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Via Electronic Delivery

Ms. Marlene H. Dortch
Federal Communications Commission
The Portals, TW-A325
445 12th Street SW
Washington, DC 20554

Re: Ex Parte Presentation – MB Dkt. 10-56, *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licensees.*

Dear Ms. Dortch:

Pending before the FCC is a $30 billion transaction that will play a pivotal role in shaping the future of media in the United States. Comcast, the nation's largest cable company and leading provider of high-speed broadband Internet access, is seeking to merge with NBC Universal, one of the five media conglomerates that controls almost every TV viewing hour in America. At a time when the societal importance of broadband has been never been greater and the way we access information and entertainment is undergoing a transformational shift, the FCC has an historic opportunity to ensure tomorrow's communications landscape serves the public.

Increasingly, consumers are using broadband Internet services to expand their video programming options. As EarthLink explained previously, the merger will substantially lessen competition in the emerging online video market.[1] Yet, broadband

[1] *See* Petition to Condition or Deny of EarthLink, Inc., MB Dkt. 10-56 (filed Jun. 21, 2010) and Appendix 2: Report of Professor Simon J. Wilkie, *Consumer Sovereignty, Disintermediation and the Economic Impact of the Proposed Comcast/NBCU Transaction*; Reply to Opposition to Petition to Condition or Deny of EarthLink. Inc., MB Dkt. 10-56 (filed Aug. 19, 2010) and Appendix 1: Reply Report of Professor Simon J. Wilkie, *Economic Analysis of the Proposed Comcast-NBCU-GE Transaction*; *Supplemental Report of Professor Simon J. Wilkie*, MB Dkt. 10-56 (filed Sept. 30, 2010) ("*Wilkie Supplemental Report*").

access – the dial tone of the 21st century[2] – is about more than just video entertainment.[3] There is widespread agreement that broadband Internet access is increasingly vital to our nation.[4] Just last week, federal and state regulators called for universal availability of broadband Internet services.[5] Earlier this year, the FCC stressed that "[b]roadband in the home can help minimize the socioeconomic disparities that persist among low-income, minority or socially disadvantaged populations, which tend to be disparately impacted by a lack of access to quality information or essential services."[6]

The uncontested record evidence before the FCC shows that the proposed Comcast-NBCU transaction will increase the price for standalone broadband Internet service.[7] This will not only limit consumer choice and interfere with the growth of online video, but will cause even more Americans to forego broadband altogether.[8] In other words, although Comcast touts the transaction as "pro-competition," "pro-consumer,"

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[2] *See Vice President Biden Kicks Off $7.2 Billion Recovery Act Broadband Program* (Dec. 17, 2009), *available at* http://www.whitehouse.gov/the-press-office/vice-president-biden-kicks-72-billion-recovery-act-broadband-program (quoting Governor Sonny Perdue (R-GA) "Internet access is as important to our communications infrastructure today as reliable telephone service was a century ago.").

[3] *See, e.g.*, Omnibus Broadband Initiative, *Connecting America: The National Broadband Plan*, GN Dkt. 09-51 (rel. Mar. 16, 2010) ("*National Broadband Plan*").

[4] The FCC's *National Broadband Plan* described broadband as "a foundation for economic growth, job creation, global competitiveness and a better way of life." *See National Broadband Plan* at XI.

[5] *Federal-State Joint Board on Universal Service*, Recommended Decision, CC Dkt. 96-45, FCC 10J-3 (rel. Nov. 4, 2010).

[6] *National Broadband Plan*, Ch. 9, n. 50, *citing* Letter from Rep. Calvin Smyre, Georgia House of Representatives and President of the National Black Caucus of State Legislators, to Julius Genachowski, Chairman, FCC, GN Dkt. 09-51 (filed Jan. 8, 2010).

[7] *See, e.g., Wilkie Supplemental Report*. Notably, Comcast has wholly failed to refute this detailed and careful economic analysis, apparently choosing to rest on its previous, well-worn, retorts. *See, e.g.*, Letter from Michael H. Hammer, Attorney, Comcast, to Marlene H. Dortch, Secretary, FCC, MB Dkt. 10-56 (filed Nov. 3, 2010).

[8] Affordability remains one of the top reasons that individuals do not have broadband at home, with the most recent Census Bureau data showing approximately 95 percent of households with income over $100,000 subscribe to broadband, compared with approximately 35 percent of households with income of less than $25,000. *See Exploring the Digital Nation: Home Broadband Internet Adoption in the United States*, U.S. Department of Commerce (Nov. 2010), *available at* http://www.ntia.doc.gov/reports/2010/ESA_NTIA_US_Broadband_Adoption_Report_11082010.pdf. *See also Federal-State Joint Board on Universal Service,* Statement of FCC Commissioner Mignon L. Clyburn, CC Dkt. 96-45 (Nov. 4, 2010) (less than half of low-income Americans have subscribed to broadband, with many citing the expense as the reason why).

and "pro-innovation," the facts actually show that the transaction will increase the "broadband affordability gap," leaving the very Americans who could most benefit from broadband opportunities little option but to disconnect.[9] As Chairman Genachowski put it, "The digital divide is an opportunity divide – if you can't get online, you can't compete in the digital economy."[10] For this reason, the FCC (unlike Comcast) cannot simply ignore the impact the Comcast-NBCU transaction will have on U.S. consumers.

<u>Cord-Cutting: Choice or Necessity?</u>

The impact of the merger-induced standalone broadband price increase will be widely felt. Consumers are increasingly "cutting the cord" – getting rid of their traditional multichannel video service such as Comcast's cable service – in favor of less costly options, including online information and entertainment sources. While Comcast largely dismisses cord cutting as minimal, it at least acknowledges publicly that consumers are increasingly dropping their service due to economic reasons.[11] In describing Comcast's 3rd quarter loss of 275,000 subscribers, a prominent media analyst observed that "the customers they are losing tend to be at the bottom half of the economy – a lot of them appear to be struggling to make ends meet."[12] While the loss of poorer subscribers who cannot afford steep monthly communications bills may not trouble Comcast, the FCC should be extremely concerned that the higher standalone broadband prices caused by the proposed transaction will cause even more Americans to forego broadband service altogether.

As EarthLink and others have shown, cord cutting is also a growing indicator of the transformation of the video paradigm. The FCC has already acknowledged that, "[t]he number of suppliers of online video and audio is almost limitless."[13] Viewers – especially younger viewers – have discovered the vast sea of video content available on the Internet, including traditional offerings, user-generated content, short-form video and

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[9] As the FCC stated, "Some segments of the population – particularly low-income households, racial and ethnic minorities, seniors, rural residents and people with disabilities – are being left behind." *National Broadband Plan* at 167.

[10] *FCC Chairman Julius Genachowski Statement on NTIA Broadband Adoption Report*, FCC (Nov. 8, 2010).

[11] *See* Peter Kafka, *Comcast Says Its Disappearing Subscribers Aren't Cord Cutters*, Media Memo, Wall Street Journal Digital Network (Oct. 27, 2010), *available at* http://mediamemo.allthingsd.com/20101027/comcast-says-its-disappearing-subscribers-arent-cord-cutters/.

[12] *See* Tim Arango, *Comcast Loses More Subscribers Than Expected, but Its Earnings Top Estimates*, New York Times (Oct. 28, 2010), *available at* http://www.nytimes.com/2010/10/28/business/media/28comcast.html (quoting Craig Moffett, Sanford C. Bernstein & Company) ("*Comcast Loses More Subscribers Than Expected*").

[13] *Implementation of the Child Safe Viewing Act*, <u>Report</u>, 24 FCC Rcd. 11413, ¶ 126 (2009).

more. Streaming services such as Netflix and the online video capabilities of Google TV, Clicker, Boxee, Apple TV and others have opened up a new way of letting consumers watch what they want, where they want, when they want. The evidence before the FCC, however, shows that Comcast will do whatever it takes to stop or slow this trend, including raising the price of the standalone broadband access that cord cutters use and obstructing online video competitors, which ultimately hinders consumers from choosing what they want. Indeed, Comcast's recently disgorged confidential internal documents make it abundantly clear that the concerns raised by EarthLink and others are more than mere speculation.[14] Allowing Comcast to achieve these goals is certainly not in the larger public interest.

<u>Breaking the Bundle: Comcast's Grip Gets Tighter</u>

Increased standalone broadband access prices and Comcast's profit-maximizing motivation to focus on higher-end customers as a result of the merger will also affect the ability of consumers to "break the bundle" and buy only the service or services they want. Verizon's CEO Ivan Seidenberg recently explained that consumers' interest in buying service bundles (usually including Internet access, pay TV, and telephone) is clearly diminishing. "Young people are pretty smart. They're not going to pay for something they don't need to," he said.[15] Nor should they. Consumers should have choice rather than being forced into service packages through pricing designed to limit their options. Notably, just as with cord cutters, not everyone who wants to break their bundle is a young, "cutting-edge technologist."[16] Especially with the continued uncertain economy and persistent high unemployment, many consumers are seeking ways to save money, whether by eliminating their wireline telephone service and relying on wireless, using lower-cost (or free) Internet-based Voice-over-IP (VoIP) services, or using their broadband access connection for video. While higher standalone broadband access prices could cause these consumers to re-think eliminating their Comcast service bundle, it could also simply force consumers to eliminate services that provide a valuable societal connection. The FCC, as the agency charged with ensuring the proposed merger affirmatively benefits the public, must not disregard less advantaged Americans.

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[14] *See* Letter from Jennifer P. Bagg, Counsel, EarthLink, Inc., to Marlene H. Dortch, Secretary, FCC, MB Dkt. 10-56 (filed Nov. 9, 2010).

[15] *See* Greg Sandoval, *Verizon CEO: Cord Cutting is Real*, CNET News (Sept. 23, 2010), *available at* http://news.cnet.com/8301-31001_3-20017388-261.html.

[16] *See Comcast Loses More Subscribers Than Expected, supra* ("The reality is it's someone who is 40 years old and poor and settling for a dog's breakfast of Netflix and short-form video.").

Comcast's Future Broadband Monopoly

Broadband prices are already higher than prices in other comparable industries.[17] In fact, the FCC and the Department of Justice have determined that broadband Internet access is not a competitive market, meaning consumers are deprived of innovation, quality-of-service, and competitive pricing.[18] Today, Comcast is the dominant communications provider in major cities throughout the United States, including Chicago, Philadelphia, Boston, San Francisco, Washington, Atlanta, Detroit, Houston, Seattle, Minneapolis, Miami, Denver, Sacramento, Pittsburgh, Baltimore, Portland, and Indianapolis. In the future, it is clear it will be the monopoly provider in its service area for high-speed, video-capable broadband services.[19] Monopoly control over broadband pipes, without any government oversight, is a well-tested recipe for anticompetitive conduct.

It is well accepted that allowing one company to exercise unfettered control over content and conduit will harm the public.[20] Consumer welfare losses resulting from the loss of Internet content diversity alone can be substantial.[21] Noted economists observed

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[17] The broadband market "looks nothing like other parts of electronics, such as computers or integrated circuits, where the quality adjusted price decline per year regularly exceed double digits." *See* Shane Greenstein and Ryan McDevitt, *Evidence of a Modest Price Decline in US Broadband Services*, Working Paper # 0102, The Center for the Study of Industrial Organization at Northwestern University (Jan. 2010), *available at* http://www.wcas.northwestern.edu/csio/Papers/2010/CSIO-WP-0102.pdf.

[18] *See, e.g.*, *National Broadband Plan* at 36, 42. *See also Ex Parte* Submission of the Department of Justice, GN Dkt. No. 09-51, at 14, 28 (filed Jan. 4, 2010) (not only is monitoring needed in "those areas in which only a single provider offers—or even two providers offer—broadband service," but price regulation may be appropriate "to protect consumers from the exercise of monopoly power.") ("DOJ *Ex Parte* Submission"); Robert Atkinson, *The Role of Competition in a National Broadband Policy*, 7 J. on Telecomm & High Tech. L. 1, 11 (2009).

[19] *National Broadband Plan* at 42.

[20] *See*, *e.g.*, Ha J. Singer and J.Gregory Sidak, *Vertical Foreclosure in Video Programming Markets: Implications for Cable Operators*, 6 Review of Network Economics 372, 376 (2007) ("In addition to the competitive injury of unaffiliated video programming providers, the abuse of that market power by cable operators would harm consumers of video programming through less competition (resulting in higher prices and less choice) in the downstream MVPD market, as unaffiliated video programming becomes affiliated programming, which is then withheld to rival MVPDs.").

[21] *See e.g.*, Mark A. Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. Rev. 925, 945-46 (2001) ("[T]he risk of giving control of the network to a strategic actor is a threat to innovation," including innovation of future Internet applications and content.); Tim Wu, *Why Have a Telecommunications Law?: Anti-Discrimination Norms in Communications*, 5 J. Telecomm. & High Tech. L. 15, 16 (2006).

almost a decade ago, "[A] vertically integrated broadband provider will have strong incentives to discriminate against unaffiliated content providers despite the fact that consumers value diversity in broadband content."[22] Emerging online and streaming video is particularly vulnerable to anticompetitive practices: "[A] cable provider who allows video streaming will find it harder to engage in the profitable and customary price discrimination that sets high markups for premium cable programming. Thus, a cable provider might rationally, but inefficiently, try to stop this innovative method of distribution."[23] Though Comcast's desire to quash competition, increase prices and manipulate service availability may not be unexpected, it highlights why the FCC must act to ensure that the transaction serves more than Comcast's bottom line.

<u>Wholesale Access Remedies Serve the Public</u>

The serious, detrimental consequences of the proposed transaction do not necessarily mean the FCC must deny the merger. Instead, as it has over many decades, the FCC can require measures to be implemented to counter the harms that flow, in large part, from the lack of competitive broadband alternatives for consumers and video programmers. Earlier this year, the Department of Justice explained the utility of merger conditions in addressing competition concerns such as those presented here.[24] Given that the FCC has already found that broadband subscribers benefit from the presence of multiple broadband providers,[25] and that well-functioning wholesale markets can help foster retail competition,[26] such a remedy is particularly suitable here.

Mandatory nondiscriminatory wholesale broadband access, as proposed by EarthLink and supported by DISH Network, Public Knowledge, and the New Jersey

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[22] Jerry A. Hausman, J. Gregory Sidak & Hal J. Singer, *Residential Demand for Broadband Telecommunications and Consumer Access to Unaffiliated Internet Content Providers*, 18 Yale J. on Reg. 129, 162-163 (2001) ("consumers would suffer very large welfare losses if they were denied programming choices over the Internet.").

[23] *See* Joseph Farrell, Phillip J. Weiser, *Modularity, Vertical Integration and Open Access Policies: Towards a Convergence of Antitrust Regulation in the Internet Age,* 17 Harv. J. Law & Tec 85, 109 (2003). *See also id.* at 108 (a "platform monopolist's desire to price discriminate can . . . lead it to exclude efficient innovation or price competition in complementary products").

[24] DOJ *Ex Parte* Submission 11 ("The operative question in competition policy is whether there are policy levers that can be used to produce superior outcomes, not whether the market resembles the textbook model of perfect competition. In highly concentrated markets, the policy levers often include: (a) merger control policies; (b) limits on business practices that thwart innovation (e.g., by blocking interconnection); and (c) public policies that affirmatively lower entry barriers facing new entrants and new technologies.").

[25] *National Broadband Plan* at 37.

[26] *Id.* at 47, also noting that "the nation's regulatory policies for wholesale access affect the competitiveness of markets for retail broadband services provided to small businesses, mobile customers and enterprise customers."

Division of Rate Counsel, is a successful, tested mechanism that has been used by regulators and policymakers throughout the world to reduce the likelihood of anticompetitive conduct by gatekeepers such as Comcast.[27] Conditioning the transaction on the availability of nondiscriminatory wholesale broadband access service will help ensure that consumers can "cut the cord" and "break the bundle" and will also allow the online video market to develop. Consumers will have somewhere to turn for broadband access in the face of standalone broadband price increases. Video programmers, including emerging online video distributors, will have an independent means to reach viewers, which will also help reduce Comcast's incentives to engage in blocking, discrimination and other anticompetitive practices. As a result, users will be able to access video content unobstructed by Comcast. Further, Comcast will have a market-based check on its conduct, spurring it to increase innovation (and investment) and improve customer service.

This type of structural remedy EarthLink has proposed – which is grounded in market-based contractual arrangements – is also proven and efficient. A similar approach in the *AOL-Time Warner* merger was successfully implemented by the FCC, the Federal Trade Commission, and the industry a decade ago. EarthLink's experience shows that a "reasonable rates and terms" requirement for nondiscriminatory wholesale broadband access coupled with agency "backstop" approval can mitigate merger concerns and ensure consumers are served. Notably, once implemented, minimal government intervention and oversight is needed to produce enormous consumer benefits. Especially in the face of award-winning independent broadband access providers like EarthLink,[28] the competitive pressure will help discipline Comcast's ability to raise prices and engage in other anti-consumer practices.

The FCC cannot approve the merger of Comcast-NBCU unless the public interest is served. The public interest "necessarily invites reference to First Amendment principles" and the public's right to enjoy a diversity of information sources.[29] As the

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[27] *See, e.g.,* Government Accountability Office Report, *National Broadband Plan Reflects the Experiences of Leading Countries, but Implementation Will Be Challenging,* GAO 10-825 (Sept. 2010), *available at* http://energycommerce.house.gov/Press_111/20101012/GAO.Report.Broadband.2010.pdf. *See* Petition to Deny of DISH Network, L.L.C and EchoStar Corporation, Appendix, at 35; Petition to Deny of Public Knowledge, at 15; Reply Comments of New Jersey Division of Rate Counsel, at 42, MB Dkt. 10-56 (filed Jul. 21, 2010).

[28] *Customer Satisfaction with Residential High-Speed Internet Service Declines Slightly from 2009*, J.D. Power and Associates – Press Release (Oct. 28, 2010), *available at* http://businesscenter.jdpower.com/news/pressrelease.aspx?ID=2010167 (EarthLink is ranked in the Top *Two in Internet Service Provider Residential Customer Satisfaction, South Region*; and *Top Three in Internet Service Provider Residential Customer Satisfaction, East and West Regions*).

[29] *Metro Broadcasting v. FCC*, 497 U.S. 547, 567 (1990).

U.S. Supreme Court reiterated over 60 years ago, "Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints" on the public's ability to enjoy the free flow of information.[30] As we transition to the next phase of media – with its rich promise of virtually unlimited content – the FCC must ensure that the rights of "the viewers and listeners" remain paramount. Accordingly, the FCC must approve the transaction only with appropriate safeguards to ensure the public is served.

Respectfully submitted,

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[30] *Associated Press v. U.S.*, 326 U.S. 1, 20 (1945).