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July 21, 2010

FILED/ACCEPTED

JUL 21 2010

Federal Communications Commission
Office of the Secretary

***Via Hand Delivery and ECFS***

Marlene H. Dortch
Federal Communications Commission
Office of the Secretary
445 Twelfth Street, S.W.
Washington, D.C. 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 Licensees, MB Docket No. 10-56**

**REDACTED – FOR PUBLIC INSPECTION**

Dear Ms. Dortch:

On Behalf of the American Cable Association ("ACA") and in accordance with the First and Second Protective Orders adopted in this proceeding,[1] enclosed please find two copies of the redacted, public version of ACA's Response to Comments.

The symbols ** Begins Highly Confidential** and ** Ends Highly Confidential ** denote where Highly Confidential Information has been redacted.

Additionally, an unredacted Highly Confidential version of this filing is being filed simultaneously with the Office of the Secretary under separate cover letter and under seal, and will be made available pursuant to the terms of the Protective Orders.

Sincerely,

Barbara Esbin

Barbara S. Esbin
Counsel for American Cable Association

Enclosures

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[1] *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licensees*, Protective Order, 25 FCC Rcd 2133 (MB 2010); *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licensees*, Second Protective Order, 25 FCC Rcd 2140 (MB 2010).

**REDACTED – FOR PUBLIC INSPECTION**

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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

**RESPONSE TO COMMENTS**

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July 21, 2010

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## SUMMARY

The Applicants maintain that "the proposed transaction presents no 'horizontal' competitive concerns" and "no cognizable threat of 'vertical' anticompetitive effects," and thus consumers and competition would not be harmed significantly. The ACA respectfully and adamantly disagrees with both contentions. In its initial comments, the ACA demonstrated that: (1) the proposed combination of NBCU's and Comcast's programming assets would result in significant increases in market power for the new Joint Venture, leading to higher prices both for multichannel video programming distributors ("MVPDs") purchasing this programming and for their customers; and (2) the proposed combination of NBCU's programming assets and Comcast's cable distribution systems would result in MVPDs that compete with these cable systems paying significantly higher prices for NBCU programming, which again would be passed on to their customers. In these comments, the ACA reinforces these conclusions based on information provided in key documents Comcast and NBCU have submitted to the Commission to date, and it demonstrates that the horizontal and vertical harms will be even more significant and widespread than described by the ACA in its initial comments. Consequently, the Commission cannot find the proposed combination is in the public interest without first adopting complete, robust, and durable remedies to ameliorate these harms.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc., to Assign and Transfer Control of FCC Licenses | ) | MB Docket No. 10-56 |

**RESPONSE TO COMMENTS**

Pursuant to the Public Notice issued by the Federal Communications Commission ("FCC" or "Commission") in the above-captioned proceeding on March 18, 2010,[1] the American Cable Association ("ACA"),[2] by its attorneys, hereby files its response to comments on the applications by Comcast Corporation ("Comcast"), General Electric Company ("GE") and NBC Universal ("NBCU") (hereinafter referred

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1 *Commission Seeks Comment on Applications Filed by Comcast Corporation, General Electric Company and NBC Universal, Inc. to Assign and Transfer Control of FCC Licenses*, Public Notice, MB Docket No. 10-56, DA 10-457 (rel. Mar. 18, 2010) ("Public Notice").

2 The ACA represents approximately 900 small and medium-sized cable companies serving mostly smaller markets and rural areas throughout the United States. ACA's membership encompasses a wide variety of businesses – family-owned companies serving small towns and villages, multiple system operators serving predominantly rural markets in several states, and hundreds of companies in between. Together, these companies serve more than 7.6 million households and businesses. All ACA members transact with Comcast, NBCU and their affiliates for "must have" cable and broadcast programming, and other popular and important video offerings.

to jointly as the "Applicants") for consent to assign and transfer control of certain spectrum licenses to a new limited liability company that would constitute a joint venture of GE and Comcast. The ACA explained in its initial comments that the proposed transaction, if consummated, would have significant deleterious horizontal and vertical competitive effects. As shown herein, the data submitted by the Applicants in response to the Commission's information requests and the comments and supporting data filed by other interested parties verify the ACA's concerns and support its position that the transaction should not be approved absent enforceable conditions sufficient to protect competition and consumer welfare.

## I. THE RECORD CONFIRMS THE ACA'S DESCRIPTION OF THE HARMS CAUSED BY THE PROPOSED COMBINATION AND RAISES ADDITIONAL CONCERNS

The Applicants maintain that "the proposed transaction presents no 'horizontal' competitive concerns" and "no cognizable threat of 'vertical' anticompetitive effects,"[3] and thus consumers and competition would not suffer significant harms. The ACA respectfully and adamantly disagrees with both contentions. In its initial comments, the ACA demonstrated that: (1) the proposed combination of NBCU's and Comcast's programming assets would result in significant increases in market power for the new Joint Venture, leading to higher prices both for multichannel video programming distributors ("MVPDs") purchasing this programming and for their customers; and (2) the proposed combination of

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[3] *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses or Transfer Control of Licensees*, Applications and Public Interest Statement (filed Jan. 28, 2010), at 78. ("Comcast-NBCU Application")

NBCU's programming assets and Comcast's cable distribution systems would result in MVPDs that compete with these cable systems paying significantly higher prices for NBCU programming, which again would be passed on to their customers. In these comments, the ACA reinforces these conclusions with references to key documents Comcast and NBCU have submitted to the Commission to date.[4] The Applicants' documents show that they intend to **** BEGIN HIGHLY CONFIDENTIAL **** **** END HIGHLY CONFIDENTIAL **** to greatly enhance their market power and then leverage this enhanced market power to benefit Comcast's cable distribution properties and to the detriment of consumers and competition. As a result, the horizontal and vertical harms will be even more significant and widespread than described by the ACA in its initial comments.

At its heart, the proposed transaction is driven by the desire of the Applicants to increase the leverage (market power) of their programming assets, which they can then exercise to the detriment of MVPDs in general and competing MVPDs in particular. As discussed in the following sections, the documents submitted by the Applicants attest to the fact that: **** BEGIN HIGHLY CONFIDENTIAL ****

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[4] On July 15, 2010, the Applicants informed the Commission that they will be submitting additional "documents, data, and analyses" on July 21, 2010 in their Opposition to Petitions to Deny and Response to Comments. *See,* Letter from Michael H. Hammer, Counsel for Comcast Corporation, A. Richard Metzger, Jr., Counsel for General Electric Company, and David H. Solomon, Counsel for NBC Universal, Inc. to William T. Lake, Chief, Media Bureau, Federal Communications Commission, MB Docket No. 10-56 (July 15, 2010).) The ACA intends to examine this new information and file its own analysis as promptly as is reasonable.

**** END HIGHLY CONFIDENTIAL **** Thus, not only are concerns about the anticompetitive impacts of the transaction raised by the ACA fully warranted, but the degree and extent of harm is even greater than the ACA described in its initial comments. Consequently, the Commission cannot find the proposed combination is in the public interest without first adopting complete, robust, and durable remedies to ameliorate these harms.

## II. THE PRE-COMBINATION MARKET POWER OF COMCAST AND NBC UNIVERSAL IS SUBSTANTIAL

As explained by the ACA in its initial comments, in conducting an analysis of the proposed combination of Comcast and NBCU, it is important to first examine the assets each entity possesses today. NBCU is a leading video programmer, with 10 owned and operated ("O&O") NBC local broadcast television stations and more than 200 independently owned affiliated stations, 15 Telemundo network O&Os and 45 affiliated stations, and a suite of highly-rated national cable programming networks. While Comcast is unquestionably the leading MVPD, it also has important programming assets – particularly its 9 regional sports networks ("RSNs").

These programming assets are so important to viewers that they provide NBCU and Comcast each individually with substantial market power. The

Commission has held that national broadcast station programming such as that provided by NBCU's O&Os and network affiliates constitutes "must have" programming that all MVPDs, including the ACA's members, effectively must carry to be competitive.[5] NBCU internal documents confirm this conclusion **** BEGIN HIGHLY CONFIDENTIAL ****

**** END HIGHLY CONFIDENTIAL ****[7]

Importantly, not only does NBCU possess significant market power by virtue of its O&O's, but it wields that power against MVPDs to solidify and extend the power and reach of its cable programming networks.[8] **** BEGIN HIGHLY CONFIDENTIAL ****

**** END HIGHLY**

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5 For a complete discussion of "must have" programming issues, including the Commission's findings, *see* Initial Comments of the American Cable Association, MB Docket No. 10-56 (filed June 21, 2010) ("ACA Comments"), at 10-13.

6 39nbcu0000057.txt. 39nbcu0000059.

7 The documents submitted by NBCU in response to the Commission's request in "Image" format were all marked both "Confidential" and "Highly Confidential." It is for that reason that the ACA is using the "Highly Confidential" designation in these comments. The ACA also notes that these documents includes public documents, such as court opinions, and news or trade publication articles. Where documents are publicly available, the ACA uses the public version.

8 **** BEGIN HIGHLY CONFIDENTIAL ****

**** END HIGHLY CONFIDENTIAL ****

9 39nbcu0004426.txt.

**CONFIDENTIAL** ** NBCU notes that ** **BEGIN HIGHLY CONFIDENTIAL** **

** **END HIGHLY CONFIDENTIAL** ** As shown by NBCU internal documents, the company views retransmission of broadcast networks ** **BEGIN HIGHLY CONFIDENTIAL** **

** **END HIGHLY CONFIDENTIAL** **

In sum, NBCU strongly believes in the great economic value of its broadcast network assets, particularly its local station affiliates. NBCU states that ** **BEGIN HIGHLY CONFIDENTIAL** **

** **END HIGHLY CONFIDENTIAL** ** Indeed, the company brags that this strategy has ** **BEGIN HIGHLY CONFIDENTIAL** **

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10 *Id.*

11 39nbcu0000001.txt.

12 *Id.*

13 39nbcu0005850.txt.

** END HIGHLY CONFIDENTIAL **

The same "must have" status applies to NBCU's highly popular cable programming networks such as USA, Syfy, MSNBC, CNBC, Bravo and Oxygen. This is confirmed in documents submitted to the Commission both by Comcast and NBCU. Comcast states ** BEGIN HIGHLY CONFIDENTIAL ** ** END HIGHLY CONFIDENTIAL ** NBCU proudly describes its cable network properties as ** BEGIN HIGHLY CONFIDENTIAL ** ** END HIGHLY CONFIDENTIAL **

Today, Comcast also enjoys substantial market power in those local/regional video programming markets where it owns its 9 RSNs. In a Rating Agency Presentation on November 5, 2009 to review the proposed transaction, the Applicants refer to the RSNs as ** BEGIN HIGHLY CONFIDENTIAL **

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[14] 39nbcu0000001.txt.

[15] 31-COM-00000332.

[16] 39nbcu0004426.txt.

[17] *Id.*

**** END HIGHLY CONFIDENTIAL **** Internal documents from April 2010 released by Comcast detail what Comcast describes as **** BEGIN HIGHLY CONFIDENTIAL ****

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**END HIGHLY CONFIDENTIAL ****

The record compiled thus far clearly demonstrates that, if the proposed transaction is permitted to take place, the Applicants' market power will increase dramatically. As succinctly stated by the American Antitrust Institute ("AAI"), "[t]he proposed JV [Joint Venture] is designed to shelter Comcast and NBCU businesses from competition. This rationale is based fundamentally on the enhancement of market power and the potential to execute anticompetitive strategies."[20]

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18 39nbcu0005871, at 46. **** BEGIN HIGHLY CONFIDENTIAL ****
**** END HIGHLY CONFIDENTIAL ****

19 **** BEGIN HIGHLY CONFIDENTIAL **** **** END HIGHLY CONFIDENTIAL ****, 53-COM-00000058.

20 Comments of the American Antitrust Institute, MB Docket No. 10-56 (filed June 21, 2010) ("AAI Comments"), at 26.

Absent sufficient, enforceable conditions, the Applicants' combined and enhanced market power will be exercised over MVPDs seeking to acquire programming for linear and online distribution. Additionally, as demonstrated by the ACA's initial comments, the Applicants will have the incentive and ability to use their market power to harm MVPDs that compete directly with Comcast's cable systems.[21] The ACA's concerns are shared by others, including the Public Interest Petitioners:

> The merging parties are already among the dominant players in the current video market. This merger will give them the incentive and ability to not only preserve and exploit the worst aspects of the current market, but also to extend them to emerging markets. The merger will result in higher prices, fewer programming and provider choices, and diminished media diversity. It will inhibit innovation in budding markets and will encourage other similarly situated companies to follow suit or suffer diminished market power relative to what the Applicants will possess post-merger.[22]

The Applicants' post-combination market power will afford them the ability to diminish competition and harm consumers along several critical dimensions. The horizontal combination of NBCU and Comcast "must have" programming will create the incentive and ability to raise costs for all MVPDs to purchase both types of programming.[23] Increasing costs for programming will result in raised costs to

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21 ACA Comments, at 25-34.

22 Joint Petition to Deny of Consumer Federation of America, Consumers Union, Free Press, and the Media Access Project, MB Docket No. 10-56 (filed June 21, 2010) ("Public Interest Petitioners Comments"), at 12.

23 *See* ACA Comments, at 17-25; *see also* William P. Rogerson, "Economic Analysis of the Competitive Harms of the Proposed Comcast-NBCU Transaction" (June 21, 2010) ("Rogerson Report"), attached as Exhibit A to ACA Comments, at 9-18.

consumers, weaken smaller MVPDs' ability to compete, and siphon resources away from needed broadband deployment.

Further, the transaction raises the potential for serious vertical harms in the distribution of linear and online video programming. By providing Comcast with control of NBCU's programming assets, the transaction will afford it additional incentive and ability to harm MVPDs against whom it competes directly by increasing the cost of "must have" and other popular linear programming. As a direct consequence of these cost increases, prices to consumers will rise and competition will suffer.[24] The same dynamics extend to the online distribution of Comcast/NBCU-controlled programming.

In its initial comments, the ACA explained that existing program access rules and previous merger conditions imposed by the Commission are inadequate to address the risks of harm inherent in the proposed transaction.[25] The ACA called on the Applicants to propose additional safeguards to address the risks of harm to smaller MVPDs and their customers.[26] As shown below, the documents produced by Comcast and NBCU prove that the potential harms identified by the ACA – and echoed by other commenters – are not hypothetical, but are likely to occur post-transaction. Thus, it is essential that safeguards in addition to those proffered by the Applicants be put in place if the transaction is to be approved.

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24 *See* ACA Comments, at 25-37; Rogerson Report, at 18-27.

25 ACA Comments, at 37-47.

26 *Id.*, at 47.

## III. APPLICANTS' SUBSTANTIAL HORIZONTAL AND VERTICAL MARKET POWER WILL BE SIGNIFICANTLY INCREASED BY THE PROPOSED COMBINATION OF COMCAST AND NBCU ASSETS

The programming assets of NBCU and Comcast today provide each company with significant market power which they do not hesitate to wield. As discussed by Professor William P. Rogerson in his economic analysis of the transaction, combining the Applicants' programming assets so they are owned and controlled by a single entity would materially increase that market power.[27] Absent appropriate regulatory safeguards, the combined entity would exercise this enhanced market power when selling programming to all MVPDs, and especially to those MVPDs that compete directly with Comcast cable systems, to the detriment of competition and consumer welfare.

### A. The Proposed Transaction Threatens Serious Horizontal Harms

In its initial comments and the accompanying analysis by Professor Rogerson, the ACA explained that by combining control over NBCU's "must have" broadcast and cable network programming and Comcast's "must have" RSNs, the post-transaction entity will have the ability to command significantly higher prices for these types of programming, especially in markets where MVPDs distribute both a

[27] *See* William P. Rogerson, Economic Analysis of the Competitive Harms of the Proposed Comcast NBCU Transaction, (June 21, 2010), attached as Exhibit A to ACA's Comments, filed June 21, 2010 ("Rogerson Report"), at 14.

Comcast RSN and an NBCU O&O station.[28] Higher programming fees will result in higher cable service subscription fees for consumers.[29]

The economic theory underlying this conclusion is that combined ownership of the programming assets will expand the joint entity's bargaining power and thus allow it to charge higher fees for this programming.[30] The programming fee increases will then be passed on to subscribers in the form of higher subscription prices.[31] According to Professor Rogerson, when a programmer and an MVPD negotiate the fee that the MVPD will pay the programmer, they basically are deciding how to divide the joint economic gains created from having the MVPD carry the programming.[32] Application of the standard modeling approach used in the economic literature demonstrates that a programmer selling two different networks will be able to charge more by bundling the networks together so long as the networks are substitutes in the sense that the marginal value of either of the networks to the MVPD is lower

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28 *See* ACA Comments, at 19-25; Rogerson Report, at 9-18. Regarding the areas where harm will occur, the ACA notes in its initial comments (n.60) that in the *News Corp.-Hughes Order*: "The Commission found that 'News Corp. currently possesses significant market power in the DMAs in which it has the ability to negotiate retransmission consent agreements on behalf of local broadcast television stations.' The Commission further stated that, 'Our conclusions apply to any O&O station as well as any local broadcast station affiliate on whose behalf News Corp. negotiates retransmission consent agreements.'" *In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee*, MB Docket N. 03-124, Memorandum Opinion and Order, 19 FCC Rcd 473, 565, n.577 ("*News Corp.-Hughes Order*").

29 ACA Comments, at 19.

30 Rogerson Report, at 11.

31 *Id.*

32 *Id.*

conditional on already carrying the other network.[33] In short, a single network owner will be able to negotiate higher total fees than will two independent network owners.[34]

The Applicants contend that "[t]he proposed overlaps between Comcast's and NBCU's businesses are extremely limited" and thus "[t]he proposed transaction will not increase the likelihood of coordinated or unilateral harms."[35] However, a review of the documents produced by the Applicants demonstrates that in fact they recognize there is a substantial overlap in the programming assets of Comcast and NBCU, that they intend to sell these assets in combination to MVPDs and that they are likely to add to them to increase the number of programming overlaps. In other words, Professor Rogerson's analysis should be viewed as a conservative assessment of the post-transaction behavior in which the Applicants plan to engage and the impact such behavior is likely to have on MVPDs and subscribers.

Numerous Comcast internal documents address ** **BEGIN HIGHLY CONFIDENTIAL** **

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33 *Id.*

34 According to Professor Rogerson, the basic economic reason for this conclusion is that when negotiations for each network occur separately, each programmer is only able to extract some share of the joint profit from adding the last network but when negotiations occur for a bundle of networks, the programmer is able to extract a share of the joint surplus from adding the entire bundle. Rogerson Report, at 13. Professor Rogerson also notes that Comcast's economic expert, Professor Michael Katz, in a filing to the Commission in another proceeding, supports the concern about joint negotiations lessening competition: "To the extent that broadcast stations entering into LMAs are substitutes from the perspective of MVPDs, such negotiations eliminate competition and raise the stations' bargaining power, which will result in consumer harm." Rogerson Report, at 17. *See also* Comments of Time Warner Cable Inc., MB Docket No. 09-182 (filed July 12, 2010) at 8 ("By aggregating their market power and negotiating in tandem instead of in competition with one another, broadcasters can more easily raise the price of retransmission consent and more effectively threaten to withhold their signals during negotiations.").

35 Comcast-NBCU Application, at 89.

**** END HIGHLY CONFIDENTIAL **** According to Comcast, **** BEGIN HIGHLY CONFIDENTIAL ****

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Comcast succinctly describes **** BEGIN HIGHLY CONFIDENTIAL ****

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[36] 31-COM-00000326.

[37] 31-COM-00000334.

[38] 31-COM-00000332.

[39] 31-COM-00000333.

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Professor Rogerson noted that the "greatest threat of horizontal harms from this transaction occurs in regions of the country served by an NBC O&O and a Comcast RSN" and that the "transaction also threatens horizontal harm in regions of

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40 31-COM-00000338. Document 31-COM-00000326, **** BEGIN HIGHLY CONFIDENTIAL ****

**** END HIGHLY CONFIDENTIAL ****

41 31-COM-00000299. The ACA does not contest that there may be so-called beneficial synergies in the combination of programming assets. Rather, the ACA maintains (and has demonstrated a likelihood) that in the particular instance of the combination proposed by Comcast and NBCU, the combined entity will have substantially *enhanced* market power as a direct result of the transaction, which will be employed to raise prices significantly for a great many consumers.

the country served by a Comcast RSN but not served by an NBC O&O."[42] The documents submitted by Comcast ** **BEGIN HIGHLY CONFIDENTIAL** **

** **END HIGHLY CONFIDENTIAL** ** demonstrate, however, that the actual harms are likely to be greater and occur in many more areas of the country.

In addition, NBCU internal documents from late 2009 detail the company's plans to extend the substantial leverage (and resulting market power) afforded by control of broadcast retransmission consent rights beyond its O&O markets, which would then increase the number of areas subject to competitive harms from the proposed transaction. The documents describe ** **BEGIN HIGHLY CONFIDENTIAL** **

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**END HIGHLY CONFIDENTIAL** ** The proposed transaction would provide the combined entity with enhanced incentives to employ this strategy and greater potential financial rewards from its application. At the same time, the potential for harm to consumers and competition would rise significantly. Indeed, internal documents produced by Comcast ** **BEGIN HIGHLY CONFIDENTIAL** **

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42 Rogerson Report, at 5.

43 39nbcu0001687.txt.

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Thus, the Commission should expect that, post-transaction, Applicants will employ their augmented ability to act on existing incentives to combine programming assets to increase bargaining leverage resulting in substantially enhanced market power, and that this newly augmented market power will be employed far more extensively than the ACA described in its initial comments.

Other interested parties have reached similar conclusions. The Public Interest Petitioners have noted:

> [t]he crux of the merger is the consolidation of control over bundles of critical programming categories that distributors ... must have in order to attract viewers. As the operator of major broadcast and cable networks, NBCU has significant market share in several critical programming areas. Comcast also has amassed a significant amount of content that the FCC has acknowledged to be "must have" programming – to wit, its sizeable and exclusive control over regional sports programming across the country. Together, Comcast and NBCU will exert substantial control over critical content categories – sports, news, Spanish language, and women's programming.[45]

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44 31-COM-00000616. **** BEGIN HIGHLY CONFIDENTIAL ****
**** END HIGHLY CONFIDENTIAL **** Document 31-COM-00000330. **** BEGIN HIGHLY CONFIDENTIAL ****

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45 Public Interest Petitioners Comments, at 18.

The National Telecommunications Cooperative Association ("NTCA") and the Western Telecommunications Alliance ("WTA") echoed the concern that "[t]he merged entity will control a much larger block of highly demanded programming" and cautioned that by controlling this expanded block of highly demanded programming, "the merged entity will be able to charge higher fees to MVPDs and impose onerous contractual requirements and restrictions."[46] Several commenters confirmed that the combined entity could employ the retransmission consent process to "bundle cable network content with the broadcast signal to fetch higher prices for NBC and Telemundo broadcast and cable content, as well as Comcast cable content."[47] They noted further that ultimately these price increases "would be passed on to the subscribers of Comcast's competitors."[48]

### B. The Proposed Transaction Threatens Serious Vertical Harms

In addition to the horizontal harms described in the preceding section, the proposed transaction raises the threat of serious vertical harms that must be addressed by the Applicants and the Commission.

The proposed transaction would combine NBCU's programming assets with Comcast's extensive cable systems. Thus, the transaction would result in significantly enhanced vertical integration. Professor Rogerson explains that this

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46 Petition to Deny and Comments of the National Telecommunications Cooperative Association and the Western Telecommunications Alliance, MB Docket No. 10-56 (filed June 21, 2010) ("NTCA/WTA Comments"), at 4.

47 Public Interest Petitioners Comments, at 31.

48 *Id.*

heightened vertical integration "would increase the joint venture's ability to bargain for higher programming fees for NBCU programming from MVPD rivals of Comcast."[49] Ultimately, "[t]hese fee increases will be substantially passed through to subscribers in the form of higher subscription fees."[50]

In his analysis, Professor Rogerson estimates the effect of the enhanced vertical integration from the proposed transaction on the prices that the combined entity will charge for NBCU programming to three types of MVPDs: DBS providers and the two largest local telephone providers of video programming (*i.e.*, AT&T and Verizon), other incumbent cable system operators, and cable overbuilders (including broadband service providers and local exchange carriers – "LECs" – who distribute video programming and compete with incumbent operators).[51] The basis for Professor Rogerson's calculation of the effect is that the per-subscriber opportunity cost of selling programming to subscribers of a MVPD competing with a Comcast cable system is equal to the share of customers that would switch to the competitor multiplied by the profit per subscriber that the Comcast cable system would earn on every customers who switches.[52] The estimated price increase to the competing

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49 Rogerson Report, at 19.

50 *Id.*

51 *Id.*, at 35.

52 *Id.*

MVPD is equal to half the value of the increased opportunity cost created by the transaction.[53]

Professor Rogerson uses publicly available data to calculate a "reasonably plausible initial estimate of the likely effect of the vertical transaction on programming fees."[54] For the six designated market areas ("DMAs") with NBCU O&Os where Comcast cable systems are a significant presence, Professor Rogerson estimates that the vertical effect of the proposed transaction will essentially be a doubling of retransmission consent fees that the NBCU O&O broadcast station can command through retransmission consent negotiation.[55] Further, Professor Rogerson calculates that fees for NBCU's national cable networks charged to satellite TV providers and the two largest LECs will increase 18%.[56] Finally, Professor Rogerson calculates that for cable overbuilders and smaller LECs increases of more than 100% in retransmission consent fees increases and of over 40% in fees for NBCU's national cable networks will occur in situations where 100% of the cable overbuilder's or LEC's customers are passed by Comcast.[57] Even in instances where less than

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53 *Id.*, at 21-22.

54 *Id.*, at 30.

55 *Id.*, at 37.

56 *Id.*, at 38.

57 *Id.*, at 40.

100% of the cable overbuilder's or LEC's customers are passed by Comcast, the resulting retransmission programming fee increases will be significant.[58]

The internal documents produced by the Applicants show not only that they are highly cognizant of the financial rewards the combined entity will reap by combining NBCU's programming assets with Comcast's extensive cable distribution systems but also that this potential windfall represents a major motivation for the deal.

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Numerous commenters share the ACA's concerns regarding the post-transaction entity's ability to extract higher retransmission consent and program access fees from competing MVPDs. NTCA/WTA observe:

> The merger creates a situation in which the network is also a MVPD competitor. The new company has the ability to charge outrageous fees for network programming and the incentive to withhold it from competitors. The merged company will have negotiating power not before seen in the retransmission consent process.[61]

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58 Professor Rogerson calculates that cable overbuilder RCN, 44% of whose customers are passed by Comcast, would experience a 58% increase in retransmission consent fees and a 19% increase in program access fees for the NBCU national cable networks bundle.

59 31-COM-00000304.

60 31-COM-00000299.

61 NTCA/WTA Comments, at 7.

Similarly, DIRECTV cogently observes that: "[t]he most significant impact of the proposed transaction would be higher prices ..."[62] DIRECTV sponsored a report by Professor Kevin Murphy in which a standard bargaining model (similar to that employed by Professor Rogerson) was used to determine the likely increase in prices for NBCU broadcast programming that would result from the transaction.[63] Professor Murphy estimated that retransmission consent rates would increase after Comcast's acquisition of NBCU in a range "from ** **BEGIN HIGHLY CONFIDENTIAL** **

** **END HIGHLY CONFIDENTIAL** ** These estimated fee increases from vertical integration clearly are substantial. Moreover, although Professor Murphy's analysis focuses on the effects in markets where NBCU has O&O stations, "there is good reason to believe that the impact will be felt more broadly."[65]

In addition to the ability to exercise market power to materially increase prices to MVPDs addressed by Professors Rogerson and Murphy, several commenters identified related non-price harms that would flow from the vertical integration of

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62 Comments of DIRECTV, Inc., MB Docket No. 10-56 (filed June 21, 2010) ("DIRECTV Comments"), at 15.

63 *See* Kevin M. Murphy, "Economic Analysis of the Impact of the Proposed Comcast/NBCU Transaction on the Cost to MVPDs of Obtaining Access to NBCU Programming" (June 21, 2010) ("Murphy Report"), attached as Exhibit A to DIRECTV Comments.

64 Murphy Report, at 21-22.

65 Comments of DIRECTV, at 22. DIRECTV Comments also described Comcast's aggressive pursuit of "opportunities to maximize its own value at the expense of other firms by, for example, denying them key programming or raising the prices they pay for it." More specifically, DIRECTV cited Comcast's decade-long refusal to sell Comcast SportsNet-Philadelphia programming to DIRECTV and DISH Network. *Id.*, at 8.

NBCU programming assets with Comcast's extensive cable distribution system. For example, the Public Interest Petitioners expressed the concern that "post-merger Comcast could vertically leverage its position as the dominant cable operator in multiple markets to give favorable carriage to NBC broadcast signals and less favorable treatment to competing local broadcasters."[66] In addition, the Fair Access to Competition & Telecommunications Coalition ("FACT") stated:

> Combining Comcast's channels with NBC-owned channels would provide the Venture with the ability and incentive to engage in forced tying and to demand specific carriage of channels in a manner that would impair the ability of competitive distributors, including FACT members, as well as competitive independent programming sources, to serve consumers.[67]

NTCA/WTA echoed FACT's concern.[68]

## IV. CONCLUSION

The record in this proceeding amply demonstrates that the proposed transaction would create significant horizontal and vertical harms, resulting in reduced competition, higher costs to consumers, and diminished broadband deployment. Unfortunately, the program access commitments offered by the Applicants to date would not protect against these harms. The ACA again calls upon the Applicants to develop and propose meaningful, enforceable commitments that address the risks

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66 Public Interest Petitioners Comments, at 47.

67 Initial Comments of the Fair Access to Content & Telecommunications Coalition, MB Docket No. 10-56 (filed June 21, 2010) ("FACT Comments"), at 13.

68 NTCA/WTA Comments, at 5. NCTA/WTA also raised the closely-related problem of tiering. *Id.*, at 6-7.

associated with the transaction. Absent those commitments, the Commission should adopt appropriate requirements to ensure that competition and the public interest are protected.

Respectfully submitted,

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July 21, 2010

**Certificate of Service**

I, Barbara S. Esbin, attorney with the law firm of Cinnamon Mueller, hereby certify that copies of the foregoing **Redacted Version of ACA's Response to Comments** to be served via USPS mail on this 21st day of July, 2010 to the following:

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