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FILED/ACCEPTED

November 9, 2010

NOV - 9 2010

Federal Communications Commission
Office of the Secretary

Via Hand and Electronic Delivery

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

Re: 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*
REDACTED – FOR PUBLIC INSPECTION

Dear Ms. Dortch,

Pursuant to the Second Protective Order in the above referenced proceeding, enclosed please find two copies of a redacted *ex parte* letter filed by EarthLink, Inc., which is also being filed today electronically. A Highly Confidential, unredacted version is being filed under separate cover.

Respectfully submitted,



Jennifer P. Bagg
Counsel for EarthLink, Inc.

Enclosure

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Dear Ms. Dortch:

The voluminous record before the Commission regarding the proposed merger of Comcast Corporation (“Comcast”), General Electric Company (“GE”) and NBC Universal, Inc. (“NBCU”) (collectively, the “Applicants”) reflects a diverse range of companies, individuals, local entities and consumer groups who have described in detail how, post-merger, Comcast will have the incentives and ability to harm the continued development of online video, reduce consumer choice, and undercut our nation’s broadband objectives. EarthLink, Inc. (“EarthLink”) has provided abundant evidence – which the Applicants have failed to refute – demonstrating that Comcast’s control over programming and content combined with its dominant gateway control over broadband access will result in less competition, diminished choice, decreased information diversity, reduced broadband investment, and higher prices for consumers.¹ Faced with this record, the Commission cannot find the transaction serves the public interest unless it requires the Applicants to implement measures to remedy these harms.

¹ See, e.g., Petition to Condition or Deny of EarthLink, Inc., MB Dkt. 10-56 (filed Jun. 21, 2010) (“EarthLink Petition”), Appendix 2: Report of Professor Simon J. Wilkie, *Consumer Sovereignty, Disintermediation and the Economic Impact of the Proposed Comcast/NBCU Transaction*, MB Dkt. 10-56 (filed Jun. 21, 2010) (“Wilkie Initial Report”); Reply to Opposition to Petition to Condition or Deny of EarthLink, Inc., MB Dkt. 10-56 (filed Aug. 19, 2010) (“EarthLink Reply to Opposition”), Appendix 1: Reply Report of Professor Simon J. Wilkie, *Economic Analysis of the Proposed Comcast-NBCU-GE Transaction*, MB Dkt. 10-56 (filed Aug. 19, 2010); *Supplemental Report of Professor Simon J. Wilkie*, MB Dkt. 10-56 (filed Sept. 30, 2010) (“Wilkie Supplemental Report”).

Despite the Applicants' "rosy" public presentations, extensive lobbying, media blitz, and repeated assurances to Commission officials charged with ensuring the public is served,² the recently filed confidential materials (withheld by the Applicants until mid-October, 2010) underscore that the prospect of anticompetitive practices directed against emerging online video providers is far from speculative.³ It is now abundantly clear that the proposed merger will increase Comcast's incentives and ability to obstruct online video competition by leveraging its newly acquired assets using multiple mechanisms.⁴ To meet its statutory obligation to ensure the transaction affirmatively serves the public interest, the Commission must look past the Applicants' carefully tailored presentations and focus on the wealth of record evidence demonstrating that the public will suffer unless the Commission takes remedial steps.

² *Applications for Consent to the Transfer of Control of Licenses, General Electric Company to Comcast Corporation, Applications and Public Interest Statement*, at 36-70 (filed Jan. 28, 2010) ("Application") (the "transaction will be pro-consumer, pro-competitive, and strongly in the public interest . . . by combining [NBCU and Comcast] the transaction will advance the Commission's public policy goals of diversity, localism, competition, and innovation."); Brian Stelter and Tim Arango, *Comcast Spends Big in Pressing for Merger*, NY Times (Sept. 26, 2010), [available at](http://www.nytimes.com/2010/09/27/business/media/27comcast.html?pagewanted=all) <http://www.nytimes.com/2010/09/27/business/media/27comcast.html?pagewanted=all> (noting Comcast spent \$6.9 million on lobbyists through June 2010 and had nearly 30 lobbying firms on its payroll); Press Release, Comcast and GE, *Comcast and GE to Create Leading Entertainment Company* (Dec. 3, 2009), [available at](http://www.comcast.com/nbcutransaction/pdfs/Press%20Release_Final_12.3.09.pdf) http://www.comcast.com/nbcutransaction/pdfs/Press%20Release_Final_12.3.09.pdf (promoting the merger as the "next phase of the media industry's evolution" and that it will "accelerate digital offerings and expand[] consumer choice").

³ The delay in producing these materials is significant. Not only has substantial time elapsed since Comcast was first ordered to disclose materials relevant to the online video distribution market, but parties have expended considerable resources in the meantime to present their own evidence that the merger will harm the rising tide of online video competition, all the while the starkest evidence was within Comcast's own control.

⁴ EarthLink Petition, at 40.

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As EarthLink and others have explained, Comcast's cable subscription profits are fundamentally threatened by the emergence of a robustly competitive online video market.⁵ Though Comcast has argued that "online video is not a substitute for traditional linear MVPD service" and "foreclosure of competing online video distributors would not be profitable for the joint venture,"⁶ it is now clear that Comcast's incentives and actions are being driven by the threat online video poses to the traditional cable model. For example, even before the merger was contemplated, Comcast internally concluded that a {{ [REDACTED] }} including online viewing.⁷ A key concern of Comcast has been that content providers {{ [REDACTED] }}⁸ and that the rise of online video {{ [REDACTED] }}.⁹ The record also shows that Comcast focused repeatedly on the threat of {{ [REDACTED] }}¹⁰ at one point expressing its fears about the impact of emerging online video on its market strategy, questioning {{ [REDACTED] }}.¹¹ In Comcast's candid words, companies such as {{ [REDACTED] }}¹² and {{ [REDACTED] }}.¹³

⁵ See, e.g., Petition to Deny of Consumer Federation of America, Consumers Union, Free Press and Media Access Project, at 26, MB Dkt. 10-56 (filed Jun. 21, 2010); Petition to Deny of DISH Network L.L.C. and EchoStar Corporation, at 23-25, MB Dkt. 10-56 (filed Jun. 21, 2010); Comments of the Writers Guild of America, West, at 18, MB Dkt. 10-56 (filed Jun. 21, 2010); Reply Comments of the New Jersey Division of Rate Counsel, at 12-13, MB Dkt. 10-56 (filed Jul. 21, 2010); Reply to Comcast-NBC Universal Opposition of the Communications Workers of America, at 20-22, MB Dkt. 10-56 (filed Aug. 19, 2010).

⁶ Opposition to Petitions to Deny and Response to Comments of Comcast Corporation, General Electric Company, and NBC Universal, Inc., at 184, MB Dkt. 10-56 (filed Jul. 21, 2010) ("Comcast Opposition").

⁷ 64-COM-00000297.

⁸ 64-COM-00001569.

⁹ 64-COM-00000464.

¹⁰ See, e.g., 64-COM-00002710 – 00002746.

¹¹ 64-COM-00002719.

¹² 64-COM-00001374. Indeed, Comcast views online video as {{ [REDACTED] }}. Id., at 00001377-00001378.

¹³ 64-COM-00002843.

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The documents also show that Comcast is poised to take whatever steps it deems necessary to address its significant concerns with {{ [REDACTED] }}, and that it even re-designed its online business model to the {{ [REDACTED] }}.¹⁴ The confidential data show that significant and growing numbers of consumers {{ [REDACTED] }}.¹⁵ The data also indicate {{ [REDACTED] }}.¹⁶ The documents also reveal that Comcast is rightly concerned about {{ [REDACTED] }}¹⁷ and {{ [REDACTED] }}.¹⁸

Though Comcast contends it has no interest in controlling or limiting consumers' online viewing experience,¹⁹ the confidential documents show that Comcast's major

¹⁴ See, e.g., 64-COM-00001524, 00001526, 00002233.

¹⁵ 64-COM-00000836. See also, 64-COM-00000791 ({{ [REDACTED] }}); 64-COM-00000795 (Fancast is positioned to compete with {{ [REDACTED] }}); 64-COM-00001525 ({{ [REDACTED] }}); 64-COM-00001549-00001555 ({{ [REDACTED] }}); 64-COM-00003296 ({{ [REDACTED] }}).

¹⁶ Indeed, one document indicates that {{ [REDACTED] }}. 64-COM-00003322. This document states that {{ [REDACTED] }}. *Id.*

¹⁷ 64-COM-00000790 (data shows {{ [REDACTED] }}); 64-COM-00001532, 64-COM-00001535 (identifying {{ [REDACTED] }}); 64-COM-00001566-00001567 (online video is {{ [REDACTED] }}); 64-COM-00003288 ({{ [REDACTED] }}).

¹⁸ 64-COM-00001716-00001726 ({{ [REDACTED] }}). See also, 64-COM-0001736 ({{ [REDACTED] }}).

¹⁹ See, e.g., Comcast Opposition, at 189-190 (commenting that the post-merger Comcast lacks the market power to foreclose or limit distribution and that foreclosing online video would be "bad business"); Reply to Responses of Comcast Corporation, General Electric Company, and NBC Universal, Inc., at 25, MB Dkt. 10-56 (filed Aug. 19, 2010) (arguing post-merger Comcast will lack the incentive to limit online video because online video is complementary, rather than a substitute for MVPD, and because such action would not be profitable); Letter from Michael H.

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concern is {{ [REDACTED] }}. ²⁰ These statements underscore the ample incentives of Comcast to design and control its broadband access offerings to achieve its strategic goals of maintaining its cable subscription revenue model.

EarthLink has also presented evidence in its Petition and subsequent filings that demonstrate the numerous ways Comcast will be able to undermine competition and entry into the online video market.²¹ Many of the concerns raised by EarthLink and others identify a central theme: Comcast has unique control over users' last-mile broadband access and the newly acquired control over additional vast swaths of content will increase its incentives and ability to act in ways that harm consumers and undermine the growth of online video.²² The additional evidence makes it clear that, absent government intervention, Comcast will be able to leverage its control over content and conduit to:

- Tie consumer access to online content to a cable television subscription, preventing consumers from "cutting the cord" and "breaking the bundle;"²³
- Withhold and/or raise online video rivals' costs of access to affiliated programming and content;²⁴ and

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Hammer, Attorney, Comcast, to Marlene H. Dortch, Secretary, FCC, MB Dkt. 10-56 (filed Oct. 26, 2010) (noting there is no need to impose conditions because applicants have no incentive to harm online video distribution).

²⁰ 64-COM-00001584 ({{ [REDACTED] }}); 64-COM-00001666 ({{ [REDACTED] }}).

²¹ See, e.g., EarthLink Petition, at 27, 35, 44; EarthLink Reply to Opposition, at 12, 14. See also, e.g., *Wilkie Initial Report*, at ¶ 15; Letter from Jennifer P. Bagg, Attorney, EarthLink, Inc., to Marlene H. Dortch, Secretary, FCC, MB Dkt. 10-56 (filed Oct. 1, 2010).

²² Indeed, Comcast {{ [REDACTED] }}. 64-COM-0000299.

²³ See, e.g., 64-COM-00001566 (Comcast explains that {{ [REDACTED] }} and suggesting that {{ [REDACTED] }}). Moreover, a guiding principle of Comcast's {{ [REDACTED] }} is to {{ [REDACTED] }}. 64-COM-00001531.

²⁴ See, e.g., 64-COM-00000233 ({{ [REDACTED] }}); 64-COM-00002022 ({{ [REDACTED] }}

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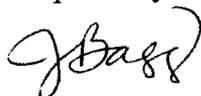
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- Obtain contract restrictions from providers of unaffiliated content and video programming as part of cable carriage arrangements that prevent unaffiliated video programmers and content providers from offering programming or other content to online video programming distributor competitor.²⁵

Additionally, EarthLink has shown that, post-merger, Comcast is likely to increase the price of standalone broadband access, further impeding the ability of consumers to choose the content, services and providers that best meet their budgets or needs and undermining national broadband goals.²⁶ Given the vital importance of these issues to the future communications landscape, the Commission must implement remedies to ensure that the transaction serves, rather than harms, the public.

Pursuant to the Commission's rules, a redacted copy of this letter is being filed electronically in the above-referenced dockets for inclusion in the public record. The filing containing highly-confidential information will be submitted in accordance with the protective orders adopted in this proceeding.

Respectfully submitted,



Donna N. Lampert
Mark J. O'Connor
Jennifer P. Bagg
Counsel for EarthLink, Inc.

(footnote continued from previous page)

[REDACTED]

²⁵ See, e.g., 64-COM-00000739 (describing a proposal for {{ [REDACTED] }}, including that {{ [REDACTED] }}). See also, 64-COM-00000742, 00000761, 00001584 (Comcast describing its plans to {{ [REDACTED] }}); 64-COM-00001696 (suggesting that Comcast {{ [REDACTED] }}).

²⁶ See generally, Wilkie Supplemental Report.