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Federal Communications Commission
Office of the Secretary

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Marlene H. Dortch
445 12th Street, S.W.
Room TW-A325
Washington, DC 20554

Re: **REDACTED — FOR PUBLIC INSPECTION**
*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*

Dear Ms. Dortch:

Enclosed please find redacted copies of DIRECTV's reply comments in the above-captioned proceeding as well as an expert economic report by Dr. Kevin Murphy entitled *Response of Professor Kevin M. Murphy to Reply Report of Mork Israel and Michael L. Katz*. Please note that redacted confidential and highly confidential information are designated by the symbols [()] and ({)}, respectively.

As required by the Protective Orders, we are also hand delivering unredacted copies of this filing, along with a highly confidential computer disk containing backup data to Dr. Murphy's report.

Respectfully submitted,

/s/William Wiltshire
William Wiltshire
Counsel for DIRECTV

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

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<i>Applications of</i>)	
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COMCAST CORPORATION,)	
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and)	MB Docket No 10-56
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For Consent to Assign Licenses and/or)	
Transfer Control of Licensees)	
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REPLY OF DIRECTV, INC.

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August 19, 2010

OVERVIEW AND SUMMARY

Nothing in the 600-page Opposition recently filed to defend Comcast's proposed takeover of NBCU meaningfully addresses the three key concerns raised by DIRECTV and others: that the proposed transaction would (1) enable Comcast to exploit an "online loophole" for critical content delivered via non-traditional platforms (such as the Internet), (2) enable Comcast to impose large price increases for broadcast and national network programming, and (3) not generate sufficient public interest benefits to offset these anticompetitive effects. Indeed, Applicants' opposition primarily rests on the counterintuitive premise that Comcast — an entity that *still* refuses to sell Philadelphia sports programming to its satellite rivals after the Commission revoked its basis for withholding — will not use programming assets to disadvantage its rivals if given the chance to do so. DIRECTV continues to believe that, on balance, grant of the pending applications would serve the public interest only if procompetitive safeguards are imposed as a condition of approval.

The Transaction Would Enable Comcast to Exploit an Online Loophole.

DIRECTV demonstrated that this transaction would give Comcast the tools to exploit an "online loophole," under which Comcast could migrate NBCU programming to the Internet or to mobile or on-demand platforms, where Comcast could then deny it to competitors or restrict access for consumers. Comcast need not migrate entire channels to make such a strategy work. Rather, Comcast could:

- supply itself NBCU content in HD or 3D format but make it available to rivals only in SD format;

- make online NBCU content available to its own systems in an earlier window than it would be available to competitors;
- provide online NBCU programming to its own systems at a high throughput rate consistent with high-quality streaming video while offering competitors the same content at slower speeds that could result in a less satisfying consumer experience;
- provide competitors with content of different length, comprising fewer total hours, or with fewer advertising availabilities; or
- favor any content aggregation site in which it has (or acquires) an interest over sites affiliated with other MVPDs.

These are the kinds of advanced, value-added services that MVPDs are increasingly using to distinguish their services from competitors.

Applicants essentially ignore this concern, suggesting perfunctorily that Comcast would never engage in such conduct. Yet as Applicants admit, {;

}). Moreover, Comcast's internal documents confirm {{

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}). Consistent with that conclusion,

Comcast's internal documents confirm that {{

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Comcast also suggests that any condition to remedy the online loophole would be unworkable and not transaction-specific. Yet the remedies proposed by DIRECTV are designed to be as minimally intrusive as possible consistent with the purposes of the program access rules. These remedies simply call for fair access to the same content at the same quality, the same speed, and the same time as Comcast makes it available to itself. They are not generalized obligations applicable to all aspects of Comcast's broadband operations, but are limited to the specific aspects of those operations affected by its vertical integration with NBCU.

The Transaction Would Permit Comcast to Raise Prices for NBCU

Programming. DIRECTV and others presented voluminous economic and other evidence that the proposed transaction would enable Comcast to raise the prices paid by its MVPD rivals for NBCU programming. Applicants now present an array of reasons why the Commission should believe Comcast won't raise prices. None are persuasive. Indeed, the Commission has considered and rejected several of Applicants' primary arguments in prior proceedings.

- Applicants repeatedly invoke fiduciary duties owed by Comcast to its minority partner (GE) as a check on potential use of NBCU programming for anticompetitive ends. The Commission has repeatedly rejected this argument. Moreover, Applicants fail to acknowledge (much less explain) why Comcast has been able to withhold the Philadelphia regional sports network from MVPD rivals for over a decade *even though it had significant minority partners in that entity.*

In any event, Comcast will take 100% ownership of NBCU in the future, at which point no fiduciary constraint would even arguably apply.

- Applicants also continue to assert that NBC is not “must have” programming, even though the Commission has previously found that broadcast network content confers market power. This argument, too, ignores Comcast’s recent deal with CBS, which demonstrates the value that Comcast ascribes to network programming. It also ignores Applicants’ internal documents and its own expert’s prior testimony, which make plain that {{

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- Applicants attempt to use Comcast’s purported savings from the elimination of double marginalization to “swamp” the cost increases it would impose on MVPD rivals. In other words, Applicants argue that it is acceptable for Comcast to raise the prices paid by its rivals’ subscribers so long as it might also lower the prices paid by its own subscribers. This could not serve the public interest. Even were the Commission to accept such a proposition, moreover, Comcast has nowhere demonstrated that it would actually lower prices.

Applicants’ economic arguments also fail to address concerns about price increases. DIRECTV’s economist, Prof. Kevin Murphy, has shown how a standard economic model predicts that the proposed transaction would significantly increase the prices other MVPDs pay for NBCU programming. Applicants’ critique of that model are flawed — and in fact directly contradict their own expert’s use of this very model for much the same purpose in a recent report to the Commission. They also criticize Prof.

Murphy's particular implementation of the model, but these arguments conflict with the empirical evidence and Applicants' own internal documents and public statements. Even adjusting his analysis in NBCU's favor, as Applicants suggest, would not change Prof. Murphy's conclusion that, as a result of market forces, the proposed merger generates incentives for Comcast to charge its MVPD competitors substantially higher prices for NBCU programming.

The Transaction Would Not Result in Cognizable Public Interest Benefits. As for alleged public interest benefits, Applicants argue their proposed "voluntary commitments" should count simply because Applicants propose to make them binding. But this assertion misconceives the nature of a "transaction specific" benefit that is cognizable under the Commission's analysis. The Commission recognizes only public interest benefits "that would not be achievable but for the proposed merger." Many of Applicants' commitments and claimed benefits — from Common Sense Media deployment to increased Spanish-language programming to faster VOD deployment to investment in NBCU programming — either are already occurring without this transaction or would likely do so. In addition, Applicants nowhere argue that the targeted conditions proposed by DIRECTV would prevent them from realizing any of these purported benefits.

* * *

In sum, nothing submitted in the 600 pages of Applicants' Opposition refutes DIRECTV's basic point. Because the harms arising from the proposed transaction so clearly outweigh any benefits it could be expected to create, the Commission can only

grant the pending applications by imposing the targeted, procompetitive conditions set forth in Exhibit C hereto.

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REPLY OF DIRECTV, INC.

INTRODUCTION

In its initial Comments,¹ DIRECTV, Inc. (“DIRECTV”) demonstrated that the acquisition of NBC Universal, Inc. (“NBCU”) by Comcast Corporation (“Comcast”), the nation’s largest cable operator and largest Internet service provider (“ISP”), from General Electric Company (“GE”, and together with Comcast and NBCU, “Applicants”) would, on balance, serve the public interest only if certain procompetitive safeguards are imposed as a condition of approval. Specifically, DIRECTV argued that conditions should be imposed to ensure fair access to three types of programming under Comcast’s control — online content, broadcast stations, and national networks — consistent with

¹ See Comments of DIRECTV, Inc., MB Docket No. 10-56 (filed June 21, 2010) (“DIRECTV Comments”).

requirements imposed on regional sports network (“RSN”) programming under Comcast’s control. In support of its arguments, DIRECTV submitted an economic analysis in which Prof. Kevin Murphy demonstrated how, based on standard economic principles, the proposed transaction would result in significant increases in the prices paid for NBCU content by Comcast’s multichannel video programming distributor (“MVPD”) rivals.² DIRECTV also proposed specific amendments to the arbitration regime imposed by the Commission in similar situations, in order to make the process a more streamlined and attractive option for MVPDs in need of redress.³ Lastly, DIRECTV showed that the public interest benefits claimed by Applicants are nowhere near sufficient to offset the harms arising from the proposed transaction.

In their Opposition, Applicants continue to maintain that no untoward effects should be expected from this combination.⁴ As discussed below, each of Applicants’ arguments is deeply flawed. Before discussing the substance of Applicants’ objections, however, it is worth noting a recent development. Earlier this year, the Commission put in place a mechanism through which MVPDs could gain access to cable-affiliated programming that had previously escaped regulation under the program access rules

² 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) (attached as Exhibit A to DIRECTV Comments) (“Murphy Report”).

³ See DIRECTV Comments at 46-51.

⁴ The Opposition (including appendices) totals more than 600 pages. DIRECTV believes it would be better for all concerned — including the Commission — not to attempt to respond to every argument and claim raised in these materials. In doing so, it does not concede any point through silence.

because it was delivered by terrestrial means.⁵ The Commission based its decision on a ten-year record of anticompetitive effects resulting from such withholding — primarily involving Comcast's denial of Comcast SportsNet Philadelphia ("CSN-Philly") to DBS rivals.⁶ As soon as these new rules became effective, DIRECTV renewed its request that Comcast offer CSN-Philly for carriage on non-discriminatory terms and conditions.⁷ By letter dated August 2, 2010, Comcast once again refused to offer CSN-Philly to DIRECTV.⁸ Although Comcast later indicated that it would be willing to discuss carriage of CSN-Philly with DIRECTV, it has not made an offer for such carriage.⁹

Moreover, Comcast has indicated on several prior occasions that no such offer will be forthcoming unless DIRECTV voluntarily gives up its legal, exclusive rights to out-of-market NFL football games — an offer that does not constitute a genuine basis for negotiation, much less an offer on non-discriminatory terms and conditions, as the law requires.¹⁰ Indeed, the Opposition all but asserts that Comcast acquired its interest in CSN-Philly and denied that programming to DIRECTV in order to gain leverage to break DIRECTV's exclusive carriage of the NFL Sunday Ticket,¹¹ an agreement between

⁵ See *Review of the Commission's Program Access Rules and Examination of Program Tying Arrangements*, First Report and Order, 25 FCC Red. 746 (2010) ("*Terrestrial Loophole Order*").

⁶ See *id.*, ¶¶ 23-35.

⁷ See Declaration of Daniel Hartran, ¶ 4 (attached as Exhibit B).

⁸ *Id.*, ¶ 5.

⁹ *Id.*, ¶ 6.

¹⁰ *Id.*

¹¹ See Comcast Corp., General Electric Co., and NBC Universal, Inc., Opposition to Petitions to Deny and Response to Comments at 139, MB Docket No. 10-56 (filed July 21, 2010) ("*The Opposition*") (noting that Comcast is on record saying that it will make CSN-Philadelphia available as soon as DIRECTV

DIRECTV and an unaffiliated sports league that, unlike Comcast's conduct, was contemplated by Congress and specifically approved by the Commission.¹²

As a result, DIRECTV will now have to go through the process of filing and prosecuting a formal complaint, which Comcast can be expected to contest vigorously. Before that proceeding reaches its conclusion, baseball season will be over, and basketball and hockey season will be well under way. Meanwhile, delay will continue to work in Comcast's favor, even as it denies Philadelphia sports fans freedom of choice among MVPDs.

If, as Applicants have asserted, "past is prologue,"¹³ one can only imagine how Comcast would use its control over NBCU programming as leverage against DIRECTV in future negotiations.¹⁴ As discussed below, none of the arguments made in the

relinquishes NFL Sunday Ticket, and asserting that this indicates "Comcast's overall objective to bargain with DirecTV"). DIRECTV began carriage of NFL Sunday Ticket in 1995, and Comcast launched CSN-Philadelphia in 1997.

¹² See 47 U.S.C. § 548(e) (prohibiting certain actions by cable operators and affiliated programmers, but not other MVPDs); *General Motors Corp., Hughes Electronics Corp. and The News Corporation Ltd.*, Memorandum and Opinion and Order, 19 FCC Rcd. 475 (2004) ("*News/Hughes*"), Appendix F, Section II ("DirecTV may continue to compete for programming that is lawfully offered on an exclusive basis by an unaffiliated program rights holder (e.g., NFL Sunday Ticket)").

¹³ Comcast Corp., General Electric Co., and NBC Universal, Inc., Applications and Public Interest Statement: Description of Transactions, Public Interest Showing, and Related Demonstrations at 6, 55 (filed March 5, 2010) ("Application").

¹⁴ See M. Reynolds, "NFL Scores With \$4 Billion DirecTV Sunday Ticket Extension," MULTICHANNEL NEWS (Mar. 23, 2009) (available at http://www.multichannel.com/article/190542-NFL_Scores_With_4_Billion_DirecTV_Sunday_Ticket_Extension.php). Applicants also assert that "product differentiation is a legitimate and appropriate method of competition," whether achieved by contract or by vertical integration. Opposition at 139. They neglect to mention that Congress and the Commission have specifically found that product differentiation through exclusive agreements presumptively is *not* appropriate where it results from vertical integration with a cable operator. See 47 U.S.C. § 548; 47 C.F.R. § 76.1002(b)(4). Unlike Comcast, which owns both the RSN and two of the three professional teams it carries, DIRECTV has no interest in the NFL and must periodically compete with other distributors — including Comcast — for the rights to NFL Sunday Ticket.

Opposition allay the concerns DIRECTV has presented based on rigorous economic and legal analysis as well as Comcast's own past conduct.

DISCUSSION

I. APPLICANTS FAIL TO ADDRESS THE "ONLINE LOOPHOLE."

In its Comments, DIRECTV noted that the Commission's program access rules do not clearly cover "non-linear" content delivered over facilities other than those used by traditional MVPDs, and argued that Comcast could use NBCU programming to exploit the resulting "online loophole" by denying (or raising the price of) such non-linear programming to MVPD rivals.¹⁵ Indeed, Comcast's internal documents show that DIRECTV's concerns are well placed, documenting {{

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Although the Opposition discusses some issues related to online programming at length,¹⁷ it addresses DIRECTV's concern only briefly. While Applicants attempt to dismiss concerns about the online loophole as "implausible," their bases for doing so do not withstand scrutiny.¹⁸ For example, Applicants argue that NBCU {{

¹⁵ See DIRECTV Comments at 28-30.

¹⁶ See 25-COM-348; 17-COM-70496; 17-COM-70783; 17-COM-83640.

¹⁷ With respect to online issues, the Opposition focuses primarily upon Comcast's incentives with respect to emerging online video distributors. See, e.g., Opposition at 181-89.

¹⁸ See Opposition at 161-62.

)) and has agreed with NBC affiliate stations not to move certain major sporting events from the NBC broadcast network.

Yet Comcast need not inigrate entire NBCU channels or marquee events wholesale to new distribution outlets in order to gain a significant advantage over rival MVPDs. As Applicants admit, {{

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Moreover, if Applicants are to be believed, restrictions on online distribution could be relatively short-lived, as the proposed transaction will purportedly give NBCU the incentive to acquire additional rights from content providers to enable innovative distribution models going forward.²⁰

Applicants further contend that moving programming online “would prove an entirely self-defeating maneuver” as it would force Comcast’s cable customers to “view streaming live sports programming in a sub-optimal manner.”²¹ However, Comcast’s internal documents reveal that {{

¹⁹ See *id.* at 158; Mark Israel & Michael L. Katz, *Economic Analysis of the Proposed Comcast-NBCU-GE Transaction* at 35 (July 20, 2010), attached to Opposition as Exhibit 2 (“Katz/Israel Opposition Report”).

²⁰ See Opposition at 25–26. Indeed, it is worth noting that Applicants’ agreement with NBC affiliates restricts migration of certain events to which NBCU holds rights as of June 3, 2010. *Id.* at 162. Thus, rights acquired once the joint venture is formed — including Olympic rights that will soon be available — would not be covered by this restriction.

²¹ *Id.* at 162.

²² 63 COM-697.

}} if

withheld from competing MVPDs, could give Comcast a distinct advantage in attracting and retaining subscribers. The confluence of all these factors demonstrates that the Commission cannot simply ignore the online loophole.

Applicants also assert that conditions proposed to address these concerns are unworkable, arguing in a single footnote that Commission intervention in such a nascent industry is unwise and would “raise extremely complex issues involving a wide range of stakeholders.”²³ Yet the list of issues imagined by Applicants arises from just two questions: (1) who may invoke the regulatory protections, and (2) what content is covered.

Such issues do not arise under the conditions proposed by DIRECTV.²⁴ First, the conditions could be invoked only by MVPDs — a category defined as those entities the Commission deems eligible to invoke the existing program access rules, who would also be responsible for complying with other regulations generally applicable to MVPDs (such as closed captioning, emergency alerts, etc.). Second, Comcast would be neither forced to place content online nor required to do so. It would have total control over what content to deliver over each type of distribution network (*e.g.*, Internet, mobile, VOD, etc.). But once that choice is made, Comcast would be required to make that content available to other MVPDs and/or their subscribers on the same platform(s) and on non-discriminatory terms and conditions. If, as Applicants assert, NBCU has the

²³ Opposition at 204 n.698.

²⁴ See DIRECTV Comments at 35.

incentive to seek the widest possible distribution of its content,²⁵ such a requirement would merely reinforce that incentive.

Overall, the conditions proposed by DIRECTV simply call for fair access to the same content at the same quality, the same speed, and the same time as Comcast makes it available to itself. Yet these proposed conditions would apply in a variety of situations that are (or soon will become) critical to an MVPD's ability to compete. For example, Comcast could not:

- supply itself NBCU content in HD or 3D format but make it available to rivals only in SD format;²⁶
- make online NBCU content available to its own systems in an earlier window than it would be available to competitors;
- provide online NBCU programming to its own systems at a high throughput rate consistent with high-quality streaming video while offering competitors the same content at slower speeds that could result in a less satisfying consumer experience;
- provide competitors with content of different length, comprising fewer total hours, or with fewer advertising availabilities; or
- favor any content aggregation site in which it has (or acquires) an interest over sites affiliated with other MVPDs.

²⁵ See Opposition at 25-29, 66-67.

²⁶ The Commission has recently recognized that an SD version of programming is not an acceptable substitute for HD/3D/VOD, and thus each must be treated as a distinct service for purposes of the program access rules. See *Terrestrial Loophole Order*, ¶¶ 54-55 & n.219.

The conditions proposed by DIRECTV are designed to be as minimally intrusive as possible consistent with the purposes of the program access statute and rules. They are not generalized obligations applicable to all aspects of Comcast's broadband operations, but are limited to those specific aspects of these operations affected by its vertical integration with NBCU. They limit the protected parties to MVPDs. They apply only to programming, and more specifically to only that programming which Comcast voluntarily decides to distribute by alternative means. It is hard to see how such narrowly tailored conditions targeted to the vertical nature of this transaction could impede any legitimate online initiative Applicants may have in mind.

II. THE PROPOSED TRANSACTION WILL LEAD TO HIGHER PRICES FOR BROADCAST AND NATIONAL PROGRAMMING.

DIRECTV and others demonstrated in initial comments that the proposed transaction will allow Comcast to increase the prices paid for NBCU programming by Comcast's rivals. In response to the significant issues raised by DIRECTV and other commenters, Applicants (1) continue to place critical reliance upon assertions that the Commission has considered in previous transactions and authoritatively rejected; (2) attack DIRECTV's economic analysis; and (3) suggest that any concerns could not apply to national programming. Applicants are wrong on all counts.

A. Applicants Continue to Rely Upon Arguments Previously Rejected By The Commission.

1. The Commission Has Rejected Fiduciary Duty As a Sufficient Check Against the Anticompetitive Incentives Created by Vertical Integration.

In their initial Application, Applicants and their experts asserted that fiduciary duties owed by Comcast to the NBCU joint venture would prevent anticompetitive behavior.²⁷ This assertion cannot bear the weight Applicants place upon it. As DIRECTV pointed out, the Commission has considered and rejected the argument that “corporate governance, corporate law or securities laws in general may be relied upon to adequately protect MVPD and video programming competitors from potential anticompetitive vertical foreclosure behavior on the part of Applicants. In that transaction (and others), the Commission concluded that applicants could harm rivals consistent with their fiduciary duties in a number of ways, including a uniform price increase or by making side payments to the minority interest holders as compensation.”²⁸ Both of these strategies would be available to Comcast with respect to NBCU.

Rather than recognize the Commission’s prior conclusion, Applicants now argue even more stridently that fiduciary duties would be sufficient to address concerns about potential anticompetitive conduct. For example, Applicants argue that officers and directors of the joint venture “would violate these [fiduciary] duties if they made business decisions that intentionally sacrificed joint venture profits in order to increase Comcast’s

²⁷ See DIRECTV Comments at 44 (discussing Applicants’ corporate control assertions).

²⁸ *Id.* at ¶¶ 83-84. See also Murphy Report at 31 ¶ 76 (discussing side payments).

MVPD profits — as any foreclosure strategy necessarily would do.”²⁹ Similarly, Katz/Israel assert that GE’s ability to enforce fiduciary duties “would prevent NBCU from withholding access to — or raising the prices of — NBCU programming in order to benefit Comcast,”³⁰ and that GE has strong incentives to ensure that the joint venture “does not engage in costly foreclosure strategies, regardless of the benefits to Comcast Cable.”³¹ This simply cannot be squared with Commission precedent.

Even setting aside Commission precedent, there is a more practical reason to doubt Comcast’s claims concerning fiduciary duty: *Comcast has withheld CSN-Philly from its DBS rivals for over a decade despite fiduciary duties owed to two different partners.*

In July 1996, Comcast acquired a 66.3% interest in Comcast Spectacor, L.P. (“Spectacor”), a partnership that owned the Philadelphia Flyers, the Philadelphia 76ers, and their arenas. The Comcast-controlled Spectacor and the owner of the Philadelphia Phillies thereafter formed Philadelphia Sports Media, L.P. (“PSM”), a partnership that launched the CSN-Philly RSN in 1997. Spectacor’s interest in the PSM partnership was 70%, giving Comcast an effective interest in the RSN of approximately 46%.³² Although

²⁹ See *Opposition* at 140-141.

³⁰ Katz/Israel *Opposition Report* at 12.

³¹ *Id.* at 29.

³² See Comcast Holdings Corp., Form 10-K for the Period Ending 12/31/97 at 13 (*available at* <http://files.shareholder.com/downloads/CMCSA/725460497x0xS950159-98-50/22301/filing.pdf>) (“Comcast 1997 Annual Report”).

Comcast completed its acquisition of the Phillies' interest in the RSN in 2006, its Spectacor partnership {{ }},³³

Both Spectacor and PSM are Pennsylvania limited partnerships.³⁴ Under Pennsylvania law, partners owe a fiduciary duty to one another, including the duty of loyalty.³⁵ Accordingly, Comcast owed fiduciary duties twice over with respect to CSN-Philly — to both its partner in Spectacor and its partner in PSM (the owner of the Philadelphia Phillies). Yet at no time did the fiduciary duties owed to these third parties preclude Comcast from withholding CSN-Philly from its DBS rivals, thereby denying the partnership(s) the benefit of affiliate fees from those rival MVPDs. If Applicants are to be believed, such a foreclosure strategy would *necessarily* "sacrifice[] joint venture profits in order to increase Comcast's MVPD profits" in violation of fiduciary duties to the joint venture.³⁶

DIRECTV is not asserting that Comcast has breached its fiduciary duty to its partners in either Spectacor or PSM over the years. Rather, this example demonstrates that Comcast has proven itself adept at implementing foreclosure strategies notwithstanding the impediments that such duties would theoretically place on such

³³ See Comcast Corp., Responses to the Commission's Information and Discovery Request at 14.

³⁴ See, e.g., Comcast 1997 Annual Report (listing subsidiaries); Comcast Corp., Form 10-K for the Period Ending 12/31/2002 (available at <http://files.shareholder.com/downloads/CMCSA/725460497x0xS950159-03-238/1166691/filing.pdf>) (same).

³⁵ See *Clement v. Clement*, 436 Pa. 466, 260 A.2d 728 (1970) (Pennsylvania law "very simply and unambiguously provides that partners owe a fiduciary duty one to another"); 15 Pa. Cons. Stat. §§ 8334 (entitled "Partner accountable as fiduciary"), 8504 (making provisions for general partnerships found in Chapter 83 applicable to limited partnerships).

³⁶ See Opposition at 140. Professors Katz and Israel admit that they have not studied any aspect of a foreclosure model applied to CSN-Philly. See also Katz/Israel Opposition Report at 33

activities. This evidence confirms the Commission's decision to reject principles of corporate governance as a substitute for more transparent conditions enforceable by the parties that would be directly harmed by anticompetitive behavior.

Of course, the notion that NBCU would work sufficiently closely with its controlling shareholder to overcome "friction" and achieve a bevy of new business models (as Applicants claim) yet not take that shareholder's interests into account is unrealistic. It should thus come as no surprise that, in a conference call to discuss Comcast's most recent financial results, a Comcast representative explained how tightly NBCU would be bound to the company, stating

just to be clear, once the deal closes and we issue our statements, we will be — NBCU will be consolidated with Comcast. We will control it and we will manage it. Obviously, we will have a lot of say in terms of how that business performs.³⁷

Moreover, because Comcast has the right to acquire 100% of the joint venture within the next several years, the Commission could not rely upon fiduciary constraints as anything more than a short-term fix for a long-term problem. The Opposition makes clear that Comcast intends to take 100% ownership of NBCU in the near future.³⁸ And because Comcast will already have control of NBCU, no further regulatory review will be required for Comcast to exercise its rights to acquire the remaining interest in NBCU

³⁷ Comcast Corporation, Q2 2010 Earnings Call, Management Discussion Section, at 13 (July 28, 2010) (statement by Michael Angelakis, Chief Financial Officer) (available at files.shareholder.com/downloads/CMCSA/980586264x0x391044/4414f8c7-a69e-4b94-9753-909a5f680991/Comcast_Transcript-7.28.10.pdf) ("Comcast Q2 Earnings Transcript").

³⁸ See, e.g., Opposition at 67 ("The transaction also will result in a reduction initially and elimination (once Comcast owns all of NBCU) of double marginalization"), 69 (arguing that marginal costs would decrease by "eventually 100% when Comcast obtains full ownership of NBCU"). Applicants argue that this process could take up to seven years — but it could be completed immediately, if GE and Comcast agree. See Application at 15.

from GE. These factors further undercut any reliance Applicants would have the Commission place on fiduciary duty.

2. The Commission Has Rejected the Assertion That Broadcast Network Programming Does Not Drive Subscriber Switching.

The Application argued that NBC broadcast network fare is not “must have” programming, and therefore should not be subject to the procompetitive safeguards that the Commission has imposed in every other recent broadcast/MVPD combination.³⁹ As DIRECTV pointed out in response, the Commission found just the opposite in the *News/Hughes* proceeding: that “carriage of local television broadcast station signals is critical to MVPD offerings”⁴⁰ and that a broadcast network operator “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.”⁴¹ Nonetheless, Applicants continue to insist that NBC network programming in particular is not sufficiently important to warrant regulatory concern. As demonstrated below, this assertion is not only erroneous, but also conflicts with the parties’ internal documents and their own expert’s prior analysis.

³⁹ See Application at 118.

⁴⁰ *News/Hughes*, ¶ 202.

⁴¹ *Id.* at ¶ 201. In order to prevent anticompetitive use of such programming by vertically integrated companies, the Commission has required commercial arbitration of retransmission consent disputes (with continued carriage pending resolution) as a condition in both recent transactions that involved a combination of broadcast and MVPD assets — even though one of those cases involved only two broadcast stations and neither involved a dominant MVPD such as Comcast. See *id.*, ¶¶ VI.C; *News/Hughes*, Appendix B, Section IV (2008).

Applicants argue that the conclusions reached in *News/Hughes* should not apply to this proceeding for three reasons, none of which can withstand scrutiny.⁴²

1. *Alleged "evidence in the record."* First, Applicants contend that "for the first time" the record includes "evidence on actual switching to rival MVPDs that resulted from temporary foreclosure."⁴³ Yet the record in *News/Hughes* included evidence of switching during a period in which Time Warner Cable systems in Houston did not carry the ABC affiliate. The Commission thoroughly analyzed the data from the event and found a statistically significant effect demonstrating the significance of broadcast network programming.⁴⁴

2. *Lower ratings.* Applicants also note that the ratings for broadcast television network programming have declined in general, and argue that viewers may no longer regard such programming as "must have." Yet as set forth in DIRECTV's Comments, NBC controls the rights to many marquee sporting events and highly popular shows.⁴⁵ Numerous studies confirm the Commission's conclusion that viewers still deem this programming a critical element in any MVPD service. For example, a recent survey found that 52% of current pay TV subscribers would consider switching to a different MVPD if NBC broadcast programming were no longer offered by their current MVPD

⁴² See Opposition at 142 n.475.

⁴³ *Id.*

⁴⁴ See *News/Hughes*, Appendix D, ¶¶ 18-23.

⁴⁵ See DIRECTV Comments at 14.

— the highest figure found in the survey.⁴⁶ Similarly, the Congressional Research Service noted that major broadcast networks “continue to capture relatively large audiences” and found that “in some ways network proliferation has increased the value of these networks, even if their audience share has shrunk over time.”⁴⁷ Accordingly, it concluded that an MVPD “could find itself at risk of losing substantial numbers of subscribers if a contract negotiation impasse resulted in it not carrying the programming of one of those [network] affiliates.”⁴⁸

The notion that broadcast programming is no longer “must have” is also belied by Comcast’s conduct, its internal documents and its economic expert. Comcast recently renewed its retransmission consent agreement with CBS well before the prior agreement expired in order to lock up CBS programming for ten years.⁴⁹ Analysts believe that Comcast will pay up to \$1 per subscriber per month for CBS programming by expiration of the new agreement⁵⁰ — a figure suggesting that Comcast’s *executives*, at least, consider broadcast programming to be “must have.”

⁴⁶ See J.P. Morgan, “J.P. Morgan Consumer Survey: Identifying ‘Must Carry’ Networks and Consumer Appetite For Channels A La Carte” (Apr. 20, 2010).

⁴⁷ Charles B. Goldfarb, *Retransmission Consent and Other Federal Rules Affecting Programmer-Distributor Negotiations: Issues for Congress* at 22 (Congressional Research Service Report for Congress July 9, 2007) (available at http://assets.opencrs.org/rpts/RL34078_20070709.pdf).

⁴⁸ *Id.*

⁴⁹ Mike Farrell, *Comcast Inks CBS Retrans Deal*, Multichannel News (Aug 2, 2010) (available at http://www.multichannel.com/article/455544-Comcast_Inks_CBS_Retrans_Deal.php).

⁵⁰ Sarah Rabil, *CBS, Comcast Sign 10-Year Contract to Carry TV Shows*, Bloomberg News (Aug 2, 2010) (available at <http://www.bloomberg.com/news/2010-08-02/cbs-signs-10-year-contract-allowing-comcast-to-carry-its-television-shows.html>).