam of rents. In order to innovate, the monopolist must expect to recoup both the cost of innovation and the forgone rents from the old platform. This threshold implies that a firm with market power will be less innovative than one without market power. However, in an oligopoly market with a limited number of firms, when firms compete as “strategic substitutes” there is a well known issue that firms may rush to innovate to obtain “first mover advantage.” A comprehensive survey of the literature is provided by Baker in 2007.[13]

[12] *See* Kenneth J. Arrow, “*Economic Welfare and the Allocation of Resources for Invention*,” in THE RATE AND DIRECTION OF ECONOMIC ACTIVITIES: ECONOMIC AND SOCIAL FACTORS (Richard Nelson, ed. 1962).

[13] See Jonathan B. Baker “Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation.” Washington College of Law American University Washington, D.C., available at http://ssrn.com/abstract=962261

17. In his insightful paper Baker goes on to point out the key role played by antitrust enforcement in preserving an environment that fosters innovation. The role of a maverick competitor or a smaller competitor is key in preserving the incentive of a dominant firm with market power to innovate. Indeed this is the case in the industry here.

18. In the recent past, the Department of Justice had blocked the proposed acquisition of a key satellite DBS platform by Primestar, a consortium of the dominant cable companies. Then, the cable companies argued that they could use the extra capacity as a complementary service to existing cable service by offering consumers more channels than the capacity of their existing analogue cable systems. As the merger did not go through the dominant cable firms were now faced with competition from competitors with many new services that their legacy systems initially could not match. Thus, to meet the competition from DBS, the cable companies were forced to innovate and invest in the hybrid fiber coax digital networks that we have today.

19. This expensive innovation would not have happened but for the judicious application of antitrust and competition policy. In addition to the Primestar decision, the FCC's Program Access Rules played a key role in the development of the industry. As the dominant incumbents, the cable companies would have the incentive to get control of essential

programming, or so called "must see TV," and deny access to their competitors. This would foreclose competition and stop innovation. The Program Access Rules prevented some of this from happening.

20. It is instructive to compare the case of the MVPD market in Australia, with no program access rules, with the U.S. experience. To avoid the problem of cable monopoly that occurred in the U.S., Australia introduced a duopoly cable structure. As for program access, however, it was believed that allowing exclusive access to content would foster innovation and competition. The resulting equilibrium was that the two cable systems each came to control half the content! As a result prices in Australia (on a purchasing power basis) are higher than the U.S. and service is inferior. Although Australia has a similar economic profile to the U.S. – developed, suburban and English speaking, as of 2007 it had only a 22% subscription to MVPD service compared with approximately 87% in the United States. In this case eventually one firm (Optus) exited the industry and there is now a de-facto monopoly infrastructure provider.[14] The economic cost of this policy error is enormous. [15]

[14] Australian Competition and Consumer Commission, Analogue Subscription Television Broadcast Carriage Service: Final Decision, March 2007; FCC, Thirteenth Annual Assessment of the Status of Competition, ¶8 (1/16/09).

[15] Since the demise of the cable duopoly policy subscription rates have risen in the last few years to 33% today. (http://www.budde.com.au/Research/Australia-Pay-TV-Statistics-Subscribers-Overview-and-Analysis.html)

21. In the current case the product market itself is evolving as consumers can obtain access to their desired video content through alternative channels such as the Internet and cell phones. As before, this merger will place control of important content, the NBCU library and ongoing programming, in the hands of the largest cable company. This imbues Comcast with the ability to stop innovation by denying competitors access to this content through alternative and emerging access platforms, or by hampering such access. If consumers view these modes of access as complements to their MVPD service, as Katz and Israel argue, then Comcast will now have the incentive to deny the customers of its MVPD competitors access to their content of choice, as this will in turn make Comcast's MVPD product more appealing to consumers.

22. In the near term it is probable that OVPDs and MVPD distribution platforms will become competitors in a single horizontal market. In this case the merger is imbuing the largest MVPD with a direct ability to harm horizontal competitors by denying access to key content, or by increasing the cost of access to key content, and by using signal degradation to harm competitors.

B. Comcast Has Historically Engaged In Anti-Competitive Behavior

23. Comcast has a history of degrading rivals' online products. On August 1, 2008, the FCC formally ruled that Comcast had illegally

throttled BitTorrent traffic.[16] BitTorrent protocol was being utilized by several companies including Warner Bros., Viacom, PBS, and Paramount Pictures to distribute online media content. As the general counsel for Vuze, one of the initiators of the FCC inquiry, put it, "Comcast is a competitor to all of us who deliver high-quality video content."[17] Comcast also drew public scrutiny for purposely degrading signal quality in an attempt to find more economical ways to provide service.[18]

24. It has also been suggested that Comcast has selectively applied recompression to HDTV signals, thereby affecting viewing quality. The data on this issue as reported by the AVS Forum are reproduced below.[19]

[16] McCullagh, D. "FCC Formally Rules Comcast's Throttling of BitTorrent Was Illegal", CNET News, (8/1/08).

[17] McCullagh, D. "BitTorrent Firms: Comcast Throttling Is Anticompetitive", CNET News, (2/14/08).

[18] Williams, C. "Cable TV Under Fire for Degrading HD Quality", MSNBC.com, (4/21/08).

[19] *See* http://www.avsforum.com/avs-vb/showthread.php?t=1008271

TABLE 1:

Average bitrates were obtained by comparing the size of each recording, in total bytes, and dividing by the total number of seconds reported by VideoRedo. Multiplied by 8 to convert Mbps to Mbps.

Average Bitrates on FiOS v. Comcast
Code:

	FiOS	Comcast	Difference
AETV HD	18.66 Mbps	14.48 Mbps	-28.9%
Discovery HD	14.16 Mbps	10.43 Mbps	-35.8%
Discovery HD Theater	17.45 Mbps	12.60 Mbps	-38.5%
Food Network HD	14.32 Mbps	13.73 Mbps	-4.3%
HGTV HD	14.76 Mbps	12.43 Mbps	-18.7%
MHD	17.73 Mbps	13.21 Mbps	-34.2%
National Geographic HD	13.40 Mbps	11.92 Mbps	-12.4%
Universal HD	12.72 Mbps	11.01 Mbps	-15.5%
HBO HD	8.87 Mbps	8.81 Mbps	-0.7%
Cinemax HD	11.40 Mbps	10.77 Mbps	-5.8%
Starz HD	11.93 Mbps	9.76 Mbps	-22.2%
CNN HD		11.42 Mbps	
History HD		10.40 Mbps	
SciFi HD		12.59 Mbps	
USA HD		12.48 Mbps	

25. The above table suggests that Comcast, indeed, has the ability to selectively degrade online video content and has done so in the past. While this may have been done for legitimate network management reasons, the post-merger Comcast will be operating with a new and powerful incentive to favor Comcast-controlled NBCU content over non-Comcast and non-NBCU content in the online distribution channels, as well as Comcast MVPD customers over DISH customers.

26. If Comcast were to degrade the quality of the video content transmitted from the DISH subscribers' Slingbox to their personal computers or mobile devices, this would have a material impact on the

viability of an increasingly important complementary service of a major horizontal competitor.

27. On a forward-looking basis it would be difficult to monitor such discriminatory behavior and determine if it was motivated by legitimate network traffic management concerns. Even if a household were to successfully detect discriminatory behavior, the costs of seeking recourse are too high for the household to bear individually.[20]

IV. THE ROLE OF REGULATION AND ANTITRUST IN NASCENT MARKETS

28. From a regulatory and antitrust perspective, the proposed transaction would cause a substantial change in the structure of the relevant market for the distribution of video content. Because of the nascent nature of online video distribution and programming as a complementary service and eventually a substitute, this change in market structure would fundamentally change the course of this market. As a result, the transaction may affect consumer behavior by not only inflicting harm to other MVPDs who are attempting to offer complementary online video services, but by stifling the emergence of online video and foreclosing online video as a future substitute service.

29. This is a formative era for the restructuring of video markets in light of watershed technological breakthroughs. Allowing incumbent firms

[20] For example, individual households could seek recourse in the form of litigation for punitive or injunctive relief.

with market power to create substantial barriers to entry by degrading rivals' products or raising rivals' costs likely would have long run detrimental effects which once the joint venture is in place would be difficult to undue through regulatory or anti-trust enforcement. Once the "eggs are scrambled" by the joint venture, regulatory and antitrust enforcement will only become more difficult.[21]

30. Comcast's obvious strategy is to (1) channel the growth and development of online video distribution toward complementary product positioning, which will help to protect its current profit margins by managing any direct competition in the marketplace, (2) restrict access to the content it controls and/or (3) discriminate against the content it does not control.

31. Israel and Katz conclude that the nascent nature of online video distribution and programming means that the Commission should proceed with great caution, if at all, regarding any structural or regulatory measures designed to mitigate anti-competitive effects.[22] I disagree. In fact, the nascent nature of the products and corresponding

[21] Further, from day one of the transaction, Comcast has majority ownership and makes the decisions for NBCU. It can be expected to use that control to maximize Comcast's private interests. As a sophisticated conglomerate, GE knows what it is getting into as a minority investor and will be compensated for the sale of control. No regulator should reasonably rely upon Comcast being restrained from acting in its self interest based on a perceived legalistic "duty" to GE, as suggested by Israel and Katz.

[22] Israel and Katz place great weight on the current joint venture structure of the proposed Comcast/NBCU transaction. In particular, they use that current ownership structure to argue that it limits Comcast's incentives to engage in exclusionary conduct.

markets makes it more—not less—important for the Commission to take actions to prevent likely anti-competitive effects.

32. Whether online video programming is a complement or substitute to MVPD services, the merger will cause permanent changes in the evolution of markets for online video distribution and programming. This is true especially given that the likely anti-competitive effects have been a standard practice of a party to the transaction in the past. Once the transaction has been approved, Comcast's incentive to continue with, or even increase, its anti-competitive behavior will certainly not decrease, and its ability to do so will increase significantly.

V. Application of the Commission Staff Model

33. These conclusions, and my fundamental disagreement with Israel and Katz, are based on economic rationality, but I note that they are not inconsistent with the Commission Staff model for several reasons. First, Israel and Katz readily acknowledge that critical parameters in the Commission Staff model are highly uncertain. The reliability of these parameters is the basis for the Israel and Katz conclusion that the proposed transaction will not harm consumer welfare. One of the chief parameters in question is their assumption that the extreme position of complete foreclosure is the best metric to judge the effects of proposed

transaction on consumer welfare.[23] Given this uncertainty, as well as the nascent nature of the relevant markets, the prudent regulatory and antitrust policy is for the FCC to take a cautious approach and explore remedies that would effectively eliminate those albeit uncertain outcomes that would be harmful to consumer welfare.

34. This is one of many reasons why it is difficult to rely too heavily or exclusively on the results presented by Israel and Katz based on the Commission Staff model.

VI. MERGER IMPACT ON PRICING AND EFFICIENCY

A. Impact on Pricing

35. Mixed bundling – selling a bundle of services at a price below the sum of the prices of the individual service components – "is an extremely effective means of indirectly price discriminating."[24] Mixed bundling is also indicative of market power (*e.g.,* as seen in the bundling practices of Microsoft Office) and is a common strategy in this industry where "triple play" packages for provision of video, voice and broadband Internet are prevalent.

36. The merger of NBCU and Comcast must have an impact on pricing. Consider the price of stand-alone broadband access from Comcast today. In setting the current price, Comcast balances lost revenues

[23] This is true even assuming, *arguendo*, the basic analysis used by Israel and Katz is correct.

[24] R. Preston McAfee *"Competitive Solutions: The Strategists Toolkit,"* Princeton, 2002, p. 277.

from higher stand-alone prices (which some consumers will choose not to buy at the higher price) with the added revenues from customers with higher-profit bundled services.[25] Therefore, at the margin, the post-merger Comcast entity will have the incentive to raise the price of stand-alone broadband service absent other competitive pressures.

37. In particular, consider the case of two products, "cable" and "broadband," both of which have a marginal cost of zero (this is just a normalization). Suppose that consumers have a reservation value for each broadband service, x and cable service, y, with a joint distribution $F(x,y)$ with density $f(x,y)$. The monopolist optimal mixed bundling prices ($p^*_x, p^*_y\ p^*_b$) satisfy the condition that for an increase in the price of broadband, p^*_x, by ε, it must be that $-Ap^*_x + B\varepsilon + C(p^*_b - p^*_x) = 0$, where A is the measure of the set of customers who drop broadband service, B is the measure of those who remain just with broadband, and C is the measure of the set who switch to the bundle. Now consider an MVPD broadband provider is vertically integrated with an advertising supported programming channel, and obtains an increase in advertising revenues from the programming entity of δ per video subscriber. The impact of increasing the price of broadband by ε, then, is:

[25] However, post merger, Comcast will now have a higher profit margin on customers who choose the bundle due to the increased number of subscriptions to NBCU channels.

$-Ap^*_x + B\varepsilon + C(p^*_b - p^*_x + \delta) = C\delta > 0$. Thus, it will be profitable for the vertically integrated firm to raise price above the optimal price of the un-integrated firm. The size of this effect depends on C and δ. Thus the larger the footprint of the MVPD MSO and the larger the holdings of the programming entity the greater this effect will be.

B. Post Merger Efficiency Claims

38. It should also be noted that Comcast claims that the merger leads to efficiencies through elimination of "double marginalization" in programming costs. From these efficiencies, it is claimed, Comcast will have an incentive to lower MVPD prices to its own customers. However, the substantial economic evidence contradicts this claim. There have been 23 econometric studies, as shown in Table 2 in the Appendix, of how MVPD size affects pricing, and although it is claimed larger MVPDs have lower programming costs, the record shows that size does lead to higher prices. Thus there is no evidence that any such benefit would be passed on to consumers.

VII. CONCLUSION

39. Based on the foregoing analysis, it is clear that the proposed Comcast/NBCU transaction will provide the post-merger Comcast with strong incentives and abilities to interfere with horizontal MVPD competitors, as well as emerging OVPD services, regardless of whether

online video content is a complement or substitute for traditional MVPD services.

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 19, 2010.

Simon J. Wilkie

TABLE 2

EFFECT OF MSO SIZE ON CABLE PRICES

Study	Year of Source Data	Variable for Size of MSO	Statistical Significance Level	Effect of MSO Size on Cable Prices
FCC (1994)	1992 FCC Price Survey	Dummy variable indicating whether the cable system is owned by an MSO	0.05	Ownership of a cable system by an MSO leads to a 7.5% increase in basic cable prices.
	1992 FCC Price Survey	Number of cable systems owned by the MSO	0.05	Doubling the number of cable systems owned by an MSO leads to a 1% increase in basic cable prices.
Jayaratne (1996)	1992 FCC Price Survey	Dummy variable indicating whether the cable system is owned by an MSO	0.01	Ownership of a cable system by an MSO leads to a 13% increase in basic cable prices.
	1992 FCC Price Survey	Number of cable systems owned by the MSO	0.05	Doubling the number of cable systems owned by an MSO leads to a 1% increase in basic cable prices.
Emmons and Prager (1997)	1983 Television & Cable Factbook	Number of cable systems owned by the MSO	Not statistically significant	Doubling the number of cable systems owned by an MSO leads to a 0.8% increase in basic service cable prices.
	1989 Television & Cable Factbook	Number of cable systems owned by the MSO	0.1	Doubling the number of cable systems owned by an MSO leads to a 2% increase in basic service cable prices.
FCC (1999)	1998 FCC Price Survey	Dummy variable indicating whether the cable system is owned by an MSO	0.1	In 1997, ownership of a cable system by an MSO leads to a 4.1% increase in cable prices.

	1998 FCC Price Survey	Dummy variable indicating whether the cable system is owned by an MSO	0.2	In 1998, ownership of a cable system by an MSO leads to a 3.3% increase in cable prices.
GAO (2000)	1998 FCC Price Survey	Dummy variable indicating whether the cable system is owned by one of the 10 largestMSOs	0.01	Ownership by one of the 10 largest MSOs leads to a 8.8% increase in cable prices.
FCC (2000)	1999 FCC Price Survey	Dummy variable indicating whether the cable system is owned by an MSO	0.2	In 1998, ownership of a cable system by an MSO leads to a 3.5% increase in cable prices.
	1999 FCC Price Survey	Dummy variable indicating whether the cable system is owned by an MSO	0.2	In 1999, ownership of a cable system by an MSO leads to a 3.6% increase in cable prices.
	1999 FCC Price Survey	Dummy variable indicating whether the cable system is part of a cluster of cable systems	0.05	When the cable system is part of a cluster of cable systems owned by an MSO, cable prices are 2.6% higher.
Chipty (2001)	1991 Television & Cable Factbook	Number of homes passed nationally by the MSO	0.05	Doubling the number of homes passed nationally by an MSO leads to a 6.7% increase in premium cable prices.
FCC (2001)	2000 FCC Price Survey	Dummy variable indicating whether a cable system is owned by an MSO	0.01	Ownership by an MSO leads to a 15.0% increase in cable prices (without cluster dummy).
	2000 FCC Price Survey	Dummy variable indicating whether a cable system is owned by an MSO	0.01	Ownership by an MSO leads to a 13.7% increase in cable prices (with cluster dummy included).

	2000 FCC Price Survey	Dummy variable indicating whether a cable system is part of a cluster of cable systems	0.01	When the cable system is part of a cluster of cable systems owned by an MSO, cable prices are 2.4% higher.
FCC (2002)	2001 FCC Price Survey	Dummy variable indicating whether a cable system is owned by an MSO	0.01	Ownership by an MSO leads to a 22.8% increase in cable prices.
	2001 FCC Price Survey	Number of nationwide subscribers served by the MSO	0.01	Doubling the number of subscribers served by the MSO leads to a 1.8% increase in cable prices.
GAO (2002)	2001 FCC Price Survey	Dummy variable indicating whether a cable system is owned by one of the 10 largest MSOs	0.01	Ownership by one of the 10 largest MSOs leads to a 6.6% increase in cable prices.
Karakari, Brown, and Abramowitz (2003)	1998 FCC Price Survey	Dummy variable indicating whether the cable system is owned by one of the 10 largest MSOs	0.01	Ownership by one of the 10 largest MSOs leads to a 5.6% increase in cable prices.
GAO (2003)	2001 FCC Price Survey	Dummy variable indicating whether a cable system is owned by one of the 10 largest MSOs	0.01	Ownership by one of the 10 largest MSOs leads to a 5.3% increase in cable prices.
Savage and Wirth (2005)	1999 Television & Cable Factbook	MSO’s share of all cable systems	Not statistically significant	A 10 percentage point increase in the number of nationwide cable systems owned by an MSO leads to a $1.32 increase in monthly basic service cable prices.
FCC (2006)	2005 FCC Price Survey	Number of nationwide subscribers served by the MSO	0.01	Doubling the number of subscribers served by the MSO leads to a 2.5% increase in cable prices.

GAO (2005)	2004 FCC Price Survey	Dummy variable indicating whether a cable system is owned by an MSO serving at least one million nationwide subscribers	Not statistically significant	Ownership by an MSO serving at least one million nationwide subscribers leads to a 1.3% increase in cable prices.
Clements and Brown (2006)	2001 FCC Price Survey	Dummy variable indicating whether a cable system is owned by one of the top 10 largest MSOs	0.01	Ownership by one of the 10 largest MSOs leads to a 6.9% increase in cable prices.
Chu (2008)	1992-2002 Television & Cable Factbook	Dummy variable indicating if the cable system is owned by one of the seventeen largest MSOs by subscriber count as of September 2004	0.01	Ownership of a cable system by an MSO leads to reduction in subscriber utility of $2.57 per month.

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ATTACHMENT B

Comcast/NBCU Advertisement Published in
COMMUNICATIONS DAILY, July 21, 2010

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ATTACHMENT C

Letter from Amy B. Cohen, Vice President and Associate General Counsel, Comcast SportsNet, to Dave Shull, Senior Vice President, Programming, DISH Network L.L.C., July 23, 2010

One Comcast Center, 28th Floor • Philadelphia, PA 19103-2838

July 23, 2010

BY ELECTRONIC
AND FIRST CLASS MAIL

Dave Shull
DISH NETWORK L.L.C.
9601 S. Meridian Boulevard
Englewood, CO 80112

Re: Comcast SportsNet Philadelphia

Dear Dave:

This will acknowledge receipt of Kevin Cross's letter dated June 21, 2010 regarding carriage of Comcast SportsNet Philadelphia ("CSN-P"), based on the issuance of *In the Matter of Review of Commission's Program Access Rules and Examination of Programming Tying Arrangements*, 25 FCC Rcd. 746 (2010) ("*Terrestrial Order*"). Notwithstanding the FCC's recent change of view in the *Terrestrial Order* about the applicable law, Comcast's longstanding business policy not to offer carriage of CSN-P to DBS providers, including DirecTV, has not changed and remains the same. As you may know, Dish and another DBS provider previously challenged that business policy and it was found to be lawful by the FCC, in a ruling later affirmed by the United States Court of Appeals for the District of Columbia Circuit. *See Terrestrial Order* ¶ 70 n.256 (citing to these decisions).

Please let me know if you have any questions.

Very truly yours,

Amy B. Cohen

Amy B. Cohen
Vice President, Associate General Counsel
Comcast Sportsnet