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June 21, 2010

VIA ELECTRONIC DELIVERY

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

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

REDACTED – FOR PUBLIC INSPECTION

Dear Ms. Dortch:

Enclosed please find a copy of EarthLink, Inc.'s redacted Petition to Condition or Deny ("Petition") filed today via ECFS with the Federal Communications Commission. Pursuant to the First and Second Protective Orders entered in this proceeding, the unredacted versions of the Petition containing information designated as "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" were filed with the Commission today via hand delivery.

Should you have any questions, please do not hesitate to contact the undersigned.

Sincerely,

Jennifer P. Bagg
Counsel for EarthLink, Inc.

Enclosures

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

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

PETITION TO CONDITION OR DENY OF EARTHLINK, INC.

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June 21, 2010

EXECUTIVE SUMMARY

The proposed combination of Comcast-NBCU would create a communications and information behemoth that will alter the American media landscape. The "new" Comcast would control a vast swath of the media, including the nation's largest cable network, numerous cable channels, broadcast programming, national, regional and local programming networks, major market broadcast stations, interactive video services, video on-demand and pay-per-view services, online video distribution, online interactive services and programming guides, theatrical motion picture production and content, wireless Internet services, and substantial Internet content. Though Comcast and NBCU paint a picture of a rosy future for consumers, this outcome is by no means assured.

The dramatic increase in the scope and scale of Comcast's control over programming and content combined with its dominant gateway control over the broadband access network raises the specter that the transaction will result in less competition, diminished choice, decreased information diversity, reduced broadband network investment, and higher costs for consumers. At a time when broadband-driven online platforms are beginning to usher in a new era for consumers to view, share and interact with innovative video programming and pioneering Internet content – literally redefining television – there is a serious risk that this promise could be cut short.

In economic terms, as explained by Professor Simon Wilkie, the proposed combination has both vertical and horizontal impacts upon competition that undermine the public interest. By virtue of the transaction, Comcast will be in a position to erect barriers to entry, raise rival's costs and otherwise interfere with emerging online video competition. Among other impacts, the transaction raises the risk that Comcast will be able to use its market power to stifle growth and innovation of online video and other broadband content as it increases Comcast's incentives and ability to interfere with the ability of unaffiliated Online Video Program Distributors and programmers to compete, including Blip.tv, Metacafe, Netflix, Vuze, Veoh, Vimeo, YouTube, and many others.

Consistent with its profit-maximizing incentives, Comcast will have even greater incentives to prevent consumers from "breaking the bundle," which best promotes choice by ensuring consumers are not forced to subscribe to and pay for services they do not want or cannot afford. To prevent consumers from "cutting the cord" – choosing online video rather than a cable television subscription – Comcast can block content to Internet users that do not want or are unable to purchase cable television subscriptions; degrade broadband traffic and engage in similar "management" practices that interfere with the free flow of competing online content; limit broadband access service bandwidth capacity; and discriminate against independent Internet Service Providers through price discrimination and other practices. Comcast can also demand independent programmers restrict online distribution of content as a condition of cable carriage and can withhold "must-have" programming from competing online providers. As Comcast's past conduct highlights, these risks are real and substantial.

To address these public interest harms, the Commission should not approve the transaction unless consumers are guaranteed unfettered, unaffiliated access to competitive content and video programming, and are free to choose what they want from the provider of their choice. In EarthLink's operational experience as one of the nation's largest and oldest independent Internet service providers, consumer choice among competitive service providers is the most effective, efficient and straightforward mechanism to attain this goal. For over ten years, EarthLink has been bringing nationally-recognized and award-winning broadband Internet service choice to Americans throughout the country, building value-added consumer offerings that utilize wholesale broadband transmission inputs. EarthLink's consistent view has been confirmed: innovation, investment, diverse content, customer support standards, and consumer broadband demand increase when consumers have independent access to multiple providers.

In contrast to the post-merger Comcast, unaffiliated broadband ISPs lack any incentive to tie access to online content to cable service subscriptions and have strong motivation to bring consumers unfettered competitive video and innovative content. In these difficult economic times, consumers are looking to reduce costs by using an attractively priced, standalone broadband Internet service rather than subscribing to a bundle. As online video develops further, this trend will increase. Moreover, the resulting competition and content diversity will help to keep cable prices in check and support innovation and investment by all broadband content and service providers, helping to drive broadband deployment, adoption, and competition in furtherance of the FCC's *National Broadband Plan* goals.

For these reasons, the FCC should condition approval of the transaction upon the provision by Comcast of nondiscriminatory wholesale standalone Broadband Access Service to at least four independent ISPs across the Comcast broadband territory at reasonable rates and terms. This condition would use the successful broadband access condition that was adopted by the FTC and FCC in the AOL-Time Warner merger approval as a model, as it has proven to be a success for broadband consumers and an efficient nudge toward market-based arrangements that meet consumer needs. Only by ensuring much-needed competition can the FCC find the proposed transaction in the public interest.

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GLOSSARY OF TERMS

Terms that are used throughout EarthLink's Petition are listed below.

Term	Abbreviation	Definition	Examples
Broadband Access Service	N/A	The provision to end users of high-speed (more than 768 Kbps) connectivity to the Internet by any means, including, for instance, hybrid fiber-coaxial, optical fiber or coaxial cable, xDSL, satellite systems, fixed or mobile wireless services, ultra-high frequency microwave or multichannel multipoint distribution services.*	cable modem Internet access xDSL Internet access
Multichannel Video Programming Distributor	**MVPD**	An entity, including but not limited to a cable operator, which is engaged in the business of making available for purchase, by subscribers or customers, multiple channels of Video Programming.*	Comcast Time Warner Cable Cablevision
Online Video Programming Distributor	**OVPD**	An entity which is engaged in the business of making available, either for free or for a charge, Professional Video programming delivered over the Internet to end users, through any means of online delivery including, but not limited to, a website, an online or mobile wireless portal, or an aggregator or syndicator of professional online video programming.* *Note: An unaffiliated OVPD is an OVPD not affiliated with a MVPD or broadcaster.*	Netflix YouTube iTunes Hulu Veoh Blip.tv FanCast XFinity
Professional Video	N/A	Any video that is created or produced using professional-grade equipment, talent, and/or production crews, or for which media and/or entertainment companies hold or maintain the rights of distribution and/or syndication.*	*See "Video Programming"*
Unaffiliated or Independent Internet Service Provider	**"Unaffiliated ISP"** or **"Independent ISP"**	A provider of Internet access, related services and content, that is not owned by or otherwise affiliated with a facilities-based provider of Broadband Access Services.	EarthLink AOL
Video Programming	N/A	All Professional Video content delivered via any means, whether in an analog or digital format.*	Television/Web Series Sports/News/ Educational

* *Definition adopted from the FCC's Information and Discovery Request for Comcast Corporation, MB Dkt. 10-56 (May 21, 2010)*

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PETITION TO CONDITION OR DENY OF EARTHLINK, INC.

EarthLink, Inc., by its attorneys and pursuant to the FCC's Public Notice,[1] hereby files this Petition to Condition or Deny the application of Comcast Corporation ("Comcast"), General Electric Company ("GE") and NBC Universal, Inc. ("NBCU") (the "Applicants") to assign or transfer control of certain licenses (the "Transaction"). EarthLink respectfully submits the FCC should condition approval of the Transaction.

INTRODUCTION AND SUMMARY

The Federal Communications Commission ("FCC" or "Commission") is faced with a request for approval of a vertical and horizontal merger of assets that would create a communications and information behemoth. The "new" Comcast would exercise control over a vast swath of media resources, including cable channels, broadcast programming, national, regional and local programming networks, local broadcast stations, interactive video services,

[1] *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, DA 10-457, MB Dkt. 10-56 (rel. Mar. 18, 2010). As described herein, EarthLink is directly harmed by the proposed Transaction and is therefore a party in interest pursuant to Section 309(d) and 310(d), 47 U.S.C. §§ 309(d)(1), 310(d).

video on-demand and pay-per-view services, online video distribution, online interactive services and programming guides, theatrical motion picture production and content, wireless Internet, and other related services. This dramatic increase in the scope and scale of Comcast's control over programming and content combined with its dominant gateway control over the broadband network that connects its cable and Broadband Access Service users to content creates an unprecedented agglomeration with far-reaching consequences for our nation's communications landscape.

Section I describes the applicable standards for the FCC's public interest review process, the relevant product markets (both current and future) and the competitive concerns the Transaction raises. To find the public interest is served, the FCC must find that the public will be better off as a result of this proposed Transaction. In practical terms, this means the Transaction will provide the public improved, not diminished, competition and choice; that the diversity of information sources consumers enjoy will remain vibrant, open and robust; and that our nation's goals to increase broadband service innovation, deployment and adoption will be furthered.

As currently proposed, the Transaction holds the significant risk of detrimental effects for the American public. Section II explains the increased incentives the Transaction creates for Comcast to restrict the growth of a competitive market for online video and further suppress the ability of independent broadband ISPs to serve consumers. By increasing Comcast's incentives to impede existing and emerging competition from unaffiliated OVPDs, including Metacafe, Netflix, Blip.tv, Vuze, Veoh, YouTube, and a growing number of others, the proposed Transaction enhances Comcast's incentives to use its market power to impede competition and choice of online content and diminish the consumer's Internet experience. In economic terms, as described in detail by Professor Simon Wilkie in his report attached hereto, the proposed Transaction has both vertical and horizontal impacts upon competition that undermine the public interest.

Comcast will have increased incentives to maximize profits by preventing consumers from "breaking the bundle," essentially forcing consumers to subscribe to and pay for services they do not want or cannot afford. Comcast will also have greater incentives to prevent consumers from "cutting the cord" – choosing online video rather than a cable television subscription – by blocking content to Internet users who do not want or are unable to purchase cable television subscriptions and degrade broadband traffic and engage in similar network and capacity "management" practices to interfere with the free flow of competing online content. At the same time, the Transaction amplifies Comcast's incentives to discriminate against unaffiliated broadband ISPs, including through pricing practices that interfere with the ability of consumers to take only standalone Broadband Access Service to enjoy online video. Comcast will also have heightened incentives to engage in practices that raise costs for consumers and rivals, both in the MVPD and OVPD markets, including withholding "must-have programming" from unaffiliated OVPDs and demanding that independent programmers restrict online distribution of content as a condition of cable carriage.

Section III explains the ability of Comcast to engage in these detrimental practices. Combining the NBCU content assets with Comcast's duopoly – and monopoly – position in the market for Broadband Access Service, Comcast will be able to maximize its profits by stifling growth and innovation of online video and other broadband content and engaging in other anticompetitive conduct. Not only will Comcast's behavior be unrestrained because of the lack of enforceable "open Internet" rules, it could well become the cable "leader," providing a roadmap for others to emulate its harmful practices. As a result, rather than serve the public by increasing competition, diversity and choice, the Transaction makes it likely that consumers will be worse off.

Section IV describes how the FCC could mitigate these substantial concerns with a condition that is low-cost, market-oriented and highly beneficial. To ensure the public interest is affirmatively served, the Commission should not approve the Transaction unless consumers are free to choose the Broadband Access Service provider of their choice, which will allow unfettered access to competitive content, including Video Programming. In EarthLink's consistent view and operational experience as one of the nation's oldest and largest independent ISPs, consumer choice among competitive Internet providers is the most effective, efficient and straightforward mechanism to attain this goal.[2] For over ten years, EarthLink has been bringing nationally-recognized and award-winning broadband service choice to consumers throughout the country, building value-added consumer offerings that utilize wholesale broadband transmission inputs.[3] EarthLink's experience has confirmed what the FCC previously postulated – innovation,

[2] EarthLink has the experience and history promoting broadband innovation and choice for consumers that few, if any, companies can rival. Currently, EarthLink's Broadband Access Service serves approximately 700,000 broadband subscribers and is offered via private commercial wholesale arrangements with competitive (Covad) and incumbent (Verizon, AT&T and Qwest) wireline providers and with a relatively few cable providers (Time Warner Cable and a very limited arrangement with Comcast).

[3] Among EarthLink's awards are: Highest in Customer Satisfaction Among Dial-Up Internet Service Providers, J.D. Power and Associates, in 2007 and 2008; Top Three in Customer Satisfaction Among DSL Providers, East and West Regions, J.D. Power and Associates, 2008; Highest in Customer

investment, diverse content, customer support standards, and consumer broadband demand increase when consumers have independent access to multiple providers of broadband applications and content.[4]

In contrast to Comcast, unaffiliated broadband ISPs have strong incentives to bring consumers unfettered competitive video and innovative content and lack any incentive to tie access to online content to cable service subscriptions. By offering a competitive broadband option, independent ISPs empower consumers to "break the bundle," especially needed in these difficult economic times when many consumers are looking to reduce costs by choosing only the services and content they desire. This approach further stimulates consumer broadband demand and usage, particularly in lower income populations with limited ability to purchase multiple high-priced service offerings (*i.e.*, "bundles"). The resulting competition and content diversity will also help to keep cable prices in check and support innovation and investment by all broadband content and service providers, including in the emerging online video market. In turn, this competition will create strong incentives for Comcast to invest in its network, helping to drive broadband deployment, adoption, and competition in furtherance of the FCC's *National*

Satisfaction Among Residential Internet Service Providers, West Region, J.D. Power and Associates, 2009; Top Three in Customer Satisfaction Among Residential Internet Service Providers (tied with Verizon), South Region, J.D. Power and Associates, 2009.

[4] *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Second Report and Order, 14 FCC Rcd. 19237, ¶ 3 (1999) ("*Wireline Second Report and Order*"). In addition to offering a range of user-friendly features (security, spam and privacy tools, targeted information, hosting, toolbars, etc.), independent ISPs often assist users in the sometimes challenging process of upgrading to broadband. *See, e.g.,* Shane Greenstein, *Commercialization of the Internet: The Interaction of Public Policy and Private Choices*, National Bureau of Economic Research (Apr. 11, 2000), *available at* http://www.nber.org/chapters/c10779.pdf ("*Greenstein Report*"); Jason Oxman, *The FCC and the Unregulation of the Internet*, OPP Working Paper No. 31, (July 1999), *available at* www.fcc.gov/Bureaus/OPP/working_papers/oppwp31.pdf ("*Oxman Report*").

Broadband Plan goals.[5]

For these reasons, EarthLink describes a Proposed Condition that would require Comcast to provide nondiscriminatory wholesale, standalone Broadband Access Service to at least four independent ISPs across the Comcast broadband network at reasonable rates and terms. This condition would be modeled upon the successful condition that was adopted in the AOL-Time Warner merger orders (by both the Federal Trade Commission ("FTC") and FCC), and that has proven to be a success for broadband consumers and an effective nudge toward market-based arrangements that meet consumer needs.

Without conditions to ensure the Transaction will enhance competition, increase consumer choice and promote a diversity of information sources, the Application must be denied.

DISCUSSION

I. THE FCC MUST DENY THE TRANSACTION UNLESS IT AFFIRMATIVELY SERVES THE PUBLIC INTEREST

A. The FCC's Public Interest Review Must be Guided by the Goals of the Communications Act to Promote Competition, Diversity and Broadband for All Americans

In reviewing the proposed Transaction, the Commission must conduct a public interest analysis pursuant to section 310(d) of the Communications Act to determine whether the Applicants have demonstrated the public interest will be affirmatively served.[6] The Commission

[5] *See* Federal Communications Commission, *Connecting America: The National Broadband Plan* at pp. 9-11, GN Dkt. 09-51 (rel. Mar. 16, 2010) ("*National Broadband Plan*").

[6] *See* 47 U.S.C. § 310(d); *See also Application for Consent to Transfer the Control of Licenses, XM Satellite Radio Holdings Inc. to Sirius Satellite Radio Inc.*, Memorandum Opinion and Order and Report

has observed that significant mergers "are likely to create potential for both good and ill."[7] The potential harms resulting from the Transaction must be weighed against the potential benefits "to ensure that, on balance, the proposed transaction will serve the public interest, convenience, and necessity."[8] The Applicants bear the burden of proof to demonstrate by a preponderance of the evidence that the Transaction serves the public interest.[9]

In the past, the Commission has examined proposed mergers using four key factors, including the impact of the transaction on the Communications Act's provisions, FCC Rules, and the ability of the FCC to meet its statutory mandates.[10] Notably, the Commission's analysis of

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and Order, 23 FCC Rcd. 12348, ¶ 30 (2008) ("*XM-Sirius Order*"); *News Corporation and the DirecTV Group, Inc. and Liberty Media Corporation, For Authority to Transfer Control*, Memorandum Opinion and Order, 23 FCC Rcd. 3265, ¶ 4 (2008) ("*Liberty Media-DirecTV")*; *General Motors Corporation and Hughes Electronics Corporation, and The News Corporation Limited, For Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd. 473, ¶ 15 (2004) ("*News Corp-Hughes Order*").

[7] *See Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., to AOL Time Warner Inc.*, Memorandum Opinion and Order, 16 FCC Rcd. 6547, ¶ 5 (2001) ("*AOL-Time Warner Order*").

[8] *Consolidated Application for Consent to Transfers of Control of Holders of Title II and Title III Authorizations and Petition for Declaratory Ruling under Section 310 of the Communications Act of 1934, Intelsat, Ltd. to Zeus Holdings Limited.*, Order and Authorization, 19 FCC Rcd. 24820, ¶ 15 (2004). *See also XM-Sirius Order,* ¶ 30; *AOL-Time Warner Order,* ¶ 19.

[9] *See, e.g., XM-Sirius Order,* ¶ 30; *AOL-Time Warner Order,* ¶ 19. *Liberty Media-DirecTV Order,* ¶ 22. EarthLink has performed an initial review of the Comcast and NBCU filings of June 11, 2010, responding to the FCC's Information and Discovery Requests, which EarthLink received on June 14, 2010. EarthLink has not had sufficient time, however, to review that additional information in detail, and reserves the right to provide supplemental information at a later date.

[10] *See, e.g., AOL-Time Warner Order,* ¶20; *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc. to AT&T Corp.*, Memorandum Opinion and Order, 15 FCC Rcd. 9816, ¶ 9 (2000) ("*AT&T–MediaOne Order*"):

> (1) whether the transaction would result in a violation of the Communications Act or any other applicable statutory provision; (2) whether the transaction would result in a violation of the Commission's rules; (3) whether the transaction would substantially frustrate or impair the Commission's implementation or enforcement of the Communications Act and other statutes; and (4) whether the transaction promises to yield affirmative public interest benefits.

harms under the Communications Act requires a more searching review than a traditional antitrust analysis.[11] For the FCC to find a proposed transaction is in the public interest, it must evaluate independently the "merger's likely effect on future competition"[12] and must "be convinced [by the Applicants] that it will enhance competition" affirmatively.[13]

Moreover, the FCC must consider whether the Transaction will interfere with the objectives, goals and enforcement of the Communications Act.[14] These goals include the broadband goals recently articulated in the Commission's *National Broadband Plan* and the "basic tenet of national communications policy that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[15]

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[11] Thus, the Department of Justice review is focused on whether the effect of a proposed merger may substantially lessen competition pursuant to the Sherman Antitrust Act (15 U.S.C. §§ 1-7) and the Clayton Act (15 U.S.C. §§ 12-27). As we describe herein, the proposed Transaction would enable Comcast to use its market power to stifle competition in the emerging OVPD market and create a range of other anticompetitive effects. Antitrust authorities, therefore, should also find that the Transaction is contrary to federal competition laws and impose the proposed condition to remedy antitrust concerns. *Cf.* Proposed Final Judgment, *United States of America v. Ticketmaster Entertainment and Live Nation*, 1:10-cv-00139, Jan. 25, 2010, *available at* http://www.justice.gov/atr/cases/f254500/254558.htm.

[12] *AOL-Time Warner Order*, ¶ 21.

[13] *Id. See also XM-Sirius Order*, ¶ 32; *Applications of NYNEX Corporation and Bell Atlantic Corporation for Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, Memorandum Opinion and Order, 12 FCC Rcd. 19985, ¶ 2 (1997) ("*Bell Atlantic-NYNEX Order*").

[14] *See AOL-Time Warner Order*, ¶ 22 ("Our public interest analysis necessarily encompasses "'the broad aims of the Communications Act.'") (*quoting Application for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc. to AT&T Corp.*, Memorandum Opinion and Order, 14 FCC Rcd. 3160, ¶ 14 (1999)). *See also AT&T-MediaOne Order*, ¶ 9; *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd. 18025, ¶ 9 (1998) ("*MCI-WorldCom Order*").

[15] *See Turner Broadcasting System, Inc. v. Fed. Comm'cn Comm'n*, 512 U.S. 622, 663 (1994) (internal quotation marks and citations omitted); *AOL-Time Warner Order*, ¶ 59, nn. 172-173.

Key Objectives of the Communications Act the FCC Must Consider

The FCC Must Ask, "Does the Proposed Transaction…"

§ 230(b)(1)	Promote the continued development of the Internet?
§ 230(b)(2)	Preserve the vibrant and competitive free market that presently exists for the Internet?
§ 230(b)(3)	Encourage the development of technologies which maximize user control over what information is received by individuals, families and schools?
§ 257(b)	Favor diversity of media voices?
§ 601(4)	Assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public?
§ 612(g)	Provide diversity of information sources?
§ 628(a)	Promote the public interest, convenience and necessity by increasing competition and diversity in the multichannel video programming market?
§ 706	Encourage the deployment on a reasonable and timely basis of advanced telecommunications to all Americans?

As explained by the Commission:

> [B]roadband is a foundation for economic growth, job creation, global competitiveness and a better way of life. It is enabling entire new industries and unlocking vast new possibilities for existing ones. It is changing how we educate children, deliver health care, manage energy, ensure public safety, engage government, and access, organize and disseminate knowledge.[16]

In the *National Broadband Plan* the FCC made recommendations that will "foster competition, drive demand for increased network performance and lower the cost of deploying

[16] *National Broadband Plan* at xi. As Chairman Genachowski has emphasized, broadband access has "immense power to improve the quality of lives of our citizens," Julius Genachowski, Chairman, FCC, Prepared Remarks at The Clinton Presidential Library on Connecting the Nation: A National Broadband Plan, at 2 (Nov. 24, 2009), and is "essential to job creation in a digital economy, to ongoing investment in vital 21st century infrastructure, and to our ability to lead the world in innovation," Julius Genachowski, Chairman, FCC, Prepared Remarks at the Open Agenda Meeting on A National Broadband Plan for Our Future, at 2 (Mar. 16, 2010). *See also National Broadband Plan*, Statement of Commissioner Copps at 1 (stressing that "broadband is the Great Enabler of our time").

infrastructure."[17] Among these recommendations is the promotion of wholesale broadband access competition to serve American homes and businesses.[18]

Likewise, Congress last year established broadband deployment and usage as a top national priority in the Recovery Act and required awardees of broadband grants to adhere to the FCC's Internet Policy Statement, as well as policies of nondiscrimination and interconnection.[19] This requirement recognizes that diverse independent ISPs are well-positioned to bring value-added Broadband Access Services to consumers and to provide additional marketplace choices, which serve to increase broadband usage and drive innovation and investment.

Today, emerging online video competition is making a significant contribution to broadband deployment, demand and usage. As articulated by Commissioner McDowell, "[m]ore video competition ultimately spurs greater demand for, and deployment of, broadband facilities."[20] Commissioner Clyburn has underscored that broadband deployment is an

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[17] *National Broadband Plan* at p. 9.

[18] *Id.* at pp. 9, 47-48. *See also Applications filed by Frontier Communications Corporation and Verizon Communications, Inc. for Assignment or Transfer of Control*, Memorandum Opinion and Order, ¶ 27, WC Dkt. 09-95, FCC 10-87 (rel. May 21, 2010) ("Ensuring robust competition not only for American households but also for American businesses requires particular attention to the role of wholesale communications markets, through which providers of broadband and other services secure critical inputs from one another.").

[19] *See* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 § 6001(k)(2)(D) (2009) ("Recovery Act").

[20] *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd. 746, Dissenting Statement of Commissioner McDowell (2010). *See also Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 5101, ¶ 62 (2007) ("The record here indicates that a provider's ability to offer video service and to deploy broadband networks are linked intrinsically, and the federal goals of enhanced cable competition and rapid broadband deployment are interrelated.").

opportunity to add to the diversity of information sources,[21] and Commissioner Copps recently emphasized, "America's future town square will be paved with broadband bricks. It must be accessible to all – not the province of powerful gatekeepers, tollbooths and walled gardens. It must reflect the diverse voices of this diverse land."[22] To ensure the Transaction furthers the public interest, the Commission must determine whether it will be helpful or harmful to the development of online video competition and broadband growth, and whether it will enhance or diminish diversity.

If the Commission is unable to find that the proposed transaction will serve the public interest, it must deny the Application. Alternatively, if the record presents substantial and material questions of fact, section 309(a) of the Communications Act requires the Commission to designate the application for hearing.[23] The FCC also may impose conditions to the proposed transfer of licenses and authorizations to ensure that the public interest is served.[24]

B. The FCC Must Weigh the Impact of Current and Future Competition in the Relevant Markets

The identification and evaluation of markets, and the potential for a transaction to impact emerging markets and competition, is important to the overall public interest analysis since "mergers can reflect the healthy operation of competition. . . but they can also threaten its

[21] *See* Mignon Clyburn, Commissioner, FCC, Prepared Remarks at 35th Annual Community Radio Conference on Key Initiatives for the Further of Community Broadcasters (Jun. 10, 2010).

[22] Michael Copps, Commissioner, FCC, Prepared Remarks at Stanford Law School on Openness and Innovation in the Digital World, at 5 (June 10, 2010).

[23] *See* 47 U.S.C. § 309(e).

[24] *See* 47 U.S.C. § 303(r); *MCI-WorldCom Order*, ¶ 10; *XM-Sirius Order*, ¶ 33; *Liberty Media-DirecTV Order*, ¶ 26.

continued existence, eliminating competitors or creating opportunities to disadvantage rivals in anticompetitive ways."[25] The Transaction impacts both the emerging OVPD market and the market for Broadband Access Service.

1. OVPD Market

a. The OVPD market is an emerging market.

The growth of broadband Internet usage is converging traditional television and online video, creating new platforms for Video Programming distribution.[26] No longer limited to the traditional linear Video Programming from broadcasters and MVPDs, consumers are increasingly turning online to enjoy a wide range of "over-the-top" video, including user-generated content, web-originated entertainment, educational programs, and news, political, religious, and public affairs programming. OVPDs and other online video programming sources provide Internet-based high-quality video, HD-quality streams, video sharing, and access to a wide variety of content.[27] Providers like MUZU TV, Vimeo, Veoh, Vudu, Sony, YouTube, blip.tv, Netflix and a growing number of others offer a range of content, choice and interactivity that is often superior to linear television. One of the largest and most active participants in the OVPD market is Comcast, through its Fancast Xfinity offering.

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[25] *AOL-Time Warner Order*, ¶ 15.

[26] *See* Appendix 2, "Report of Professor Simon J. Wilkie, Consumer Sovereignty, Disintermediation and the Economic Impact of the Proposed Comcast/NBCU Transaction" (attached hereto) ("Wilkie Report").

[27] *See, e.g., Frequently Asked Questions*, Hulu, *available at* http://www.hulu.com/about/media_faq; *Media Center*, Netflix, *available at* http://www.netflix.com/MediaCenter; *About Us*, Metacafe, *available at* http://www.metacafe.com/aboutUs; *About*, blip.tv, *available at* http://blipt.tv/about; *The FAQ*, Vuze, *available at* http://faq.vuze.com/?CategoryID=2; Geoff Duncan, *Walmart Buys Vudu: Will Online Video Streaming Go Mass Market*, DigitalTrends (Feb. 23, 2010), *available at* http://www.digitaltrends.com/home-theater/walmart-buys-vudu-online-video-streaming-service/.

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The increased availability of online content, coupled with broadband technology and capacity advances, have spawned OVPDs and resulted in significant growth of online video. From 2007 to 2009, online viewership of movies or television programming doubled from 16% of all Internet adult users to 32% of users in 2010.[28] In March 2010, 180 million people were estimated to have watched online video,[29] with an estimated 17% of weekly television audiences currently watching online at least one episode of a full-length television program.[30] According to the Pew Online Video Study, "[t]he spread of broadband, the increased use of social networking and status update sites like Facebook and Twitter, the popularity of video-sharing sites like YouTube, and the embrace of video features by untold numbers of websites, have all contributed to the surge in online video watching."[31]

Moreover, over 800,000 households have dropped their cable television subscription entirely in favor of online options[32] and this number is expected to grow to 1.6 million by 2011.[33] While still emerging, "[a]mong online video watchers, 8% have connected their

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[28] *See State of Online Video*, Pew Internet and American Life Project (June 2010), *available at* http://www.pewinternet.org/Reports/2010/State-of-Online-Video.aspx?r=1 ("*Pew Online Video Study*").

[29] *See 180 Million Americans Viewed Online Videos in March*, ComScore (May 4, 2010), *available at* http://www.cablefax.com/ct/news/ctreports/commentary/comScore-180-Million-Americans-Viewed-Online-Video-in-March_41180.html (In fact, 84.8% of the total U.S. Internet audience, nearly 180 million Internet users, viewed Internet video in March 2010).

[30] *See* Erick Schonfeld, *Estimate: 800,000 U.S. Households Abandoned Their TVs for the Web*, TechCrunch (Apr. 13, 2010), *available at* http://techcrunch.com/2010/04/13/800000-households-abandoned-tvs-web/ ("*800,000 Households Abandon TV*").

[31] *Pew Online Video Study* at 3.

[32] *See 800,000 Households Abandon TV.*

[33] *Id.*

computer to their television so they can watch online video on a television screen."[34]

The amount of time consumers watch online video is also increasing. Hulu.com, for example, provides three times the number of streams as it did last year, even though the number of new users has only increased by 50%.[35] The low satisfaction rate with MVPD customer service[36] and the increasingly high prices for MVPD services[37] have also likely played a role in consumers opting for alternative services and providers.

The steady and growing interest by companies both large and small in online video services indicates this market is in the embryonic stage and should be nurtured and enabled to grow. For the public, the evolution of online video is increasing innovation, facilitating user interaction, sharing and creation of video, enhancing consumer experiences, and driving greater broadband adoption and usage.

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[34] *Pew Online Video Study* at 3.

[35] *See* Catharine P. Taylor, *Hulu Addiction is Growing, According to Nielson Online Video Stats*, Bnet (Jan. 15, 2010), *available at* http://industry.bnet.com/media/10005926/nielsen-online-video-stats-show-hulu-addiction-is-growing/. *See also Hulu's Rise Continues*, Reuters MediaFile (Apr. 13, 2010), *available at* http://blogs.reuters.com/mediafile/2010/04/13/hulus-rise-continues/ (The average Hulu viewer watched 23.3 videos in February 2010, averaging 2.4 hours of video, with commercials, per viewer.).

[36] *See Survey Sez: Cablecos Lag in Customer Satisfaction, Internet TV on the Rise*, Cable360.com (Apr. 14, 2010), *available at* http://www.cable360.net/ct/news/ctreports/commentary/40869.html (According to a recent study, less than 14% of consumers are very satisfied with their cable provider.).

[37] *See* Matt Richtel, *Cable Prices Keep Rising, and Customers Keep Paying*, New York Times (May 24, 2008), *available at* http://www.nytimes.com/2008/05/24/technology/24cable.html?_r=1 (Since 1996, the cost of cable has increased by 77%, more than double that of inflation). *See also The Rising Cost of Cable in America*, ABC News Report (Aug. 21, 2008), *available at* http://www.freepress.net/rising_cable; *Cable Rates' Endless Rise*, Consumer Reports (May 2009), *available at* http://www.consumerreports.org/cro/magazine-archive/may-2009/viewpoint/overview/cable-rates-ov.htm (Rates for some of the most basic tiers have spiked over 122% since 1995).

b. The characteristics of the OVPD market differ from the MVPD market.

The characteristics of the OVPD market differ from the MVPD market in pricing, technology and other important ways. OVPDs can offer consumers features, functions and interactivity that are far superior to what traditional MVPDs are either willing or able to provide. For example, in addition to accessing Professional Video, online users can also tap into amateur videos on an enormous range of topics when choosing what to watch. Users are also able to upload their own responsive videos to what they see on the OVPD services (*e.g.*, responding to political programming with a different opinion, or uploading a "sequel" to professional programming); post instant commentary and reviews of programming; share content with others; and integrate video into other online content such as social media, web forums, and other online communities.

The costs and ease of market entry in the OVPD market are also far different than the MVPD market. Since online video runs "over the top" of an existing broadband network, it does not require the massive expenditure of technology, capital, and time typical to provide MVPD services. Barriers to entry are lowered further by elimination of prolonged placement negotiations with program networks and broadcast stations, and/or MVPDs. This ease of entry substantially enhances diverse and minority viewpoints.[38] Further, since the content is online and publicly-available, the OVPD market has low service switching costs for consumers, unlike the MVPD market with its associated customer premises equipment ("CPE") costs and

[38] *See Fed. Commc'n Comm'n v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 796 (U.S. 1978) (holding that the FCC acted rationally in finding that diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints).

installation processes. OVPDs can also help free consumers from the service bundles commonly encountered with MVPD service.

Fundamentally, the OVPD market reflects the open architecture characteristics of a web-based service since OVPDs do not dictate for users "what's on" but rather open opportunities for "what's available," with the content itself constantly changing as users and other video creators upload more diverse professional and amateur video content. As such, the OVPD viewing experience is markedly different from the typical "channelized" or pre-arranged video viewing options of MVPD service, even though OVPD services may include user-driven subject groupings and other features to aid video selection. In fact, the growth of the OVPD market is likely to obliterate the traditional concept of channels, as users obtain content online in new, different and improved ways.

The OVPD market is still developing and will continue to change as online video and broadband usage increase. Today, while OVPDs can be accessed by virtually any subscriber with broadband access and much of the programming is not yet of a local nature, the geographic scope of the market has local characteristics: consumers generally subscribe to and use OVPD programming at their home or business, and local differences of Broadband Access Service including broadband availability, speeds, broadband provider terms and conditions, and other factors affect users' access to OVPDs and online content. Over time, OVPD programming is likely to evolve as competition and the wealth and variety of video programming generate content more tailored to diverse local interests, *i.e.*, local news and political events, local weather and traffic reports, or programming of a cultural nature specific to a particular demographic in a locality. Since the FCC must consider how the Transaction will impact future competition, it should recognize that for the consumer, the OVPD market should be treated as inherently local in nature.[39]

Ways the OVPD Market Differs from MVPD Market

Characteristic	OVPD	MVPD
Pricing	User must purchase access to robust, high-speed Broadband Access Service	User must purchase cable subscription, tiered pricing depending on channels, bundled pricing for telephone and data
Equipment Required	Computer, mobile devices or other viewing devices (e.g., FLO TV) or applications	Television set and cable box required; additional equipment necessary for high-definition, recording content
Types of Programming	Professional content, amateur/user generated content, web only programming	Professional content only
Viewing of Programming	Anytime	At scheduled time (unless recorded or available by video on demand)
Barriers to entry	Low	Very high
Features/User Options	Increased interactivity and openness (e.g., upload responsive video, instant commentary and reviews, sharing features)	Limited interactivity (e.g., video on demand, channel guide)

2. High-Speed Broadband Access Service Market

The last-mile high-speed Broadband Access Service[40] market, local in geographic

[39] Given the significantly lower barriers to entry, as described above, and the further deployment of broadband throughout the country, there is likely to be a dramatic increase in local programming options online that will surpass the local programming available today by MVPDs.

[40] The FCC defines "Broadband Access Service" as "more than 768 Kbps." *See* "Information and Discovery Request for Comcast Corporation," at 12, MB Dkt. 10-56 (Filed May 21, 2010). EarthLink has incorporated this definition for purposes on this filing but asserts that for purposes of weighing this Transaction, Broadband Access Service should be defined with a significantly higher speed so as to ensure sufficient capacity for emerging technologies such as "over-the-top" video.

scope,[41] is characterized by a lack of competition, high entry barriers, and high end-user switching costs. It is largely non-contestable and reflects, at best, persistent duopoly. FCC data consistently show that Broadband Access Service is overwhelmingly offered and provided only by either the incumbent wireline telephone carrier or the incumbent cable company, presenting a classic economic case of duopoly, with market control by just two dominant providers. The most recent data confirms that, while approximately two-thirds of residential high-speed connections are at 3 Mbps or higher, only the cable and incumbent telephone companies offer such services, with little evidence that mobile data offerings offer a competitive alternative at this time.[42] The *National Broadband Plan* also found that this market is substantially non-contestable: "Building broadband networks—especially wireline—requires large fixed and sunk investments. Consequently, the industry will probably always have a relatively small number of facilities-based competitors, at least for wireline service."[43]

The Department of Commerce's NTIA agrees that consumers frequently have limited, and often no, choice among broadband access providers.[44] The Department of Justice has further concluded that consumers seeking to use the most bandwidth-intensive applications may have

[41] *See AOL-Time Warner Order*, ¶ 74 (concluding that the relevant market for residential high-speed Broadband Access Service is local).

[42] *See High-Speed Services for Internet Access: Status as of December 31, 2008*, FCC Report, Chart 11, 13 and Table 6 (rel. Feb. 2010). Moreover, the data of Table 13 also show that incumbents only enter markets where they hold a monopoly or duopoly position. *Id.*, Table 13.

[43] *National Broadband Plan* at p. 36.

[44] *See* Letter from Lawrence Strickling, Assistant Secretary for Communications and Information, Dept. of Commerce, NTIA, to Julius Genachowski, Chairman, FCC, at 3, GN Dkt. 09-51 (filed Jan. 4, 2010) ("*NTIA NBP Letter*"); *id*. at 6 (broadband is at best a duopoly in many areas of the country).

only a single viable choice of broadband access provider.[45] Importantly, and as the FCC described in its *National Broadband Plan*, for high-bandwidth applications such as OVPD services, the current broadband duopoly is receding to a monopoly market, as approximately 75% of U.S. consumers "will likely have only one service provider (cable companies with DOCSIS 3.0-enabled infrastructure) that can offer very high peak download speeds."[46]

The significant switching costs associated with this market, including long-term contracts with consumers, the bundling of voice and video services, specialized CPE that must be installed to change providers, the need for installation truck rolls, etc. all lend advantages to the early-on legacy entrants, *i.e.*, cable operators and wireline incumbent telephone companies, and help limit consumer choice.

This highly concentrated market – combined with a lack of contestability and no future competition on the horizon – presents a textbook case of market failure.[47] For consumers, this

[45] *See Ex Parte* Submission of the Department of Justice at 14, GN Dkt. 09-51 (filed Jan. 4. 2010).

[46] *National Broadband Plan* at p. 42. The FCC also notes the "fragile" state of such competition where it presently exists. *Id.* at 37.

[47] *See*, *e.g.*, *FTC v. H.J. Heintz*, 246 F.3d 708, 724 (D.C. Cir. 2001) ("In a duopoly, a market with only two competitors, supracompetitive pricing at monopolistic levels is a danger."); *See Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation, and EchoStar Communications Corporation*, Hearing Designation Order, 17 FCC Rcd. 20559, ¶ 100 (2002) ("*EchoStar-Hughes Order*") ("courts have generally condemned mergers that result in duopoly"); *id.*, ¶ 103 ("existing antitrust doctrine suggests that a merger to duopoly or monopoly faces a strong presumption of illegality"); *FTC v. Staples*, 970 F. Supp. 1066, 1081 (D.C. Cir. 1997) (markets are highly concentrated where competitors dropped from three to two); United States Dept. of Justice Antitrust Div. and Federal Trade Commission, *1992 Horizontal Merger Guidelines,* 57 Fed. Reg. 41552, § 0.1 (1992) ("where only a few firms account for most of the sales of a product, those firms can exercise market power, perhaps even approximating the performance of a monopolist. . .").

has meant that even as broadband providers' deployment costs continue to fall,[48] consumer prices have increased,[49] with the greatest increases in markets where only one broadband provider offers service.[50] As Commissioner Clyburn recently remarked:

> The same day we announced these important recommendations designed to usher more Americans into the digital age, however, I learned that another major broadband provider is raising its rates for its lowest tiers of broadband service. This news came on the heels of plans unveiled by other major providers throughout the country to increase prices as well. So, just as we are in the process of proposing steps to ensure that more people are comfortable signing up for broadband service, providers of that very service are raising prices.[51]

It is against this market backdrop the FCC musts assess the public interest consequences of the Transaction.

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[48] *See Costs of Providing Broadband Dropping*, Broadband DSL Reports (May 4, 2009), *available at* http://www.dslreports.com/shownews/Cost-Of-Providing-Broadband-Dropping-102253 (noting, for example, an 18% drop in Time Warner Cable's costs of providing service from 2008 to 2009).

[49] *See* Saul Hansell, *As Costs Fall, Companies Push to Raise Internet Price*, New York Times (Apr. 19, 2009), *available at* http://www.nytimes.com/2009/04/20/business/20isp.html?_r=1 (while it costs Comcast an average of $6.85 per home to double Internet capacity within a neighborhood, its upgraded higher speed services are priced at over three times existing 8 Mbps services).

[50] *See* John B. Horrigan, *Home Broadband Adoption 2009*, Pew Research Center Publications (Jun. 17, 2009), *available at* http://pewinternet.org/Reports/2009/10-Home-Broadband-Adoption-2009/3-Connections-costs-and-choices/5-Choice-and-price.aspx?r=1. ("Among broadband subscribers who report that one company serves their area, the average monthly bill is $44.70. Among broadband subscribe[r]s who report that more than one company serves their area, the average monthly bill is $38.30.").

[51] Mignon Clyburn, Commissioner, FCC, Statement Regarding Broadband Affordability and Competition (Mar. 10, 2010). *See also* Cecilia Kang, *FCC Commissioner Blasts ISPs for Raising Broadband Prices*, Washington Post Tech Blog (Mar. 10, 2010), *available at* http://voices.washingtonpost.com/posttech/2010/03/fcc_commissioner_clyburn_blast.html (noting that Comcast raised its monthly basic broadband price by $2.00).

C. The Proposed Transaction Raises Both Vertical and Horizontal Concerns

1. The Transaction Raises the Likelihood of Vertical Foreclosure

As Congress and the Commission have recognized, "vertical integration can create potential problems when the integrated company has market power at one or more of the levels of integration."[52] The Commission generally analyzes the impact of vertical integration on the public interest by examining the incentive and ability of the potentially merged companies to harm competitors.[53] Vertical foreclosure is the ability of the new post-merger firm to exclude downstream competitors from the market, or upstream competitors from downstream affiliates, thereby reducing their customer base, raising prices, and harming consumers.[54] If the Applicant is found to possess market power, the Commission will analyze whether the transaction increases the incentive for the new firm to engage in vertical foreclosure.[55] Throughout its review, the Commission is guided by the "desire to avoid intervention and the realization that some degree of timely intervention to preserve competition may avoid a later need for more onerous intervention to either regulate where competition has disappeared or to attempt to reintroduce

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[52] *AOL-Time Warner Order*, ¶ 13.

[53] *See id.* at ¶ 265-76; *News Corp-Hughes Order*, ¶¶ 101-07; *Applications for Consent to the Transfer of Control of Licenses from Comcast Corp. and AT&T Corp. to AT&T Comcast Corp.*, Memorandum Opinion and Order 17 FCC Rcd. 23246, ¶¶ 140-42 (2002) ("*Comcast/AT&T Order*"); *EchoStar-Hughes Order*, ¶ 276.

[54] *See News Corp-Hughes Order*, ¶ 78, describing harms of vertical integration:

> Where a firm that has market power in an input market acquires a firm in the downstream output market, the acquisition may increase the incentive and ability of the integrated firm to raise rivals' costs either by foreclosing supply of the input it sells downstream competitors or by raising the price at which it sells the input to competitors. By doing so, the integrated firm may be able to increase its profits by raising prices in the downstream market, or increasing its market share in that market, or both.

[55] *Id.*

competition once it has been eliminated."[56]

As described herein, the proposed Transaction increases Comcast's ability and incentives to engage in vertical foreclosure against competitors.[57] As Professor Wilkie explains:

> Integrated firms, such as the proposed Comcast/NBCU, will build market power as result of their content and infrastructure control by restricting output (in terms of both content and quality), raising prices, or both. In the current case, Comcast will have an incentive to restrict output in such a way as to favor the revenue-maximizing distribution of its owned content. This favoritism can take the form of content exclusionary practices, as is addressed by Israel and Katz, or more subtle content discrimination through transmission degradation or even outright blocking.[58]

Comcast can undermine competition and entry into the OVPD market by (i) tying access to online content to retention of a cable television subscription so that consumers can neither "cut the cord" nor "break the bundle;" (ii) engaging in broadband network practices that block, degrade or discriminate against online traffic to or from OVPD competitors and consumers; (iii) setting the capacity of bandwidth allocated to its Broadband Access Service at such a low level, or engaging in similar network configurations (while reserving capacity for its affiliated IPTV offerings), so as to effectively foreclose unaffiliated OVPD services; (iv) withholding or raising OVPD rivals' costs of access, to Comcast and NBCU affiliated programming and content;[59] (v)

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[56] *See AOL-Time Warner Order*, ¶ 15.

[57] *See News Corp-Hughes Order*, ¶ 71. As the Commission has explained:

> a vertically integrated firm that competes both in an upstream input market and a downstream output market may have the incentive and ability to: (1) discriminate against particular rivals in either the upstream or downstream markets (e.g., by foreclosing rivals from inputs or customers); or (2) raise the costs to rivals generally in either of the markets.

[58] *See* Wilkie Report, at ¶ 14.

[59] Comcast today provides some affiliated non-broadcast Video Programming to OVPDs. *See* Responses of Comcast Corporation to the Commission's Information and Discovery Request, MB Dkt. No. 10-56, p.

obtaining 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 OVPD competitors; and (vi) increasing the price for standalone Broadband Access Service, especially in areas where it is the only feasible high-speed provider, to discourage its use for online video.

2. The Transaction Impedes Horizontal Competition

In reviewing mergers that involve a horizontal integration of assets, the FCC examines the potential decrease in competition of the affected market.[60] While the FCC may reference a traditional antitrust HHI analysis as a threshold for understanding the potential anticompetitive effects of a transaction, it is in no way conclusive[61] or dispositive of the competitive impact of a merger.[62] Notably, the FCC also considers whether the transaction will reduce existing competition and how it will affect "the incentive and ability of other firms to react and of new firms to enter the market."[63] The FCC has looked to the impact on consumers, including whether and how the loss of competition will lead to higher prices, lower quality of service and a

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18 and Exh. 6.5 (filed Jun. 11, 2010) ("Comcast June 11th Response"). Post-merger, this access to programming will likely be lost to OVPDs that are a competitive threat to the Comcast.

[60] *See EchoStar-Hughes Order*, ¶ 27 ("In addition to considering whether the merger will reduce existing competition, therefore, we also must focus on whether the merger will accelerate the decline of market power by dominant firms in the relevant communications market.").

[61] *See MCI-WorldCom Order*, ¶ 37; *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation; For Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 19 FCC Rcd. 21522, ¶ 69 (2004) ("*AT&T-Cingular Order*").

[62] *See News Corp-Hughes Order*, ¶ 283.

[63] *AT&T-Cingular Order*, ¶ 69. *See also EchoStar-Hughes Order*, ¶ 27.

decrease in innovative programming.[64]

Here, the Transaction is likely to have a negative impact on horizontal competition in the OVPD market. Today, Hulu.com and numerous NBCU properties (*e.g.*, NBC.com, MSNBC.com, CNBC.com, SyFy.com, Chillertv.com, History.com, etc.) make available online full-length Professional Video programming. This online Video Programming competes with other OVPD offerings, including Comcast's Fancast XFinity. This competition, however, will be lost to the Transaction. In fact, post-Transaction it is reasonable to expect Comcast will act to diminish consumer choice and access to OVPDs. Comcast can be expected either to restrict or eliminate NBCU programming from Broadband Access Service subscribers by placing it behind the "paywall" of TV Everywhere, or to favor the NBCU content by degrading competing OVPD offerings in an effort to diminish the competitive threat of online programming. Professor Wilkie highlights this concern: "As online video services and programming begin to take on a competitive relationship with MVPD services going forward, the current transaction will increase Comcast/NBCU's incentive to favor their own online video programming."[65]

The horizontal integration of NBCU traditional Video Programming (*e.g.*, Bravo, CNBC, NBC Sports, Oxygen, USA Network, Weather Channel, etc.) also materially harms the emerging OVPD market. No longer independent, these important sources of programming will now be directed and distributed to align with Comcast, which best maximizes Comcast's cable profits by

[64] *See News Corp-Hughes Order*, ¶ 75 (*citing EchoStar-Hughes Order*, ¶ 138). To ensure that competition will thrive in the wake of mergers involving programming and content, the FCC has imposed conditions that require applicants to allow unaffiliated programmers access to their MVPD platform on nondiscriminatory terms and conditions. *See News Corp-Hughes Order*, ¶¶ 103, 107.

[65] Wilkie Report, at ¶ 17.

limiting emerging OVPD competition and restricting content to ensure it remains only a complement to Comcast's cable television service. Even the local broadcast stations are potential sources of supply for OVPD providers. Here too, the Transaction will create incentives for Comcast to wall off NBC stations, as well as NBC network content, entirely from OVPDs, similar to the way today Comcast protects its own local sports production (*i.e.*, the Comcast SportsNet programming) from access by OVPDs.[66]

II. THE TRANSACTION INCREASES COMCAST'S INCENTIVES TO STIFLE THE GROWTH OF A COMPETITIVE MARKET FOR ONLINE VIDEO DISTRIBUTION AND INDEPENDENT ISPS

A. Comcast Has Numerous Financial Incentives to Restrict Consumer Access to Traditional Video Programming on its Cable Television System and to Restrict Online Viewing

As explained in its SEC filings, Comcast makes significant profits from the operations of its traditional cable television business.[67] Moreover, both Comcast and NBCU earn significant revenues and profits from payments for programming carriage from MVPDs.[68] As Professor Simon Wilkie finds, regardless of whether online video is a complement or develops as a substitute for Comcast MVPD service, "[a] merged Comcast/NBCU entity will have strong incentives to discriminate in favor of its own programming regardless of the future structure of the online video content market."[69]

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[66] *See* Comcast June 11th Response, p. 18 (stating "there are no [OVPDs] that carry a Non-Broadcast Programming Network," which includes all of Comcast's local sports networks).

[67] Comcast 2009 Annual Report on Form 10-K, at 23-24 (filed Feb. 23, 2010), *available at*, http://www.sec.gov/Archives/edgar/data/1166691/000119312510037551/d10k.htm (Comcast earned $19.377 billion in 2009 out of a total revenues of $35.756 billion) ("Comcast 2009 10-K").

[68] *See* Comcast June 11th Response, Exh. 6.8.

[69] Wilkie Report, at ¶ 15.

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The facts further establish that the distribution of traditional Video Programming via cable television systems is far more profitable to Comcast than offering consumers access to the same content online.[70] After the NBCU acquisition of assets, Comcast would earn far more revenue, and operate at a higher margin, through its cable television business even if online distribution of NBCU content via OVPDs earned Comcast some additional advertising and distribution revenue.[71] Current revenue from the distribution and advertising of video content offered by OVPDs is meager compared with the revenue derived from Comcast's cable television business.[72] As such, it would not be rational for Comcast to put its cable revenues at risk by promoting the NBCU content to OVPDs or even making any such content available at all online. Moreover, NBCU's decisions to put content online were {{[redacted]}}[73] Further, {{[redacted]

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[70] *See* Comcast June 11th Response, Exh. 6.8 ({{[redacted]}}).

[71] In 2009, NBC.com, an NBC-affiliated OVPD, earned just under {{[redacted]}} in advertising revenues. *See* Responses to FCC Request of May 21, 2010 to NBC Universal, Inc., MB Dkt. 10-56, NBCU Request 6(h) & 7(h), Exh. 1a (filed Jun. 11, 2010) ("NBCU June 11th Response"). NBCU received an additional {{[redacted]}} in advertising revenues from Hulu in 2009. *See* NBCU June 11th Response, NBCU Request 6(h) & 7(h), Exh. 1. In comparison, NBC's broadcast channel earned just over {{[redacted]}} in advertising revenues. *See* NBCU June 11th Response, NBCU Request 6(j), Ex 1. Per household, that equaled {{[redacted]}} net advertising revenue for NBCU's broadcast channel. *Id*.

[72] *Compare* Comcast June 11th Response, Exh. 6.8 *with* Comcast 2009 10-K at 23-24.

[73] NBCU June 11th Response, p. 19.

[redacted]}}[74] {{[redacted]}}[75]

Thus, it is clear that post-merger Comcast will have strong incentives to maximize its profits with the acquired NBCU content and to undermine the emergence of OVPD offerings that are or may become competitive with its cable services. This is especially true insofar as the online advertising and distribution of Video Programming is far less certain and business models are far more risky than maintenance of cable-driven profits. Thus, it is in Comcast's self-interest to avoid an online video model.

B. The Transaction Enhances Comcast's Incentives to Ensure OVPDs Remain Only a Complement to its Cable Television Business

1. A competitive OVPD market is likely to threaten Comcast's cable profits.

Though Applicants essentially sidestep the issue,[76] the potential disruptive impact of the OVPD market on the MVPD market is undeniable since the offerings of unaffiliated OVPDs increasingly provide direct competition to traditional cable television. Indeed, Comcast itself informed the Commission of this threat in 2006 when it explained that online video marketplace

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[74] *Id.*

[75] *Id.*, p. 20.

[76] *See, e.g.*, *Applications for Consent to the Transfer of Control of Licenses, General Electric Company, to Comcast Corporation, Applications and Public Interest Statement*, p. 93 (filed Jan. 28, 2010) ("Applicant's Public Interest Statement") ("the proposed transaction will not materially increase concentration in a hypothetical market for online video distribution."); *id*. p. 99 ("online video does not compete directly with MVPD service. . . few consumers regard online video as a close substitute for MVPD service, and would therefore consider 'cutting the cord.' Indeed, online video distribution is presently incremental and complementary to Comcast's cable business") (citations omitted).

"developments are impossible to ignore" and that "[a]ll this competition compels every competitor to counter. . . ."[77] Comcast's SEC statements likewise indicate that Comcast view online video services as competition to its cable video offerings, describing "online services that offer Internet video streaming" as a service that Comcast's cable service competes with for customers.[78]

Pursuing success as a competitive OVPD holds enormous risks and very few gains for Comcast relative to its current business model which relies on the subscription and advertising revenues of its closed cable system.[79] As Comcast's COO Steven Burke explained, "the biggest risk is so much stuff gets on the Internet for free that we turn into the newspaper business."[80] Burke also explained Comcast has:

> The exact same interests that the content providers have in making sure that we get ahead of the steamroller that is the Internet. . . . So many other businesses in the media space. . . didn't get ahead of it. Whether it is music or newspapers or radio, they didn't have a model that protected their core

[77] Reply Comments of Comcast Corporation, at 20, MB Dkt. 06-189 (filed Dec. 29, 2006).

[78] Comcast 2009 10-K at 6, 14.

[79] The online challenge for Comcast is to implement a business strategy that allows consumers to access online video that also supports Comcast's current revenue streams or, as Comcast's Roberts recently put it, "allows … [cable] distributors to get paid." *See* Ben Grossman and Melissa Gurthire, *TV Everywhere; Money: Sort of*, Broadcasting & Cable (May 17, 2010), *available at* http://www.broadcastingcable.com/article/452775-TV_Everywhere_Money_Sort_of.php. TV Everywhere" aligns consumer demands for video online with Comcast's priorities of protecting and enhancing its current business model. By limiting online content to users who pay for cable subscriptions, Comcast's current advertising and subscription revenues from its closed cable system remain intact.

[80] Saul Hansell, *Tweaking the Cable Model, to Avoid Newspapers' Fate*, New York Times (Apr. 6, 2009), *available at* http://bits.blogs.nytimes.com/2009/04/06/tweaking-the-cable-model-to-avoid-newspapers-fate/.

> business, and then, boom, here comes the Internet as their destroyer of wealth.[81]

In short, Comcast's economic incentives are such that it fares far better by ensuring that online video does not develop as a substitute for cable television service.

2. Comcast mischaracterizes the emerging nature of OVPD market.

Katz and Israel assert that online video functions primarily as a complement to cable television services and therefore Comcast has ample incentives to support the growth of these services.[82] This characterization overlooks the state of the emerging competition between the two services and the degree to which online video services increasingly function as a substitute for, and not just a complement of, cable television services. As Professor Wilkie observes,

> Currently, there are numerous models for media distribution, including online broadcaster controlled content (*e.g.* full length television episodes offered by NBC.com, CBS.com, etc.), online content aggregators (*e.g.* full length episodes and movies offered by Hulu.com, TV.com, Netflix, etc.), and full service providers who both aggregate content and provide the distribution infrastructure (*e.g.* broadcast and cable offerings of traditional MVPD service providers, as well as newer products offered by AT&T U-verse, Verizon FiOS, etc.). Taken independently, these models of media distribution will compete for both consumer and advertising revenues. Online content providers and aggregators have powerful economic incentives to cooperate with independent ISPs to develop substitute online video services platforms to compete with traditional MVPD services. This is the case regardless of how quickly the transition away from more traditional media delivery formats takes place or which new type of format establishes itself in the coming years.[83]

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[81] Jeff Baumgartner, *Comcast Nears 'TV Everywhere' Launch*, Light Reading CABLE (Sept. 9, 2009), *available at* http://www.lightreading.com/document.asp?doc_id=181548&site=lr_cable.

[82] *See* Mark Israel and Michael Katz, *The Comcast/NBCU Transaction and Online Video Distribution*, MB Dkt. 10-56 (May 4, 2010) ("Katz/Israel") ("[households] use online video in ways that supplement their traditional viewing").

[83] Wilkie Report, at ¶ 9.

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In support of its position, Comcast states that complementary online Video Programming and distribution stimulates Comcast's cable subscriptions and viewership, driving increased revenues to Comcast from continued and/or additional cable subscriptions, advertising revenue, and demand for traditional cable programming.[84] According to Comcast, "online viewing serv[es] to supplement traditional television viewing."[85] This limited characterization overlooks Comcast's larger financial incentives.

As an initial matter, Comcast's analysis depends on a narrow and static understanding of consumers' perception of the value of the online Video Programming and services. To the extent consumers increasingly perceive online Video Programming, content and services as a functional replacement for traditional Video Programming offered over cable systems, and conclude online video and content provide a superior offering, they will seek to minimize their costs and are likely to drop their cable television service – "cut the cord" – in favor of online video services.[86] As noted, there is ample evidence to suggest that consumers' perceptions are not as fixed as

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[84] Katz/Israel at 28 ("To the extent that online video is complementary to traditional MVPD video services, Comcast has an incentive to encourage NBCU to make *more* content available online, which will benefit Comcast Cable through expanded television viewing.") (emphasis in original).

[85] *Id*.

[86] *See* Peter Kafka, *Survey Says: Web Video Watchers Aren't Pirates. But they may be Ready to Cut the Cord*, All Things Digital (Jun. 9, 2009), *available at* http://mediamemo.allthingsd.com/20090609/survey-says-web-video-watchers-arent-pirates-but-may-be-ready-to-cut-the-cable-cord/ (reporting a Bernstein Research study showed that "a third of online video watchers say they could see themselves ditching TV altogether in favor of the Web."); Deborah Yao, *Cable Companies See Customers Cutting Back: 'The Beginning of Cord Cutting*, Huffington Post (Feb. 8, 2007), *available at* http://www.huffingtonpost.com/2009/02/09/cable-companies-see-custo_n_165138.html (Glenn Britt, CEO of Time Warner Cable, explained to investors that "We are starting to see the beginning of cord cutting. . . . People will choose not to buy subscription video if they can get the same stuff for free" Bobby Tulsiani, Senior Analyst at Forrester Research, said "This time there is a real, viable alternative to cable.").

Comcast portrays them and that an escalating number of consumers perceive OVPDs as competitors to cable television service.

Moreover, Comcast's characterization of online Video Programming as only complementary to traditional Video Programming ignores the unique features and functions offered by OVPDs. Comcast's economists describe available online content as mostly consisting of clips or repeats of traditional television programs.[87] While online Video Programming may encompass such traditional programming, it also provides much more. Online content enables viewers to customize their video experience, interact with others, create and share video, and view new first-run programming developed initially for online viewing. OVPDs also may be accessed from any broadband connection, effectively unbundling programming distribution from broadband access.[88] In addition, OVPDs represent a whole new tranche of opportunities for independent programmers, who are increasingly utilizing OVPDs to avoid the high hurdles of distribution on broadcast networks, cable networks and conventional channels, allowing them to display first-run content online instead.[89] At the same time, traditional Video Programming remains necessary to attract consumers to this emerging platform, and it may well be the deciding factor for many consumers to "cut the cord."

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[87] *See* Katz/Israel at 24-25.

[88] *See* Wilkie Report, at ¶¶ 6-9, 23.

[89] *See, e.g.,* Jessica E. Vascellaro, *Web Series Tap Prime Time*, Wall Street Journal (Jun. 9, 2010), *available at* http://online.wsj.com/article/SB10001424052748704749904575293140111348612.html (finding that "[o]riginal Web series are finding a niche at night" and that according to Nielsen Co. Viewership, more people are watching online Video Programming during the traditional peak television viewing hours of 8 p.m. to 11 p.m. Monday through Friday. Moreover, "[w]hile some of that growth is coming from websites that offer TV shows online, it is also coming from viewers turning in the evenings to other Web services by little-known creators.").

3. Comcast can maximize profits by restricting capacity and engaging in discriminatory network practices on its broadband access network.

The Transaction also will increase Comcast's incentive to restrict the capacity and throughput of its Broadband Access Service in a way that interferes with the development and distribution of competitive online Video Programming.[90] Reports already show that Comcast intends to allocate a substantial portion of the available capacity via DOCSIS 3.0 to its IPTV services,[91] thereby limiting the capacity for Broadband Access Service.

Significantly, Katz and Israel anticipate Comcast's incentive to restrain overall capacity or allocate it in a way that favors its IPTV services, while disfavoring competitive Video Programming offerings offered via Broadband Access Service. Katz and Israel note that, to the extent that online video becomes a substitute for cable television service, this "would lead to substantial congestion and associated degradation in service quality for most of today's broadband Internet local access networks."[92] It is unclear why Comcast's economists have such

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[90] In addition to Comcast's conduct with BitTorrent, Professor Wilkie also points out that Comcast has a history of practices restricting online access. Wilkie Report, at ¶¶ 25-27.

[91] *See infra* note 92; *See also* Mitch Bowling, Senior Vice President and General Manager of Comcast's New Businesses unit has made Comcast's intentions behind DOCSIS 3.0 clear:

> New technologies and online trends are driving the need for increasingly faster Internet speeds. We offer a solution to that: DOCSIS 3.0, also known as wideband. With wideband, we are now offering customers 50 Mbps downloads, which is about as fast as anyone is going at this point. This means you can download a typical 1.5 GB standard def movie (or the equivalent of 400 mp3 songs) in about 4 minutes. On a typical DSL connection that would literally take hours.

Speeding is encouraged, Comcast voices blog (Mar. 30, 2009), *available at* http://blog.comcast.com/2009/03/speeding-is-encouraged.html.

[92] Katz/Israel at 32.

a dour view of its current technological and network capacity with DOCSIS 3.0.[93] This statement, however, confirms that Comcast has strong incentives to restrict Broadband Access Service bandwidth which will, in turn, restrict the entry of competing, but unaffiliated, OVPDs.[94]

Similarly, the Transaction will increase Comcast's incentive to engage in network practices (*e.g.*, traffic degradation, discrimination, throttling, etc.) that favor its own content, which will weaken the ability of online video providers to gain a foothold in the market.[95] Comcast's incentives to use capacity restrictions are in line with its cost-cutting incentives to avoid the need to invest in and upgrade its network for Broadband Access Service. Yet, it is in the public interest, and furthers the nation's broadband goals, for the Commission to establish a

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[93] *See, e.g., DOCSIS Project Primer*, CableLabs (2010), *available at* http://www.cablelabs.com/cablemodem/primer/ ("DOCSIS 3.0 will enable[] direct competition with VDSL and FTTx service offerings from the telcos, and will provides a platform for the evolution of the cable video business into IPTV"). From a technical perspective, DOCSIS 3.0 can enable download speeds of 152 Mbps. *See Description: Data-over-Cable Service Interface Specifications (DOCSIS)*, Cisco Support Community (Jun. 10, 2009), *available at* https://supportforums.cisco.com/docs/DOC-1239. *See also*, Comcast June 11th Response at 8 [[[redacted]]].

[94] Katz and Israel assert that future networks may have the capacity to handle online video services that function as a substitute for cable television services, but that even then, the additional demand for Comcast's broadband "would very likely enhance the profits earned by Comcast. . . ." Katz/Israel at 37. These statements appear to turn on a speculation that Comcast will change its current charging practices , for example, to charge consumers on a usage or metered basis for online capacity.

[95] *See* Wilkie Report, at ¶ 18. As Professor Wilkie notes:

> Comcast will have incentives to engage in anti-competitive signal degradation regardless of whether or not online video products are complementary or competitive. Such an outcome is, in fact, likely given that Comcast has engaged in this type of anti-competitive behavior in the past. The market-structure distinction of complement and substitute only dictates whom the anti-competitive activity would be directed against, not its presence in the market. Any analysis of this transaction needs, therefore, to recognize Comcast/NBCU's unique position and incentives to engage in anti-competitive conduct while, as argued by Israel and Katz, nascent online video programming is still largely complementary to MVPD services.

regulatory framework that encourages Comcast to do just the opposite: to invest in and deploy broadband networks that provide robust broadband capacity supportive of unimpeded broadband access for consumers, including sufficient capacity to support unaffiliated OVPDs.[96]

C. The Transaction will Create Additional Incentives for Comcast to Discriminate Against Independent ISPs

As Professor Wilkie explains, "[a]n independent ISP would of course not have any incentive to favor one source of packaged programming over any other but allow the consumer to pick their most preferred package and vendor. In contrast, the vertically integrated Comcast/NBCU would have an incentive to favor its own offerings and packages."[97] Indeed, unaffiliated ISPs can provide consumers the necessary broadband link with online content, including customer care and installation, and customer billing.

Since unaffiliated ISPs compete with Comcast's affiliated High-Speed Internet service and facilitate OVPD competition, it follows that the Transaction also enhances Comcast's incentives to discriminate against unaffiliated ISPs. As the Commission recognized in the AOL-Time Warner merger proceeding, the harm to competition among ISPs raises serious public interest concerns with a merger of this size and significance as it "would interfere with each of the [Internet policy] objectives" of the 1996 Act.[98]

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[96] *See National Broadband Plan* at p. 9 (citing the goal of affordable access to download speeds of at least 100 Mbps and actual upload speeds of 50 Mbps "to create the world's most attractive market for broadband applications, devices and infrastructure").

[97] Wilkie Report, at ¶ 23.

[98] *AOL-Time Warner Order*, ¶ 61.

Specifically, "the ability and incentive to discriminate against unaffiliated ISPs" will "thwart the deployment of advanced telecommunications capability to all Americans by limiting choice in the realm of residential high-speed Internet access services. . . diminish the public's ability to obtain information from diverse sources," and "constrain consumers' access to the 'widest possible' array of information over high-speed technology."[99] In other words, if Comcast can act on its incentives to discriminate and exclude independent ISPs, it will undermine broadband deployment and usage and impede consumers from accessing a diversity of information sources.

1. Discrimination against independent ISPs can take several forms.

Comcast's market power in the Broadband Access Service market combined with its ample incentives to engage in anticompetitive foreclosure in the OVPD market raise serious competitive concerns. As discussed, Comcast has incentives to engage in network practices (blocking, degrading, throttling, etc.) that harm the ability of independent ISPs to offer reliable, robust broadband transmission for online video viewers.

Comcast may also engage in certain pricing practices vis-à-vis independent ISPs that undermine the ability of unaffiliated OVPDs to provide services. TV Everywhere, for example, discriminates against the Broadband Access Services of independent ISPs by requiring consumers to subscribe to cable service in order to access certain online Video Programming, in effect undermining the consumer's ability to "break the bundle" and choose only what she needs

[99] *Id.*

or wants.[100] Likewise, Comcast will have increased incentives to oppose broadband access arrangements for independent ISPs, similarly making it more difficult for consumers to "break the bundle."

2. Comcast's current wholesale Broadband Access Service is insufficient and uneconomic.

EarthLink currently has a small number of Broadband Access Service subscribers utilizing Comcast wholesale broadband inputs via a limited commercial arrangement.[101] The terms, scope and economics of the arrangement, however, make the offering insufficient and uneconomic. As a result, the expected benefits of a competitive standalone wholesale Broadband Access Service have not materialized. The terms of the Comcast-EarthLink agreement are likely due to the strong incentives of Comcast to restrict consumers from enjoying a fully competitive ISP option at the expense of its bundled and affiliated ISP service.

Comcast's refusal to offer EarthLink wholesale services in the majority of its footprint has essentially excluded EarthLink and other independent ISPs from providing consumers a choice of competitive broadband services in many markets where Comcast is the only high-speed option. The Comcast contractual arrangement is limited geographically in scope to the Boston, Seattle, and Houston markets, as well as a few other relatively small metropolitan areas, which represent only a small fraction of consumers passed by Comcast. Moreover, the pricing

[100] Comcast could also delay or refuse to provision Broadband Access Service to customers that choose an independent ISP/OVPD bundled offering and "cut the cord" from Comcast's cable television service. Similarly, Comcast could fail to address trouble tickets or provisioning and service requests by independent ISPs.

[101] The majority of these customers were acquired by EarthLink originally via the Time Warner Cable agreement but were transferred to Comcast via cable swaps.

of this limited arrangement renders the wholesale service uneconomic for consumers. As a result, competition and consumer choice is further constrained.

III. COMCAST HAS THE ABILITY TO STIFLE THE DEVELOPMENT OF ONLINE VIDEO DISTRIBUTION AND PROGRAMMING

A. Control Over the Broadband Access Network Gives Comcast the Ability to Restrict the Growth of Competitive OVPDs

Comcast owns and operates one of the largest broadband transmission networks in the United States and is the largest facilities-based provider of Broadband Access Services.[102] As such, Comcast manages *all* Internet traffic to and from *every* Comcast Broadband Access Service subscriber, and possesses the unique ability to degrade and prioritize packets of *all* online traffic, including traffic of competitors. As Comcast has explained, "broadband networks often serve as a platform for the delivery of a multiplicity of services, including broadband Internet services"[103] though the majority of its revenues derive from its cable service.[104]

Using its control over the last-mile broadband access network, Comcast has the ability to use several technical means – including, for instance, the use of deep packet inspection ("DPI") – to inspect, isolate, degrade or prioritize any traffic to and from a Comcast Broadband Access Service customer, including video traffic of competing OVPDs or other competitive online content offerings. Aside from legitimate engineering practices for network management,

[102] *See* Applicant's Public Interest Statement, at 17 (Comcast currently owns and operates cable systems serving approximately 23.8 million customers in 39 states and the District of Columbia."); *id*. at 19 ("Comcast's High-Speed Internet service, also delivered over Comcast's cable plant, currently has approximately 15.7 million customers").

[103] Comments of Comcast at 8, GN Dkt. 09-51 (filed Jun. 8, 2009).

[104] *See* 2009 Comcast 10-K. More than one-half of Comcast's 2009 revenues (equaling $35.8 billion) were generated by its cable television services, far exceeding its revenues from other services.

Comcast can use its broadband network control for any of a number of commercial reasons. Comcast has already demonstrated that it can and will use its control to block and degrade Internet traffic that poses a competitive threat.[105]

In addition, Comcast also controls, manages and allocates the capacity available for Broadband Access Service. For example, Comcast has the ability to design its emerging DOCSIS 3.0 transmission functionality to reserve high capacity for Comcast's IPTV initiative, while limiting the additional capacity assigned to its Broadband Access Services.[106] Without robust broadband capacity,[107] consumers will be thwarted in their ability to enjoy online video and other competing online content, while OVPDs and other independent programmers will be constrained in the types of programming and services they can offer. For example, video length, quality of picture, interactivity, etc. are impacted by the available capacity assigned to Broadband Access Service. As a result, Comcast has sufficient control to limit OVPDs in their

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[105] *See Comcast Corp. v. Fed. Commc'n Comm'n*, 600 F. 3d 642, 644 (D.C. Cir. 2010).

[106] *See, e.g.,* Jeff Baumgartner, *Comcast Forges 'Excalibur' for IPTV*, Light Reading CABLE (October 28, 2009), *available at* http://www.lightreading.com/document.asp?doc_id=183740&site=cdn& (describing Comcast's IPTV and video convergence project – Excalibur – which is designed to "put all IP services, including video, into a common provisioning and management system." Excalibur will be used to help Comcast pursue an "IPTV strategy that includes personalized unicast video services"); Todd Spangler, *Comcast to Take IPTV for a Spin*, Multichannel News (May 4, 2007), *available at* http://www.multichannel.com/article/128874-Comcast_to_Take_IPTV_for_a_Spin.php; *Cable Operators Move Ahead with Wideband Rollouts*, Communications Daily, No. 8 (May 18, 2010); *Cable Broadband Growth Re-accelerating, Comcast Says*, Communications Daily, No. 3 (Apr. 29, 2010) (Comcast has increased deployment of DOCSIS 3.0, allowing for higher broadband speeds and increased capacity for new services, like IPTV).

[107] "Robust broadband" is a key goal because it enables Americans "to participate in 21st century American life" including "[h]ealth care, education and other important aspects of American life." *National Broadband Plan* at p. 10. Consistent with this functional approach, robust broadband here means a connection with capacity sufficient to enable users to view programming and interact with OVPD services.

ability to provide service options that are a competitive substitute to Comcast's traditional cable television offerings, limiting consumer choice.

Finally, Comcast also has control over its stand-alone Broadband Access Service pricing and control over whether, and to what extent, it offers wholesale Broadband Access Service to other ISPs. These elements effectively control whether consumers will have a choice of service providers (ISPs and OVPDs) and whether most consumers will purchase a bundle of Comcast-affiliated services.

B. Control Over NBCU Content Increases Comcast's Ability to Restrict Competition in the OVPD Market and Limit Diversity

The Transaction proposes to vest Comcast with control over the entire NBCU family of leading video content, distribution, and content-producing entities.[108] As others have noted, the Transaction removes NBCU as an independent programming outlet and an independent source of news and information, including across Internet and online outlets;[109] enables Comcast to combine content and distribution in a way that stymies content and program competition by

[108] *See* Applicant's Public Interest Statement, at 26-32. These assets include: NBC Television Network and the Telemundo Network, with all of their associated television content and programming arrangements; 26 Owned & Operated television broadcast stations and 15 local television stations that broadcast Telemundo Network programming; Cable programming services such as CNBC, MSNBC, Bravo, Chiller, CNBC World, mun2, Oxygen Media, Sleuth, Syfy, Universal HD, and USA Network, as well as attributable interests in The Weather Channel Companies (25%), A&E Television Networks, and ShopNBC; Online interactive services including NBC.com, CNBC.com, iVillage, and its interest (32%) in Hulu.com; and film production companies such as Universal Pictures, Focus Features, and Focus Features International.

[109] *See* Testimony of Mark Cooper, Director of Research, Consumer Federation of America, to House Subcommittee on Technology and the Internet (Feb. 4, 2010) ("Cooper Testimony") (stating that currently, Comcast and NBC compete for viewers, but a merged Comcast will no longer have incentive to improve and create content); Letter from Maurice Hinchey, et al., U.S. House of Representatives, to Julius Genachowski, Chairman, FCC, at 1-2, MB Dkt. 10-56 (Feb. 4, 2010) (A Comcast/NBCU merger "would further limit the public's access to independent sources of information, which is absolutely essential to a well-functioning democracy.").

bundling traditional broadcast programming, cable offerings and Internet delivery of content;[110] and increases Comcast's ability to leverage content across multiple platforms (broadcast, cable, Internet) allowing it to act as a "gatekeeper" for affiliated content and to diminish the reach of any competitive service or content.[111]

Comcast's ownership and control of the NBCU assets will increase its ability to withhold "must-have" traditional Video Programming from unaffiliated OVPDs and other online providers and withhold the large collection of NBCU content (NBC broadcast and cable programs and NBC Universal content), including original content (sports, news, local programming, cable programming) already under Comcast's control.[112] Comcast also has the ability to insist that independent programmers that seek access to NBC program networks and cable channels abide by restrictions that limit distribution of their programming via online video distribution platforms.[113] These practices significantly hamper the development of a competitive

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[110] *See* Testimony of Colleen Abdoulah, President and CEO, WOW!, to House Subcommittee on Technology and the Internet (Feb. 4, 2010) ("Abdoulah Testimony") ("The deal greatly increases horizontal concentration by effectively combining key content assets from the two firms, as well as important distribution assets. This increased market power can then be employed vertically by the combined entity to threaten competing video distributors."); Cooper Testimony ("The merger would dramatically increase the incentive and ability of Comcast to raise prices, discriminate in carriage, foreclose and block competitive entry and force bundles on other cable systems.").

[111] *See* Cooper Testimony (describing Comcast's "TV Everywhere" initiative combining online video and distribution, a service that ensures content is only available to Comcast cable customers).

[112] Alternatively, Comcast could achieve this same end by offering access to NBCU programming at exorbitantly high rates that are too expensive for online video providers to afford and/or other unreasonable terms and conditions.

[113] *See* Will Richmond, *Cable Industry Closes Ranks*, Video Nuze (Nov. 12, 2008), *available at* http://www.videonuze.com/blogs/?2008-11-12/The-Cable-Industry-Closes-Ranks/&id=2004 ("I believe [the cable industry] has closed ranks to frown heavily on the idea of cable programming. . . showing up for free on the web, or worse in online aggregators' (*e.g.*, Hulu, YouTube, Veoh, etc.) sites. The message is loud and clear to programmers: you'll be jeopardizing those monthly affiliate fees come renewal time if

OVPD market, restrict consumer choice and limit diversity.

Bolstering these concerns is the launch of Comcast's online Fancast Xfinity service, part of the larger "TV Everywhere" strategic plan of several MVPDs, including Comcast. Under the TV Everywhere model, a consumer is permitted to watch video over the Internet free of charge *only if* the consumer has a Comcast cable television subscription.[114] Tying a cable television subscription to access to a vast array of Video Programming makes it economically infeasible for unaffiliated OVPDs to offer a fee-based alternative service to consumers, as they already must pay for Comcast's cable television service. In a nutshell, TV Everywhere enables Comcast to restrict consumers' access to online content and stymie the growth of competitive online alternatives[115] while cable subscribers

Control over NBCU Content Enables Comcast to Restrict Access to "Must-Have" Programming By:

- *Withholding content from unaffiliated OVPDs*
- *Limiting online viewing to consumers with cable subscriptions*
- *Placing restrictions on online distribution in contracts with independent programmers*

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your crown jewels leak out; worse, you'll be subverting the entire cable business model."). *See also, e.g.*, Testimony of Andrew Jay Schwartzman, President and CEO, Media Access Project, to Senate Committee on the Judiciary (Feb. 4, 2010); Statement of Herb Kohl, Senator, Wisconsin, to Senate Committee on the Judiciary (Feb. 4, 2010) ("We have recently heard concerns from programmers that cable TV companies are demanding restrictions on their ability to show their programming on the Internet"); *See also* Abdoulah Testimony.

[114] *See* A Complete TV Everywhere Solution, thePlatform, *available at* http://theplatform.com/tv_everywhere (Adding to its financial interests in TV Everywhere, Comcast also owns thePlatform, a company that handles the authentication and authorization process for subscribers to access the TV Everywhere services. According to thePlatform, "[m]any TV Service Provider's want to add TV Everywhere features to their own web sites so that subscribers can watch premium content in a manner that is complementary to how Programming Networks pay for this content in traditional TV models.").

[115] *See* Ben Grossman and Melissa Guthrie, *TV Everywhere; Money: Sort Of*, Broadcasting & Cable (May 17, 2010), *available at* http://www.broadcastingcable.com/article/452775-TV_Everywhere_Money_Sort_of.php (As Time Warner's Jeff Bewkes recently put it to the cable

continue to be tied to their cable services.[116] As such, the TV Everywhere model also enables Comcast to neutralize the threat of unaffiliated OVPDs, interfere with the ability of consumers to "cut the cord," and reduces the emergence of online services that compete with its cable services.[117]

These practices raise concerns regarding the breadth and diversity of available online content and applications. The reduction in the diversity of content and information sources reflects an even greater consolidation of ownership over Internet and video content and conduit. Congresswoman Maxine Waters underscored this risk:

> I am very concerned about the implications this merger has on diversity, localism, and competition in today's media market. Today, five companies own America's major broadcast networks, and 90 percent of the top 50 cable networks; produce three-quarters of all prime-time programming; and control 70 percent of the prime time television market share. These same companies also own the nation's most popular newspapers and 85 percent of the top 20 internet news sites.[118]

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industry: "Get your VOD robust, get your interfaces stronger and better, and bring them to your television systems, and then take the whole thing and put it on broadband.").

[116] In the absence of TV Everywhere, cable operators likely would pursue the launch of separate and competing online video providers that compete on a national (indeed, a global) level with one another. TV Everywhere permits MVPD providers to avoid that model of head-to-head multi-provider competition, and to join a service collaboration that effectively avoids MVPDs competing with one another online on a national geographic scale.

[117] TV Everywhere broadband practices that restrict consumer choice and access to online video content are also at odds with the Commission's *Internet Policy Statement* principles. *See Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Policy Statement, 20 FCC Rcd. 14986 (2005) ("*Internet Policy Statement*"). Specifically, the fourth principle provides that "consumers are entitled to competition among network providers, application and service providers, and content providers." *Id*. By tying online content to cable television service, consumers are forced either to forego access to legal content or forego choice of video providers.

[118] Letter from Maxine Waters, U.S. House of Representatives, to Julius Genachowski, Chairman, FCC (Apr. 12, 2010).

EarthLink agrees that by eliminating the NBCU family of Internet content-generating entities as a source of independent content, the Transaction will significantly diminish the independence and diversity of sources of news, information and entertainment and expand consolidation and ownership of content with conduit. As such, the Transaction could be a large step backwards for the American public.[119]

C. Comcast's Ability to Impede Online Video Distribution and Programming is Heightened by the Lack of Open Internet Rules

Without open Internet rules[120] or effective enforcement of the *Internet Policy Statement*,[121] there is no regulatory oversight of Comcast's broadband network practices. As such, Comcast is able to use its control of the broadband network, along with its control over affiliated and newly acquired NBCU content, to further its private commercial interests. For the OVPD marketplace, this means that today Comcast may lawfully block or degrade packets of unaffiliated OVPDs at any time and for whatever commercial purposes it sees fit.

In the wake of *Comcast v. FCC* and the "Third Way" Notice of Inquiry, it is uncertain when (or even if) the Commission will finalize open Internet rules.[122] It is assured, however, that if rules are adopted, they will face a strenuous court challenge and, if that challenge is successful,

[119] *See Associated Press v. United States*, 326 U.S. 1, 20 (1945) ("[The First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public"); *Red Lion Broad. Co. v. U.S.*, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas").

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

[121] *See Comcast*, 600 F.3d at 661.

[122] *See Framework for Broadband Internet Service*, Notice of Inquiry, GN Dkt. 10-127 (rel. Jun. 17, 2010).

more delay and uncertainty will ensue. Therefore, the Commission cannot here rely on enforcement of possible future open Internet rules or the Commission's *Internet Policy Statement* principles as an effective governmental backstop.

Importantly, even if the FCC were to impose open Internet rules, it is likely Comcast would still have the ability to use its broadband network and content assets to undermine the development of the OVPD market and harm consumers. For instance, Comcast would still be able to force customers (either explicitly or implicitly through its pricing practices) into bundles for Broadband Access Service and its cable services, thereby limiting customer choice and discouraging the emergence of OVPDs. Today, Comcast already prices its service bundles to heavily discourage consumers from purchasing standalone Broadband Access Service.[123] Even with open Internet rules, Comcast could also restrict the capacity of its Broadband Access Service and thereby foreclose OVPDs from robust access to and from consumers.[124]

By contrast, even without open Internet rules, independent ISPs such as EarthLink offering standalone Broadband Access Service via Comcast's network have every incentive to encourage consumers to "break the bundle" and access online content and applications, including by pricing Broadband Access Service in a way to make it a more attractive competitive option, especially for those consumers who cannot afford a higher-priced Comcast bundled offering.

[123] For example, the current promotional rate for Comcast's Economy Internet Service (1Mbps downstream/3.84 Kbps upstream) is $26.95 per month for customers who also subscribe to Comcast Cable and/or Comcast Digital Voice Service, while the rate for customers who subscribe to the Internet service alone is $40.95 per month. *See* https://www.comcast.com/shop/buyflow2/products.cspx?SourcePage=Internet&profileid=85485456-6CF6-48AE-AFE5-2AAC7939C070&lpos=Nav&lid=2ShopHSI&Inflow=1&.

[124] It is unclear at this time whether broadband capacity allocation decisions such as these would be considered a violation of the Commission's proposed open Internet rules.

Independent ISPs can also assist prospective customers in the broadband start-up process, resolve broadband service complaints and trouble-ticket issues, and handle the customer relationship (including billing) in many ways that the OVPD provider would not have the expertise or the capacity to handle.

D. The Transaction Positions Comcast as a "Leader" Among Cable Operators Seeking to Impede the Growth of Competitive Online Video Services

The Transaction also increases the likelihood of significant and pernicious indirect effects upon the OVPD market. As the largest cable operator and integrated media company in the country, Comcast's actions affect the private interests of cable television operators throughout the nation. By establishing industry-known policies and practices in furtherance of an OVPD foreclosure strategy, Comcast could function as an MVPD "leader," showing the way for others to mimic Comcast's strategic behavior.[125] Thus, the Transaction enables Comcast to resolve one of the major impediments to tacit collective strategic behavior – the ability to form a plan and establish practices and policies of the group.

It is equally true that Comcast's foreclosure strategy will prove more successful to Comcast and other cable operators to the extent that other MVPDs adopt a similar strategy. As

[125] Courts have noted in the antitrust context that "conscious parallelism," is the behavior of "firms in a concentrated market . . . [that] recogniz[e] their shared economic interests and their interdependence with respect to price and output decisions." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993). *See also Bell Atlantic v. Twombly***,** 550 U.S. 550, 553 (2007) (*citing Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540-41 (1954) ("a showing of parallel 'business behavior is admissible circumstantial evidence from which the fact finder may infer agreement.'")).

such, the Transaction also heightens the potential that Comcast and others[126] will engage in collusive activities.[127] TV Everywhere is one example. The Applicants here also have other experience with a cable industry-wide "paywall" model (*i.e.*, blocking access to content unless a fee is paid). For example, the broadcast and cable television companies established a "paywall" with NBC's online coverage of the Vancouver Winter Olympics that restricted access to live streaming of the Olympics events to those consumers who could demonstrate they were pay television subscribers.[128]

History also teaches that the Transaction will likely increase merger activity among content providers and other cable operators and telephone companies, leading to yet more media consolidation and loss of independent sources of content. Merger activity in the 1990s suggests that other cable operators, for example, may also seek to acquire control over additional content for a variety of reasons including to compete with Comcast, to tighten further the control of broadband content and conduit, and to increase the industry's ability to restrict competitive

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[126] *See, e.g.*, Tracy Swedlow, *Rogers Officially Launches its "TV Everywhere" Service, Rogers On Demand Online,* Interactive TV Today (May 26, 2010), *available at* http://www.itvt.com/story/6845/rogers-officially-launches-its-tv-everywhere-service-rogers-demand-online.

[127] Public interest groups allege that Comcast and others are attempting to collude in order to segregate particular away from the public Internet. *See* Request for Investigation into Potential Antitrust Violations Regarding "TV Everywhere" from Free Press et al., to the Honorable Christine Varney, Assistant Attorney General, Antitrust Division, U.S. Department of Justice (Jan. 4, 2010). *See also,* Marvin Ammori, *TV Competition Nowhere: How the Cable Industry Is Colluding to Kill Online TV*, Free Press, 3 (Jan. 2010), *available at* http://www.freepress.net/files/TV-Nowhere.pdf ("TV Everywhere appears to be a textbook example of collusion.").

[128] *See* John Ourand, *Olympics a test case for web video?*, Sports Business Journalism, *available at*, http://www.sportsbusinessjournal.com/article/62188 ("The authentication system. . . is designed to match Internet users to their cable company based on the consumers' [IP] address. If an IP address does not match up with an operator's records (i.e., if you are at work), consumers will be asked to fill out information that would further verify that they actually subscribe.").

online video distribution and programming. For example, the 1995 Walt Disney and ABC merger[129] sparked a series of follow-on mergers, including CBS and Westinghouse in 1995,[130] Turner Broadcasting and Time Warner in 1995,[131] CBS and Viacom in 1999,[132] and AOL and Time Warner in 2000.[133] During this time, the percentage of independent content aired on the major television networks went from 50% to approximately 5% as the conduits and the broadcasters favored their own content.[134]

IV. GIVING CONSUMERS A CHOICE OF BROADBAND INTERNET SERVICE PROVIDERS WILL MITIGATE SUBSTANTIALLY POTENTIAL PUBLIC INTEREST HARMS

A. The Commission Should Adopt a Structural Remedy to Address the Harms of the Transaction

Since the Transaction raises Comcast's abilities and incentives to undermine competition, diversity and choice, unless the Commission takes action to mitigate these harms, it must deny the proposed Transaction. EarthLink believes a structural remedy grounded in market-based contractual arrangements is a proven and efficient approach. Once implemented, little

[129] *See* David Einstein and Jeff Pelline, *Disney's Stunning Deal to Buy ABC/Biggest Media Firm in World Would Emerge*, San Francisco Chronicle (Aug. 1, 1995), *available at* http://articles.sfgate.com/1995-08-01/news/17813145_1_cap-cities-abc-stock-capital-cities.

[130] *See* Sallie Hofmeister, and Jane Hall, *CBS Agrees to Buyout Bid by Westinghouse Entertainment: $5.4 Billion Merger Would Create Biggest TV, Radio Empire. But the Deal Faces Obstacles*, Los Angeles Times (Aug. 2, 1995), *available at* http://articles.latimes.com/1995-08-02/news/mn-30646_1_tv-station.

[131] *See Time Warner, Turner Approve Merger*, CNET News (Nov. 16, 1995), *available at* http://news.cnet.com/Time-Warner,-Turner-Approve-Merger/2100-1033_3-273890.html.

[132] *See* M. Corey Goldman and Tom Johnson, *Viacom Tunes Into CBS*, CNNMoney (Sept. 7, 1999), *available at* http://money.cnn.com/1999/09/07/deals/cbs/.

[133] *See* Sandeep Junnarkar and Jim Hu, *AOL to Buy Time Warner in Historic Merger*, CNET News (Jan. 10, 2000), *available at* http://news.cnet.com/2100-1023-235400.html.

[134] *See* Testimony of Jean Prewitt, President and CEO, Independent Film & Television Alliance, to House Judiciary Committee (Feb. 25, 2010).

government intervention and oversight is needed to produce enormous public interest benefits, including a much-needed "nudge" to more market-based arrangements going forward.

Specifically, as further detailed in Appendix 1, the Commission should adopt a condition requiring Comcast to enter into private contractual arrangements with at least four unaffiliated ISPs to purchase wholesale standalone Broadband Access Service from Comcast at reasonable rates and on reasonable terms.[135] The unaffiliated ISPs would be permitted to use this competitive Broadband Access Service for their Internet access services throughout Comcast's footprint and to all Comcast subscribers. Under these arrangements, Comcast also will be prevented from blocking or degrading any traffic or content, subject to legitimate engineering management practices. This proposed remedy is modeled on the successful ISP access condition adopted by the FTC and later enhanced by the FCC in the AOL-Time Warner merger proceeding.[136]

It is important to note that, while primary reliance on privately-negotiated contracts between Comcast and independent ISPs is appropriate, the condition must include provisions that ensure its purposes are met. For example, the standalone wholesale Broadband Access Service must provide sufficiently robust capacity to allow consumers to view online video programming. Further, pricing must not facilitate a "price squeeze" by Comcast,[137] which will

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[135] *See* Appendix 1, "Proposed Condition: Wholesale Standalone Broadband Access" (attached hereto).

[136] *See America Online, Inc. and Time Warner Inc.*, FTC Docket No. C-3989, Decision and Order, File No. 001 0105, 6-11 (FTC) (proposed Dec. 14, 2000) ("*AOL-Time Warner FTC Order*"); *America Online, Inc. and Time Warner Inc.*, FTC Docket No. C-3989, Agreement Containing Consent Orders, File No. 001 0105, 6-11 (FTC) (proposed Dec. 14, 2000); *AOL-Time Warner Order*, ¶ 126.

[137] The FCC has long held that price squeezes and predatory pricing are inconsistent with the Communications Act and contrary to the public interest. *See, e.g.*, *Ameritech Operating Companies*

undermine ISPs' ability to invest in the development of the service (including customer care, marketing, and provisioning) or to invest in new relationships with OVPDs.[138] EarthLink believes that these issues can be met through the private negotiation process between Comcast and the ISPs once the Commission has established general parameters of the service, as provided for in Appendix 1. The Commission should also stand ready with effective enforcement mechanisms should condition-related problems arise.

Despite its shortcomings, the current EarthLink-Comcast relationship provides a starting point to build upon to ensure consumers have access to competitive wholesale standalone Broadband Access Services. In fact, given that many of the hurdles faced by parties who contemplate contractual relationships have already been resolved by Comcast and EarthLink, the proposed contractual condition would be a relatively easy next step for Comcast and EarthLink (as well as other independent ISPs) and would allow the proposed Transaction to move forward.

Petition for a Declaratory Ruling and Related Waivers to Establish a New Regulatory Model for the Ameritech Region, Order, 11 FCC Rcd. 14028, ¶ 20, n.44 (1996) ("A price squeeze can occur when an entity that provides both a retail product and a necessary input for providing that retail product possesses market power over the input. A price squeeze exists when the price of the input product is so high, relative to the price of the retail product, that competing providers of retail service are unable to make a profit."); *GTE Telephone Operating Cos.; GTOC Tariff No.* 1, Memorandum Opinion and Order, 13 FCC Rcd. 22466, ¶ 32 (1998).

[138] As detailed in Appendix 1, a 40% discount off of Comcast's retail broadband rates may be an effective check against price squeeze, and yet still allow ISPs to offer price-competitive and innovative services to consumers. As Professor Wilkie explains, "it has been common for special access pricing to be a 40% discount off the rack price if one signs a long term (5 year) contract. Thus, as the proposed condition is also for long term access, a natural benchmark would be 40% of the retail price." Wilkie Report, at ¶ 56. In the alternative, Professor Wilkie explains, "we could infer that the incremental cost of offering broadband is less than the incremental price of adding it to bundle and, thus, if we take this number and subtract the avoided cost for ISP services and managing the customer relationship, then we can obtain an imputed cost which forms a reasonable basis for benchmarking a price." *Id.* at ¶ 57.

B. The AOL-Time Warner Merger Conditions Resulted in Increased Consumer Choice and Competition for Broadband Access Services

In both the FTC and FCC review of the AOL-Time Warner transaction, the merger was conditioned upon entering a private contractual arrangement under which EarthLink was granted non-discriminatory access to the Time Warner Cable system to provision competitive Broadband Access Service.[139]

This condition has proven to be a success for everyone involved: Time Warner Cable, EarthLink, consumers and regulators. Time Warner and EarthLink have been fully satisfied with the relationship, as evidenced by the fact that the parties have voluntarily renewed the arrangement after the mandatory five-year condition had expired. Further, as a result of the reasonable terms, prices and conditions made available to EarthLink, Time Warner Cable's customers continue to have access to a competitive Broadband Access Service offering. In fact, today approximately 445,000 consumers have selected EarthLink's Broadband Access Service as a result of the wholesale arrangement with Time Warner Cable and EarthLink has even been voted as the highest-rated "cable broadband provider."[140] Moreover, regulators have enjoyed a "hands-off" approach as parties have not needed a referee to fulfill the mandates of the commercially-based merger condition.

The prohibition imposed by the FTC and the FCC that prevented Time Warner from interfering with content passed along by independent ISPs or from discriminating against the transmission of content on the basis of affiliation foreshadowed the open Internet concerns that

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[139] *See AOL-Time Warner FTC Order*, p. 11; *AOL-Time Warner Order*, ¶ 126.

[140] *See* Highest in Customer Satisfaction Among Residential Internet Service Providers, West Region, J.D. Power and Associates, 2009.

exist today. The FCC was "convinced that discrimination against unaffiliated ISPs with respect to technical performance would be sufficiently harmful to such ISPs,"[141] recognizing that independent ISPs must be free to offer consumers an open Internet experience rather than mere wholesale service. As such, the nondiscrimination requirement acted as a safeguard for consumers and protected their ability to access the Internet content and applications of their choice. Again, this aspect of the condition has operated well, with not a single complaint or need for an enforcement action during the entire term of the condition.

C. A Condition Requiring Comcast to Offer a Wholesale Standalone Broadband Access Service Will Further the Public Interest

1. The proposed condition will stimulate development, innovation and investment in the OVPD market.

While the Transaction provides Comcast strong incentives to pursue a strategy to prevent unaffiliated OVPDs from establishing a "foothold," the structural remedy proposed here effectively mitigates these anticompetitive concerns. Indeed, the proposed remedy will help nudge marketplace forces to re-shape Comcast's strategy from a closed model to an open model. As online video offerings achieve incremental success, it will be fully apparent to Comcast, its subscribers, investors and other members of the online and video ecosystem that a strategy based upon a closed system model is not the winning solution. Instead, a business strategy can and should evolve that enables Comcast to pursue the combined revenue potential of: (i) advertising-based distribution of its considerable content across all media, including on online video distribution services; (ii) retail subscription and advertising revenues from sales of bundled

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[141] *AOL-Time Warner Order*, ¶ 99.

Benefits of Wholesale Condition:

- *Stimulates the OVPD market*
- *Pro-consumer choice and pro-competition*
- *Enables consumers to "break the bundle" and "cut the cord"*
- *Increases diversity of information sources*
- *Furthers the nation's broadband goals*
- *Encourages open Internet practices*

video-telephony-data services to consumers; and (iii) wholesale revenues from ISP contracts supported by consumers who want access to Comcast's broadband transmission network but not a Comcast retail relationship. The right initial structural remedy now can provide the impetus for the marketplace to open up affiliated content to online distribution.

In the meantime, the condition will also allow unaffiliated ISPs to invigorate the market for online Video Programming and other online content by providing an independent avenue for distribution. Unaffiliated ISPs and OVPDs can attract "early adopters" who, in turn, will help establish online video as a viable video alternative. As noted, unaffiliated ISPs can assist early adopters of OVPD services with the sometimes significant organizational and technical hurdles presented.[142]

2. The proposed condition is pro-consumer and pro-competition.

Providing additional competitive broadband alternatives increases the incentives of all broadband providers to offer better services and support in order to win and retain customers. These effects include improved customer service and response time, enhanced features and functions, better online safety and security options, and the addition of innovative content and

[142] *See, e.g.*, Nick Bilton, *Cable Freedom is a Click Away*, New York Times (Dec. 9, 2009), *available at* http://www.nytimes.com/2009/12/10/technology/personaltech/10basics.html; Marguerite Reardon, *You Don't Need Satellite TV When Times Get Tough*, CNET News (Dec. 19, 2008)¸ *available at* http://news.cnet.com/8301-1035_3-10125962-94.html.

applications. As the FCC noted previously, independent ISP provision of broadband access enables "affordable, high-speed access to the Internet to residential and business consumers. As a result, consumers will ultimately benefit through lower prices and greater and more expeditious access to innovative, diverse broadband applications by multiple providers of advanced services."[143]

Over time, the successful performance of independent ISPs will contribute to reducing Comcast's incentives to tie the online availability of traditional Video Programming to cable subscriptions[144] by offering customers another avenue to view such programming, all of which ultimately benefits consumers' experiences. While this competition-based model may not maximize Comcast's short-term profits, it will create the greatest consumer welfare and provide a sound arena for competition.

Further, the availability of an independent option for Broadband Access Service, which facilitates the ability of consumers to "cut the cord" by eliminating cable service, can also be expected to restrain Comcast from raising cable television prices and to encourage Comcast to improve customer service for its cable television subscribers. At a time when cable prices continue to rise and consumers are feeling the pinch of difficult economic conditions, this remedy will provide a much needed assist.

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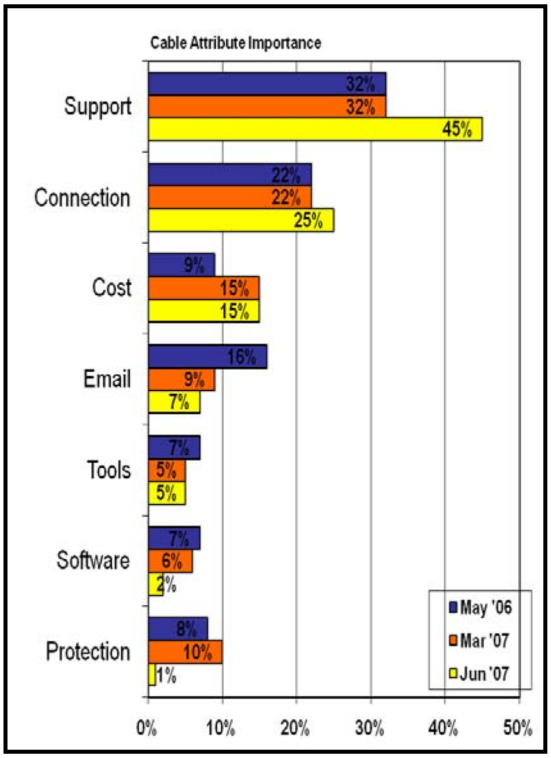
[143] *See Wireline Second Report and Order*, ¶ 3 (1999).

[144] Similarly, the FCC noted in the *AOL-Time Warner Order* that "[i]f, in contrast, AOL Time Warner were obligated to carry multiple, unaffiliated ISPs over its network on non-discriminatory terms, those ISPs could serve as an alternative outlet for non-AOL Time Warner content, making it more likely that AOL Time Warner's affiliated ISPs would feature such content themselves to remain competitive." *AOL-Time Warner Order*, ¶ 61.

Moreover, the condition will promote choice of Broadband Access Services for those consumers that would prefer to purchase broadband access functions and features not offered by Comcast.[145] EarthLink surveys underscore that features specific to EarthLink's broadband Internet service offerings, such as award-winning customer and technical support, email and online protection are important to customers in choosing EarthLink as their broadband service provider.

EarthLink Study: Features Customers Value from their Broadband Provider



[145] It is clear from EarthLink's own experience that the offering of competitive broadband access services adds significantly to consumer satisfaction and broadband adoption. Features specific to EarthLink's broadband service offerings lead customers to choose a competitive alternative to the incumbent provider where they might not otherwise take up broadband service at all. *See, e.g.*, Letter from Jennifer P. Bagg, Counsel, EarthLink, Inc. and New Edge Network, Inc., to Marlene H. Dortch, Secretary, FCC, at 2, GN Dkt. 09-51 (filed Sept. 14, 2009).

Notably, 12% of EarthLink cable customers indicate that they moved to EarthLink's service due to certain features EarthLink provided that the underlying cable operator did not or because they were generally dissatisfied with the service of the underlying cable operator. In addition, 5% of EarthLink cable customers chose EarthLink as their initial broadband provider, likely due to recommendation or brand recognition and loyalty.

Reason Customer Moved to EarthLink		
	EarthLink DSL	**EarthLink Cable**
It's your first Internet provider	10%	5%
EarthLink provided a particular feature you wanted	6%	6%
Too many problems with previous ISP	9%	6%
Wanted to upgrade service	26%	24%
Have Internet at work and wanted it at home also	5%	7%
Needed cheap service to check email	9%	18%
Wanted faster Internet connection	34%	33%
Wanted to downgrade service	1%	1%
Wanted a backup ISP	0%	1%

3. The proposed condition will enable consumers to "break the bundle."

The remedy also serves the public interest by empowering consumers to make their own determinations as to which services to subscribe. EarthLink's experience with other competitive, incumbent and cable providers of standalone wholesale Broadband Access Service demonstrates that independent ISPs like EarthLink help free consumers to "break the bundle" and take only the products they want (or can afford) among the variety of video and telephone options available today, including mobile and VoIP offerings, further promoting competition.[146]

Without question, bundled service offerings can provide both cost-savings and convenience for those consumers that wish to purchase multiple services from one provider. For other consumers, however, bundling can force purchase of unwanted services, or tiers of service, simply to gain access to the desired service. Giving consumers the ability to opt-out of the bundled double-play (cable-broadband) or triple-play (cable-broadband-voice) offerings enables them to choose from a new array of stand-alone or bundled offerings from providers unaffiliated with Comcast. For example, consumers might choose only a stand-alone broadband service or might separately purchase services from unaffiliated OVPDs with unique and different online video services. In the same way, consumers might choose unaffiliated VoIP and/or wireless services to create their own competitive "bundle." In this way, the proposed condition interjects much needed affordability and choice for consumers. Significantly, many consumers are priced out of Broadband Access Service due to higher prices for standalone service. A competitive standalone option enables lower income consumers to avail themselves of only the services they need, including the emerging offerings available online.

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[146] Significantly, since January 1, 2007, approximately 190,000 customers have migrated from EarthLink's dial-up services to EarthLink Broadband Access Services. Interestingly, while this number demonstrates that EarthLink's wholesale Broadband Access Services have impelled many consumers to migrate from dial-up to broadband, it is equally important that many new broadband subscribers (not just former EarthLink dial-up customers), are selecting EarthLink's services over the services of incumbent providers. In other words, EarthLink's presence in the broadband marketplace is attracting customers who may not have otherwise subscribed to broadband services. Specifically, since January 1, 2007, more than 90% of new EarthLink cable modem subscribers were new to EarthLink's services all-together.

Of course, no consumer would be required to change to an unaffiliated ISP. Instead, with a competitive market for OVPD and Broadband Access Service in play, consumers would be free to pick and choose between services and offerings. Allowing EarthLink and other ISPs to offer Comcast-based consumers a host of service features and functionalities as well as award-winning customer service that compete with Comcast's Broadband Access Service will drive this competition and choice.

4. The condition will increase diversity of information sources.

Pursuant to the policies and mandates established by Congress, it is a basic tenet of communications policy that multiple voices lead to increased diversity.[147] Significantly, diverse owners bring diverse perspectives and have an incentive to differentiate their programming to reach different audiences.[148] As such, ensuring independent voices have distribution options, including through unaffiliated OVPDs and ISPs, increases the diversity of viewpoints to the

[147] *See, e.g.*, 47 U.S.C. § 257, requiring the FCC to identify and eliminate market barriers for entrepreneurs and small businesses, and to "promote the policies and purposes of this Act favoring diversity of media voices." *See, e.g.*, 47 C.F.R. § 73.3555(d)(1)(i)-(iii) (newspaper/broadcast cross-ownership rule); *2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Notice of Inquiry, FCC 10-92, ¶ 22 (2010) ("*Broadcast Ownership NOI*") ("The Commission adopted the newspaper/broadcast cross-ownership rule "'in furtherance of our long standing policy of promoting diversification of ownership of the electronic mass communications media.'"). *See also, FCC v. Nat. Citizens Comm. for Broad.*, 436 U.S. 775, 796 (U.S. 1978) (holding the FCC acted rationally in finding that diversification of ownership would enhance the possibility of achieving greater diversity of viewpoint).

[148] *Broadcast Ownership NOI*, ¶ 29 ("As noted, the Commission has implemented its public interest authority and the Section 202(h) mandate by seeking to promote competition, localism, and diversity through its media ownership rules. The Commission and the courts have recognized that, '[i]n setting its licensing policies, the Commission has long acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power.'") (*citing Prometheus Radio Project, et al. v Fed. Commc'n Comm'n*, 373 F.3d 372, 383 (3d Cir. 2004)).

benefit of all Americans.

Today, underserved minority and other disadvantaged populations are using the Internet to have their voices heard due the high barriers of entry on other platforms. The emergence of online video and development of unaffiliated OVPDs has the potential to allow independent voices to reach large and diverse audiences. Minority populations already take advantage of this opportunity to transmit and access unique and diverse information outside of the control of monolithic media providers.[149] The availability of alternative distribution provided by independent ISPs and OVPDs will ensure that one party does not have the market power to force out alternative speakers from the online marketplace of ideas and will promote content diversity.

5. The proposed condition furthers the nation's broadband goals by spurring deployment, investment and innovation.

The proposed condition will also encourage investment by all participants in the broadband ecosystem: Comcast, independent ISPs, OVPDs, other video programmers and other online and broadband-enabled content and applications providers, setting the stage for increased broadband innovation, demand and deployment.

EarthLink's operational experience has been that consumer demand for broadband increases when more consumers are able to extract greater value out of available broadband applications, content and functionalities.[150] Just as independent ISPs introduced consumers to

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[149] *See* Jack Loechner, *Minorities Dominate Use of New Media*, Media Post (Mar. 28, 2008), *available at* http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=83414.

[150] Ensuring broadband transmission for independent ISPs enables "affordable, high-speed access to the Internet to residential and business consumers. As a result, consumers will ultimately benefit through lower prices and greater and more expeditious access to innovative, diverse broadband applications by multiple providers of advanced services." *Wireline Second Report and Order*, ¶ 3.

the possibilities of the Internet, including e-mail, instant messaging, personalized websites, customer-driven content and other features,[151] they have a key role in bringing consumers broadband-based Internet services, helping to drive broadband deployment, penetration, and competition in furtherance of the FCC's *National Broadband Plan* goals.

The condition will also positively impact Comcast's incentives to invest in its broadband transmission network because the addition of unaffiliated ISPs' sales and marketing of Comcast Broadband Access Services will drive wholesale revenues for Comcast, and create fuller network utilization. Fuller utilization of Comcast's broadband access network will create additional revenues which will enable Comcast to invest in deploying additional capacity to keep users "on net," especially as online video demand rises. As the FCC has found, policies that guarantee consumer choice among competing information service providers encourage legacy network providers to continue to innovate and invest, as they follow the lead of the competitive providers who often experiment with a variety of cutting-edge services.[152] At the same time, the threat by Comcast that it will cease or reduce investment should not drive FCC action as Comcast has already significantly invested at this time.[153]

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[151] In addition to offering a range of user-friendly features (security, spam and privacy tools, targeted information, hosting, toolbars, etc.), independent ISPs can assist users in the sometimes challenging process of upgrading to broadband. *See, e.g., Greenstein Report*; *Oxman Report.*

[152] *See National Broadband Plan* at p. 38 (describing how competition has "induced broadband providers to invest in network upgrades," and, as a result, consumers are benefiting from the new choices and higher speeds).

[153] Comcast June 11th Response, at 7 ("Comcast is not currently planning significant physical expansion of bandwidth on its cable systems. . . ."). *See also, id.* at 8 [[[redacted]]].

The proposed condition also will encourage independent ISPs to innovate and invest in their broadband services and technologies to meet the enhanced demands of broadband customers, including customers that prefer to join the movement to online video.[154] Conversely, without such a remedy, innovation and broadband deployment will suffer. As the Commission observed, "broadband providers appear to invest more heavily in network upgrades in areas where they face competition."[155]

Indeed, the *National Broadband Plan* recognizes that ensuring "robust competition" for American households and businesses "requires particular attention to the role of wholesale markets"[156] and that the offering of wholesale Broadband Access Service is essential to the growth of broadband deployment throughout the nation.[157] It will "foster competition, drive demand for increased network performance and lower the cost of deploying infrastructure."[158] Ample evidence from other countries that have implemented wholesale access obligations shows significant increases in the availability and speed of consumer broadband.[159] In the absence of

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[154] Independent ISPs have a long history of innovating in features and applications that companies with more captive customers, such as Comcast, may not focus on. *See, e.g.*, *Greenstein Report*; *Oxman Report.*

[155] *National Broadband Plan* at p. 47.

[156] *Id. See also* Comments of the Federal Trade Commission at 3, GN Dkt. 09-51 (filed Sept. 4, 2009) ("Competitive firms are constantly searching for superior profit opportunities as they seek to win the favor of customers, who effectively vote for preferred products and services with their dollars.").

[157] *See National Broadband Plan* at p. 47.

[158] *Id.* at p. 9.

[159] *See, e.g., Next Generation Connectivity: A Review of Broadband Internet Transitions and Policy from Around the World*, Harvard University Berkman Center for Internet & Society, 13- 14, (Feb. 15, 2010) ("'open access' policies – unbundling, bitstream access, collocation requirements, wholesaling, and/or functional separation – are almost universally understood as having played a core role in the first generation transition to broadband in most of the high performing countries; that they now play a core

such policies, "the price of entry is too high and competition falters; over time, innovation lags, and the goal of broader and better access suffers."[160]

The proposed condition will also help to realize Congress' Recovery Act goals for broadband deployment and usage.[161] In awarding grants for broadband projects, receipt of funding is conditioned upon adherence to nondiscrimination and interconnection as well as the FCC's *Internet Policy Statement*.[162] By this requirement, Congress recognized that independent ISPs are well-positioned to bring value-added broadband services to consumers and provide additional market choices, which serve to increase usage and drive innovation and investment.

Further, the proposed condition also will stimulate investment and innovation by online video programmers and other broadband content and applications providers. With the

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role in planning for the next generation transition; and that the positive impact of such policies is strongly supported by the evidence of the first generation broadband transition."). *Id.* at 110 ("'a 'mix' of infrastructure and [wholesale] service competition, like the one promoted in the Netherlands, stimulates investment by both incumbents and entrants and offers better consumer benefits.'") (internal citation omitted).

[160] *See* Yochai Benkler, *Ending the Internet's Trench Warfare*, New York Times (Mar. 20, 2010), *available at* http://www.nytimes.com/2010/03/21/opinion/21Benkler.html?ref=opinion. *See also* Richard Martin, *FCC Punts on National Broadband Plan*¸ VON Blog (Mar. 24, 2010), *available at* http://www.von.com/blogs/martin/blogdefault.aspx?m=art&a=fcc-punts-on-national-broadband.html (noting that the FCC's "well-intentioned recommendations. . . will accomplish little as long as nothing is done about fostering true competition over existing, costly high-speed fiber access cable"); *Plans for Broadband, Pipe Dream,* The Economist (Mar. 18, 2010), *available at* http://www.economist.com/world/united-states/displaystory.cfm?story_id=15732610 ("Almost uniquely among OECD countries, America has adopted no policies to require the owners of broadband cables to open their infrastructure to rival sellers in order to enhance competition.").

[161] *See* Recovery Act § 6001(k)(2)(D) ("use of broadband infrastructure and services" to "advanc[e] consumer welfare, civic participation, public safety and homeland security, community development, health care delivery, energy independence and efficiency, education, worker training, private sector investment, entrepreneurial activity, job creation and economic growth, and other national purposes").

[162] *See id.* at § 6001(j) ("non-discrimination and network interconnection obligations that shall be contractual conditions of grants awarded under this section, including, at a minimum, adherence to the principles contained in the Commission's [Internet Policy Statement]").

independent ISP focused on obtaining subscribers, it will provide the necessary broadband path for all online providers to sell their content and services, including video programmers, who can offer online content directly to OVPDs, who will have a ready-made audience for their product.

6. The condition will encourage open Internet practices.

Finally, the proposed condition will also encourage Comcast broadband practices that encourage, and do not dampen, the open Internet principles of the *Internet Policy Statement*.[163] With competition from unaffiliated ISPs, Comcast will be under competitive pressure to avoid discrimination in order to avoid customer attrition. Rather than the behavioral "broadband nanny" approach, the proposed condition provides a structural approach to openness.

In fact, detection of problematic broadband practices will be fostered as independent ISPs using Comcast's Broadband Access Services will be better able to bring to regulators' attention any practices that detrimentally impact consumers' broadband experience; certainly, unaffiliated ISPs will have every reason to do so. Ultimately, the condition would be fully consistent with proposed open Internet rule 8.11, Competitive Options, and is an implementation of the principles supporting that proposed rule.[164]

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[163] Comcast asserts that it is committed to the FCC's Open Internet principles. *See* Letter from Michael H. Hammer, Counsel, Comcast, et al., to William Lake, Chief, FCC Media Bureau, at 14, MB Dkt. 10-56 (June 2, 2010) ("We always have provided our service so that a user can go anywhere he or she wants to go on the Internet, and we always have operated our High-Speed Internet service in conformance with the [*Internet Policy Statement*]. Our commitment to operating in this manner is unwavering, regardless of whether the FCC adopts any of the open Internet rules currently under consideration.").

[164] *See* Reply Comments of EarthLink, at 8, GN Dkt. 09-191 (filed Apr. 26, 2010).

Petition to Condition or Deny of EarthLink, Inc.
MB Dkt. 10-56

CONCLUSION

For the foregoing reasons, EarthLink urges the FCC to require Comcast to offer wholesale standalone Broadband Access Service to independent ISPs as a condition to approval of the proposed merger. Without such a condition, the Commission must deny approval of this Transaction.

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June 21, 2010

APPENDIX 1

PROPOSED CONDITION:
WHOLESALE STANDALONE BROADBAND ACCESS

Within ninety (90) days after the effective date of the order approving the proposed transaction with conditions ("Order") and prior to closing the transaction, Comcast shall enter into a Wholesale Standalone Broadband Access Service Agreement ("Agreement") with at least four (4) national unaffiliated Internet Service Providers ("ISPs").

The requirements of the Agreement shall be as follows:

REQUIRED TERMS	DESCRIPTION
Prior Approval	FCC approval of the Agreement required prior to execution.
Term	The Agreement shall be for a term of at least five (5) years with a reasonable customer transition period upon termination.
Rates	Wholesale standalone broadband access service shall be provided at reasonable rates, which shall be at least 40% less than the current advertised retail rates for Comcast's broadband access services, including any promotional discounts and bundled rates [or at the imputed cost of such service]. If Comcast offers free installation and/or modem equipment or other services, either to its retail consumers or to any other party, the unaffiliated ISPs shall obtain such services/equipment as part of the wholesale rate.
Geographic Scope	Wholesale standalone broadband access service shall be made available in 100% of Comcast's nationwide footprint. The number of customers provisioned using wholesale standalone broadband access service shall not be limited.
Access/Ordering	Reasonable terms of access, including without limitation reasonable ordering and provisioning, shall be established. Comcast shall provide the unaffiliated ISPs: (i) access to systems and tools necessary for the ISPs to offer Tier 1 customer support, or Comcast shall provide the Tier 1 support; (ii) a prequalification system that allows the unaffiliated ISPs to determine accurately the serviceability of a customer through a real-time API, or Comcast shall provide all serviceable addresses in a file updated daily; (iii) prequalification data which shall include whether a customer will be rejected due to owed balance or credit issues; and (iv) APIs for trouble reporting, ticket creating, ticket updates, and network outages. Comcast shall provide Tier 2 support, and shall report network outages promptly to the ISPs. Customers will not be required to purchase any other Comcast product or other service as a condition of service from the unaffiliated ISPs.

Billing	ISPs may have a direct billing arrangement with their customers. Comcast may offer a billing service to any ISP, but shall not require any ISP to purchase this service as a condition of obtaining access.
Services	If Comcast makes available different levels of broadband access service (including, but not limited to, quality of service guarantees, maximum and minimum throughput capacity, and byte consumption per customer) to any Comcast broadband access service customers, Comcast shall make those levels of service available to the unaffiliated ISPs with whom it has contracted for access. Comcast shall include in the wholesale service all telephony or video features that Comcast provides as part of its own stand-alone broadband access service.
Ordering	Comcast shall allow customers to select an ISP by a method that does not discriminate in favor of Comcast's affiliates on the basis of affiliation, including when the customer chooses a Comcast bundled offering. At a minimum, Comcast shall allow customers to obtain a list of unaffiliated ISPs by calling their local Comcast customer service representative and requesting such a list. Whenever a customer requests a listing of unaffiliated ISPs, Comcast shall provide the list in a reasonable and timely manner. Such list shall not discriminate in favor of Comcast's affiliates.
Network Usage	Comcast shall not interfere or discriminate in any way, directly or indirectly, with content passed in either direction along the bandwidth contracted for and being used by any ISPs with whom Comcast has an Agreement. Comcast shall make available to the unaffiliated ISPs any network flow monitoring data (regarding data transport between the ISPs' connection point to the broadband network and a customer's location) or usage accounting that is available to Comcast's personnel. The Agreements shall contain a clause warranting that, to the extent Comcast provides any Quality of Service mechanisms, caching services, technical support customer services, multicasting capabilities, address management and other technical functions of the broadband network that affect customers' experience with their ISP, Comcast shall provide them in a manner that does not discriminate in favor of Comcast's affiliated ISP on the basis of affiliation.

Marketing	The unaffiliated ISPs shall be permitted to market their services to Comcast broadband access service customers and Comcast shall be prohibited from restricting the ability of any current or prospective Comcast customers to select and initiate service from any ISP with whom Comcast has an Agreement. The unaffiliated ISPs shall not be required to include any content or provide marketing as a condition of obtaining broadband access service. Comcast shall not solicit the customers of the unaffiliated ISPs based on information in Comcast's records (*e.g.*, prequalification, ordering, or repair information) to purchase or switch to Comcast's service.
Dispute Resolution	The FCC shall be permitted to hear and resolve disputes that arise from any of the mandated merger conditions.
Confidentiality	The Agreement shall not prevent the unaffiliated ISPs from disclosing the terms of the contract or facts relating to any dispute to the FCC under the FCC's confidentiality procedures.

ENFORCEMENT: Disputes concerning Comcast's compliance with this condition shall be adjudicated by the FCC through the filing of a formal complaint and such disputes shall be resolved within sixty (60) days of the filing of the complaint.

APPENDIX 2

REPORT OF PROFESSOR SIMON J. WILKIE

CONSUMER SOVEREIGNTY, DISINTERMEDIATION AND THE ECONOMIC IMPACT OF THE PROPOSED COMCAST/NBCU TRANSACTION

June 21, 2010

I. INTRODUCTION

A. Qualifications

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

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

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

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

B. Assignment

4. I have been asked by EarthLink to review, from an economic perspective, the additional effects of the proposed Comcast/NBCU transaction.[1] More

[1] This transaction would give Comcast a significant broadcasting services and programming portfolio in addition to its considerable service provision infrastructure. Thus, Comcast will

specifically, I have been asked to analyze possible anti-competitive consequences of such a transaction on the emerging online video market and Internet service providers ("ISPs"). Under the structure of the proposed transaction, Comcast will have clear business incentives that are not aligned with consumer interests. In addition, Comcast has a history of punitively limiting the bandwidth of competitive content, which raises obvious anti-competitive concerns. The acquisition of NBCU by Comcast would not only increase Comcast's incentives to act anti-competitively, but would give it a natural set of content to promote, further increasing Comcast's ability to act anti-competitively. EarthLink has proposed pro-competitive structural remedies, which I will also comment on.

C. Summary of Conclusions

- The nascent market for online video programming distributor services ("OVPD"), including the provision of broadcast and cable content, is rapidly growing and developing.

- Online content providers and aggregators have powerful economic incentives to cooperate with independent ISPs to develop substitute online video services platforms to compete with traditional multichannel video programming distributor ("MVPD") services.

- The merged Comcast/NBCU entity will have strong incentives to discriminate in favor of its own programming.

control not just the consumer access point, but also a considerable portion of the content that arrives through that access point. The major focus of the merger analysis appears to be the anti-competitive effects in the broadcast market. As such, a great deal of attention appears to be centered on possible anti-competitive activities related to the withholding of broadcast content.

- The merger of NBCU and Comcast would likely increase Comcast pricing of stand alone broadband offerings.

- The nascent nature of this market makes it important for the Commission to take actions to prevent likely anti-competitive effects.

- EarthLink's low-cost structural remedy – requiring independent ISPs to have access to Comcast customers – ensures that, if Comcast engages in discriminatory activities that degrade consumer welfare, consumers will have the option to switch to another ISP.

- This condition was imposed on the AOL/Time Warner transaction and, subsequently, Time Warner Cable has not been found to engage in such discriminatory practices. Moreover there appears to be no negative impact on investment due to the imposition of the proposed remedy.

- Implementing the rule could be done through commercial negotiation or using a simple imputation test.

D. Outline of Report

5. Section II explores the current state of the market for online video services. Section III discusses and analyzes the incentives to discriminate against unaffiliated online distributors and content that would result from the Comcast/NBCU merger, and some of the basic pitfalls associated with analyzing the Comcast and NBCU merger within such a context. Section IV explores the role of antitrust and regulation within these nascent markets. Section V applies the Commission Staff model to the Comcast/NBCU merger. Section VI explores the impact of the merger on pricing. Section VII analyzes EarthLink's proposed pro-competitive structural remedy for the merger.

II. NASCENT MARKETS FOR ONLINE VIDEO SERVICES[2]

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

7. The disintermediation of media content began in earnest in 1999 with the introduction of TiVo. TiVo, like DVRs subsequently offered by MVPDs, allows users to record user selected programming and view it at times other than that of the live broadcast.[3] Therefore, while consumers still pay a flat fee for a stream of continuous MVPD programming, they are able to actively select and capture specific content to watch at their

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

[3] A similar, albeit more primitive, functionality has been provided by VCRs since the early 1980's.

choosing. In the last several years, TiVo has expanded the functionality of its products to incorporate a larger amount of broadband content. [4]

8. The desire to acquire specific content coupled with high speed Internet access to media makes alternative formats increasingly attractive to consumers. This past year the FCC Media Bureau Chief Bill Lake stated publicly that the separation of the TV and the Internet is "coming to an end" and expressed the general view that the convergence of broadband and television is approaching. This is seen in the more than 800,000 US households that have moved from traditional MVPD service to receiving their video programming online over the last two years, and another 800,000 are estimated to do the same in 2010.[5] While online video distribution and programming are rapidly growing and developing, it is considered a nascent market in the sense that it is still small in comparison to traditional MVPDs and there is still quite a bit of uncertainty about the future structure of this market.

9. Currently, there are numerous models for media distribution, including online broadcaster controlled content (*e.g.* full length television episodes offered by NBC.com, CBS.com, etc.), online content aggregators (*e.g.* full length episodes and movies offered by Hulu.com, TV.com, Netflix, etc.), and full service providers who both aggregate content and provide the

[4] Spangler, T. "Can TiVo Reinvent Itself?", Multichannel News, (12/14/09).

[5] Schonfeld, E. "Estimate: 800,000 U.S. Households Abandoned Their TVs For the Web", Techcrunch.com, (4/13/10).

distribution infrastructure (*e.g.* broadcast and cable offerings of traditional MVPD service providers, as well as newer products offered by AT&T U-verse, Verizon FiOS, etc.).[6] Taken independently, these models of media distribution will compete for both consumer and advertising revenues. Online content providers and aggregators have powerful economic incentives to cooperate with independent ISPs to develop substitute online video services platforms to compete with traditional MVPD services.[7] This is the case regardless of how quickly the transition away from more traditional media delivery formats takes place or which new type of format establishes itself in the coming years.

10. According to a report from The Diffusion Group, revenue from the delivery of Internet video to television sets will grow nearly six-fold in the next five years, from a meager $1 billion in 2009 to $5.7 billion in 2014. The report posits that in 2009, pay-per-view services will account for 96% of this revenue stream. By 2014, however, annual Internet delivery subscription revenue will have grown 50-fold and account for 31% of global over-the-top TV revenue.[8]

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

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

[8] *See* http://tdgresearch.com/blogs/press-releases/archive/2009/09/14/over-the-top-tv-revenue-to-top-5-6-billion-by-2014.aspx

11. The study points to current hardware trends as fueling this growth, specifically the ongoing shift to broadband-enabled TVs and the rapid diffusion of ancillary web-enabled platforms such as game consoles, Blu-ray players, and hybrid set-top boxes. Widespread penetration of such platforms will set the stage for a rapid uptake of Internet-to-TV video services, both pay-per-view and subscription-based.

12. The Diffusion Group finds that "As these platforms more widely diffuse and consumers become more comfortable with using Internet-based TV services, the market will be primed for the arrival of full-fledged PayTV replacement services."[9] There will be revenues associated with both pay-per-view and subscription video services, as well as the diffusion of broadband-enabled TVs and a variety of web-enabled video platforms.[10]

III. COMCAST'S POTENTIAL FOR ANTI-COMPETITIVE BEHAVIOR

A. Comcast's Incentives To Engage In Anti-Competitive Behavior

13. When firms integrate their economic incentives can change dramatically. Firms will often merge when they believe a single decision-making body will align their interests in a way that would be difficult to achieve through independent negotiations. Therefore, the merged entity will have different combined incentives than if each firm were operating independently. The

[9] Ibid.

[10] These include game consoles, Blu-ray players, hybrid set-top boxes, Internet extenders, and others. Indeed, in recent weeks we have seen ESPN sign deals with Playstation and X-Box as both game systems move to become video distribution platforms.

resulting entity would develop pricing policies, distribution methods, and overall firm strategy in order to efficiently reposition itself in the market. However, it is not necessarily the case that the incentives of the merged entity will align with consumer welfare.[11]

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

15. A merged Comcast/NBCU entity will have strong incentives to discriminate in favor of its own programming regardless of the future structure of the online video content market. If, as Israel and Katz would have us believe, online video programming and MVPD services are, and will continue to be, complements, Comcast/NBCU may not want to foreclose access to content entirely, but they will still have incentives to behave anti-competitively.[12] For example, the merged entity will have an

[11] For example, if the merged entity has greater market power it may raise prices, reduce output, and/or degrade the quality of its goods/services, all of which are standard outcomes of increased market power.

[12] Several MVPDs, including Comcast, are currently working to position online video services and programming as a complementary service, such as TV Everywhere. This augments, but does not

incentive to promote online distribution of its own content, from which it receives revenues, over that of others. Comcast could achieve this by selectively degrading the transmissions of non-affiliated distributors on its infrastructure network. [13] This may result in Comcast/NBCU having the ability to bully these non-affiliated distributors into licensing and carrying Comcast/NBCU content. Indeed, Comcast/NBCU may even be able to bully affiliated distributors into paying an anti-competitive price to carry the Comcast/NBCU programming so that Comcast will not discriminate against its other programming.

16. Alternatively, online video services and programming may, in the future, increasingly be viewed as a substitute for traditional MVPD services by many households, directly competing with, or even replacing, cable or satellite TV.

17. As online video services and programming begin to take on a competitive relationship with MVPD services going forward, the current transaction will increase Comcast/NBCU's incentive to favor their own online video programming. The merged entity will have an incentive to block access to or degrade rivals' online product (e.g., Fox, CBS, etc.) in order to (1)

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necessarily replace, traditional MVPD services. Clearly, Comcast has an incentive to promote online video programming as a complement that would not replace profit generating MVPD services. Based on this market structure, Israel and Katz argue that Comcast/NBCU would not find it profitable to engage in exclusionary conduct relative to programming content. Israel and Katz focus on only one type of exclusionary conduct, namely the refusal to license NBCU content to competitors in an attempt to thwart the development of online video programming.

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

encourage consumers to continue to purchase their traditional MVPD services, and (2) promote and maximize revenue from NBC programs.[14] Further, Comcast/NBCU will have an incentive to degrade the quality of *all* rival online video products, not necessarily just those that do not license NBCU content. [15] It could also be the case that Comcast as an ISP will have an incentive to favor delivery of its own NBCU content via NBC.com, Comcast's online television companion service "Fancast Xfinity," and other online video services which have NBCU licensed content. This would result in the degradation of delivery service for non-NBCU affiliated content or other discriminatory practices. In either case, Comcast/NBCU has incentives that are not aligned with the interests of consumers.

18. Thus, Comcast will have incentives to engage in anti-competitive signal degradation regardless of whether or not online video products are complementary or competitive. Such an outcome is, in fact, likely given that Comcast has engaged in this type of anti-competitive behavior in the past. The market-structure distinction of complement and substitute only dictates whom the anti-competitive activity would be directed against, not

[14] It should be noted that already vertically integrated multiple system operators favor their own channels over competitors to a degree that cannot be explained by economic efficiency. (*See* paper commissioned by FCC, "Vertical Integration and the Market for Broadcast and Cable Television Programming", by Austan Goolsbee, April 2007).

[15] The exact nature of these incentives will depend on the nature of Comcast's revenue streams from infrastructure vs. programming. Comcast has produced some data which may contain this information, but I have not had an opportunity to review the data. In light of this, I reserve the right to adjust my opinions.

its presence in the market.[16] Any analysis of this transaction needs, therefore, to recognize Comcast/NBCU's unique position and incentives to engage in anti-competitive conduct while, as argued by Israel and Katz, nascent online video programming is still largely complementary to MVPD services.

19. Indeed, if viewing a program online and through traditional channels are complements, in that watching clips online reinforces the fan and builds the audience for the MVPD program, then incentives to favor ones' own content could be particularly acute. This is because the price paid by advertisers tends to be *convex* with the audience. That is, a program that garners double the ratings will command more than double the advertising price for a given slot. In particular, "must see TV" commands a large premium.[17] It is particularly noticeable that the pricing for top rated programming commands a significant premium even though the absolute share of the audience held by top rated shows has fallen over time. Thus, if by favoring affiliated programming online through high quality distribution (e.g., less jitter, high quality images, etc), Comcast could improve the relative rating of NBCU programming then the returns could

[16] For example, owned vs. un-owned, affiliate vs. unaffiliated, MVPD vs. online video programming.

[17] See, for example, Ronald Goettler "*Advertising Rates, Audience Composition, and Competition in the Network Television Industry,*" Carnegie Mellon GSIA WP #1999—E28.

be significant. Significantly, Comcast, as the largest MVPD in the country, is the most likely to benefit from this behavior of its broadband offerings.

20. In a world with a plethora of broadband providers to choose from, this threat may not be a concern. However, the changing nature of competition in this industry should be a consideration of the highest priority given the industry's unique structure. Currently, most consumers of traditional MVPD services have a choice between a single cable provider, a couple of satellite providers, and possibly other specialty providers such as AT&T U-verse (a DSL provider with over 2 million users) or Verizon FiOS (a high-speed cable system with over 3 million users).[18,19]

21. As the nascent market for online video distribution and programming continues to grow, and "whenever/wherever" programming becomes more prevalent, cable distribution of traditional MVPD services will have a significant competitive advantage relative to other platforms. Satellite providers may be disadvantaged because they can offer only television programming without the additional complementary online content provision that cable can "bundle" in. DSL providers also will be disadvantaged because they do not have the capacity to provide multiple

[18] Chuang, T. "AT&T U-Verse Hits 2 million Users Today, no O.C. updates", OCregister.com, (12/9/09).

[19] O'Neill, J. "Verizon Earnings Tumble, but FiOS Growth Continues, Topping 3 Million", fierceiptv.com, (4/22/10).

simultaneous high-definition streams to a household.[20] As such, consumer choice in many markets across the U.S. may become more and more limited to a single cable service provider.[21]

22. Ideally from the consumer's point of view, online video content would become a truly competitive force in the market. To do so, two underlying conditions must be met. First, for consumers to be sovereign they must have the ability to divorce online services and programming from the traditional MVPD platform without restriction in content. This point has already been made in the current proceedings, and is addressed by Israel and Katz in some detail. Second, and the main focus of this analysis, online video content must not be discriminated against, in part or in whole, in terms of distribution and distribution quality, so that it is a truly equal-quality substitute in the market.

23. The market is moving in this direction in interesting ways. In particular, consider a product like Slingbox, which enables consumers to watch the video content from the MVPD that they subscribe to over any broadband connection. Although the original intent of Slingbox was to enable a subscriber to watch their preferred subscription programs on the road, it essentially has broken the link between the programming package and the

[20] Katz and Israel make this point in their discussion of network congestion. "…telcos' standard DSL networks may lack sufficient bandwidth to individual households to support more than one high-definition video stream at a time.…" (Israel and Katz Report, p. 22 (5/4/10)).

[21] Or there may be two service providers in the limited large metropolitan markets where Verizon FiOS can compete on all these dimensions with the local cable station.

pipe. That is, one could subscribe to DirecTV's programming package and watch it at home over an Internet connection purchased from Comcast. Thus, a subscriber in a Comcast franchise area need not be limited to Comcast's MVPD offerings. This has the potential for further disintermediation and competition in the industry. Thus, the OVPD model may provide greater competition even for the pricing of existing MVPD programming bundles if open access is allowed. An independent ISP would of course not have any incentive to favor one source of packaged programming over any other, but allow the consumer to pick their most preferred package and vendor. In contrast, the vertically integrated Comcast/NBCU would have an incentive to favor its own offerings and packages.

24. This latter point is of particular concern in the current transaction for two reasons. First, Comcast has a history of discrimination in its Internet distribution that would limit the extent to which online video service and programming can become a truly competitive force in the marketplace. Second, the current transaction only serves to increase Comcast's incentives to engage in such activity, as it will now have a more natural set of content to promote (NBCU or NBCU-affiliated content), and a more natural set of content to discriminate against (all other content).

B. Comcast Has Historically Engaged In Anti-Competitive Behavior

25. Comcast has a history of degrading rivals' online products. On August 1, 2008, the FCC formally ruled that Comcast had illegally throttled BitTorrent traffic.[22] BitTorrent protocol was being utilized by several companies including Warner Bros., Viacom, PBS, and Paramount Pictures to distribute online media content. As the general counsel for Vuze, one of the initiators of the FCC inquiry, put it, "Comcast is a competitor to all of us who deliver high-quality video content."[23] Comcast also drew public scrutiny for purposely degrading signal quality in an attempt to find more economical ways to provide service.[24]

26. It has also been suggested that Comcast has selectively applied recompression to HDTV signals that would affect the viewing quality. The data on this issue as reported by the AVS Forum is reproduced below. [25]

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

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

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

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

TABLE 1:

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

Average Bitrates on FiOS v. Comcast
Code:

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

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

28. On a forward-looking basis, absent more competitive choices, it would be difficult to monitor such discriminatory behavior and determine if it was motivated by legitimate network traffic management concerns. Even if a household were to successfully detect discriminatory behavior, the costs of

seeking recourse are too high for the household to bear individually.[26] EarthLink, and other independent ISPs, can collectively represent the interests of these households, allowing marketplace and consumer choice to discipline behavior, as discussed in Section VII.

29. In contrast, Time Warner Cable, which is subject to pro-competitive discipline from competitive ISPs, has not engaged in such behavior. In light of this, it is interesting to note that EarthLink's proposed pro-competitive structural solution was implemented successfully in the AOL/Time Warner merger, as discussed in detail below.

IV. THE ROLE OF REGULATION AND ANTITRUST IN NASCENT MARKETS

30. From a regulatory and antitrust perspective, the proposed transaction would cause a substantial change in the structure of the relevant markets. Because of the nascent nature of the market for online video distribution and programming, this change in market structure would fundamentally change the future course of this market. As a result, the transaction may affect consumer behavior by stifling the emergence of online video and foreclosing online video as a substitute service.

31. Traditional MVPDs have every incentive to try to appropriate as much of the emerging market as possible. Given this overall strategy by industry players, the presence of substantial barriers to entry means that the

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

evolution of the market structure during the nascent phase of these markets will have its effects magnified over time. Development and guidance of the market structure at this critical moment in the evolution of these markets will determine long-run performance. Once the "eggs are scrambled" by the joint venture, regulatory and antitrust enforcement will only become more difficult, for example, in the (likely) later event that Comcast seeks to acquire the remaining portion of NBCU.[27]

32. If one accepts the current case of the complementary nascent market for online video services and programming, Comcast's obvious strategy is to (1) channel the growth and development of online video distribution toward complementary product positioning, which will help to protect its current profit margins by managing any direct competition in the marketplace, and (2) restrict access to the content they can control and/or discriminate against the content they can't control.

33. Israel and Katz conclude that the nascent nature of the complementary markets for online video distribution and programming means that the Commission should proceed with great caution, if at all, regarding any structural or regulatory measures designed to mitigate anti-competitive

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

effects.[28] I disagree. In fact, the nascent nature of the markets makes it more—not less—important for the Commission to take actions to prevent likely anti-competitive effects.

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

V. APPLICATION OF THE COMMISSION STAFF MODEL

35. These conclusions, and my fundamental disagreement with Israel and Katz, are based on economic rationality, but I note that they are not inconsistent with the Commission Staff model for several reasons. First, Israel and Katz readily acknowledge that critical parameters in the Commission Staff model are highly uncertain. The reliability of these parameters is the basis for the Israel and Katz conclusion that the proposed transaction will not harm consumer welfare. It must also follow, then,

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

from the same uncertainty surrounding the parameters that there is a substantial probability that the proposed transaction will harm consumer welfare.[29] Given this uncertainty, as well as the nascent nature of the relevant markets, the prudent regulatory and antitrust policy is for the FCC to take a cautious approach and explore remedies that would effectively eliminate those albeit uncertain outcomes that would be harmful to consumer welfare.

36. It is also worth noting that Israel and Katz fail to examine an important issue in the transaction: the competitive implications of bundling by Comcast, i.e., bundling its MVPD video service with its cable Internet service, as in "Fancast Xfinity." They merely state: "In order for a household to view video programming delivered over the Internet, the household must purchase Internet access."[30] As discussed below, however, the ability (or inability) to bundle services will affect the structure of the market significantly.[31]

37. In light of these issues, it is difficult to rely too heavily or exclusively on the results presented by Israel and Katz based on the Commission Staff model. EarthLink has proposed an additional low-cost structural remedy for the Commission to consider in conjunction with the Israel and Katz

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

[30] Israel and Katz Report, p. 3 (5/4/10).

[31] At its most basic level, of course, this will affect whether and how soon consumers begin to view online video services and programming as a competitive substitute to the traditional MVPD format.

results, which more specifically addresses the issue of Comcast's incentives to discriminate in terms of online content distribution. I turn to an analysis of this proposed remedy in Section VII.

VI. MERGER IMPACT ON PRICING

38. Mixed bundling, selling a bundle of services at a price below the sum of the prices of the individual service components, "is an extremely effective means of indirectly price discriminating."[32] Mixed bundling is also indicative of market power (*e.g.*, as seen in the bundling practices of Microsoft Office) and is a common strategy in this industry where "triple play" packages for provision of video, voice and broadband Internet are prevalent.

39. The merger of NBCU and Comcast must have an impact on pricing. Consider the price of stand-alone broadband access from Comcast today. In setting the current price, Comcast balances lost revenues from higher stand-alone prices (which some consumers will choose not to buy at the higher price) with the added revenues from customers with higher profit bundled services.[33] Therefore, at the margin, the post merger Comcast entity will have the incentive to raise the price of stand-alone broadband service absent other competitive pressures.

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

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

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

41. Sufficient competitive choices, such as an independent ISP like EarthLink could provide, would mitigate the harm to consumers who wished to remain with a stand-alone broadband provider at the old prices. This is

because the availability of sufficient neutral provider choices would serve to discipline Comcast's ability to raise prices.

VII. EARTHLINK'S PROPOSED STRUCTURAL REMEDY IS PRO-COMPETITIVE

A. Proposed Structure

42. EarthLink has proposed that the Commission apply the same remedy used in the AOL/Time Warner merger, namely that "[Comcast/NBCU] shall not restrict the ability of any current or prospective ISP customers to select and initiate service from any unaffiliated ISP which, pursuant to a contract with [Comcast/NBCU], has made its service available over [Comcast/NBCU's] cable facilities ("Participating ISP"). [Comcast/NBCU] shall allow customers to select a Participating ISP by a method that does not discriminate in favor of [Comcast/NBCU's] affiliates on the basis of affiliation," as well as other billing, technical, contracting and enforcement provisions the Commission provided in its remedy for the AOL/Time Warner merger.[34]

43. The FTC adopted certain non-discrimination requirements for the EarthLink agreement. These included: "A. Respondents shall not interfere in any way, directly or indirectly, with Content passed in either direction along the Bandwidth contracted for and being used by any Non-affiliated ISP in compliance with the Non-affiliated ISP's agreement with Respondents;" and "D. Respondents shall not discriminate on the basis of affiliation in the

[34] *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., to AOL Time Warner Inc.*, Memorandum Opinion and Order, 16 FCC Rcd. 6547 (2001).

transmission or modification of Content that Respondents have contracted to deliver to Subscribers over their cable systems."[35]

B. Rationale for Proposed Structure

44. The structural solution proposed by EarthLink ensures that, if Comcast engages in discriminatory activity that degrades consumer welfare, consumers will have the option to switch to another ISP that does not have the same incentives to discriminate against specific content because they do not have the same content-integrated structure as the Comcast/NBCU entity. In other words, consumers will have the ability to use the same infrastructure to download the same content without having to worry about whether some content will be purposefully delayed or degraded. Having independent ISPs on their network, which will allow consumer choice, will discourage Comcast from engaging in deceptive network management practices similar to the BitTorrent activity because independent ISPs are less likely to be complicit. Regardless of whether particular online video *content* is a substitute or a complement in relation to Comcast/NBCU broadcast and/or cable products and/or service, the provision of Internet service by an independent ISP is *always a substitute* for the provision of Internet service by Comcast.

[35] America Online, Inc. and Time Warner Inc., FTC Docket No. C-3989, Decision and Order, File No. 001 0105, 11 (FTC) (proposed Dec. 14, 2000).

45. Moreover, because these competitor ISPs do not own the major content sources such as Comcast combined with NBCU, they will not have incentive to discriminate against the same content as Comcast. Furthermore, ISPs such as EarthLink with no owned content will not have an incentive to discriminate at all. Instead, they will try to provide the best service they can in an attempt to be competitive. Secondly, because they are independent and do not own traditional broadcast or MVPD distribution channels, they have no incentive to favor one distribution channel over another.

46. This remedy mitigates the potential harm to consumers by ensuring they will have a choice of ISPs, even if they choose to use Comcast's cable TV and/or voice service. Allowing consumers to "break the bundle" if they so choose promotes competition and disciplines Comcast pricing of Internet service provision. On a forward-looking basis as noted above, this may become even more of an issue as cable modem speeds improve over DSL. Sufficient competition may not be offered by DSL competitors due to bandwidth constraints and, thus, may not be considered a disciplining alternative. Thus, the competition provided by Verizon FiOS (for consumers in those geographic markets where FiOS is deployed), or possibly over-builders who have also deployed a fiber or hybrid fiber/coax network, are likely the only competition that exists in the relevant product

market. So the question remains: will the limited geographic scope and depth of this competition be enough to constrain the possible harms?

47. This remedy has the added benefit of indirectly encouraging the further development of online video programming by "leveling the playing field." By making it difficult for content-integrated ISPs to discriminate against non-affiliated programming, this solution will promote the growth and health of these programmers, giving consumers more diversity in online content. This will put pressure on Comcast to continue to invest in, and expand, their broadband network. It will also diminish the incentive of Comcast/NBCU to paralyze online video programming with unaffiliated content, as there would be a real marketplace "penalty" imposed upon them by upset customers who will switch to another ISP.

48. In a nascent market, the Commission should move with a not undue preponderance of caution, recognizing the gravity of their actions in creating long term structural shifts in the market for online video programming. The costs of denying or regulating the proposed merger must be outweighed by the perceived benefits to consumers in terms of increased competition, choice, and quality. For the online video services and programming market, the EarthLink proposal passes this cost/benefit test. The costs are minimal, requiring only a pro-competitive structural arrangement. Moreover, Comcast would still make a profit even when a consumer uses EarthLink, as EarthLink would still pay a wholesale rate to

Comcast for the service. On the other hand, the expected potential benefits of allowing for a market-based correction mechanism to prevent Comcast/NBCU from engaging in anti-competitive behavior are large.

C. History of AOL/Time Warner Condition

49. The condition imposed in 2000 required that the parties negotiate in good faith for commercial contracts with three unaffiliated ISPs. As a condition of the merger closing, a commercial arrangement had to be reached with EarthLink. Since then, ten years have passed in which to examine if the condition has had any adverse side effects on investment or competition. As a threshold matter, it is worth pointing out that AOL/Time Warner is vertically integrated and has not been found to be engaging in the discriminatory practices that it has been alleged Comcast engaged in.

50. In Table 2 below, I present data on investment since 2001 for Comcast and Time Warner. As can be seen both on a per-subscriber basis and as percentage of revenues, Time Warner has invested more in its network than Comcast. This is true even though Time Warner was subject to the FCC access rules for 6 years and then voluntarily agreed to renew them on a negotiated basis.

TABLE 2:

Cable Infrastructure Expenditures

(in Millions, except subscribers)

MVPD Service Providers	Basic Video Subscribers [1]	2001-2009 Subscription Revenues	2001-2009 Capital Expenditures	Expenditure per Subscriber	Expenditure % of Revenues
Comcast Corporation	23,559,000	$165,550	$35,394	$1,502	21.4%
Time Warner Cable, Inc.	12,859,000	$94,438	$21,526	$1,674	22.8%

[1] As of Dec. 2009.

Source: http://www.ncta.com/Stats/TopMSOs.aspx
Comcast 10-K 2001, 2003, 2006, 2007, 2009
Time Warner Cable 10-K 2006, 2007, 2009
Time Warner Inc. 10-K 2002, 2003

51. Similarly, the presence of the AOL/Time Warner condition has not adversely affected costs and pricing, as Time Warner Cable stand-alone Internet pricing is actually lower than the comparable service of Comcast.[36] This is shown in Table 3.

[36] I compared Time Warner pricing for the Los Angeles area to pricing offered by Comcast for the closest comparable area, San Jose. Time Warner pricing is for the first 12 months of service. Subsequent pricing information was not made available on their website.

TABLE 3:

Standalone Cable Internet Monthly Pricing[1]

Time Warner Cable (Los Angeles)		Comcast (San Jose)	
Speed	**Price**	**Speed**	**Price**
up to 1.5Mbps	$29.99	up to 1.5Mbps	$43.95
up to 15Mbps	$49.99	up to 15Mbps	$62.95

[1] Includes monthly modem rental.

Source: www.timewarnercable.com
www.comcast.com

52. This is surprising. Given the higher degree of vertical integration in comparison to Comcast, I would expect higher pricing for stand-alone Internet service from Time Warner, as explained in Section VI. The above is consistent with the hypothesis that the AOL/Time Warner condition is pro-competitive.

53. Thus, the evidence suggests that AOL/Time Warner condition has essentially imposed no social costs and provided consumers with greater choice. In this case, it remains a very low cost (possibly a zero cost) option that provides protection against the putative harms identified above.

D. Implementation

54. The viability of the mechanism implemented in the AOL/Time Warner merger depends on the wholesale pricing for access to the cable provider's

infrastructure allowing for competitive entry of alternative ISPs. In other words, Comcast must not be able to create a "price squeeze" that makes entry impossible. In AOL/Time Warner the condition required that the three commercial contracts with independent ISPs be negotiated in order for the merger to be approved. This incentive to strike a deal on commercially viable terms provided pressure to thwart a price squeeze, at least at the outset.

55. However, even absent these pressures, it would be easy to benchmark what are reasonable terms based on industry practices. In particular, as EarthLink already has a commercial contract with Time Warner, a market benchmark has been established. This could be used in an arbitration proceeding following the FCC arbitration mechanism for programming that has been applied both in the News Corp./DirecTV transaction and the Adelphia/Comcast transaction.

56. Secondly, EarthLink has an industry benchmark in the case of wholesale sale of special access circuits. In particular, it has been common for special access pricing to be a 40% discount off the rack price if one signs a long term (5 year) contract. Thus, as the proposed condition is also for long term access, a natural benchmark would be 40% of the retail price.

57. A third approach is following a so-called "imputation test." That is, we could infer that the incremental cost of offering broadband is less than the incremental price of adding it to bundle and, thus, if we take this number

and subtract the avoided cost for ISP services and managing the customer relationship, then we can obtain an imputed cost which forms a reasonable basis for benchmarking a price. This approach, of course, ensures that Comcast cannot exploit an indirect price squeeze through the difference between the bundle pricing and the standalone broadband price offering.

VIII. CONCLUSION

58. Based on the foregoing analysis, it is clear that the proposed Comcast/NBCU transaction will provide the post-merger Comcast with strong incentives and abilities to interfere with emerging online video services and affect broadband pricing in a manner that is harmful to consumer welfare. EarthLink's proposed structural remedy as a condition of merger approval will be a low-cost and effective mechanism to improve significantly the public welfare results of the Transaction.

APPENDIX 3

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

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

DECLARATION

I, Samuel R. DeSimone, Jr., General Counsel and Secretary, EarthLink, Inc. hereby declare to the best of my knowledge and belief that the facts contained in the EarthLink Petition to Condition or Deny, filed with the Federal Communications Commission on June 21, 2010, are true and correct.

Samuel R. DeSimone, Jr.

June 21, 2010