Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

To the Commission:

PETITION TO DENY OF WEALTHTV L.P.

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EXECUTIVE SUMMARY

The Transaction will consolidate the nation's dominant cable and broadband provider (Comcast) and a leading programming provider (NBCU) and will allow Comcast to pursue predatory and discriminatory conduct toward independent programmers, such as WealthTV. The Merger would result in a vertically and horizontally integrated communications giant of a scope that is truly unprecedented and will enhance Comcast's market power to raise cable rates and block competition and hinder diversity in programming.

The number of media properties that would exist under the Venture's control is staggering. The properties include: two national television broadcast networks (NBC – with a total of 234 affiliates – and Telemundo); 10 NBC owned and operated broadcast affiliates; 15 Telemundo owned and operated broadcast affiliates; 36 owned and managed cable television networks, including 10 regional sports networks; 18 additional cable channels in which the Venture would have ownership interest; ownership and control of 27 online media properties; ownership interest in another 5 online media properties; and 2 major motion picture studios. [1] Comcast would also own controlling interest in iN DEMAND, the nation's dominant video on demand and pay-per-view system, and Comcast Media Center (CMC), a satellite distributor of 280 video channels to over 2,000 cable systems. In all, the Venture is projected to control more than one out of every five television-viewing hours.[2]

Among the media properties involved in the merger are notable "must-have" channels, particularly the NBC broadcast network, USA Network (the top rated cable channel), and the Comcast regional sports networks, all of which an MVPD must carry in order to compete, and

[1] A full listing of Comcast and NBCU media properties involved in the Transaction is set forth at Appendix A attached hereto.

which give the Venture absolute power to dictate carriage terms and channel placement for its less popular services.

The competitive threat to consumers and independent programmers from the proposed Merger is found in four areas: cable / MVPD distribution; online distribution; pay-per-view / video-on-demand distribution; and broadcast television.

With outright or attributable interest in a projected 54 cable programming channels, Comcast will be able to foreclose cable access to independent programmers by favoring the Comcast-owned channels on its own cable systems. In addition, by tying its channels when selling to other cable companies the Venture hinders access on those MVPDs to independent programmers due to system capacity constraints.

Many independent programmers, including WealthTV, have not been granted access to Comcast's cable system, the nation's dominant cable provider serving nearly one-quarter of all American households. It is extremely difficult, if not impossible, for an independent programmer to become viable or sustain operations without carriage on the nation's largest cable system.

There are also great competitive concerns regarding the nascent online video market. The Venture will control 35 digital media properties, including the second-most highly watched video website, Hulu.com and the Merger will allow Comcast to control a significant share of the Internet programming market through its ability to restrain access to its 19 million broadband customers for independent content sources, and to tie online access to a cable subscription. Comcast has already demonstrated its willingness to restrict customer access to online video and this Merger will perpetuate such behavior.

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[2] "Merger Plans for Comcast, NBC Ignite Battle Over Television Access", Cecilia King, The Washington Post, December 4, 2009.

With controlling interest in the nation's largest pay-per-view (PPV) / video-on-demand (VOD) service, "iN DEMAND", Comcast already wields make-or-break power with respect to independent programmers' ability to gain such carriage to virtually every cable system in America. Adding to that would be ownership of two national television broadcast networks, NBC and Telemundo, giving the Venture the ability to tie such broadcast content to its cable, VOD, and online content creating yet another formidable challenge to competing MVPDs and independent programmers.

The proposed Venture will have the incentive and the capacity to substantially harm the competitive programming business in cable, broadcast, online and on-demand markets. The Application demands an unprecedented level of scrutiny by the Commission. WealthTV submits that the Commission must deny the Application as presented. Alternatively, if the Commission is to grant the Application, strict and enforceable conditions as specifically outlined in this Petition – supplemental to and independent of present program and access carriage rules – must be imposed to ensure that the anti-competitive behavior the Merger would enable is prevented. WealthTV recommends that the Commission require Comcast to make the following concessions (set forth in greater detail in the Pention):

- Carry all "Established Independent Networks" (as defined in this Petition) on its basic or expanded basic programming tiers across all of its subscribers.
- Prohibit Comcast from taking any action that imposes restrictions on access to online video programming.

- Revise the Commission's rules with respect to access complaints against Comcast to make them subject to Baseball-Style Arbitration[3] and to a defined pleading shot clock.
- Require Comcast to fully divest its interest in iNDEMAND and Comcast Media Center.

[3] In baseball-style arbitration, each side submits a final best offer and the arbitrator selects whichever one he or she deems best.

TABLE OF CONTENTS

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To the Commission:

PETITION TO DENY

WealthTV L.P. ("WealthTV"), pursuant to Section 309(d) of the Communications Act of 1934, as amended (the "Communications Act"),[1] and Section 73.3584[2] of the Commission's Rules,[3] hereby petitions to deny the above-captioned application for transfer of control of NBC Universal, Inc. ("NBC") from General Electric Company ("GE") to Comcast Corporation ("Comcast").[4]

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[1] 47 U.S.C. § 309(d).

[2] This Petition extends to all of the licenses and authorizations included in the Application.

[3] 47 C.F.R. § 73.3584.

[4] See "Commission Seeks Comment on Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc., to Assign and Transfer Control of FCC Licenses," Public Notice (Mar. 18, 2010) (hereinafter, the applications referred to therein, "Application" and the

I. INTRODUCTION

The Application presents questions of fact as to whether a grant of the Application will serve the public interest consistent with the Commission's standard of review. The Transaction will consolidate the nation's dominant cable and broadband provider (Comcast) and a leading programming provider (NBCU) and will allow Comcast to pursue, at a greater magnitude, its predatory and discriminatory conduct toward independent programmers, such as WealthTV. The Merger will also enhance Comcast's market power to raise cable rates and block competition and hinder diversity in programming.

The proposed Merger would result in a vertically and horizontally integrated communications giant of a scope that is truly unprecedented. Never in the history of the communications industry has a merger occurred that places such a vast array of content under the control of an entity that is the Nation's largest single multichannel video programming distributor ("MVPD") serving some 24 million homes[5] and its largest broadband operator with nearly 19 million[6] homes served.

The number of media properties that would exist under the Venture's control is staggering. That number includes: two national television broadcast networks (NBC – with a total of 234 affiliates – and Telemundo); 10 NBC owned and operated broadcast affiliates; 15 Telemundo owned and operated broadcast affiliates; 36 owned and managed cable television networks, including 10 regional sports networks; 18 additional cable channels in which the Venture would have ownership interest; ownership and control of 27 online media properties;

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transaction referred to therein, the "Transaction" or the "Merger", and the proposed combined entity, the "Venture").

[5] See http://www.ncta.com/Stats/TopMSOs.aspx

[6] "Comcast Continues To Beat Telcos In Broadband Growth", Karl Bode, DSL Reports, April 28, 2010.

ownership interest in another 5 online media properties; and two major motion picture studios.[7] Comcast would also own controlling interest in iN DEMAND, the nation's dominant video on demand and pay-per-view system and Comcast Media Center (CMC), a satellite distributor of 280 video channels to over 2,000 cable systems. In all, the Venture is projected to control more than one out of every five television-viewing hours.[8]

The competitive threat to consumers and independent programmers from the proposed Merger is found in four areas: cable / MVPD distribution; online distribution; pay-per-view / video-on-demand distribution; and broadcast television.

With outright or attributable interest in a projected 54 cable programming channels, Comcast will be able to foreclose cable access to independent programmers by favoring the Comcast-owned channels on its own cable systems. In addition, by tying its channels when selling to other cable companies the Venture hinders access on those MVPDs to independent programmers due to system capacity constraints.

Among the media properties involved in the merger are notable "must-have" channels, particularly the NBC broadcast network, USA Network (the top rated cable channel), and the Comcast regional sports networks, all of which an MVPD must carry in order to compete. Thus, the Merger will place essential products under the control of a competitive distributor. With such power, Comcast can raise programming rates across the board and have no negative impact on its own cable operations as increased costs will simply be offset by increased revenue within the integrated corporate structure. The vast content holdings, including the must-haves, will also

[7] A full listing of Comcast and NBCU media properties involved in the Transaction is set forth at Appendix A attached hereto.

[8] "Merger Plans for Comcast, NBC Ignite Battle Over Television Access", Cecilia King, The Washington Post, December 4, 2009.

give the Venture absolute power to dictate carriage terms and channel placement for its less popular services.

Many independent programmers, including WealthTV, have not been granted access to Comcast's cable system, the nation's dominant cable provider serving nearly one-quarter of all American households. As discussed herein, the method of operation for Comcast with respect to independent programmers has been to deny carriage unless the independent grants equity to Comcast. Alternatively, Comcast has launched competitive channels of its own instead of granting carriage to independents.[9] It is extremely difficult, if not impossible, for an independent programmer to become viable or sustain operations without carriage on the nation's largest cable system.

There are also great competitive concerns regarding the nascent online video market. The Venture will control 35 digital media properties, including the second-most highly watched video website, Hulu.com and the Merger will allow Comcast to control a significant share of the Internet programming market through its ability to restrain access to its 19 million broadband customers for independent content sources, and to tie online access to a cable subscription. This will prevent independent programmers from gaining access to the emerging online video market. Comcast will have greater ability and incentive to demand online exclusivity in its affiliation agreements with programmers and to impose "authentication" requirements on Internet viewers – requiring that they be cable subscribers to the programming before permitting online access – as it has done with its Xfinity service. Comcast has already demonstrated its willingness to restrict customer access to online video and this Merger will perpetuate such behavior.

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[9] See discussion of MOJO and Black Family Channel, *infra.*

With controlling interest in the nation's largest pay-per-view (PPV) / video-on-demand (VOD) service, "iN DEMAND", Comcast presently wields make-or-break power with respect to independent programmers' ability to gain such carriage to virtually every cable system in America. iN DEMAND already has exclusive rights to the PPV and VOD services offered by the National Hockey League, the National Basketball Association, Major League Soccer, and Major League Baseball and it leverages that exclusivity freely in the market today. With the Merger will come all of the NBCU content, including theatrical programming from United Studios and Focus Features, thus giving iN DEMAND even greater power and control in the PPV and VOD markets. Comcast also has great leverage over a significant portion of the cable marketplace through its ownership of the Comcast Media Center / H.I.T.S., discussed below. Through CMC, Comcast has a great deal of control over which programming channels are delivered to the 2,000 cable systems CMC serves.

With ownership of two national television broadcast networks, NBC and Telemundo, the Venture will be able to tie its broadcast content to its cable content creating yet another formidable challenge to competing MVPDs and independent programmers. The power of broadcasters is evident in the trend toward increased fees that cable operators must pay for retransmission rights.[10] As the owner of NBC and Telemundo, Comcast stands to benefit – and the competition stands to lose – in two ways. Comcast can raise retransmission fees without harm to its own bottom line, while damaging competitive MVPDs, and it gains yet more essential "must-have" content that it can bundle and leverage. Independent programmers, such

[10] See Multichannel News, October 12, 2009, "Retransmission-consent revenue rose again for the 17 major broadcast-station groups in the second quarter to more than $150 million from more than $100 million in the first quarter. It was the second consecutive three-month period that retrans revenue topped $100 million."

as WealthTV, share in the harm as MVPDs have less channel capacity and fewer financial resources to add independent channels.

The proposed Venture will have the incentive and the capacity to substantially harm the competitive programming business in cable, broadcast, online and on-demand markets. The Application demands an unprecedented level of scrutiny by the Commission. WealthTV submits that the Commission must deny the Application as presented. Alternatively, if the Commission is to grant the Application, strict and enforceable conditions as specifically outlined in this Petition – supplemental to and independent of present program and access carriage rules – must be imposed to ensure that the anti-competitive behavior the Merger would enable is prevented.

If the Merger is approved, in order to avoid the discriminatory carriage access conduct set forth above and allow independent programmers to remain viable, WealthTV recommends that the Commission require Comcast to make the following concessions:

A. Fair Carriage Terms

Require that Comcast carry all "Established Independent Networks"[11] on its basic or expanded basic programming tiers across all of its subscribers. Comcast's voluntary public interest commitment to carry two "independent" channels on its lineup per year for the next three years is insignificant and meaningless given the number of independent programmers and the dozens of channels it will carry once the company completes its all digital conversion. Moreover, Comcast's voluntary concession does not specify where the two "independent" channels would

[11] It is recommended that "Established Independent Network" mean a network: (1) with no direct or common ownership any MVPD and/or broadcast network; (2) having a current and established history of providing programming 24 hours a day, seven days a week for at least 36 consecutive months; (3) have current and continuous carriage for at least 36 months with a minimum of two major MVPD operators comprised of any two of the following: a) a top five cable MVPD; b) a top two DBS provider; c) a top two telecommunications MVPD; and (4) the ability to demonstrate via third-party ratings that the EIN performs in the top 75 percent of a major MVPD system.

be placed or ensure that the independent programmers would not be required to give equity to Comcast. Favorable channel placement on a popular programming tier is the key to the success of a non-affiliated programmer

B. Internet Video

Prohibit Comcast from taking any action that imposes restrictions on access to online video programming, including, requiring authentication of an existing cable subscription to view online content; or imposing exclusivity clauses and prohibitive alternative distribution platform clauses in its affiliation agreements with programmers.

C. Reformed Complaint Process

Make Access Complaints against Comcast Subject to Baseball-Style Arbitration[12]. The FCC's existing program complaint process does not allow for a meaningful remedy. As a result, Comcast-NBCU must enter commercial, "baseball-style" arbitration for disputes over program carriage. This condition applies to any Established Independent Networks that is an unaffiliated, independent programmer that has been denied carriage. It is recommended that the following conditions apply:

1. Establishment of a shot clock in determining whether the complainant has established a prima facie case within 30 days of the filing of a complainant's reply to a defendant's answer to a complaint or the day on which the reply is due. The FCC shall issue a final ruling no later than 6 months from date of the initial filing date of the complaint.
2. Establishing a prima facie case. Prima facie means that a complainant shall put forth evidence of the elements of the discrimination offense, supported as appropriate by documents and testimony by declaration or affidavit that if subsequently found to be true by a finder of fact, would be sufficient to establish a program carriage violation.
3. Comcast's refusal to deal or refusal to negotiate in good faith with a non-affiliated video programmer because of the programmer's assertion of rights or remedies shall constitute discrimination.

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[12] In baseball-style arbitration, each side submits a final best offer and the arbitrator selects whichever one he or she deems best.

4. Once Established Independent Network files a complaint alleging discrimination with respect to a change in the terms or conditions of carriage, any such change shall be null and void and the terms and conditions of carriage shall revert to status quo ante during the pendency of the Commission's decision on the complaint.

D. iN DEMAND.

Require Comcast to fully divest of its interest in iNDEMAND. Such divestiture will reduce the amount of programming that Comcast owns and favors to the detriment of independent programmers. Divestiture will also prevent Comcast from using the joint venture to illegally coordinate activities among the top cable company equity owners: Comcast, Cox, Time Warner, and Bright House.

II. FACTS AND ANTI-COMPETITIVE CONCERNS

A. About WealthTV

WealthTV is a privately owned, independent lifestyle and entertainment channel available in high definition and standard definition in approximately 10 million American households. It is distributed by just over one hundred cable operators and telecommunication companies offering video services, including Charter Communications, Verizon FiOS TV, and AT&T U-Verse TV. Since 2004, WealthTV has provided high quality programming that has demonstrated broad appeal across age and income demographics. Despite its proven viability, the channel is not carried on Comcast cable systems or on the Comcast CMC/H.I.T.S. system. Comcast has refused numerous requests to grant carriage access to WealthTV.

WealthTV is one of the increasingly rare breed of programmers that are truly independent – not affiliated with a national broadcast network, a national producer of multiple video programming, or any MVPD. Such independence affords WealthTV the ability to remain unencumbered by content pressures from affiliated MVPDs or national programming networks and to deal fairly with all MVPDs. But lacking MVPD ownership or affiliation with one of the "must-have" channels, such as one of the Comcast regional sports networks with professional basketball, baseball or hockey or a channel with USA Network ratings, also makes it difficult for WealthTV to secure carriage agreements. As discussed below, when multi-channel programmers engage in "take one – take all" practices and compel carriage of their full inventory of channels, it is increasingly difficult for independent programmers to find space on the shelves of MVPDs.

Ensuring that independent programmers such as WealthTV continue to exist and thrive so that diverse voices can be heard is of critical importance to the public interest. WealthTV delivers unique and high-quality targeted programming that is unserved by any other programmer. As such, WealthTV contributes to a robust and diverse marketplace of entertainment and information content. However, the Merger presents a clear and present danger to viability of WealthTV and every other independent programmer.

B. Comcast

1. Comcast's Cable Ownership and Influence

Comcast is the nation's largest provider of cable services and controls approximately 37 percent of the cable subscriber market and 25 percent of the video subscriber market.[13] Comcast

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[13] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming* Report, Thirteenth Annual Report, MB Docket No. 06-189, p. 143, Appendix B, Table B-1 (2009) (comparing Comcast's subscribership to number of cable subscribers and MVPD households. By comparison, Comcast's 10-K for the fiscal year ending Dec. 31, 2009, claims that the company serves approximately 24 percent of multichannel video customers nationwide).

serves 23.6 million video customers and is the largest residential high-speed Internet provider with 18.8 million customers.[14]

Comcast is also a powerful provider of cable programming through its ownership in cable networks such as the Golf Channel, E! Entertainment Television, Style Network, VERSUS, G4, and 10 powerful regional sports networks ("RSNs") that are "must-have" channels in the markets they served. Comcast also owns interests in numerous content providers and networks, including FEARnet (33%); iN DEMAND (54%, discussed below); MGM (20%); Music Choice (12%); PBS KIDS Sprout (40%); Pittsburgh Cable News Channel (30%); TV One (34%); SportsNet New York (8%); and Current Media Inc. (5%). It also has ownership interests in A&E, Biography, History, Lifetime, TVOne, Retirement Living and other cable networks.[15]

Comcast Interactive Media develops and operates Internet businesses, including Comcast.net, thePlatform, Fandango, Plaxo, Daily Candy and Fancast Xfinity, a proprietary "TV Everywhere" service.[16] During 2009, Comcast began offering certain cable network programming online to its high-speed Internet customers through its Fancast XFINITY.

Moreover, Comcast has significant ownership in and influence with many smaller cable companies. For example, Comcast currently owns approximately 30% of Bresnan Communications, the nation's 13th largest cable system. Further, it is generally believed in the industry that some smaller cable companies, including Bresnan Communications, are allowed to purchase programming via Comcast's negotiated affiliation agreements with programming networks at preferred rates. In other words, Comcast is apparently negotiating on behalf of

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14 DSL Reports, April 28, 2010, http://www.dslreports.com/shownews/Comcast-Continues-To-Beat-Telcos-In-Broadband-Growth

15 See Appendix A.

16 Comcast Corporation 10-K for Fiscal Year Ended Dec. 21, 2009, Item 7, page 21.

other cable companies for the acquisition of cable programming. Cable companies that rely on Comcast for negotiating rates for a bulk of their programming lineup, tend to choose networks for their programming lineup from the group of programmers with which Comcast has elected to conclude affiliation agreements. Thus, Comcast has expanded market share and influence substantially beyond its own 24 million subscribers.

Furthermore, numerous small cable companies are dependent on Comcast for advanced technologies and services through which Comcast gains additional programming influence. Specifically, Comcast owns the Comcast Media Center, commonly called H.I.T.S. for "head-end-in-the-sky" a satellite service that delivers some 280 channels of cable programming in MPEG-2 digital encoding to over 2000 local cable systems.[17] This service is essential to smaller cable operators as those channels would otherwise need to be encoded at the system level with very costly equipment. According to the Comcast Media website:

> H.I.T.S. (Headend In The Sky) is the industry's leading provider of economical, turnkey solutions for cable operators and MSOs that increase revenue, decrease operating costs and enhance their digital programming platform. From HD and SD digital linear programming to video on demand and interactive TV, HITS offers everything a cable TV system needs to compete. The entire suite of HITS solutions integrate to optimize the cable headend for advanced video services and linear and high definition linear programming. While each solution can stand alone, the greatest value can be achieved when the cable MSO combines services to create additional sources of revenue beyond the core video service.[18]

The channels carried on H.I.T.S. are principally the large vertically integrated channels. WealthTV is not carried on H.I.T.S. and the service similarly excludes many other independent programmers.

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[17] See http://www.comcastmediacenter.com/company/

[18] See http://www.comcastmediacenter.com/hits-quantum/

The extraordinary scope and reach of the Comcast Media Center is reflected in Comcast's own description of the Center, which follows here:

> "Denver-based Comcast Media Center (CMC), a business unit of Comcast Cable, provides centralized content management and distribution solutions for cable systems, television networks and other video content providers and for advertisers "All From The Center."CMC's multiplatform content distribution services for cable system operators include:
>
> - HITS Quantum all-digital platform of linear HD and SD digital video and audio services, which serves over 400 cable MSO affiliates who operate more than 2,000 local cable system headends across the country;
> - VOD In a Box, a centralized content management solution that delivers over 1,200 HD and SD video on demand programs;
> - HITS AxIS, a centralized platform that supports the development and delivery of iTV applications; and,
> - HITS Broadband, a carrier-class IP connectivity service.

The CMC's Content Distribution services for television programming networks and other content providers include:

- A video on demand (VOD) platform that manages and distributes over 9,000 VOD assets each month;
- Network origination services for linear television channels;
- Live event delivery via CDOC, the CMC's Content Distribution Operations Center;
- Transmission services via satellites serving North America and the Atlantic and Pacific operating regions and global terrestrial fiber networks;
- Disaster recovery services; and,
- Transcoding, hosting, storage and IP multicasting services to support multiplatform content distribution.

Comcast Media Center's Advertising Distribution services include the Advertising Distribution Network (ADN), a web portal for centrally managing advertising and programmer's promotional spots that has more than 1700 users at cable MSO, division and system locations; and content management services for advanced advertising applications. The CMC also provides a full spectrum of Production services for HDTV and standard definition video and audio content, including studios, editing, and audio mixing and sweetening."[19]

Thus, the Comcast Media Center / H.I.T.S. facility is yet another programming choke-point controlled by Comcast which impacts programming carriage decisions on some 2,000 non-Comcast cable systems as well as VOD and advertising. If an independent programmer that is not carried on H.I.T.S. is to be offered on one of those systems, the system must purchase additional reception equipment at significant capital expense. H.I.T.S. is an essential distribution facility in the cable market where access has been denied to many independent programmers.

In addition to its presence in the cable and online video markets, Comcast also controls a significant share of the advertising market. As part of its programming license agreements with programming networks, Comcast receives an allocation of scheduled advertising time that it sells to local, regional and national advertisers. Comcast's programming networks compete for advertising revenue with other national and local media, including other television and cable networks.[20]

2. Comcast's Majority Ownership of iN DEMAND

Comcast is also a majority equity owner (reportedly 51%) of "iN DEMAND," a company that distributes video-on-demand ("VOD"), pay-per-view ("PPV"), high definition and other

[19] See http://www.comcastmediacenter.com/company/

[20] Comcast is also in partnership with a number of top cable companies in Canoe Ventures, an advertising venture. Reportedly, Comcast has elected not to compete with its Canoe Venture partners. Similarly, Comcast, along with the other cable owners of iN DEMAND, have allegedly agreed not to compete with each other.

programming to cable systems across the nation. iN DEMAND is the dominant provider of VOD and PPV services in the U.S. cable market.

The other equity owners of iN DEMAND are the second, third and sixth largest cable companies, Time Warner, Cox Communications, and Bright House. Together, these four cable giants supply cable video services to approximately 44 million[21] of the 63 million cable homes in our nation, equating to about 71% of the cable subscribers. iN DEMAND offers high definition programming to consumers and is distributed by the very same cable companies that own it.[22] The Board of Directors of iN DEMAND consists of the three senior programming executives at Comcast, Cox and Time Warner (Time Warner represents Bright House's interest). Thus, the senior programming executives of these top four cable companies, who determine which cable networks are granted carriage on their respective company's systems, also control the programming acquired or created and offered by iN DEMAND. This structure creates the clear opportunity to expand their discussions into pricing, markets and other areas, which, if such discussions occur, would be *per se* violations of Section 1 of the Sherman Act.

Comcast customers may choose from more than 17,000 standard- and high-definition programming choices offered by iN DEMAND (and therefore owned by Comcast) each month. Not surprisingly, channels launched by iN DEMAND are given program carriage access by Comcast over unaffiliated independent broadcasters, such as WealthTV. As a result of the merger, if approved, Comcast will increase its dominant position to determine program carriage decisions and it will have the ability and incentive to expand its own carriage choices to include its newly acquired library of films and programming.

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[21] National Cable Television Association, See: http://www.ncta.com/Stats/TopMSOs.aspx

iN DEMAND also holds exclusive rights for the distribution of the VOD and PPV content of four major professional sports leagues: NBA, NHL, MLB, and MLS. Anecdotal evidence indicates that iN DEMAND has used those exclusive sports rights when dealing with cable operators to leverage agreements for theatrical releases and other VOD and PPV content. Tying products, such as iN DEMAND's less successful MOJO[23] programming service to its lucrative aggregated content PPV and VOD services, artificially inflates costs and ensures carriage by non-owners of a less desired service than WealthTV.

Post merger, this conduct will likely only worsen. The ability to leverage exclusive contracts or to demand higher fees is enhanced if Comcast also gains control of the NBCU theatrical studios, Universal Studios and Focus Features. The small group of media corporations that own iN DEMAND, with their formidable distribution and expanding programming breadth, will be able to use their control of production and distribution to eliminate original, independent content from competing against affiliated content. This conduct will also lead to higher prices and less diversity for consumers.

C. NBCU

If the Merger is approved, Comcast will have even more affiliated content through the acquisition of NBCU to favor in its carriage decisions and the situation for independent programmers will be direr than even the current environment.

NBCU controls or is affiliated with key broadcast and cable assets, including NBC, the oldest broadcast network; 10 NBC O&O local broadcast stations; 234 NBC-affiliated stations; the Telemundo broadcast network; 15 Telemundo O&O broadcast stations; and 14 cable

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[22] To Petitioner's knowledge, these parties did not seek government approval for the joint venture, either through a business review letter from the Antitrust Division or through similar means from the Federal Trade Commission.

networks, including the number one rated USA Network. Other NBCU owned networks include Syfy, CNBC, MSNBC, Bravo, and Oxygen. The company also owns 27% of the Internet-delivered Hulu.com, the second most highly viewed platform for Internet video.[24]

NBCU has exclusive U.S. television rights to significant array of highly popular sporting events, carriage of which are essential to any MVPD. Its sports programming includes: the 2010 Winter and 2012 Summer Olympic Games, National Football League Sunday Night Football, NHL/Stanley Cup, the PGA Tour, the 2010 U.S. Open (golf), the French Open (tennis), the Ryder Cup, Wimbledon, the Kentucky Derby, the Preakness, Notre Dame Football, and the Super Bowl in 2012.

NBC also owns Universal Pictures, Focus Features and Universal Media Studios and Universal Studios Home Entertainment, which distributes more than 4,000 films titles, assets that would fall under the control of the Venture.

D. Comcast Discrimination in Favor of Affiliated Channels

Historically, Comcast has demonstrated a policy of discriminating in favor of its own and/or affiliated channels to the detriment of independent programmers and has financed high definition channels that receive immediate carriage by all of its cable owners without the same level of scrutiny that unaffiliated networks face. This behavior was clearly in evidence with when iN DEMAND launched "MOJO to serve the upscale male audience."[25] MOJO, which was

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[23] See Section III D., *infra*.

[24] "Hulu is jointly owned by NBC Universal, News Corp. and Walt Disney. The site opened to the public just two years ago and has already become a significant part of the online video ecosystem. In 2009, the total number of minutes of video viewed on Hulu grew 140%, according to comScore, an Internet market research company. As of March 2010, the site was second only to Google's sites (including YouTube) in total number of videos viewed." Smart Money, May 10, 2010.

[25] See: http://www.indemand.com/press/view/3

strikingly similar to WealthTV and aimed at the same "upscale male audience", was created and launched by iN DEMAND after repeated fruitless requests by WealthTV for carriage on Comcast, Time Warner and Cox systems. MOJO was then launched on Comcast, Cox, Time Warner, and Bright House systems. Additionally, iN DEMAND tied distribution of MOJO with license fees not commensurate with its value to other more desirable iN DEMAND programming.[26]

There are also instances in which Comcast has obtained equity from independent programmers at the same time as granting carriage access. This was the case for the Retirement Living Television Channel ("RLTV"). RTLV started in 2006 and since then had been unable to receive carriage on Comcast. By 2008, RLTV was on the brink of bankruptcy. On January 16, 2009, RLTV and Comcast announced an agreement stating that RLTV had concluded an affiliation agreement with Comcast and Comcast received equity ownership in RLTV. Over the following months, RLTV gained carriage on a number of Comcast systems across the United States.

The story of the Black Family Channel ("BFC") and TV One (a Comcast property) is also one that reflects the power of Comcast to make or break an independent channel. BFC was launched in 1999 to offer an alternative to BET. The network's schedule included a variety of programs including religious programs, sports, music, talk shows, and children's programs and eschewed rap and hip-hop in favor of gospel music. TV One, a channel very similar to BFC, was, on the other hand, launched in 2004 with financial support from and carriage rights on Comcast Cable systems. BFC reached only 16 million homes[27] while at the same time

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[26] See Robert C. Wilson hearing testimony, April 30, 2009, WealthTV v. Comcast, Time Warner, Cox, Brighthouse, page 4976.

[27] Broadcasting & Cable, February 12, 2006

Comcast-owned TV One achieved carriage in 38 million households.[28] BFC, an independent channel and voice of diversity, could not weather being foreclosed from access to Comcast systems and died in April 2007, less than three years after Comcast's replicate service was launched.

Thus, well before the announcement of the proposed Merger, Comcast has already displayed a predisposition to granting discriminatory carriage access to its own channels over independent programmers such as WealthTV. As set forth below, this will be further exacerbated when Comcast acquires a majority ownership interest in NBCU, a leading cable and online video programmer. Moreover, the Merger, if approved, will give Comcast added market power to increase prices to consumers, decrease diversity, and lessen competition.

In the Application, Comcast has made the following commitment:

> ***Commitment 13:*** *As Comcast makes rapid advances in video delivery technologies, more channel capacity will become available. So Comcast will commit that, once it has completed its digital migration company-wide (anticipated to be no later than 2011), it will add two new independently-owned and -operated channels to its digital line-up each year for the next three years on customary terms and conditions.*

A commitment to add a total of only *six* independent channels over the next six years is woefully inadequate. After years of impeding independent programming from gaining carriage a commitment to do so little is unacceptable. Furthermore, any commitment to add independent programming must also incorporate specific terms that extend some level of protection to the independent programmers in terms of length of carriage, not having to relinquish equity to Comcast, and similar specifics. Since issuing that commitment, Comcast has already modified and undermined it. Comcast has now stated that at least one of the independent channels will be minority owned. Thus, Comcast is now committing only one new independently AND one

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[28] See http://www.tvoneonline.com/inside_tvone/news_content.asp?ID=1201

minority-owned and operated channel to be added per year and NO more than one new non-minority independently owned and operated channel will be added in any given year.

E. Carriage and Channel Placement

The placement of a channel on a cable system, both in terms of service tiers and channel adjacency to similar channels, can be of critical importance to the success of that channel. Even when independent programmers have been able to secure carriage rights on MVPDs, it is often on optional, less highly penetrated tiers. Why? It is because large multi-channel programmers, such as NBCU and Comcast use their market power to compel carriage on the most widely distributed tier (above the basic level) thus squeezing out independents. Large programmers with multiple channels demand not only carriage of their less popular channels – such as NBCU requiring that an MVPD take "Sleuth" along with the top-rated USA Network – they also demand that ALL their channels be placed on expanded basic, the most highly penetrated tier of service and be placed in a neighborhood of like channels (such as grouping CNBC with CNN, et al.).

The approval of a consolidation, such as that sought in the Application, will go far in terms of perpetuating the problem of channel tying, forced tiering, and mandated neighborhood channel placements as the Venture will have such immense market power with interests in 54 programming channels. Thus, the Commission must either deny the Application or impose strict conditions on the Venture's ability to aggregate channels and to dictate carriage terms when licensing the content.

MVPDs consider the NBC broadcast network and USA Network as being "must-have". That is, they are channels that must be available on the MVPD system if it is to be competitive in the market. Arguably, CNBC and MSNBC are also "must-have". Others, such as Sleuth

Oxygen, and FearNet are less popular and would generally not be considered as must-have channels.

Perhaps in recognition of that fact, NBCU has made it a practice in recent years to tie its less popular services to the must-haves, compelling MVPDs to "take one – take all". Furthermore, it is reportedly the practice of NBCU to contractually require that *all* NBCU cable channels be carried on MVPDs' most widely distributed tier of service (typically expanded basic) above the lifeline tier. That has been the practice of NBCU at least with new market entrants, such as telco video providers where the market negotiating power rests in NBCU. WealthTV has been advised by some MVPDs that NBCU has even contractually required that new MVPDs commit to carrying a yet-to-be launched comedy channel on the expanded basic level.

The effect of such tying and forced channel tiering is extremely negative on independent programmers such as WealthTV. While today NBCU requires carriage of some 8 to 10 channels on expanded basic as a condition of allowing the MVPD to carry any NBCU channels, post-Merger, the Venture will be positioned to demand carriage and placement of as many as 54 channels. At the same time, other multichannel programmers are engaged in similar practices and, as a result, there is little room (or money) for the independent programmers. When independent channels are able to gain carriage rights it is often on higher, less penetrated service tiers, which results in reduced viewership and the corresponding reduced advertising revenue.

The Merger would only aggravate an already intolerable situation. The Venture would control or have ownership interests in some 54 cable channels, enough on some MVPD systems to completely fill the expanded basic tier. The market power that the Venture would have with control of the NBC Network, USA Network, CNBC, Versus, and the Comcast Sports Networks is daunting and if the Merger is to be approved by the Commission it must be under conditions that prohibit or highly restrict the tying of programming and the forced placement of channel on specified tiers or in "neighborhoods" of services, unless qualified independents are given equal carriage opportunities.

F. The Merger Will Impair Independent Programmers' Ability to Deliver Programming over the Internet

The proposed merger will also give Comcast the ability to gain further market power in the online video market. Presently, Comcast ties the availability of its video content online to a cable subscription.[29] Thus, only authenticated cable subscribers can access the online content offered buy Comcast. NBCU has also demonstrated a predisposition to restricting access to its online programming. During the 2010 Winter Olympics, NBCU allowed only certain cable subscribers to fully access its coverage online.

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 percent interest in Hulu.com, NBCU's online video provider and the second most popular video website on the Internet in the United States[30].

Comcast has also demonstrated a willingness to interfere with consumers' ability to access video via the Internet. In 2007, Comcast took measures to slow down and/or block video file sharing via BitTorrent transfers. Comcast broadband customers would suddenly discover

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[29] This practice is reflected in Comcast's version of the "TV Everywhere" model, which it calls "Xfinity" and/or "Fancast Xfinity".

[30] ComScore Ratings, March 2010.

that Comcast had closed access to that service.[31] Such willingness to interfere with content has raised concerns about Comcast's potential to threaten to Internet content and competitive ISPs and to impair the ability of consumers to view video over the Internet by degrading access.

The public interest is promoted when advanced technologies offer new ways to access content.[32] Comcast's attempts to control the distribution of video content on the Internet will impede independent programmers, such as WealthTV, from entering the new and emerging online video market. Video distributors offering video via the Internet need access to leading programming channels in order to make their service an effective primary video offering capable of competing. Comcast's practices of restricting access to its content through the use of exclusivity and prohibited practices clauses in its affiliation agreements with programmers will greatly limit the growth of online video. Comcast's conduct creates a barrier to entry for online programmers, hinders the growth of the online services market, and while protecting Comcast's own market power as an online video provider.

In view of Comcast's apparent propensity to restrain Internet video delivery as evidenced by both the BitTorrent matter and its "walled garden" approach to "TV Everywhere" reflected in its "Xfinity Fancast" service, the Commission must, if it does not deny the Application, impose conditions on the Merger that will prevent the Venture from impeding or preventing the delivery of content over the Internet.

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[31] Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010).

[32] See, e.g., Cable Television Consumer Protection and Competition Act of 1992 House Report, H.R. Rep. No. 102-628 at *25 (1992) ("A principal goal of H.R. 4850 is to encourage competition from alternative and new technologies, including competing cable system, wireless cable, direct broadcast satellites, and satellite master antenna television services.)

G. Independent Programmers such as WealthTV must have access to Comcast Cable systems to secure advertising revenue.

Comcast's footprint extends to 39 states and the District of Columbia. Comcast is the leading video supplier to a majority of the top 10 DMAs and possesses a majority of the subscriber households in a number of leading advertising markets. Without carriage on Comcast, independent programmers simply cannot obtain sufficient access to national advertisers. In addition, Comcast's national programming networks boast substantial subscribership. E! has 97 million subscribers; the Golf channel 81.8 million; VERSUS boasts 63.4 million; G4 has 67 million and the Style Network has 65.4 million subscribers[33]. By comparison, WealthTV, which is not carried by Comcast or the cable companies that ride Comcast's programming agreements, has fewer than 11 million subscribers. Comcast has itself acknowledged that the loss of one or more large distributors could have a material adverse impact on its programming networks.[34] In order to survive, independent programmers need access to the Comcast systems and to the MSOs that purchase programming through Comcast.

Furthermore, the Commission must ensure that the Merger would not result in the Venture having the ability to squeeze independent programmers off third party MVPD systems by forcing carriage of multiple bundled channels controlled by the Venture. If the Merger is approved without constraints, Comcast will likely increase the number of channels it bundles to smaller companies. Independent programmers such as WealthTV will be unable to secure program carriage with smaller cable companies because they are not part of Comcast's bundled package of channels and because smaller cable companies typically offer customers less channels than larger companies. In essence, with 54 potential cable channels to bundle,

[33] SNL Kagan, 2009.

[34] Comcast Corporation Form 10-K for Fiscal Year ended Dec. 31, 2009, p. 11.

Comcast-NBCU will have the ability to control a substantial portion of the programming lineups that smaller cable companies offer customers.

Comcast competitors, such as telco-video providers, would be forced to carry Comcast-affiliated networks on their lower tiers, thereby precluding market entry by independent programmers. The opportunity the Application presents is one that would give Comcast-NBCU tremendous control over content licensing in the entire MVPD market.

Bundling, moreover, raises costs for smaller cable companies and decreases competition in the cable programming market. Comcast would have greater incentive to artificially inflate the prices it charges itself for programming in order to demand higher costs for competitive MVPDs. When a distributor owns and licenses the product it is distributing to competitors, there is little incentive to keep costs of the product low. To the contrary, there is an incentive to raise the price of the product to affect those competitive distributors in any given market. As an example, Comcast acquired Versus with the acquisition price set roughly by the number of subscribers times the monthly carriage fees. Following the acquisition, when the Versus carriage agreements were recently up for renegotiation, Comcast reportedly nearly doubled the monthly fees for the service. Comcast is largely indifferent to the increased carriage fees as it is simply a transfer from one pocket to the other. As a result of these practices, the consumer ultimately pays as cable service prices continue to skyrocket.

If the Merger is allowed, Comcast can raise prices on any or all of the numerous cable channels it will control and the only negative impact will be on competitive distributors and consumers. To Comcast, as the distributor *and* licensor of the programming, any cost increases it imposes for licensing are simply revenue increases on the opposite side of the ledger. Furthermore, where Comcast-NBCU could absorb the increased costs, small and rural carriers will have fewer resources to invest in programming and building out their networks and low income consumers in their rural markets will be the most disadvantaged. This unfettered ability to raise programming costs will increase barriers to entry and limit competition.

The result of these practices, which will be enabled or enhanced by the Merger, will be a reduction of cable programming choices available to consumers while raising the prices they pay for bundled (and largely unwanted) content.

III. WEALTHTV HAS STANDING TO PETITION TO DENY THE APPLICATION

WealthTV is a party in interest with standing to petition the Commission to deny the Application in the instant proceeding.[35] It is a competitor for carriage with NBC Universal affiliated cable channels,[36] and it has "listener" standing.[37] WealthTV satisfies the constitutional threshold elements to establish standing, viz., it will suffer an injury-in-fact that is traceable to the proposed merger/license transfer applications, and a grant of this Petition to Deny would likely redress WealthTV's injury.[38]

A. WealthTV has Standing as a Competitor

Establishing competitor standing requires that "the party seeking to establish standing... must demonstrate that it is a direct and current competitor whose bottom line may be adversely

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[35] 47 U.S.C. § 309(d).

[36] See FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 471-72 (1940).

[37] See Office of Commc'n of United Church of Christ v. FCC, 359 F.2d 994, 1002 (D.C. Cir. 1966).

[38] See New World Radio, Inc. v. FCC, 294 F.3d 164, 170 (D.C. Cir. 2002) (citing Jersey Shore Broad. Corp. v. FCC, 37 F.3d 1531, 1535 (D.C. Cir. 1994)); Liberty Prods., a Ltd. P'ship WOXL-FM, Biltmore Forest, NC, Letter, 20 FCC Rcd 11987, 11990 (July 7, 2005).

affected by the challenged government action."[39] A party has standing if its likely financial injury concretely results from the challenged action.[40]

1. WealthTV L.P. Is a Direct and Current Competitor to NBC Universal

WealthTV, like all cable channels, is a direct competitor of NBC Universal. NBC Universal owns multiple cable channels, including Bravo, Syfy, USA Networks and Oxygen.[41] Each of these, like WealthTV, competes for bandwidth on cable systems like Comcast. While the channels may have differing content, the fact that they all compete for channel capacity on the same cable systems leads to their status as direct competitors.

2. The Comcast-NBCU Merger Will Directly Injure WealthTV L.P.

WealthTV's direct injury takes the form of a competitive disadvantage in terms of carriage on the Comcast systems, which would become affiliated with all NBC Universal-affiliated cable networks. These injuries may include anticompetitive practices involving bundling of rates to favor Comcast-affiliated cable channels over independent cable networks like WealthTV and anticompetitive practices involving bundling of advertising.

Congress and the Commission have previously recognized the harm that

> increased horizontal concentration and vertical integration in the cable industry have created an imbalance of power between cable operators and program vendors[;]... vertically integrated cable operators have the incentive and ability to favor affiliated programmers over unaffiliated programmers with respect to granting carriage on their systems.[42]

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[39] Mobile Relay Assocs v. FCC, 457 F.3 1, 13 (D.C. Cir. 2006) (quoting KERM, Inc. v. FCC, 353 F.3d 57, 60 (D.C. Cir. 2004)); New World Radio, 294 F.3d at 170.

[40] New World Radio, 294 F.3d at 170 (citing FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 471-72, 477 (1940)).

[41] See NBC Universal, Alphabetical Index of Sites, http://www.nbcuni.com/Alphabetical_Index/.

[42] Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Second Report and Order, 9 FCC Rcd 2642, 2643 ¶ 2 (1993).

Courts have recognized future competitive disadvantages resulting from governmental action as injuries-in-fact.[43]

The Venture's incentive and ability to bundle its programming could foreclose WealthTV's carriage on non-Comcast MVPD systems. Comcast-NBCU's ability to bundle advertising may limit access to key advertisers. Comcast's incentive to favor affiliated programming networks, including those currently owned by NBCU, will place WealthTV at a significant competitive disadvantage vis-à-vis those channels.

3. WealthTV's Injury is Fairly Traceable to the Application and Redressable by the Commission

The causal link between the Application and WealthTV's injury-in-fact is clear. The proposed transfer of licenses is necessary to facilitate a merger of Comcast and NBCU. If the Commission grants the Application as proposed, the merger will proceed, leading to the vertical integration of NBCU-affiliated cable channels into the country's largest MPVD, Comcast, which has the power to determine channel position for independent networks – indeed, even whether to carry independent networks at all and on what terms. WealthTV's injuries would be redressed through denial of the Application. A denial of the Application would eliminate the imminent injury facing WealthTV because the license transfer is a prerequisite to the Comcast-NBCU merger. Alternatively, the Commission could allay the harm through the imposition of substantial conditions, as described herein.

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[43] Adams v. Watson, 10 F.3d 915, 922 (1st Cir. 1993) ("future injury-in-fact is viewed as "obvious" since government action that removes or eases only the competitive burdens on the plaintiff's *"rivals"* plainly disadvantages the plaintiff's competitive position in the relevant marketplace" (emphasis added)); Baur v. Veneman, 352 F.3d 625, 633 (2d Cir. 2003) ("the courts of appeals have generally recognized that threatened harm in the form of an increased risk of future injury may serve as injury-in-fact for Article III standing purposes") (citing Friends of the Earth, Inc. v. Gaston Copper Recycling, Corp., 204 F.3d 149, 160 (4th Cir. 2000)).

B. WealthTV has Standing as a Listener

Aside from standing as a direct competitor to CNBC, WealthTV also has standing to petition the Commission to deny the Application as a "listener" or member of the public viewing NBC broadcast stations.[44] Like competitor standing, a petitioner asserting listener standing must, in addition to being a listener, also meet the basic requirements for Article III standing.[45] The listener must allege an injury-in-fact, that the injury is remediable and fairly traceable to the agency action.[46]

As a resident of NBC broadcast station service area and a viewer, WealthTV "can assert a possible injury to a legally protected interest... as 'spokesman' for a station's entire audience."[47] The injury facing a viewer is not based on competitive disadvantages or adverse effects to the bottom line, but rather "material impairment of [a viewer's] hopes or expectations".[48] Further, such standing exists when faced with an injury caused by the grant of an application that seriously impacts the public interest. For example, the D.C. Circuit has affirmed the granting of standing to a listener on the basis that such listener is injured when grant of applications would contravene policies underlying the Communications Act and FCC rules and policies because the FCC serves (at Congress' behest) as the public's proxy in assuring, through the apparatus of agency licensure, that media outlets in the same market do not fall into a small number of closely

[44] See United Church of Christ, 359 F.2d at 1002. See also the attached Declaration of Robert Herring, a resident of NBC's San Diego broadcast market and a regular viewer of NBC programming. As a member of the public and Chief Executive Officer of WealthTV, his individual listener standing may be imputed to WealthTV, itself. See Application of WGSM Radio, Inc., Assignor, et al., Memorandum Opinion and Order, 2 FCC Rcd 4565 (¶ 4) (1987).

[45] See supra n.8#, 10-11 and accompanying text.

[46] See supra n.11.

[47] Huddy v. FCC, 236 F.3d 720, 722 (D.C. Cir. 2001) (citing United Church of Christ, 359 F.2d at 1002).

[48] Id. at 723 (citing Jaramillo v. FCC, 162 F.3d 675, 677 (D.C. Cir. 1998)).

related hands."[49] Granting the Application would further exacerbate the anticompetitive difficulties facing independent programmers, which is contrary to the FCC's long established policies of protecting members of the public, like WealthTV, from affiliation-based discrimination.

IV. THE PUBLIC INTEREST STANDARD AND RELATED OBJECTIVES OF THE ACT.

A. Standard of Review.

1. The Commission must determine whether the Merger it is in the public interest.

The threshold requirement placed on the Applicants is to satisfy the Commission that the Applicants have demonstrated that the Merger will serve the public interest, convenience and necessity.[50] Under the Communications Act the burden is on GE and Comcast to meet that threshold.[51]

In its consideration of the application of The News Corp. to acquire control of DIRECTV, the Commission stated that it must "determine whether the transaction violates our rules, or would otherwise frustrate implementation or enforcement of the Communications Act and federal communication policy. That policy is shaped by Congress and deeply rooted in a preference for competitive processes and outcomes."[52] Under section 310(d) that examination is

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[49] Llerandi v. FCC, 863 F.2d 79, 85 (D.C. Cir. 1988) (The ultimate point of the duopoly rule is, after all, to assure (or at least enhance) diversification of viewpoints within the broadcast industry. That is, the FCC serves (at Congress' behest) as the public's proxy in assuring, through the apparatus of agency licensure, that media outlets in the same market do not fall into a small number of closely related hands. Listeners are, by definition, "injured" when licenses are issued in contravention of the policies undergirding the duopoly rule) (emphasis added).

[50] 47 U.S.C. § 310(d).

[51] 47 U.S.C. §§ 308, 310(d).

[52] General Motors Corp. and Hughes Electronics Corp and The News Corp., Memorandum Opinion and Order, 19 FCC Rcd 473, 484 ¶ 16 (2004) (internal citations omitted) (hereinafter, "News Corp.").

one that balances the potential public interest benefits against the potential public interest harms. As a part of that examination, the Commission has the duty to preserve independent and diverse voices available under the public interest standard.

> The "public interest evaluation under Section 310(d) necessarily encompasses the 'broad aims of the Communications Act,' which includes, among other things, preserving and enhancing competition in relevant markets, ensuring that a diversity of voices is made available to the public, and accelerating private sector deployment of advanced services."[53]

WealthTV submits that the Merger will injure such independent sources of information and entertainment.

In evaluating the preponderance of evidence that the Applicants must demonstrate, the Commission must consider whether the Transaction would "frustrate implementation or enforcement" of the federal communications policies intended to ensure against anti-competitive behavior and the Applicants bear the burden of showing that the public interest is best served by the proposed Transaction.[54] The preservation of independent and strong programming sources and the prevention of anti-competitive behavior by MVPDs are key elements in that evaluation.

2. In transactions involving the merger of cable interests, the Commission must also consider whether the merger will impede the availability of video programming.

In demonstrating that the public interests are met in a cable merger, the applicants must satisfy the Commission "that no cable operator or group of cable operators can unfairly impede... the flow of video programming from the video programmer to the consumer;" and

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[53] EchoStar Communications Corp., Hearing Designation Order, 17 FCC Rcd 20559, 20575 ¶ 26 (2002).

[54] See, e.g., Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Telecommunications, Inc., Transferor to AT&T Corp., Transferee, Memorandum Opinion and Order, 14 FCC Rcd 3160, 3168-70 ¶¶ 11-15 (1999) ("AT&T-TCI Order").

that "cable operators affiliated with video programmers do not favor such programmers in determining carriage on their cable systems."[55]

In the Application at hand there is ample evidence from past behavior of the Applicants of a propensity to impede the flow of video programming – be it via cable systems or Internet – and a consistent record of favoring affiliated programming to determine carriage on their cable systems. It is a record of conduct that flies in the face of the Commission's standards and irrespective of whatever promises and condition may be proffered by the Applicants, it is a record that must be considered with great gravitas.

There is scant competition in existence today between independent and vertically integrated programmers. The small remaining vestige of opportunity for the independent programmer will most certainly be diminished if the Transaction is approved. Given that very likely result, approval of the Transaction is in direct contravention to the expressed will of Congress.

3. The detrimental impact of vertical integration in the cable industry has been long acknowledged by the Congress, the U.S. Supreme Court and the Commission.

In the mid-1980's, the cable industry faced its first real competitive challenge: the C-band or "backyard" satellite system. For years, independent packagers desiring to promote the C-band industry were thwarted by cable programmers, particularly those that were vertically integrated with MVPDs. In 1992 the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")[56] was adopted to, in large part, address concerns about program access and

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[55] 47 U.S.C §533(f)(2)(A), (B).

[56] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 § 2(a)(5) (1992).

the practices of vertically integrated programmers. Nearly two decades ago Congress recognized cable's vertical integration as such a cause for concern that a new law was needed:

> The cable industry has become vertically integrated; cable operators and cable programmers often have common ownership. As a result, cable operators have the incentive and ability to favor their affiliated programmers. This could make it more difficult for noncable-affiliated programmers to secure carriage on cable systems. Vertically integrated program suppliers also have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies.[57]

Congress further noted that "vertically integrated companies reduce diversity in programming by threatening the viability of rival cable programming services."[58] It recognized that competitive harms assumed many forms: denial of access to programmers affiliated with rival multi-system operators, price discrimination, channel placement discrimination, and an offer of carriage only in exchange for a financial interest in the programmer.[59] The House Committee on Energy and Commerce "received testimony that vertically integrated operators have impeded the creation of new programming services by refusing or threatening to refuse carriage to such services that would compete with their existing programming services."[60]

In addition to Congress, the Supreme Court has noted the potential injury that vertically integrated MVPDs and content providers can cause.

> "[T]he cable industry has become increasingly horizontally concentrated and vertically integrated. Power has been concentrated in the hands of fewer and fewer operators (horizontal concentration), which has led to

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57 Cable Television Consumer Protection and Competition Act of 1992 House Report, H.R. Rep. No. 102-628 at *33 (1992).

58 Id.

59 Id.

60 Id.

> increased vertical integration as the largest operators have begun to demand ownership interests in cable programming networks."[61]

The program access and program carriage rules[62] enacted by Congress and implemented by the Commission were designed to eliminate the anti-competitive practices of vertically integrated programmers. Complaint procedures were promulgated by the Commission to redress grievances of both independent programmers and competitive distributors. The rules, however, do not specifically address issues such as forced bundling, tier placement, or channel adjacency. Likewise, the Access Rules do not begin to address VOD, PPV or Internet delivery wherein great anti-competitive threat lies in the market today. Moreover, the complaint process under the Access Rules is lengthy, expensive, uncertain and an inadequate substitute for competitive market forces.

Despite the Access Rules, independent programmers lack a meaningful remedy to Comcast's discriminatory program carriage practices. Prosecuting a complaint at the FCC is not an effective process because it is prohibitively expensive and lacks certainty due to the absence of deadlines for when the FCC must render a decision.[63] Some complaints have been pending for well over two years. Moreover, program carriage complaints are rarely decided in the favor of the programmer. In addition, independent programmers face retaliation from other cable companies that have business ventures with Comcast and that have elected not to compete against Comcast.

Vertical integration of the cable industry is causing injury to independent content providers as they struggle, increasingly, against anticompetitive industry tactics. Approval of the

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61 Turner , 910 F. Supp. at 740 .

62 See 47 C.F.R. 76.1000, et seq. (the "Access Rules")

63 See Reply Comments of Wealth TV, MB Docket No. 07-42 (Oct. 12, 2007); Reply comments of NFL Enterprises, LLC, MB Docket No. 07-42 (Oct. 12, 2007).

Application in this matter would serve only to continue a trend that is detrimental to a competitive and independent marketplace of ideas. To prevent the public interest harms detailed in this Petition, the Commission should deny the Application.

V. RECOMMENDED MERGER-RELATED CONCESSIONS AND REMEDIES

If the Merger is approved, in order to avoid the discriminatory carriage access conduct set forth above and allow independent programmers to remain viable, WealthTV recommends that the Commission require Comcast to make the following concessions:

A. Fair Carriage Terms.

Require that Comcast carry all "Established Independent Networks"[64] on its basic or expanded basic programming tiers across all of its subscribers. Comcast's voluntary public interest commitment to carry two "independent" channels on its lineup per year for the next three years is insignificant and meaningless given the number of independent programmers and the dozens of channels it will carry once the company completes its all digital conversion. Moreover, Comcast's voluntary concession does not specify where the two "independent" channels would be placed or ensure that the independent programmers would not be required to give equity to Comcast. Favorable channel placement on a popular programming tier is the key to the success of a non-affiliated programmer

[64] It is recommended that "Established Independent Network" mean a network: (1) with no direct or common ownership any MVPD and/or broadcast network; (2) having a current and established history of providing programming 24 hours a day, seven days a week for at least 36 consecutive months; (3) have current and continuous carriage for at least 36 months with a minimum of two major MVPD operators comprised of any two of the following: a) a top five cable MVPD; b) a top two DBS provider; c) a top two telecommunications MVPD; and (4) the ability to demonstrate via third-party ratings that the EIN performs in the top 75 percent of a major MVPD system.

B. Internet Video.

Prohibit Comcast from taking any action that imposes restrictions on access to online video programming, including, requiring authentication of an existing cable subscription to view online content; or imposing exclusivity clauses and prohibitive alternative distribution platform clauses in its affiliation agreements with programmers.

C. Reformed Complaint Process.

Make Access Complaints against Comcast Subject to Baseball-Style Arbitration[65]. The FCC's existing program complaint process does not allow for a meaningful remedy. As a result, Comcast-NBCU must enter commercial, "baseball-style" arbitration for disputes over program carriage. This condition applies to any Established Independent Networks that is an unaffiliated, independent programmer that has been denied carriage. It is recommended that the following conditions apply:

1. Establishment of a shot clock in determining whether the complainant has established a prima facie case within 30 days of the filing of a complainant's reply to a defendant's answer to a complaint or the day on which the reply is due. The FCC shall issue a final ruling no later than 6 months from date of the initial filing date of the complaint.

2. Establishing a prima facie case. Prima facie means that a complainant shall put forth evidence of the elements of the discrimination offense, supported as appropriate by documents and testimony by declaration or affidavit that if subsequently found to be true by a finder of fact, would be sufficient to establish a program carriage violation.

3. Comcast's refusal to deal or refusal to negotiate in good faith with a non-affiliated video programmer because of the programmer's assertion of rights or remedies shall constitute discrimination.

4. Once Established Independent Network files a complaint alleging discrimination with respect to a change in the terms or conditions of carriage, any such change shall be null and void and the terms and

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[65] In baseball-style arbitration, each side submits a final best offer and the arbitrator selects whichever one he or she deems best.

conditions of carriage shall revert to status quo ante during the pendency of the Commission's decision on the complaint.

D. iNDEMAND.

Require Comcast to fully divest of its interest in iNDEMAND. Such divestiture will reduce the amount of programming that Comcast owns and favors to the detriment of independent programmers. Divestiture will also prevent Comcast from using the joint venture to illegally coordinate activities among the top cable company equity owners: Comcast, Cox, Time Warner, and Bright House.

VI. CONCLUSIONS

The Transaction will not serve the public interest and must be denied or conditioned in such a manner as to ensure that the potential anti-competitive harms that are clearly the potential off-shoots of the Merger are interdicted.

A. Cable Carriage

The Merger will give Comcast and NBCU a greater incentive and ability to favor programming channels that are owned, in whole or in part, by the Venture. Because of this effect, the Venture will be positioned to harm independent programming voices in a variety of ways.

First, with the Venture's ownership in 54 cable channels, it will be increasingly difficult, if not impossible for independent channels to gain carriage on Comcast system, except possibly on higher, less viewed tiers. This is particularly true in today's market where large and vertically integrated programmers add more channels and engage in similar tying practices.

Second, as the Venture licenses other MVPDs it will have greater incentive and ability to force carriage of multiple Comcast/NBCU channels on those MVPDs and to demand carriage on the most widely viewed tiers of service. This will have the effect of squeezing out independent programmers.

Third, the Merger will give Comcast the incentive and ability to increase wholesale programming prices paid by MVPDs and ultimately consumer programming prices. Comcast's programming arm sets the prices it charges Comcast's distribution arm for programming. Because all of the money rolls into the same balance sheet, Comcast has little or no incentive to keep prices low. In addition, Comcast may have the incentive and ability to increase programming prices paid by MVPDs by temporarily withholding or threatening to withhold owned and operated broadcast TV stations and its RSN programming. Comcast's ability to act anti-competitively to raise programming costs for cable, telco and satellite competitors would lead to higher prices for consumers.

In terms of cable programming, the Merger is likely to result in less quality, less consumer choice, and less diversity of voices. When the nation's leading cable provider also acquires a significant amount of popular and must have programming the new entity can shut out the voices of other programmers and producers. The result is that consumers never get to see anything except what the cable giant decides they should see. This choice is not based on the relative merits of the programming, but on the economic interests that cable operators have to carry their own programming.

Comcast's acquisition of NBCU will increase Comcast's market power in both the television and online video markets, thereby giving it greater incentive to engage in discriminatory and predatory behavior against independent programmers. Comcast's market power will allow it to discriminate against independent programmers and deny them carriage on the nation's leading cable and broadband distributor. Absent such access, it is virtually impossible for an independent programmer to remain viable.

B. Internet Video

Comcast will have greater incentive and power to tie its content for online or Internet viewing to a cable subscription, thereby preventing independent programmers from gaining access to the emerging online market. Comcast will have greater incentive and power to mandate that programmers not distribute content via the Internet as a condition of carriage on Comcast cable systems. Comcast has already demonstrated a propensity for restricting access to online content both through its limitation of bandwidth in the BitTorrent matter and in the way it has operated TV Everywhere, a/k/a Xfinity. Comcast has tried to restrict viewer choice on the Internet, controlling or seeking to control bandwidth, consumer access through "authentication" and by attempting to pressure other programmers into agreements that restrict their ability to deliver video via the Internet.

If the Venture gains control of the two national networks, 54 cable channels, and 35 online media properties, including Hulu, the number two online video source, the effect upon the nascent online video business would be extremely detrimental to that innovative form of video delivery.

C. Pay-per-View and Video-on-Demand

Similarly, there is great potential for harm to the PPV and VOD markets given the controlling interest that Comcast has in the nation's largest distributor of such content, iN DEMAND. In view of the cable ownership of iN DEMAND and the means already employed by that enterprise to leverage its exclusive rights in professional sports content, it is daunting to think of an iN DEMAND that also has a majority partner that owns Universal Studios, Focus

Features and all of the other content that would fall into the Comcast camp in the event the Merger is approved.

D. Broadcast Retransmission

The Venture will be able to leverage its broadcast properties with its cable and digital media properties providing the opportunity and incentive to demand higher retransmission fees without harm to the Venture's own cable distribution and to damage competitive MVPDs. The Venture's broadcast properties would provide control of must-have content that the Venture can tie and leverage. The general public, competitive MVPDs and independent programmers, such as WealthTV, would be harmed by such conduct.

The Merger is not in the public interest. There is every reason to believe that the Merger will result in diminished access for independent programmers and higher programming prices to MVPD competitors, thereby causing costs for smaller cable companies and telcos to increase, a move that will deter investment in deploying networks throughout America. The Merger would greatly enhance the incentive and the ability Comcast and NBCU to act anti-competitively in ways that will lead to higher prices for consumers, less meaningful programming and less diversity of voices, and, ultimately, harm to the public interest.

For the reasons stated herein, WealthTV respectfully requests that the Commission deny the Application as the Transfer sought therein is not in the public interest.

Respectfully submitted,

By: ______________________

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Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

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

DECLARACTION UNDER PENALTY OF PERJURY OF ROBERT HERRING

I, Robert Herring, hereby declare under penalty of perjury that the following is true and correct to the best of my knowledge.

1. I am the Chief Executive Officer of Herring Broadcasting d/b/a WealthTV ("WealthTV").

2. WealthTV is an independently owned lifestyle and entertainment channel that offers entertainment programming. WealthTV is not owned or affiliated with any multichannel video programming distributor or broadcaster. WealthTV is a competitor of some of the proposed merged entity's cable networks. It shares similar programming and common advertisers with the competing networks.

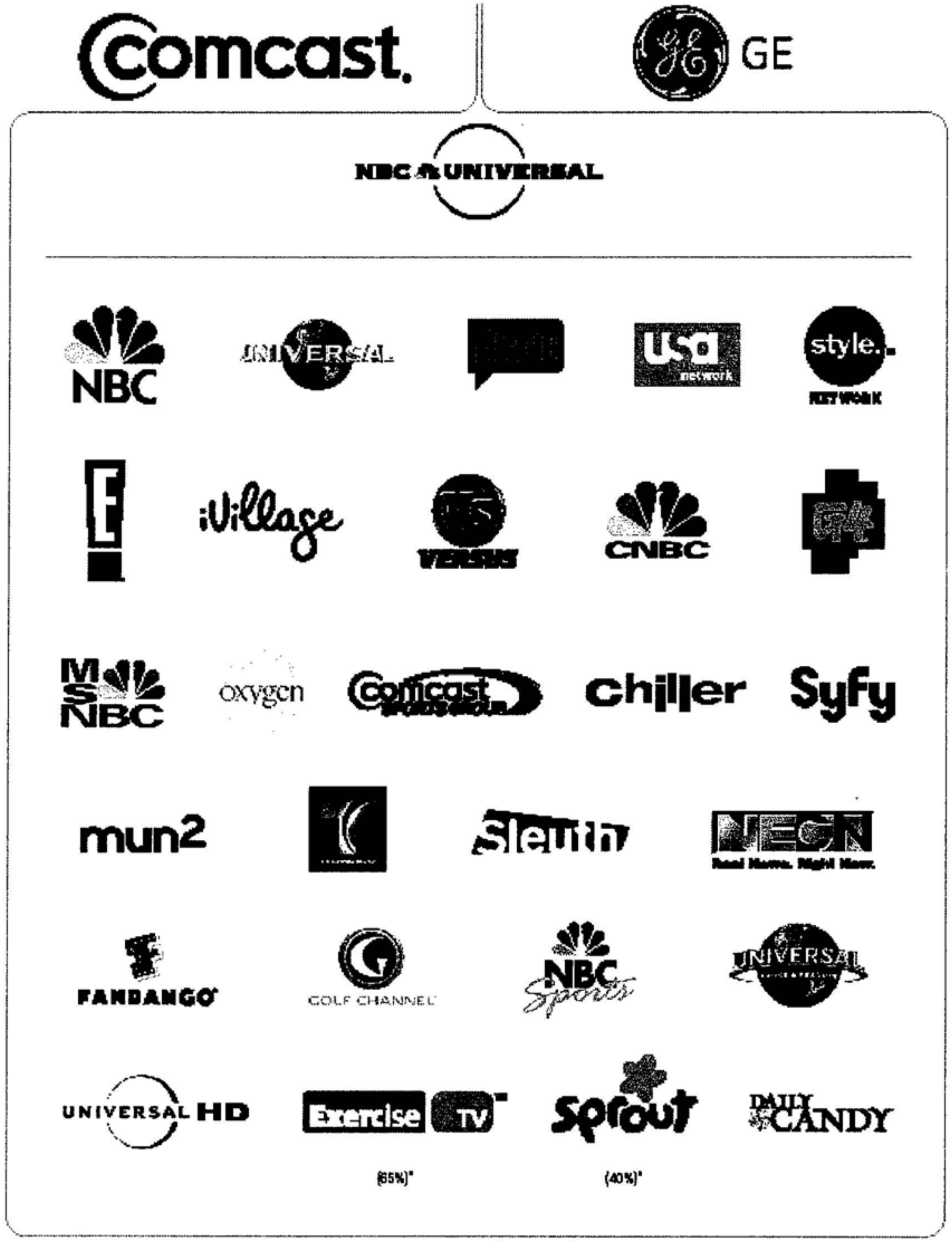
3. I reside in a community presently served by broadcast stations owned and operated by NBC Universal.

4. I am familiar with the contents of the foregoing *Petition to Deny*. The factual assertions made in the petition are true to the best of my knowledge and belief.

June 17, 2010
DATE

Robert Herring
Robert Herring

APPENDIX A
COMCAST – NBCU MEDIA PROPERTIES



*partial ownership percentage

For more information please visit: www.comcast.com/nbcutransaction

APPENDIX A
COMCAST – NBCU MEDIA PROPERTIES

Comcast | GE

NBC UNIVERSAL

- World-class cable network portfolio
- A leader in multicultural programming with Telemundo Network, 15 owned and operated Telemundo TV stations, mun2, and an interest in TVOne
- NBC, one of the country's best known broadcast networks
- 234 NBC-affiliated stations; 10 owned and operated stations
- One of the world's most successful movie production studios
- A premier sports entertainment platform
- Emmy Award-winning television production studio
- Attractive online portfolio of internet properties, with more than 40 million monthly unique visitors
- Reaching audiences in about 200 countries
- Renowned theme parks in Orlando and Hollywood

Comcast 51%
GE 49%
NBC UNIVERSAL

- Managed by Comcast
- Headquartered in New York
- 5 Member Board
  - 3 Nominated by Comcast
  - 2 Nominated by GE
- CEO: Jeff Zucker

*partial ownership percentage

For more information please visit: www.comcast.com/nbcutransaction

APPENDIX A
COMCAST – NBCU MEDIA PROPERTIES

Comcast

GE

NBC UNIVERSAL

Cable TV Networks
- USA
- Bravo
- Syfy
- Universal HD
- CNBC
- CNBC World
- MSNBC
- Chiller
- mun2
- Sleuth
- Oxygen
- E!
- Golf Channel
- Style Network
- Versus
- G4
- The Comcast Network
- Comcast Regional Sports Networks
  - CSN Bay Area (67%)*
  - CSN California
  - CSN Mid-Atlantic
  - CSN Chicago (30%)*
  - CSN MTN (50%)*
  - CSN New England
  - CSN Northwest
  - CSN Philadelphia (85%)*
  - CSS (81%)*
  - SNY (8%)* (not managed)
- New England Cable News
- Exercise TV (65%)*
- Sprout (40%)*
- ShopNBC (39%)* (not managed)
- The Weather Channel (25%)* (not managed)
- Universal Sports (8%)* (not managed)
- FearNet (33%)* (not managed)
- A&E (16%)* (not managed)
- A&E HD (16%)* (not managed)
- Biography (16%)* (not managed)
- History (16%)* (not managed)
- History International (16%)* (not managed)
- History en Espanol (16%)* (not managed)
- Military History (16%)* (not managed)
- Lifetime (16%)* (not managed)
- Lifetime Movie Network (16%)* (not managed)
- Lifetime Real Women (16%)* (not managed)
- Crime and Investigation (16%)* (not managed)
- TVOne (33%)* (not managed)
- Retirement Living TV (RL TV) (3.4%)* (not managed)

International Channels
- Syfy Universal
- Diva Universal
- Studio Universal
- Universal Channel
- 13th Street Universal
- CNBC Europe
- CNBC Asia

Broadcast Networks
- NBC
- Telemundo

NBC Television Network
- 234 NBC-affiliated stations across the country

Digital Media Properties
- CNBC.com
- Mlage.com
- NBC.com
- fandango.com
- movies.com
- dailycandy.com
- bravotv.com
- eonline.com
- thegolfchannel.com
- golfnow.com
- usanetwork.com
- oxygen.com
- style.com
- chillertv.com
- syfy.com
- versus.com
- comcastsportsnet.com
- holamun2.com
- universalhd.com
- g4tv.com
- sleuthchannel.com
- accesshollywood.com
- nbcsports.com
- nbcolympics.com
- televisionwithoutpity.com
- exercisetv.tv (65%)*
- sproutonline.com (40%)*
- universalsports.com (8%)* (not managed)
- fearnet.com (33%)* (not managed)
- msnbc.com (50%)* (not managed)
- hulu.com (27%)* (not managed)
- weather.com (25%)* (not managed)

NBC Local Media Division
- 10 NBC owned and operated broadcast TV stations
  - New York / WNBC
  - Los Angeles / KNBC
  - Chicago / WMAQ
  - Philadelphia / WCAU
  - San Jose / KNTV
  - Dallas/Ft.Worth / KXAS
  - Washington / WRC
  - Miami / WTVJ
  - San Diego / KNSD
  - Hartford / WVIT

Telemundo Stations
- 15 Telemundo owned and operated stations
  - Los Angeles / KVEA
  - New York / WNJU
  - Miami / WSCV
  - Houston / KTMD
  - Chicago / WSNS
  - Dallas/Ft.Worth / KXTX
  - San Antonio / KVDA
  - Las Vegas / KBLR
  - San Francisco/San Jose / KSTS
  - Phoenix / KTAZ
  - Fresno / KNSO
  - Denver / KDEN
  - Boston/Merrimack / WNEU
  - Tucson / KHRR
  - Puerto Rico / WKAQ
- 1 independent Spanish-language owned and operated station
  - Los Angeles/KWHY

NBC Universal Domestic & International Distribution
- Distributes NBC Universal's first-run, syndicated and library content nationally and internationally, including more than 55,000 TV episodes

Universal Studios/Production
- Universal Pictures
- Focus Features
- Universal Media Studios
- Universal Cable Productions
- Carnival
- Cattleya (18.5%)* (not managed)

Universal Studios Home Entertainment
- Distributes more than 4,000 film titles

Parks & Resorts
- Universal theme parks
- Orlando (50%)*
- Hollywood

*partial ownership percentage

For more information please visit: www.comcast.com/nbcutransaction

CERTIFICATE OF SERVICE

I, Jillian Gibson, a legal secretary at Patton Boggs LLP, hereby certify that on this 21st day of June, 2010, I caused true and correct copies of the foregoing Petition to Deny of WealthTV L.P. to be sent by first-class mail on the following individuals:

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