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July 21, 2010

VIA ELECTRONIC FILING

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

Received & Inspected

JUL 26 2010
 FCC Mail Room

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 from GE to Comcast*
MB Docket No. 10-56

Dear Ms. Dortch:

On behalf of the New Jersey Division of Rate Counsel, attached hereto and for the record in this proceeding are Rate Counsel's Reply Comments dated July 21, 2010.

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

Respectfully submitted,

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

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JUL 20 2010

FCC Mail Room

In the Matter of)
)
Joint Application by GE and Comcast for) MB Docket No. 10-56
Transfer of Control of Licenses from GE to)
Comcast)

REPLY COMMENTS OF THE NEW JERSEY DIVISION OF RATE COUNSEL

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July 21, 2010

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SUMMARY

Initial comments raise sobering concerns about the potential adverse impact of the proposed \$30 billion Comcast-NBCU transaction on diversity, local programming, rates, and innovation, and also demonstrate that the Applicants have failed to meet their burden of proving that the transaction, on balance, would serve the public interest. Post-merger, Comcast-NBCU would possess greater incentive and ability to discriminate against rivals, squelch the fledgling online video industry (which the Applicants clearly view as a direct threat to their traditional cable revenue streams), and shelter their market power.

The result would be, among other things, loss of diversity in programming; higher rates for consumers; a chilling influence on broadband investment precisely at a time when the nation is seeking to fulfill the vision set forth by the FCC in its National Broadband Plan (because the prospect of either higher programming costs, inability to obtain certain programs, or degraded access to Comcast's and NBCU's content would discourage broadband investment by providers that might otherwise rely on video revenues to justify broadband deployment); and network discrimination.

For the many reasons discussed in these reply comments and in others' initial comments, Rate Counsel is skeptical of the purported benefits of the proposed transaction, is persuaded that the Comcast-NBCU merger would harm consumers substantially, and recommends that the Commission find that the Applicants have not met their burden to prove that the transaction is in the public interest. Rather than expending substantial FCC resources to craft adequate safeguards to overcome the many deficiencies in the proposed transaction, Rate Counsel recommends that the FCC instead

reject the transaction outright. Many parties have proposed diverse remedies, and now it is the Applicants that should shoulder the burden to propose significantly improved and meaningful commitments. The Applicants' "as-filed" commitments are so lacking and insignificant that the FCC cannot simply "fine-tune" them. Because the proposed transaction and commitments are so fundamentally flawed, Rate Counsel urges the Commission to simply reject the Application, or in the alternative to require the Applicants to re-submit their application with a more credible set of conditions that more plausibly address the serious concerns that initial comments have identified.

However, Rate Counsel recognizes that the FCC may, contrary to Rate Counsel's recommendation, consider approving the transaction with conditions that the FCC seeks to design. In anticipation of such an outcome, Rate Counsel urges the Commission to consider carefully the various suggested remedies identified by parties in initial comments, and Rate Counsel highlights some of those in these reply comments.

Conditions are essential to ensure that video consumers benefit from robust, competitive broadband and programming markets across all platforms in the years to come, and that consumers may benefit from the innovations, diversity and localism in video programming and lower prices that such competition yields. In previous orders, the Commission has adopted conditions to offset potential risks. As Rate Counsel discusses above, and as the many detailed initial comments demonstrate, the risks of this merger are more serious than other mergers for which the FCC has provided conditional approval. Therefore, the FCC should adopt in some instances similar and in other instances significantly more stringent conditions if it intends to approve the unprecedented merger of Comcast and NBCU. Absent such conditions, consumers will

be irrevocably harmed by the merged entity's ability and willingness to thwart the development of competitive online video and broadcast markets. Furthermore, it is essential that the conditions truly be enforceable, the conditions not shift the cost of compliance (and risks of non-compliance) to rivals, and the FCC possess the administrative resources necessary to ensure such enforcement.

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

In the Matter of)
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Joint Application by GE and Comcast for) MB Docket No. 10-56
Transfer of Control of Licenses from GE to)
Comcast)

REPLY COMMENTS OF THE NEW JERSEY DIVISION OF RATE COUNSEL

I. INTRODUCTION

With this filing, and pursuant to the schedule set forth by the Federal Communications Commission ("FCC" or "Commission"),¹ the New Jersey Division of Rate Counsel ("Rate Counsel") replies to the comments and petitions to deny submitted by various entities regarding the application by General Electric Company ("GE"), NBC Universal, Inc. ("NBCU") and Comcast Corporation ("Comcast"), for transfer of control of licenses.²

Numerous parties submitted comments and petitions to deny. Rate Counsel does not respond to all of the numerous filings submitted to the FCC, but rather responds to

¹ / FCC Public Notice, DA 10-457, "Commission Seeks Comment on Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. to Assign and Transfer Control of FCC Licenses," released March 18, 2010 ("Public Notice").

² / On January 28, 2010, Comcast, GE, and NBCU (the "Applicants") jointly submitted applications to the Commission seeking consent to assign and transfer control of various licenses to a new limited liability company that would constitute a joint venture of GE and Comcast (the "Joint Venture") ("Application"). Subsequently, on March 5, 2010, the Applicants filed a report entitled "Application of the Commission Staff Model of Vertical Foreclosure to the Proposed Comcast-NBCU Transaction." The Applicants requested that this economists' report be considered as part of their Application to the FCC. As described in the FCC's Public Notice: "The proposed transaction would combine the broadcast, cable programming, motion picture studio, theme park, and online content businesses of NBCU with the cable programming and certain online content businesses of Comcast." Public Notice. The FCC issued an Information and Data request to the Applicants on May 21, 2010, to which responses were submitted on June 30, 2010, and posted on the FCC's web site July 9, 2010.

the salient issues raised that, in Rate Counsel's view, are of the most grave concern to consumers in New Jersey.³ The decision that the FCC renders in this case will have major consequences for the emerging on-line video markets, vertical integration in the industry, horizontal integration in the industry, and the likelihood of similar transactions in the future. The policy that the FCC sets forth in this proceeding will have far-reaching implications throughout the industry, affecting all consumers, and the quality of and prices for the information and entertainment that consumers receive.

A. INTEREST OF RATE COUNSEL IN THE INSTANT PROCEEDING.

Rate Counsel is an independent New Jersey State agency that represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. Rate Counsel participates actively in relevant Federal and state administrative and judicial proceedings.⁴ The above-captioned proceeding is germane to

³ / Among the initial comments that were filed include Joint Petition to deny of Consumer Federation of America, Consumers Union, Free Press and Media Access Project ("Public Interest Petitioners"); Petition to Deny of Public Knowledge ("Public Knowledge"); Petition to Deny of DISH Network L.L.C ("DISH") and EchoStar Corporation ("EchoStar") (jointly "DISH/EchoStar"); DIRECTV, Inc. ("DIRECTV"); American Antitrust Institute ("AAI"); Bloomberg; The Fair Access to Content & Telecommunications Coalition; City of Detroit, Michigan; City of Seattle, Washington et al; The Greenlining Institute; Alliance for Communications Democracy ("ACD"); EarthLink, Inc. ("EarthLink"); AOL, Inc. ("AOL"); American Cable Association; Christopher S. Yoo ("Yoo"); National Telecommunications Cooperative Association and Western Telecommunications Alliance; US Telecom Association; Cisco Systems; National Association of Telecommunications Officers and Advisors ("NATOA"); Communications Workers of America ("CWA"); ABC Television Affiliates Association, CBS Television Network Affiliates Association, and FBC Television Affiliates Association ("Affiliates Associations"). Rate Counsel's reply comments respond to many, but not all, of these comments.

⁴ / Rate Counsel has participated in many FCC proceedings concerning transfers of control. *See, e.g.*, In the Matter of Transfer of Control Filed by SBC Communications Inc. and AT&T Corp., WC Docket No. 05-65, Initial and Reply Comments of Rate Counsel, April 25, 2005, and May 10, 2005, respectively; In the Matter of Verizon Communications Inc. and MCI, Inc., Applications for Approval of Transfer of Control, Federal Communications Commission WC Docket No. 05-75, Initial Comments, May 9, 2005 (including affidavit of Susan M. Baldwin and Sarah M. Bosley), Reply Comments, May 24, 2005; In the Matter of AT&T Inc. and BellSouth Corporation Applications for Approval of Transfer of Control, Federal Communications Commission WC Docket No. 06-74, Initial Comments, June 5, 2006 (including declaration of Susan M. Baldwin and Sarah M. Bosley), Reply Comments, October 3, 2006 (including declaration of Susan M. Baldwin, Sarah M. Bosley and Timothy E. Howington); In the Matter of Enbarq

Rate Counsel's continued participation and interest in implementation of the Telecommunications Act of 1996⁵ as well as Title VI of the Communications Act of 1934, as amended, under Sections 601 et seq., 4 U.S.C. 52).

Among the goals that Rate Counsel recommends to guide the FCC's deliberations in this proceeding are: diversity; quality; reasonable rates, terms and conditions; variety and availability of content; localism – local programming; competition; and innovation. Also, Rate Counsel continues to urge the Commission to take into account the fact that the broadband market is dominated in many geographic markets by, at best, a duopoly, which does not present effective competition in the supply of Internet access, and which, in turn, provides an important context for assessing the impact of the proposed transaction on consumers.

B. OVERVIEW OF INITIAL COMMENTS

Initial comments persuasively demonstrate that the proposed \$30 billion Comcast-NBCU transaction would be unique and ground-breaking, but that as it is presently structured, the transaction would lead to substantial harms to consumers that unambiguously outweigh the purported benefits. If the Commission nonetheless

Corporation, Transferor, Application for Transfer of Control of Domestic Authorizations Under Section 214 of the Communications Act, as Amended, WC Docket No. 08-238, Initial Comments, January 8, 2009, Reply Comments, January 23, 2009; In the Matter of Applications filed by Frontier Communications Corporation and Verizon Communications Inc. for Assignment or Transfer of Control, WC Docket No. 09-95, Comments of the National Association of State Utility Consumer Advocates and the New Jersey Division of Rate Counsel, September 21, 2009; Qwest Communications International Inc., Transferor, and CenturyTel, Inc. d/b/a CenturyLink, Transferee, Application for Transfer of Control Under Section 214 of the Communications Act, as Amended, WC Docket No. 10-110, Initial Comments of Rate Counsel, July 12, 2010.

⁵ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"). The 1996 Act amended the Communications Act of 1934. Hereinafter, the Communications Act of 1934, as amended by the 1996 Act, will be referred to as "the 1996 Act," or "the Act," and all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code.

contemplates approving the transaction, it should only do so after more extensive scrutiny and the establishment of adequate protection and oversight by the FCC to ensure that in the years to come, consumers benefit from reasonable prices, program diversity, robust competition, and broadband deployment throughout the United States. The proposed transaction would represent the first major media merger since the industry has deployed broadband technology that can also distribute video content.⁶ As aptly described by the Public Interest Petitioners:

Not only is this merger unprecedented in the history of the video marketplace in terms of its scope, it is also unprecedented in terms of the harms it will wreak on competition and potential innovation in existing and emerging video markets. If the Commission approves the proposed transaction, it will lay the groundwork for a single company to own a huge array of popular content and enable it to exert undue influence over how that content – and the content produced by competitors – is distributed over the airwaves, cable, and Internet. Control over any one of these elements would be sufficient to warrant rejection of the merger application. Taken together, they overwhelmingly require that result.⁷

Furthermore, any conditions that the FCC may impose need to be enforceable, *and* the FCC must have sufficient resources to actually ensure such enforcement. Similarly, conditions that shift the burden and cost to rivals for enforcement should not be viewed as meaningful conditions – where small and mid-sized rivals must expend substantial time and resources to seek redress they are unduly disadvantaged by the complaint

⁶ / Public Interest Petitioners, at 11.

⁷ / *Id.*, at 10. See also American Cable Association, at 47, stating that the “Applicants propose an unprecedented consolidation of content, distribution and control of licensed spectrum” and that the transaction “would create significant horizontal and vertical harms, resulting in higher costs to consumers, reduced competition, and, in the smaller markets served by ACA members, diminished broadband deployment” and CWA, at 2, stating that the “Application before the Commission to combine the nation’s largest cable and Internet distribution company with the nation’s leading newsroom and production company would create a media conglomerate of unprecedented scope and scale that would challenge the Commission’s obligations to safeguard the public interest.”

process. A complaint-driven approach to regulatory safeguards benefits the incumbent and those with market power.

Rate Counsel is heartened that Commissioner Copps recognizes that the proposed merger is “huge – really huge” and that, among other things, “[i]t goes to how much control a few individual companies should have over the distribution of media.”⁸ Rate Counsel concurs that “the rules of the broadband game must be as open and dynamic as the technology itself, and one thing is clear above all else: broadband and the Internet must not become the province of gate-keepers and toll booth collectors.”⁹ Rate Counsel also concurs that “the risk of market failure in the marketplace of ideas has greater implications than for ordinary wares.”¹⁰

As American Cable Association explains, although Comcast is purchasing only 51% of NBCU, “the horizontal and vertical harms of the actual transaction will be substantially the same as the harms that would arise from a simple merger.”¹¹ Regarding horizontal harm, the programming assets would be under combined ownership, which creates additional incentives and opportunities for Comcast/NBCU to restrict rivals’ access to key programs, and regarding vertical harm, the joint venture and Comcast can coordinate their actions to maximize their total profits.¹² Rate Counsel concurs that the proposed Comcast/NBCU joint venture “is rooted fundamentally in the enhancement of market power and the potential to execute anticompetitive strategies” and “to shelter

⁸ / Statement of FCC Commissioner Michael J. Copps, Comcast/NBCU Forum, Chicago, Illinois, July 13, 2010 (“Copps Chicago Statement”), at 1.

⁹ / *Id.*, at 2.

¹⁰ / AAI, at 6, citing *Associated Press v. United States*, 326 U.S. 1, 27-28 (1945).

¹¹ / American Cable Association, Exhibit A, “Economic Analysis of the Competitive Harms of the Proposed Comcast-NBCU Transaction,” William P. Rogerson, June 21, 2010 (“Rogerson Study”) at 18.

¹² / *Id.*, at 3.

Comcast and NBCU businesses from competition *and* to control how competition develops between the content/MVPD and content/HSI [high speed Internet] platforms.”¹³ Rate Counsel also echoes the concern that the approval of the proposed transaction could trigger other similar mergers,¹⁴ which would further deprive consumers of the innovation, quality, and price protection that competition might otherwise provide.

II. CONSUMER HARMS

A. INTRODUCTION

The transaction would yield horizontal consolidation in the emerging online video market and vertical consolidation in the multi-channel video programming distribution (“MVPD”) market with Comcast’s distribution assets.¹⁵ As DISH/EchoStar observe, contrary to the Applicants’ attempt to define two distinct markets consisting of traditional MVPD service and online video, instead, the markets are related, and all MVPD competitors rely on the availability of online video to compete.¹⁶ Consumers seek the integration of traditional and new services. It is in part the transaction’s impact on this new emerging market that differentiates it from other mergers.

Viewed more broadly, the transaction directly affects the flow of information throughout the country. As CWA states:

The Supreme Court has emphasized the Commission’s duty and authority to promote diversity and competition among media voices based on the principle that “the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.”¹⁷

¹³ / AAL, at 5-6 (emphasis in original).

¹⁴ / *Id.*, at 17.

¹⁵ / *See, e.g.*, DISH/EchoStar, at 1; American Cable Association, at 9.

¹⁶ / DISH/EchoStar, at 2.

¹⁷ / CWA, at 6, citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) (citing *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972)) and also referencing *AT&T-Comcast Order*, para. 27.

Much is at stake in this proceeding, and yet despite the high stakes for consumers, the Applicants have failed to demonstrate that the transaction would further the goals of diversity and competition in the nation's media voices.¹⁸

In contrast with the vast majority of the comments, Cisco supports the proposed transaction.¹⁹ Cisco, which has a "long-term partnership with Comcast"²⁰ and which is one of the leading suppliers to Comcast of leased set-top boxes,²¹ anticipates that the transaction will benefit the public "by supporting the distribution of new and innovative products and services to consumers."²² Cisco describes Comcast's various cutting-edge products and services, including its deployment of DOCSIS 3.0 technology ("relying in part on Cisco routers and solutions"²³), its implementation, with Cisco's assistance, of an improved national content delivery network infrastructure²⁴ and Comcast's "track record of innovation."²⁵ According to Cisco, the transaction would "accelerate the development of in-home and media entertainment, which will help meet that demand in ways the companies could not do individually."²⁶ However, even if the proposed transaction would facilitate Comcast's ability to develop and deploy new products, Rate Counsel is

¹⁸ / CWA also raises serious concerns about Comcast's relationship with its employees, which merit Commission consideration in the Commission's deliberations about the public interest of the proposed transaction. See, e.g., CWA, at 9-12.

¹⁹ / Cisco at 2 (urging "the Commission to promptly approve the proposed joint venture").

²⁰ / *Id.*

²¹ / *Id.*, at 3.

²² / *Id.*, at 1.

²³ / *Id.*, at 4.

²⁴ / *Id.*, at 6.

²⁵ / *Id.*

²⁶ / *Id.*, at 7.

not persuaded that the “hastened deployment of these new technologies”²⁷ justifies the numerous risks to competition, diversity, rates, and localism that the transaction would pose and that Rate Counsel describes below. Furthermore, Cisco describes multiple innovative products and services that Comcast has *already* been able to pursue *without* the proposed merger. Rate Counsel is not persuaded that a company with the national scale and scope of Comcast cannot continue to innovate at a sufficiently rapid pace, even if the FCC denies the proposed transaction.

B. IMPACT OF PROPOSED TRANSACTION ON NASCENT ON-LINE VIDEO MARKET

The aspect of the proposed transaction that differentiates the application significantly from other transactions is its potential impact on the nascent online video market. Numerous parties raise concern about the inhibiting effect of the proposed transaction on the emerging online video market, and also observe that this proceeding may provide the Commission with its first opportunity to analyze comprehensively the relationship of the online video market to the video distribution business.²⁸ The proposed transaction could thwart the competition that over-the-top (“OTT”) video competition brings and also result in higher prices for consumers.²⁹

²⁷ / *Id.*

²⁸ / See, e.g., DISH/EchoStar, at 3; Public Interest Petitioners, at 22 (stating, among other things, “Comcast would have the ability – and the incentive – to choke off in its infancy the first truly effective source of competition in the video marketplace”); American Cable Association, at 34-37; AIA, at 21-24 (stating, among other things, at 24: “While consolidation that affects nascent markets is not unfamiliar to regulators and antitrust enforcers, it is not a well-tested area and consolidation raises more questions that (sic) it answers”); CWA, at 39-55 (discussing, among other things, the transition of Internet video from a complement to a substitute for cable television).

²⁹ / CWA, at 42-43.

Each of the applicants possesses substantial market power based on programming assets.³⁰ Comcast offers “FancastXfinity” which enables consumers to view online video content if they pay for access to a facilities-based MVPD, and NBCU is a stakeholder in Hulu, a rival to FancastXfinity, which enables consumers to access online video. The transaction would entirely eliminate this head-to-head competition.³¹ Hulu is the second largest online distributor (after Google sites) “while Fancast attracts about one fourth of the volume of visits as does Hulu.”³² Furthermore, the merged entity could deny rival, independent online video providers access to content that Comcast uses in its online service, “slow-roll” negotiations, or offer the content at unreasonable rates, terms and conditions.³³ By requiring consumers to subscribe to a traditional cable provider in order to view the most popular online videos, Comcast could eliminate potential competition and also protect its profitable cable television revenue stream.³⁴ Presently, consumers must subscribe to Comcast’s cable television service to obtain access to Comcast’s “TV Anywhere” (Fancast Xfinity TV).³⁵

The transaction would provide Comcast with control of NBCU feature films³⁶ as well as a one-third interest in Hulu, which would provide Comcast with tools for “killing-off emerging Internet-based competition before it can even get off the ground.”³⁷

³⁰ / American Cable Association, Rogerson Study.

³¹ / Public Interest Petitioners, at 23.

³² / AAI, at 14, cite omitted. According to AAI, rival online content aggregation and marketing sites include Boxee, Crackle, Netflix, and Sling. *Id.*

³³ / Public Interest Petitioners, at 24.

³⁴ / *Id.*, at 25.

³⁵ / AAI, at 19.

³⁶ / NBCU has a 4000-film library and a major motion picture studio that produces and/or distributes approximately 20 films per year. American Cable Association, at 34, citing Application, at 31.

³⁷ / Public Interest Petitioners, at 25.

Comcast's ability to tie in its cable television service with online content would prevent rivals from competing effectively.³⁸ Customers would suffer because Comcast would likely "impose[] the cable subscription pricing structure on the Internet."³⁹ Whereas today consumers can access Hulu without subscribing to cable television, post-transaction, such an option likely would no longer exist.

Comcast would have the ability and incentive to withhold NBCU content from online sources.⁴⁰ New applications such as Google TV (which integrates multichannel television and web media content)⁴¹ and DISHOnline.com and Sling.com require "an open, unfettered broadband connection."⁴²

Rate Counsel concurs with comments that demonstrate that online video is a "must have" item,⁴³ and that must have video programming will "retain its 'must have'

³⁸ / CWA, at 44 and Attachment B, Declaration of Hal J. Singer ("Singer Declaration"), at para. 19.

³⁹ / CWA, at 46.

⁴⁰ / Public Knowledge, at 13. *See also*, AAI, at 20-21.

⁴¹ / Google TV enables DISH subscribers to "perform a unified search covering the listings in the program guide, the subscriber's DVR and the internet," so that, for example, a consumer's "search for 'State of the Union' might bring up CNN's State of the Union program from the program guide, a recorded copy of the State of the Union address on the subscriber's DVR, and a transcript of the State of the Union address from whitehouse.gov." DISH/EchoStar, Declaration of Roger I. Lynch ("Lynch Declaration"), at paras. 3-4. This unified search would be instead of a consumer needing to separately view her PC and Television.

⁴² / DISH/EchoStar, at 6. DISH and Google recently launched Google TV, which integrates multichannel television and web media content. *Id.*, Declaration of Mark Jackson ("Jackson Declaration"), para. 10. The "SlingPlayer" software connects users on diverse computing platforms (such as PC and Mac laptop and desktop computers, iPhone, iPad, Blackberry and Android mobile devices) to their Slingbox, which then gives customers the ability to watch and control diverse devices. *Id.*, Jackson Declaration, para. 5. Both applications rely on broadband interconnections. As explained by DISH/EchoStar, the only efficient way to distribute "long tail content" (content that is of interest to only a small number of consumers) is via an Internet connection. *Id.*, at para. 13. Any discrimination by Comcast in the delivery of the data over the broadband connection would harm Comcast's rivals. *Id.*, at para. 15.

⁴³ / *See, e.g.*, DISH/EchoStar, at 7-8 including reference to Pew Research Center, Pew Internet and American Life Project: The State of Online Video (June 3, 2010), available at <http://www.pewinternet.org/Reports/2010/State-of-online-video.aspx>. *See also* DISH/EchoStar, Declaration of Dave Shull, at para. 10, stating: "DISH Network would not offer a competitive product without the NBC Network; NBC-Universal non-broadcast networks; and Universal Studios movies."

nature regardless of the distribution platform.”⁴⁴ As AAI reasonably asks, “Why is a JV [joint venture] the size and scope of Comcast/NBCU necessary to further develop these services?”⁴⁵ Individually, the Applicants *already* were developing and promoting Fancast and Hulu. Furthermore, as AAI observes “the avoidance of ‘negotiating friction’ cited by the Applicants as an efficiency justification translates to an avoidance of the vertical competition necessary for content producers to gain distribution.”⁴⁶

The proposed transaction would provide the new combined entity with even greater ability to reduce competition in the nascent online video market.⁴⁷ For example, Comcast would have an incentive to degrade the speed and quality of NBCU video on demand content that is delivered to a DISH subscriber relative to that provided to a Comcast subscriber, and similarly would have the incentive and ability to make NBCU content on Fancast/Xfinity better than that provided on DISHOnline.⁴⁸

Through NBCU’s ownership interest in Hulu, Comcast could acquire insight into the various platforms that Hulu plans to support and use that information to assist it in developing Comcast features, as well as to acquire information about Hulu’s content distribution models, which would help Comcast improve its own online video services relative to its competitors’ online video platforms.⁴⁹ Furthermore, DISH/EchoStar raise

⁴⁴ / American Cable Association, at 35.

⁴⁵ / AAI, at 22.

⁴⁶ / *Id.*, at 22-23.

⁴⁷ / DISH/EchoStar, at 18-23.

⁴⁸ / *Id.*, at 19.

⁴⁹ / *Id.*, at 20-21.

the concern, which merits the FCC's consideration, that the merged entity would have an enhanced ability to lead advertisers toward Comcast's products.⁵⁰

C. COMCAST'S PRESENCE IN THE BROADBAND MARKET

Comcast's control of last-mile networks provides it with unique market power.⁵¹ Comcast is the nation's largest residential broadband access provider, which means that it possesses unsurpassed ability to control broadband markets. According to the Public Interest Petitioners, Comcast's cable systems currently serve 24.2 million subscribers, its broadband network passes more than 50 million homes, and Comcast provides high speed Internet service to about 15 million households.⁵² Furthermore, Comcast is the dominant broadband provider in the markets that it serves.⁵³

In considering Comcast's market power in the broadband market, the FCC should also view the company's market share within relevant geographic markets rather than simply as expressed on a national basis. Furthermore, in many geographic markets, broadband access by telecommunications companies is providing less competitive pressure than it did in previous years. Relative demand for telecommunications companies' rival broadband product – digital subscriber line service ("DSL") – is expected to decline as consumers seek the higher speed and capabilities of cable companies' broadband access.⁵⁴ Rate Counsel has repeatedly demonstrated and stated in filings to the FCC that a broadband duopoly does not represent sufficient competition to

⁵⁰ / *Id.*, at 22.

⁵¹ / Public Knowledge, at 14.

⁵² / Public Interest Petitioners, at 11, footnote 12.

⁵³ / *Id.*, at 15-17.

⁵⁴ / Federal Communications Commission, *Connecting America: The National Broadband Plan*, report submitted to the U.S. Congress, March 17, 2010 ("National Broadband Plan"), Chapter 4, at 42; See, also, FCC, Wireline Competition Bureau, *High-Speed Services for Internet Access: Status as of December 31, 2008*, February 2010.

yield just and reasonable rates.⁵⁵ Accordingly, not only is a broadband duopoly insufficient to restrain Comcast's tactics and prices, but also, DSL is not keeping pace with Comcast's broadband options, resulting in Comcast increasingly dominating local broadband markets.

From the outset of the age of high-speed Internet access, cable modem use has outpaced DSL. According to the FCC's *High-Speed Services for Internet Access* reports, December 1999 cable modem subscriptions totaled approximately 1.5 million, while DSL subscriptions were under 400,000.⁵⁶ Both technologies have experienced substantial increases in subscriptions. Annual growth rates for both technologies remained above 40% through 2003, but gradually declined each year. The annual growth rate in DSL subscriptions from December 2007 to December 2008 (the most recent period for which data are available) was a mere 3%, while the growth rate for cable modem service remained a solid 14%. As of December 2008, the FCC reported approximately 41.5 million cable modem subscribers, about 30.2 million DSL subscribers, and 25.1 million

⁵⁵ / See, e.g., *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, FCC GN Docket No. 07-45, Comments of the New Jersey Division of Rate Counsel, May 16, 2007, at 18-21, citing and attaching Susan M. Baldwin, Sarah M. Bosley and Timothy E. Howington, "The Cable-Telco Duopoly's Deployment of New Jersey's Information Infrastructure: Establishing Accountability," White Paper prepared for the Public Advocate of New Jersey Division of Rate Counsel, January 19, 2007; *In the Matter of A National Broadband Plan for Our Future*, GN Docket No. 09-51, Comments of the New Jersey Division of Rate Counsel, June 5, 2009, at 29-30, 39; *In the Matters of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act; A National Broadband Plan for Our Future*, GN Docket Nos. 09-137; 09-51, Comment of the New Jersey Division of Rate Counsel, September 4, 2009, at iii, 4. *In the Matter of Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191; WC Docket No. 07-52, Comments of the New Jersey Division of Rate Counsel, January 14, 2010, at 78.

⁵⁶ / FCC, *High-Speed Services for Internet Access: Status as of December 31, 2008*, released February 2010, at Table 1; FCC, *High-Speed Services for Internet Access: Status as of June 30, 2008* (Excel tables version), released July 2009, at Table 1.

mobile wireless high-speed connections.⁵⁷ Fiber to the premises, satellite, fixed wireless, and other technologies account for about 5.3 high-speed connections.⁵⁸

AAI observes that Comcast is the largest broadband service provider in the United States, serving approximately 40% of cable modem subscribers and approximately 22% of the combined DSL/cable modem market.⁵⁹ Comcast's dominant position in the broadband market directly affects its ability and incentive to discriminate against rivals. Therefore, the FCC should heed the concerns raised in initial comments that the transaction would enhance the opportunity for Comcast to tie its broadband service with its MVPD offerings.⁶⁰

Furthermore, as CWA observes, there is a direct link between providers' incentive to deploy broadband and their ability to obtain access to programming content at just and reasonable rates, terms, and conditions.⁶¹ Therefore, the transaction, by raising the cost of accessing must-have programming, would discourage new entrants from providing broadband access to the Internet.

⁵⁷ / *Id.*

⁵⁸ / *Id.*

⁵⁹ / AAI, at 15.

⁶⁰ / Public Knowledge, at 12-13.

⁶¹ / CWA, at 13 (stating that "limiting the ability to offer a competitive video service may delay or prevent the deployment of broadband").

D. COMBINED ENTITY'S CONTROL OVER SPORTS, WOMEN'S, NEWS AND HISPANIC PROGRAMMING

The transaction would entail a horizontal combination of programming assets that the combined entity could then use vertically, to the detriment of rival MVPDs and their customers.

Initial comments emphasize the troubling fact that the merged entity would possess substantial control over significant content categories, including sports, news, Spanish language, and women's programming.⁶² The combination of must have Comcast programs and NBC broadcast programming presents horizontal harms, particularly in those markets where MVPDs distribute both Comcast and NBC owned and operated ("O&O") local television stations.⁶³ Also, the new entity would control NBCU's national cable networks. The result would be that Comcast/NBCU would have yet greater incentive and ability to raise fees for must have programming provided to smaller MVPDs.⁶⁴

As American Cable Association explains, the Commission has previously determined that an MVPD's ability to compete effectively with an incumbent cable operation "is significantly harmed if it is denied access to 'must have' vertically integrated programming, i.e., programming for which there is no good substitute."⁶⁵

Comcast/NBCU would possess a substantial portion of the lucrative sports programming market. According to the Public Interest Petitioners, Comcast controls a large number of regional sports networks ("RSN") "for which it commands fees that

⁶² / Public Interest Petitioners, at 18.

⁶³ / American Cable Association, at 3-4.

⁶⁴ / *Id.*

⁶⁵ / *Id.*, at 10, citing *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628(C)(5) of the Communications Act*, 17 FCC Rcd 12124 (2002) ("2002 Program Access Order")

average almost ten times as much as the average fees paid for basic cable networks.”⁶⁶ RSNs are “must-have” programming,⁶⁷ and withholding RSNs adversely affects the market share of MVPDs that do not carry the programming.⁶⁸ Rate Counsel echoes the concern raised in initial comments that “the merger will combine NBC’s national sports presence and exclusive rights to Olympic programming with Comcast’s dominance of regional sports programming to create a bundle of ‘must have’ programming.”⁶⁹ As CWA observes, NBC owns the rights to “arguably the most desirable lineup of national sporting events in the industry, including NBC Sunday Night Football, the premier primetime NFL game of the week, the U.S. Open Championship, The Ryder Cup, the President’s Cup, the Kentucky Derby, the Preakness Stakes, Wimbledon, the French Open and the Stanley Cup Final.”⁷⁰ Furthermore, unlike some other video content, viewers seek sports programming in real-time, which means that when Comcast withholds national sports programming from its rivals, it thwarts MVPD competition.⁷¹ Therefore, the proposed transaction directly affects consumers’ ability to watch popular programs at reasonable fees, and also indirectly affects consumers’ access to diverse programming because, by withholding or degrading access to must-have programming, the merged entity can discourage competitors and raise their costs.

⁶⁶ / Public Interest Petitioners, at 18 (cites omitted).

⁶⁷ / See, e.g., *American Cable Association*, at 10, citing *News Corp.-Hughes Order*, 19 FCC Red at 477; *id.* at 10-11, citing *Adelphia Order*, 21 FCC Red, at 8258-8259.

⁶⁸ / *Id.*, at 11, citing *Adelphia Order*, at 8270-72, paras. 146-151.

⁶⁹ / Public Interest Petitioners, at 18-19.

⁷⁰ / CWA, at 3.

⁷¹ / *Id.*, at 17; see generally, *id.*, at 17-29.

As initial comments aptly demonstrate, the transaction would also yield an entity with vast control over women's programming,⁷² which could lead to a lack of diversity and could also create barriers to rivals' ability to attract and retain consumers. The FCC has also found that local broadcast station programming "is critical to MVPD offerings."⁷³ Yet, as these comments discuss in more detail below, the transaction would reduce the variety of local programming, and therefore adversely affect consumers.

Pre-merger commitments to embrace diversity may not suffice to prevent adverse post-merger consequences of Comcast's control over the nation's second largest Spanish language broadcast network.

As initial comments explain, Comcast would acquire Telemundo, the second largest Spanish language broadcast network, where only two national networks exist and would also acquire NBCU's cable property – mun2, which is one of only a few non-sports-oriented Hispanic cable networks.⁷⁴ Telemundo reaches 93 percent of U.S. Hispanic viewers.⁷⁵ Rate Counsel acknowledges that Comcast has recently come to an agreement with various Hispanic groups regarding the transaction. Among other commitments, Comcast will appoint a Latino to its board of directors within 24 months of closing a deal to acquire control of NBC Universal Inc. Also, as part of its agreement with Hispanic groups, Comcast intends to form a nine-member Hispanic Advisory Council to focus on Comcast's and NBCU's employment, procurement, programming, philanthropy, and corporate-governance practices.⁷⁶

⁷² / Public Interest Petitioners, at 20-21.

⁷³ / American Cable Association, at 11, quoting *News Corp.-Hughes Order*, 19 FCC Rcd at 565, paras. 201-202.

⁷⁴ / Public Interest Petitioners, at 20.

⁷⁵ / American Cable Association, at 14, citing Application, at 28.

⁷⁶ / "With NBC Universal deal pending, Comcast reaches accord with Hispanics," Bob Fernandez, *The Philadelphia Inquirer*, July 1, 2010.

Nonetheless, Rate Counsel urges the Commission to heed concerns about Comcast/NBCU's ability to leverage its control over the Spanish language broadcast market.⁷⁷ As Public Interest Petitioners explain, the Applicants have not committed to invest in *new* programming for Telemundo nor to the production of local news and community affairs programming, but rather to re-run existing programming on cable and On Demand platforms.⁷⁸ The "commitments appear to be little more than a proposal to secure more cable subscribers, not to increase Telemundo's broadcast programming or better serve the Spanish language broadcast audience."⁷⁹

Also troubling is the fact that NBCU has yet to comply with the FCC's requirement related to NBCU's acquisition of Telemundo that it divest one of its three stations in the Los Angeles market within 12 months of the merger, and indeed that seven years later, NBCU has yet to comply with the FCC's requirement.⁸⁰ Commitments that the Applicants fail to follow through on and that the FCC fails to enforce are meaningless and certainly cannot be relied upon to mitigate harm to consumers or to yield benefits to consumers. The transaction would not only increase Comcast/NBCU's market power but would also increase its incentive and ability to flout Commission rules and requirements.

http://www.philly.com/philly/business/20100701_With_NBC_Universal_deal_pending__Comcast_reaches_accord_with_Hispanics.html

⁷⁷ / Public Interest Petitioners, at 20, 55-61.

⁷⁸ / *Id.*, at 58.

⁷⁹ / *Id.*, at 59.

⁸⁰ / *Id.*, at 59-60.