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October 1, 2010

***Via Electronic Delivery***

Ms. Marlene H. Dortch
Federal Communications Commission
The Portals, TW-A325
445 12th Street SW
Washington, DC 20554

Re: Notice of Ex Parte Presentation – MB Dkt. 10-56, *Application of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licensees*

Dear Ms. Dortch:

On Thursday, September 30, 2010, Donna N. Lampert and Mark J. O'Connor, both of Lampert, O'Connor & Johnston, P.C., and Professor Simon J. Wilkie and Dr. Michael Williams (by telephone) on behalf of EarthLink, Inc. ("EarthLink") discussed the above-referenced proceeding with John Flynn, Special Advisor to the Chairman; Deborah Broderson, Judith Herman, Marcia Glauberman, and Jennifer Tatel of the Media Bureau; Jim Bird and Virginia Metallo of the Office of General Counsel; and Jonathan Baker and Chuck Needy of the Office of Strategic Planning and Policy Analysis.

The attached slides, consistent with EarthLink's previous filings, were distributed and discussed at the meeting. Professor Wilkie and Dr. Williams also explained their findings, to be detailed in the forthcoming *Supplemental Report* and accompanying *Technical Addendum to the Wilkie Report* (filed June 21, 2010), that the proposed merger will increase the price of standalone broadband access to consumers in addition to harming the development of online video.

Pursuant to the Commission's rules, one copy of this memorandum and the attached materials is being filed electronically in the above-referenced dockets for inclusion in the public record and distributed to the meeting participants via email. Please do not hesitate to contact me directly if you have any questions.

Respectfully submitted,

JBagg

Jennifer P. Bagg
*Counsel for EarthLink, Inc.*

# Anticompetitive Effects in Online Video Caused by the Comcast-NBCU Merger
## (MB Dkt. 10-56)

EarthLink, Inc.
September 2010

# Online Video Distribution Market

***"[T]he video market is undergoing its biggest transformation in decades."***

*Wall Street Journal*, 8/30/10

- The increased availability of content online, coupled with advancements in broadband technology and capacity, have spawned independent online video programming distributors and resulted in a significant growth of online video.
- Online video presents an increasingly competitive threat to Comcast's MVPD business.
- Comcast's control over NBCU's programming and content will make it harder for independent providers of online video to compete.
- In this emerging market, the FCC and DOJ must ensure that transactions do not enable providers to leverage their power into new markets, and squash developing competition.

# Comcast-NBCU Merger Raises Vertical Foreclosure Concerns in the Online Environment

**Comcast can undermine competition and entry of independent online video distributors and interfere with robust broadband access for users by:**

- *Increasing the price of standalone broadband access service, especially in areas where it is the only feasible high-speed service, to discourage its use for online video.*
- *Engaging in broadband network practices that interfere with online traffic to or from online video competitors and consumers (e.g., throttling, blocking)*
- *Withholding or raising the cost of access to Comcast and NBCU affiliated programming and content to online video rivals.*
- *Tying access to content to a cable television subscription so that consumers cannot "cut the cord" or "break the bundle."*
- *Conditioning cable carriage for independent programmers on exclusivity.*

***"Netflix – premium cable's worst nightmare."***
*San Francisco Chronicle*, 9/20/10

# Comcast-NBCU Merger Raises Vertical Foreclosure Concerns in the Online Environment

***Post-merger Comcast will have strong financial incentives to use the acquired NBCU content to undermine the emergence of competitive online video services.***

- Comcast makes significant profits on its traditional cable television business and both Comcast and NBCU earn significant revenues and profits from advertising and MVPD program carriage payments.
- The distribution of traditional video programming via cable television systems is far more profitable to Comcast than offering consumers access to the same content online.

***Prof. Wilkie has demonstrated that the merger will cause Comcast to increase the price of standalone broadband access service, thus enabling Comcast to stifle the growth and innovation of online video and other broadband content.***

- The advertising revenues per cable subscriber will increase post-merger.
- Absent competitive broadband access service, Comcast will raise the price of standalone broadband access service.
- As Wilkie's supplemental report demonstrates, Katz/Israel's rebuttal to the standalone broadband pricing model is incorrect and should be rejected.

# Wholesale Standalone Broadband Access

***Unfettered access to competitive broadband and online video services is necessary to mitigate harms to consumers and the developing online video market caused by the transaction.***

- Requiring wholesale standalone broadband access on reasonable rates and terms is an effective and straightforward mechanism to address the public interest harms.
  - “Wholesale” ensures consumers can “cut the cord” and access the video content of their choice.
  - “Standalone” ensures consumers can “break the bundle” and create the service bundle of their choice.
- The availability of an independent broadband service provider will discipline Comcast’s ability to raise prices and engage in anti-competitive activity.
- Independent standalone broadband access service will allow the online video market to develop by: (1) providing an independent avenue for distribution, (2) reducing Comcast’s incentives to tie access to content to cable subscriptions, (3) increasing innovation and investment, and (4) improving customer service.

# Wholesale Standalone Broadband Access Condition

- A structural remedy grounded in market-based contractual arrangements is proven and efficient.
- A simple “reasonable rates and terms” requirement coupled with agency “backstop” approval contingency is sufficient to mitigate merger concerns and ensure consumers reap the benefits of wholesale competition.
- Once implemented, minimal government intervention and oversight is needed to produce enormous consumer benefits.
- The remedy will encourage open Internet practices by putting competitive pressure on Comcast to avoid discrimination and other anti-consumer practices.
- In sum, the costs of the proposed remedy are minimal and the expected benefits are substantial.

***“[A] major danger media companies face is allowing one player [] to gain too much power over the distribution of content. . . .”*** *Wall Street Journal,* 9/3/10