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Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
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Washington, DC 20554

FILED/ACCEPTED

AUG 19 2010

Federal Communications Commission
Office of the Secretary

August 19, 2010

Re: Submission of Filing containing information REDACTED FOR PUBLIC INSPECTION IN MB DKT 10-56

Dear Ms. Dortch,

Enclosed please find two (2) copies of a joint filing by Free Press, Media Access Project, Consumer Federation of America, and Consumers Union that have been REDACTED FOR PUBLIC INSPECTION IN MB DKT 10-56. This filing is being submitted consistent with the terms of the Media Bureau's *Second Protective Order*, DA 10-371 (March 4, 2010).

Sincerely,
/s/
Corie Wright
Free Press, Washington, D.C.
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No. of Copies rec'd 0+1
List ABCDE

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses or Transfer Control of Licensees	)	MB Docket 10-56

REPLY TO OPPOSITION
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August 19, 2010

SUMMARY

Free Press, Media Access Project, Consumer Federation of America, and Consumers Union ("Public Interest Petitioners") respectfully submit this Reply in response to Comcast and NBCU's Opposition to our Petition to Deny their applications for transfer of control or assignment of various licenses to a new joint venture.

Public Interest Petitioners have offered significant evidence of the anticompetitive leverage and tactics this merger will generate if approved in its current form. Rather than rebutting these findings, Applicants have offered talking points, flawed data, and inconsistent statements. Applicants' own internal business plans confirm Public Interest Petitioners' fears that Comcast will use leverage gained from the merger to engage in anticompetitive tactics. They also cast serious doubt on the viability of Applicants' so-called "public interest commitments."

Applicants must show that the merger would enhance (rather than merely preserve) public interest goals. Even if Comcast and NBCU could demonstrate that the proposed transaction would be competitively "neutral," it still would be *insufficient* to warrant Commission approval. But by any standard the present transaction is far from competitively neutral. The merger of the largest cable operator and one of the nation's premier video content producers will fundamentally alter the structure of the video marketplace to the detriment of competition, innovation, and diversity in MVPD and programming markets, the emerging online video market, and local media markets. In particular, this Reply highlights the adverse affects on emerging online video markets and local media markets.

Online Video Markets

The merger poses a substantial risk to the development of the nascent market for online video by eliminating horizontal competition between Comcast's and NBCU's online video

platforms, and hindering NBCU's incentives to make its programming available to platforms that compete with Comcast cable television services. By virtue of their combined control over broadband access, cable platforms, and a critical mass of content, Applicants will be uniquely situated to withhold content from emerging online video competitors. As the nation's largest broadband internet service provider, Comcast can also control access to, and the quality of, unaffiliated programming and online distributors. These factors demonstrate that the combined company will have both the incentive and the ability to influence the growth of online video to its own advantage, and to the detriment of competition and consumers.

Applicants claim in their Opposition and economic studies that online video is not a competitor to Comcast's cable or online video businesses. However, what matters is not the self-serving *ex post facto* rationalizations that are contained in the studies that Applicants have solicited for the purpose of this merger review. What matters is what Comcast has actually thought and done with regard to online video competition. To that end, it is clear from Comcast's internal documents that the company fears competition from new online competitors and has taken steps to limit that emerging competition. By acquiring access to popular content controlled by NBCU, Comcast will have much more incentive and ability to withhold content that emerging online video competitors need to establish themselves. Unfortunately, without online program access or enforceable network neutrality rules, the Commission is presently unable to prevent this type of anticompetitive conduct. To the extent that Applicants acknowledge that there are problems in these areas, they suggest that they would be better dealt with as part of an "industry wide review." But Applicants' argument begs the question: if, as Applicants appear to acknowledge, certain protections are insufficient or non-existent, then shouldn't the Commission withhold approval of the merger until it has put those safeguards in place?

Applicants suggest that the transaction will lead to greater innovation in online video. These purported benefits are tenuous and indeterminate. Comcast and NBCU have not shown that a lack of vertical integration has materially impaired their ability to innovate or to deploy new services to consumers. Thus, we are at loss as to why Applicants think this Commission should approve a merger whose primary purpose is to grease the wheels of its negotiations with other businesses. More to the point, the purported innovation "benefits" would diminish overall innovation and competition in burgeoning markets. No other company will wield the same level of market power in <u>both</u> the content and distribution markets as Comcast and NBCU would post-merger. The integration of Comcast and NBCU content and platforms gives the merged company unique incentives to engage in protectionist conduct that would stifle – not promote – innovation and competition.

Local Media Markets

The joint venture will adversely affect local media markets by eliminating direct competition between Comcast's cable operations and NBC owned and operated broadcast stations. The merger will concentrate power over local advertising in markets where Comcast will acquire an NBC-owned television station in the Comcast's cable footprint. The merger of the local Comcast cable operations with a top-4 local broadcaster, such as NBC, is likely to result in a significant decline in competition in the local ad market and excessive domination by the merged company – to the detriment of other local broadcasters (particularly, smaller, independent ones) which are already facing ad revenue declines in an economic downturn.

Applicants' voluntary commitments and side deals with stakeholders do not remedy the ill-effects of the merger in local media markets. Many are simply a promise to preserve the *status quo*, and do not affirmatively promote public interest goals. Others, to the extent they purport to promote affirmative public interest goals, are illusory and cannot be meaningfully monitored or enforced by the Commission or the public.

Applicants continue to assert that the proposed transaction will strengthen free over-the - air broadcasting because Applicants have entered into agreements with the affiliates of the "Big Four" broadcast networks. However, these agreements do not constitute actual "benefits." At best, they are attempts by non-NBC O&O stakeholders to neutralize the unfair dealing that is likely to result from the merger. This should not be confused with a legitimate benefit that affirmatively increases a public interest outcome. These agreements also raise numerous questions. It is not clear that Comcast and NBCU have filed all of the agreements they have entered into with outside parties. Applicants have yet to comply with the Commission's mandate that there be full disclosure of consideration given in exchange for withdrawing a threat to file a petition to deny or informal objection. Thus, the current record leaves unresolved several important new substantial and material issues of fact

The Applicants' voluntary "promise" to improve local programming on NBC O&O stations is dubious and unenforceable. It is especially telling that the Applicants do not make similar promises for Telemundo properties. Under NBCU's ownership, Telemundo's local operations have been significantly cut back, and NBCU has failed to comply with an FCC directive to sell off its Los Angeles triopoly. Applicants have now made what purports to be a promise to divest the Spanish language station KWHY-TV. However, the device they propose to employ – a trust – is a thinly-veiled attempt to retain the station indefinitely while stalling until such time as they can lobby the Commission to change its duopoly rules. The trust also fails to comport with the FCC's insulation standards designed to protect the Trustee from the influence of the trust Beneficiary.

The Commission should also disregard Applicants' assertions as to the generous "cash and in-contributions" they have made to various organizations. Comcast and NBCU's merger applications are not pending before the "Federal Cash-and-In-Kind-Contribution Commission," but the Federal Communications Commission. This type of financial support, while commendable, is irrelevant to the instant proceeding. The FCC's duty is to promote competition, diversity, and localism – its jurisdictional purview does not encompass charitable donations. If it did, large companies could simply buy their way out of merger review. Accordingly, the financial support that Applicants have given is not only an insufficient ground on which to grant the merger, it is a *highly improper* one.

Remedying Merger Harms

The harms resulting from this merger run so wide and so deep that we are skeptical that these harms can be remedied. Applicants' current voluntary commitments are insufficient and unenforceable and do not tip the balance in favor of granting the applications. Moreover, there are some critical assurances that Applicants still have not given to the Commission or the public with regard to the merger's impact on the Commission's core goals of competition, innovation, diversity, and localism. In this Reply, we highlight Applicants' omissions, and suggest proposals that potentially could remediate some small degree of the harms that would be created by approval of the proposed transaction. In doing so, we do not intend the list to be exhaustive, or to suggest that their fulfillment would be sufficient to attend to all the anticompetitive concerns that have been presented in this proceeding.

In conclusion, Public Interest Petitioners urge the Commission to carefully consider the detrimental affects of a Comcast/NBCU merger on competition and the public interest, and respectfully request that the Commission deny Applicants' merger applications and attendant broadcast license transfers and grant all such other relief as may be just and proper.

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses or Transfer Control of Licensees	)	MB Docket 10-56
	)	
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	)	
	)	

REPLY TO OPPOSITION
FREE PRESS
MEDIA ACCESS PROJECT
CONSUMER FEDERATION OF AMERICA
CONSUMERS UNION

Introduction

Free Press, Media Access Project, Consumer Federation of America, and Consumers Union (together "Public Interest Petitioners") respectfully submit this Reply in response to the Comcast and NBCU (together, "Applicants") Opposition[1] to our Petition to Deny[2] their applications for transfer of control or assignment of various licenses to a new joint venture.[3]

In this proceeding, both industry and public interest community members alike have offered significant evidence of anticompetitive leverage and tactics that will harm competition

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[1] *Joint Opposition to Petitions to Deny and Response to Comments of Comcast Corp., General Electric Co., and NBCU Universal, Inc.*, filed MB Dkt 10-56 (July 21, 2010) ("Opposition").
[2] *Petition to Deny of Consumer Federation of America, Consumers Union, Free Press, and Media Access Project*, filed MB Dkt 10-56 (June 21, 2010) ("Petition").
[3] *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses or Transfer Control of Licensees*, MB Dkt 10-56 (filed Jan 28, 2010) ("Application").

and consumers in the event that this merger is approved in its current form. In response, Comcast and NBCU have offered, talking points, flawed data, and inconsistent statements. Where outside parties have presented facts or arguments that are inconvenient to Applicants' case, Comcast and NBCU ignore them or claim (erroneously) that they are outside the scope of the merger review. Comcast's own internal business plans and projections confirm Public Interest Petitioners' fears that Comcast will use leverage gained from the merger to engage in anticompetitive tactics. Moreover, these documents also cast serious doubt as to the viability and intent of Applicants to follow-through on a number of the so-called "public interest commitments" they have offered. In this Reply and appended Reply Declaration, Public Interest Petitioners refute Applicants' faulty analyses, as well as take the opportunity to highlight Applicants' more serious omissions and contradictions.

I. Applicants Have Not Adequately Addressed the Claims of Multiple Parties in This Proceeding as to the Anti-Competitive Effects of the Proposed Merger

In their initial applications, Applicants attempted to gloss over, or failed to address completely, the harms to competition, localism, and diversity that would result from the transaction. Yet, notwithstanding their near 600 page Opposition response filing, Comcast and NBCU still have failed to demonstrate that the merger will result in cognizable, transaction-specific public interest benefits, or that any of the purported benefits generated by the merger outweigh the likely harms to consumers resulting from decreased competition, innovation, diversity, and localism.

It bears repeating that applicants seeking Commission approval of the proposed transaction "bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, will serve the public interest."[4] Accordingly, the Applicants must show that the merger would enhance (rather than merely preserve) public interest goals.[5] Thus, even if Comcast and NBCU could demonstrate that the proposed transaction would be competitively "neutral," it would be *insufficient* to warrant Commission approval.

But by any standard, the present transaction is far from competitively neutral. Public Interest Petitioners, in addition to numerous other petitioners and commenters have shown that the merger of the largest cable operator and one of the nation's premier video content producers would fundamentally alter the structure of the video marketplace to the detriment of competition and consumers. Nevertheless, Applicants fail to address a number of concerns we have raised; where they do, the response is inadequate, contradictory, or both. Instead, Applicants continue to assert that the merger presents "no significant competitive harms" and does not present any "material horizontal effects."[6] But, as we demonstrated in our initial pleading, the merger will result in significant horizontal harms in the MVPD and programming markets, the emerging online video market, and local media markets. In this Reply, we particularly wish to emphasize our concerns vis-à-vis the merger's adverse effects on competition and innovation in the online video market and local media markets.

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[4] *In the Matter of New Corp. and the DIRECTV Group, Inc., and Liberty Media Corp., For Authority to Transfer Control*, Memorandum Opinion and Order, 23 FCC Rcd 3265, 22 (2008).
[5] *See Applications for Consent to the Transfer of Control of Licenses XM Satellite Radio Holdings Inc., Transferor to Sirius Satellite Radio, Inc., Transferee*, Memorandum Opinion and Order and Report and Order, 23 FCC Rcd 12348, ¶ 32 (2008)("XM/Siruius Order"); *In the Applications of NYNEX Corporation Transferor, - and - Bell Atlantic Corporation Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, 12 FCC Rcd 19985, 19987, ¶ 2 (1997).
[6] Opposition at iii.

A. The Merger Will Negatively Impact the Nascent Market for Online Video Programming

In our initial filing Public Interest Petitioners demonstrated that this merger poses a substantial risk to the development of the nascent market for online video.[7] The merger eliminates horizontal competition between Comcast's and NBCU's online video platforms, and hinders NBCU's incentive to make its programming available to platforms that compete with Comcast cable television services.

Secondly, by virtue of their combined control over broadband access, cable platforms, and a critical mass of popular film, broadcast, and cable content, Comcast and NBCU would be uniquely situated to withhold content from emerging online video competitors. Comcast's acquisition of NBCU-owned films and programming would give the combined company vastly increased power over the content that budding online video competitors need to establish themselves. And, as the nation's largest broadband internet service provider, Comcast can also control access to, and the quality of, programming and online distributors that are not affiliated with either Comcast or NBC. These factors taken together demonstrate that the combined company will have both the incentive and the ability to influence the growth of online video to its own advantage, and to the detriment of competition and consumers.

Applicants refute these arguments by claiming that (1) online video is a complement and not a competitor to traditional MVPD service,[8] thus, the joint venture would have no incentive to withhold programming from competing online video providers;[9] and (2) the joint venture would

[7] Petition at Section II(A).
[8] Opposition at 184.
[9] *Id* at 184.

lack the requisite market power over online video programming to implement a foreclosure strategy.[10] As detailed below, each of these assertions is contradicted by market realities, as well as Comcast's own business plans.

1. The Joint Venture Will Have Increased Incentive and Ability to Diminish Emerging Competition in the Online Video Market by Withholding Critical Content or by Making it Available on Discriminatory Terms

Applicants argue in both their Opposition and their initial applications that online video is not a competitor to the traditional cable model, thus there is no incentive for them to quash the increased availability of content online. Yet, Comcast's own documents, as well as statements by company executives, show that it fears the growth of online video competition far more than it acknowledges in the applications or Opposition. For example, in its Annual 10-K Report filed in 2010, Comcast asserts that "[o]ur cable services also may compete to some degree for customers with other companies, such as . . . online services that offer Internet video streaming, downloading and distribution of movies, television shows and other video programming."[11]

Applicants have also submitted economic studies suggesting that online video is not a competitor.[12] While we believe these reports are flawed in their analysis, their findings are ultimately beside the point. What matters is not the self-serving *ex post facto* rationalizations

[10] *Id.* at 182.

[11] *See* COMCAST CORPORATION, ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(D) OF THE SECURITIES EXCHANGE ACT OF 1934 FOR THE FISCAL YEAR ENDED DECEMBER 31, 2009 (2010), http://files.shareholder.com/downloads/CMCSA/716386522x0xS1193125%2D10%2D37551/1166691/filing.pdf.

[12] *See, e.g.*, Dr. Mark Israel and Dr. Michael Katz, *Economic Analysis of the Proposed Comcast-NBCU-GE Transaction*, (July 20, 2010) at section VIII (appended as exhibit 2 to Applicants' Opposition).

that are contained in the studies that Applicants have solicited for the purpose of this merger review; what matters is what Comcast has actually thought and done with regard to online video competition. To that end, it is clear from Comcast's internal documents that the company has both thought and done quite a lot about online video. These documents reveal the extent to which the company fears competition from new online competitors. {{

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[13] 25-COM-00000017, at Slide 3, 5.

[14] *Id.* at , Slide 5. *See also* 31-COM-00001952 at Slide 2 {{
}}

[15] 26-COM-00000001.

[16] *Id.* at Slide 8

Even taking Applicants at their word that online video services currently occupy a "complementary" role, it is clear that Comcast views these nascent services as its biggest future competitor. Comcast's Chief Operating Officer Stephen Burke has stated that "[t]he biggest risk is so much stuff gets on the Internet for free that we turn into the newspaper business," and that "we [need to] get ahead of the steamroller that is the Internet."[17] Comcast's internal documents reflect similar concerns {{

[18]

[19]}}

[17] Posting of Saul Hansell to the NEW YORK TIMES' Bits Blog, http://bits.blogs.nytimes.com/2009/04/06/tweaking-the-cable-model-to-avoidnewspapers-fate/, (Apr. 6, 2009, 18:10 EST)
[18] 25-COM-00000194.
[19] *Id.* at Slide 50.

{{**Exhibit 1**[20]

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[20] 25-COM-00000594 at Slide 9.

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Numerous third party reports submitted by Comcast confirm [[

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[21] 25-COM-00000194 at Slide 54.
[22] *Id.* at Slide 51. Indeed, Public Interest Petitioners addressed this same issue in the Declaration of Dr. Cooper and Adam Lynn attached to our Petition to Deny. *Declaration* at 54-56, 59.
[23] 31-COM-00001500 at Slide 4.
[24] *Id.*
[25] 11-COM-00000811 at p. 2.

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2. Fancast Xfinity TV is Comcast's Primary Weapon Against New Competition from Online Video Providers. The Acquisition of NBCU Merger Makes This Strategy More Possible, More Quickly

As detailed above, it is clear that Comcast fears the emergence of online video as a competitor to its facilities-based MVPD services. The solution to ensuring that consumers do not and cannot eschew a cable subscription in favor of online video is two fold: (1) make the cable non-optional by tying access to online viewing to facilities-based cable subscription (this is the crux of the Fancast Xfinity TV model); and (2) acquire a critical mass of popular content that can be withheld from emerging online video providers to ensure that they do not become a viable competitor to Comcast's online video offerings or MVPD offerings.[30]

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[26] 17-COM-00090397 at p. 36.

[27] 11-COM-00000343 at p. 38.

[28] *Id.*

[29] 26-COM-00000333 at p. 12.

[30] To be clear, we take no issue with Comcast, or any other MVPD offering its own online video service. Nor do we suggest that content should be made available for "free" online. Indeed, we

(continued on next page)

Comcast's acquisition of NBCU film, cable, and broadcast content is an important element in making this strategy a successful one. Comcast owns content and is seeking to acquire even more content through its acquisition of NBCU. If the merger is approved, it will give Comcast a critical mass of popular NBCU broadcast, cable, and film content that Comcast can withhold from online video competitors (or, in the alternative, that it can "make available" only on discriminatory terms and conditions that are the effective equivalent of withholding such programming).

Applicants argue that even if the merger is approved, they would not possess market power to engage in content or distribution foreclosure online because their combined share of the online video distribution market is too small.[31] They claim that the joint venture would only account for 13.7 percent of national broadcast and basic cable viewing[32] and that their combined share of the online video distribution market is too small to make such a strategy successful.[33] But reliance on these statistics only tells half of the story. First, as many analysts have estimated,

(footnote continued)
believe that the more companies there are offering such services via varying business models, the greater the competition and choice for consumers. The problem with Comcast's online video strategy is that it appears to rely on limiting its online competitors' access to content, thus reducing competition and choice for consumers. It is also worth noting that Fancast Xfinity (and the TV Everywhere model generally) limits both competition and choice by tying access to online video to a facilities-based cable subscription, even though there is no technological reason to do so. A consumer cannot buy stand alone access to the Fancast Xfinity platform at any price. That means that a consumer who does not have a have TV set, but is willing to pay Comcast money for access to online content to watch on her computer must buy a cable subscription and set-top box for a television set that she does not own. Thus, Comcast appears willing to turn down a customer's ready money for internet-only Fancast Xfinity access in order to subsidize their facilities-based cable model.

[31] Opposition at 182.

[32] *Id.*

[33] Application at 122-23

the joint venture would actually control one in five hours of television viewing.[34] Second, much of this content is not substitutable – indeed, the FCC has suggested that broadcast content is "must have" programming.[35] Additionally, NBCU-controlled cable networks, such as USA and CNBC, {{ [36]}}, are some of the most popular programming on the cable dial. Thus, by withholding this content or charging online distributors discriminatory rates to access it, Comcast/NBCU could significantly impact the viability of new competitors (and hence new competition) in the online sphere. This risk is particularly acute for new entrants, who do not otherwise possess market power in the MVPD market, but are seeking to create new online video platforms that compete with facilities-based MVPD services such as cable, DBS, or telco video offerings. Because the FCC has no program access-type rules to prevent such conduct in the online video market, Comcast/NBCU could execute this strategy with impunity.

Comcast's acquisition of NBCU programming, though a critical weapon, is not the only one in its arsenal. Comcast can complement its ability to withhold its own affiliated content with its ability to leverage bottleneck control over unaffiliated content and coerce those programmers into exclusive deals that prevents them from making their content available to Comcast's online-

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[34] Bernstein Research, *Web Video: Friend or Foe…And to Whom?* at 9 (October 2009).

[35] *See, e.g., Sunset of Exclusive Contract Provisions, Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, Report and Order, 22 FCC Rcd 17791, ¶ 39 (2007) (discussing the must-have nature of RSN programming, but also determining that "a competitive MVPD's lack of access to popular non-RSN networks would not have a materially different impact on the MVPD's subscribership than would lack of access to an RSN.").

[36] 31-COM-00000298, Slide 35.

only competitors. These strategies allow Comcast to eliminate potential competition while preserving the lucrative cable TV revenue stream indefinitely.

Applicants do not acknowledge the enormous influence that Comcast – as the largest cable provider in the nation with veritable monopoly control of certain local regions[37] – has over unaffiliated programmers that rely on Comcast for the largest percentage of their MVPD subscriber fees.[38] With a national MVPD market share of nearly 24 percent,[39] Comcast's estimated subscriber fee payments represent anywhere from 6 to 18 percent of revenues for the top twenty most-carried cable channels.[40] Because programmers are so reliant on Comcast for these revenues, it would be naïve to suppose that programmers do not respond to Comcast's pressures to limit the distribution of their content to emerging online competitors.

In response to arguments that Comcast will pressure unaffiliated channels to withhold their content from competing online distributors in exchange for carriage on Comcast's cable systems, Comcast says that it "generally" does not prevent independent programmers from

[37] For example, Comcast's share of individual markets is well over 50 percent in every market in which it provides service, and an upwards of 60 percent in other markets, including Boston, Philadelphia, and Chicago.

[38] We recognize the common use of bulk discounts in the rates paid by MVPDs. The use of these discounts would lower these percentages. However, we believe these estimates represent a fair approximation. Nor would even a substantially lower figure negate the point. Of the twenty most carried cable networks (with the exception of C-Span) these fees generate an estimated 45 percent of the network's revenue. These figures are based on data derived from SNL Kagan. Analysis relied on the affiliate and net operating revenue from cable networks. Disney was excluded, due to SNL Kagan not offering advertising revenue for the network.

[39] *Id.* This figure represents Comcast's estimated national market share for Q4 2009.

[40] *Id.* Furthermore, another 51 percent of revenue comes from advertising. Of course, these networks rely on access to MVPD networks to generate this revenue. Thus, Comcast can restrict another 6 to 17 percent of these networks revenues. Combining the two, on average, Comcast has the ability to foreclose nearly a quarter of these networks' revenues. *Id.*

distributing their content online, although it argues that it is "entirely reasonable for Comcast to seek common industry contractual protections to ensure that the same content is not distributed online for free."[41] However, evidence indicates that these practices are not as innocuous as Comcast suggests, and that it does in fact use its influence to pressure programmers to withhold online distribution of their content to Comcast's competitors.

For example, in testimony before several Congressional committees, the CEO of the Comcast competitor WOW! explained that her company

> has most recently experienced problems with initiating its own version of Comcast's Fancast XFinity TV service because it has been unable to obtain content from Comcast and other content providers with whom Comcast has struck deals. This despite the fact that Comcast claims the content used in its online service is non-exclusive. This highlights the fact that mere promises of non-exclusivity offer very little. An entity can obtain a de facto exclusive by slow-rolling negotiations or by offering the product at unreasonable rates, terms, and conditions.[42]

Comcast's own internal documents are also instructive here. {{

[41] Opposition at 188-9. Comcast also argues that such claims are outside the scope of the current transaction. *Id.* Of course these issues are entirely relevant to this merger proceeding. Comcast's acquisition of NBCU content coupled with its power as a distributor is a critical aspect of this proceeding generally, and of the impact on emerging online video markets in particular. These types of tactics demonstrate the influence and power that Comcast wields over programming and distribution, and, thus, is instructive – not irrelevant to the Commission's review of the transaction.

[42] *See An Examination of the Proposed Combination of Comcast and NBC Universal Before the House Subcommittee on Communications, Technology and the Internet*, 111th Cong. (2010) (statement of Colleen Abdoullah, President and CEO, WOW!) (*Abdoullah Testimony*). Ms. Abdoullah delivered similar testimony before the Senate Committee on Commerce, Science, and Transportation, as well as the Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights.

[43]

}} Comcast claims that it "no longer proposes this language" in program carriage contracts.[44] However, whether Comcast technically does or does not "propose" this exact "language," or whether it is able to achieve a similar outcome though different terms or language in its programming contracts remains an outstanding question of material fact. Comcast has still yet to provide other carriage agreements pursuant to the following Commission discovery requests:

> 32. Provide all agreements currently in effect and all agreements executed since January 1, 2006 between the Company and any other person to provide Video Programming owned or otherwise controlled, operated, or managed by the Company to other MVPDs.
>
> 44. Provide all agreements currently in effect and all agreements executed since January 1, 2006 that the Company has entered into with any provider of Video Programming which discuss cable network carriage, retransmission consent, program carriage, and distribution rights for Video Programming.
>
> 51. Provide all agreements currently in effect and all agreements executed since December 31, 2003 between the Company and any Marquee Sports League which convey the right to distribute the League's games or other content in the United States, including

[43] 20-COM-00000071 at p. 10.
[44] Opposition at fn 642.