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December 13, 2010

Via ECFS

The Honorable Julius Genachowski
Chairman
Federal Communications Commission
445 12th Street, SW
Washington D.C. 20554

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

Dear Chairman Genachowski:

On July 21, 2010, the New Jersey Division of Rate Counsel ("Rate Counsel") submitted detailed reply comments, in which it opposed the joint application, submitted on January 28, 2010, by Comcast, GE, and NBCU (the "Applicants") seeking the consent of the Federal Communications Commission ("FCC" or "Commission") to assign and transfer control of various licenses to a new limited liability company that would constitute a joint venture of GE and Comcast ("Application"). Rate Counsel described the numerous ways in which the proposed transaction is not in the public interest and also identified conditions that should, at a minimum, apply to any approval of the transaction.

In the eleven months since the Applicants submitted their filing to the FCC, they and diverse interested parties have provided competing views of the transaction in additional economists' reports,[1] responses to the FCC's information and data requests, and numerous *ex parte* filings. Rate Counsel commends the FCC for its thorough and deliberate investigation of this merger, which could have far-reaching and potentially devastating effects on the way that consumers obtain access to information and entertainment, as well as for the diversity of and prices for such access.

In the intervening months, the Applicants have failed to address adequately the concerns that Rate Counsel and others have raised. The purpose of this *ex parte* filing is

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[1] / See, e.g. *ex parte* filing on November 24, 2010 of a report by Kevin Murphy responding to the report of Mark Israel and Michael Katz filed by Comcast on November 10, 2010.

to reiterate and expand upon Rate Counsel's original concerns. In recent *ex parte* filings, others have also described the adverse impact of the merger for consumers as well as the increased potential and incentive for anticompetitive behavior that the proposed transaction would create. Based on a review of filings submitted in recent months, Rate Counsel continues to be concerned with the Applicants' attempt to gloss over the serious and irreversible harm that the transaction would pose to consumers throughout the country. The FCC should view critically the pre-approval promises and assertions made by Applicants, and, instead, be informed and guided by Comcast's prior conduct.[2]

In recent years, the FCC concluded that Comcast had selectively targeted and interfered with connections of peer-to-peer (P2P) applications. The FCC dismissed Comcast's argument that its practices are required to combat network congestion and concluded: "the company's discriminatory and arbitrary practice unduly squelches the dynamic benefits of an open and accessible Internet and does not constitute reasonable network management" and also stated that "[m]oreover, Comcast's failure to disclose the company's practice to its customers has compounded the harm."[3] However, on April 6, 2010, the U.S. Court of Appeals for the District of Columbia vacated the 2008 FCC order that banned Comcast from blocking its broadband subscribers' use of BitTorrent (online file sharing technology).[4] The Court faulted the FCC's order because it relied on its net neutrality principles and not specific statutory authority. According to the Court, if the FCC is to rely on its ancillary authority under Title I, then it must cite the specific statutory responsibilities that its actions are seeking to fulfill. Rate Counsel acknowledges that the FCC is now pursuing ways to protect an open network,[5] but regardless, Comcast's prior conduct is instructive of its potential future conduct particularly if the transaction occurs. Rate Counsel urges the Commission to consider the compelling economic incentives and enhanced opportunities for Comcast to maximize its profits at consumers' expense that would exist post-transaction. The FCC should consider the vast and irreversible harm that the transaction would create for consumers in New Jersey and throughout the country.

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[2] / *See, e.g.,* In the Matter of Preserving the Open Internet, GN Docket No. 09-191; Broadband Industry Practices, WC Docket No. 07-52, *Notice of Proposed Rulemaking*, 24 FCC Rcd. 13064 (2009) ("Open Internet NPRM"), at paras. 36-37; Complaint of Free Press and Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications, Memorandum Opinion and Order, 23 FCC Rcd 13028 (2008); Rate Counsel, at 29 (discussing Comcast withholding sports programming).

[3] / Complaint of Free Press and Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications, Memorandum Opinion and Order, 23 FCC Rcd 13028 (2008), at para. 1.

[4] / *Comcast Corporation v. Federal Communications Commission*, United States Court of Appeals for the District of Columbia Circuit, Case No. 08-1291.

[5] / A draft "network neutrality" proposal is currently circulating at the FCC and the consideration of an Open Internet Order is on the tentative agenda for the FCC's December 21, 2010 open meeting. FCC News Release, November 30, 2010.

Approximate estimate of the harm in New Jersey

Comcast is the largest cable operator in New Jersey, with 1,315,662 subscribers in 2009.[6] The transaction directly affects New Jersey's consumers that subscribe to cable services from other providers (1,289,032 in 2009[7]) because it likely would raise other providers' cost of access to progamming and also affects consumers of video services from multichannel video programming distributors ("MVPD") such as Dish Network and DirecTV, which also likely would confront higher programming costs. Also, by facilitating Comcast's ability to raise prices and to discriminate against rivals, the transaction could also facilitate the ability of Comcast to raise its own rates.[8] The magnitude of the potential harm to New Jersey consumers from higher subscription costs is substantial – extrapolating very roughly from national estimates of harm that the American Cable Association ("ACA") computed,[9] the annual harm borne by New Jersey's cable consumers could be as much as $13 million and the net present value over the upcoming nine years for Comcast's New Jersey consumers could be approximately $97 million.[10]

This estimate of the harm to New Jersey associated with increased subscription prices is a very rough approximation of consumer harm because it does not specifically adjust for the following factors as they may relate to markets in New Jersey:

- Rogerson's numbers calculate the harm in designated market areas ("DMA") where NBC has a Regional Sports Network and in DMAs where consumers are served by NBC owned and operated television stations (for horizontal harms).

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[6] / New Jersey Board of Public Utilities, Office of Cable Television, *Cable Facts 2009*, at 21. The second and third largest cable providers are CableVision (with 948,915 subscribers) and Verizon (with 239,297 subscribers). Total 2009 cable subscribership was 2,604,694. *Id.*

[7] / *Id.*, at 21.

[8] / See, for example, "An Estimate of the Consumer Harm that Will Result from the Comcast-NBCU Transaction," November 8, 2010, William P. Rogerson, submitted by the American Cable Association, November 8, 2010 ("Rogerson III"), at fn 20.

[9] / The ACA estimates that the vertical competitive effects of this transaction will yield consumer harm of $176.5 million per year and the horizontal competitive effects of this transaction will yield consumer harm of $140.3 million per year for a total consumer harm of $316.8 million per year. The ACA computes a nine- year net present value for consumer harm of $2.6 billion. "An Estimate of the Consumer Harm that Will Result from the Comcast-NBCU Transaction," November 8, 2010, William P. Rogerson, submitted by the American Cable Association, November 8, 2010 ("Rogerson III"), at 2. (Rogerson submitted two earlier reports in this proceeding, *Rogerson I* and *Rogerson II*). The Rogerson III report observes that its use of a 5% discount rate results in an a conservative calculation of the net present value (today's interest rates are much lower than 5%; if one used a lower discount rate, the net present value of the total consumer harm would be higher than $2.6 billion). *Id.*

[10] / The National Cable and Telecommunications Association website shows that as of September 2010 there were 60.4 million basic cable and 44.4 million digital cable subscribers nationwide. http://www.ncta.com/Statistics.aspx. There were 2.6 million basic cable subscribers in New Jersey in 2009. New Jersey Board of Public Utilities, Office of Cable Television, *Cable Facts 2009*, at 21. Therefore, New Jersey basic cable customers represent 4.3% of all basic cable subscribers nationwide or 2.48% of all cable (basic and digital) subscribers.

- Rogerson calculates horizontal harm of NBCU cable networks being sold with RSNs as $54.8 million.
- Rogerson's vertical harm cost increase calculations only include the four national MVPDs: DirecTV, Dish, Verizon and AT&T for the NBCU national networks ($137.7 million).
- Rogerson's vertical harm cost increase calculations only include the four national MVPDS and only in the DMAs where NBC O&Os exist for the $38.8 million cost increase.

Furthermore, the Rogerson III Study does not purport to quantify the many other adverse consequences for New Jersey consumers associated with the proposed transaction, such as the loss of diversity in video programming, diminished diversity in local programming, potential increases in broadband rates, consumers' loss of access to programming that Comcast may withhold during and as part of negotiations, and the potential for the proposed merger to lead to further concentration in the market as other companies merge to "keep up" with Comcast.[11]

The proposed transaction poses numerous substantial harms.

In its reply comments, Rate Counsel identified and discussed numerous harms that likely would result from the proposed transaction. This filing reiterates some but by no means all of these adverse effects. The FCC should not confuse benefits that will accrue to the Applicants from those that would accrue to consumers. Furthermore, the transaction, if approved, would create pressure for others in the industry to follow suit, which would further diminish competition, diversity, and innovation.

The proposal would diminish diversity in the media market.

Consumers' ability to obtain access to diverse viewpoints and sources of information is an essential ingredient of democracy in the United States. Industry concentration of the scale and scope embodied in the proposed Comcast/NBCU merger would lead to diminished diversity and therefore harm consumers. Local news would have a harder time competing for advertising revenues in the face of merger and so would have fewer revenues to support local diverse shows.[12]

Rate Counsel concurs with Free Press et al., that the Applicants' failure to define the relevant geographic market for advertising, that is to discount the local advertising market, undermines the credibility of the Applicants' analysis of the impact of the merger on local advertising revenues.[13]

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[11] / See also Rate Counsel Reply Comments, July 21, 2010 ("Rate Counsel"), at 26-28 for additional discussion of why Comcast's economic analysis of consumer harm and benefit is too narrow and therefore flawed, and see the entirety of Rate Counsel's reply comments for a detailed discussion of the many harms that the transaction poses.

[12] / Reply to Opposition, Free Press, Media Access Project, Consumer Federation of America, Consumers Union, August 19, 2010 ("Free Press, et al."), at 20.

[13] / Free Press, Declaration of Dr. Mark Cooper and Adam Lynn in Support of Public Interest Petitioners' Reply to Opposition, August 19, 2010 ("Cooper/Lynn Declaration"), at 34.

The proposed transaction would make it that much harder for local stations to obtain advertising and so would create pressures for others in the industry to embark on similar paths of market concentration and consolidation. Comcast already limits advertising from its competitors – the transaction would enhance its ability for such discrimination.[14] As Free Press et al. explain:

> No other broadcaster will be able to offer these kinds of volume discounts and package deals unless they consolidate with an MVPD and broadband access distributor, which would only further amplify the consolidation and competition problems that will result from this merger. Thus, Applicants' assertions that their proposed transaction "does not pose any of the harms" associated with "traditional media consolidation," or that it will not result in a domino effect of consolidation are incorrect. Instead, this merger will fundamentally change the structure of local media markets in way that increases pressures for local media to consolidate in ways and to levels hereto unseen.[15]

Rate Counsel is concerned about the impact of the merger on diversity in media markets, particularly because of New Jersey's extremely diverse population. New Jersey cable subscribers have access to a host of niche programming targeted to its' diverse population that could be adversely affected by the merger if safeguards are not incorporated. New Jersey's largest ethnic groups are: Italian, Irish, African-American, German, Polish, and Jewish. However, New Jersey also has the second largest Muslim population; the third highest Asian population, as well as a large number of Hispanics according to the 2000 Census. The state has very sizable enclaves of different non-English-speaking communities representing 12 different languages and dialects which would be directly and adversely affected by any loss of diversity in programming. New Jersey's diversity in media markets is unique and therefore, approval of the merger without conditions to ensure continued diversity in media markets would be extremely detrimental to a vast segment of New Jersey consumers.[16]

The merger would create vertical harm.

NBC's must-have programming would be combined with Comcast's extensive cable distribution system.

- Comcast could then increase its charges to MVPDs that compete with Comcast for NBCU programming.[17] MVPDs would then likely increase their subscription rates.

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[14] / Free Press, et al., at 29.

[15] / *Id.*, at 26 (cites omitted).

[16] / Mapping Census 2000: The Geography of U.S. Diversity (Microsoft Excel) andAncestry: 2000 — Census 2000 Brief" (PDF). http://www.census.gov/prod/2004pubs/c2kbr-35.pdf. Retrieved 2010-07-25.

[17] / National MVPDs include Dish, DirecTV, AT&T, and Verizon. There are also regional cable overbuilders.

- Small MVPDs that purchase "must-have" programming separately from Comcast and NBCU likely would confront significant price increases, which they then likely would pass on to consumers.[18] As small MVPDs explain:

  > *When multiple blocks of this "must-have" programming are combined under single ownership, what little bargaining leverage we have to resist unjustified increases in carriage fees will be reduced materially. This is because Comcast-NBCU can then threaten to withdraw all of these blocks of "must-have" programming simultaneously.*[19]

The merger would create horizontal harm, especially in those markets where MVPDs purchase both NBC and Comcast programming.[20]

NBC's must-have programming would be combined with Comcast's must-have regional sports networks ("RSN"), giving Comcast substantial market power, which, in turn, would enable it to increase programming fees, again with the result that consumers would face higher charges. Also, if Comcast's MVPD rivals raise their rates (in order to recover the higher programming fees that they must pay Comcast), Comcast could also sustain rate increases, and, therefore, all consumers, whether served by MVPDs or by Comcast would likely face rate increases.[21]

- NBCU is a major participant in the upstream programming industry – it owns and operates (O&O) ten local broadcast television stations, which control retransmission consent for their signals in the DMAs and also owns many of the most popular national cable networks (e.g., USA, Syfy, Bravo and MSNBC, mun2, Oxygen and CNBC).
- Comcast is a significant participant in both the upstream programming market (it owns nine regional sports networks and it is also the largest cable operator in the country).[22] RSNs are must-have programming.

The merger would enhance Comcast's ability to tie content to cable subscription.

Customers would need to buy cable from Comcast to have the ability to use the online video option.[23]

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[18] / *Ex parte* filed by 43 multiple and single system MVPDs located in 18 states serving consumers in small and medium-sized markets that provide Comcasat regional sports networks to 125,000 or fewer customers in their relevant markets, November 29, 2010 (emphasis in original).

[19] / *Id.*, at 2 (emphasis in original).

[20] / *Rogerson III*, at 11.

[21] / *Id.*, at 12.

[22] / *See* Rate Counsel, at 15, stating that 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.

[23] / Comcast describes its Xfinity as follows: " XFINITY is the new brand for Comcast's technology platform, products, and services. Comcast remains the name of our company. Recently, we made some significant changes to our network and product capabilities that have given us the ability to offer even more HD channels, more Video On Demand choices, faster Internet speeds and more video online, plus new

- Tying content with cable subscriptions minimizes consumer choice. The merger likely would force consumers to purchase larger bundles or to purchase networks that they may not want. Rate Counsel urges the Commission in this and other proceedings to protect consumers' ability to choose the networks and programs that they wish. Forced bundling decreases the value to consumer and unnecessarily ratchets up prices.

- The merger could prevent competitors from getting access to content (NBC's vast library, TV shows) at reasonable rates, terms and conditions.

- The merger increases the incentive for Comcast to degrade the quality of others' access – Comcast controls essential broadband pipes. Instead the FCC should promote choice by consumers, e.g., consumers should be able to take advantage of online video without being required to purchase Comcast cable.

- Comcast's market share in broadband markets is even higher if examined based on relevant geographic markets.

    - In its Reply to Opposition, Comcast states that it "accounts for only 20 percent of broadband ISP customers nationwide and, accordingly, lacks the market power necessary to implement an ISP foreclosure strategy."[24]

    - The Applicants' reliance on the 20 percent statistic is extremely misleading – the pertinent statistics correspond with Comcast's share of relevant geographic markets. For example, one estimate of its market share in Boston is 60 percent.[25]

The FCC should be skeptical of Applicants' pre-transaction promises and rosy views.

In its pursuit of regulatory approval, Comcast may promise non-exclusivity (letting other online providers have access to content) but in reality it can "slow-roll" negotiations, and set high prices for such access.

- The merger would create a compelling economic incentive and an unprecedented opportunity for Comcast to squeeze its rivals, raise prices for consumers, and dominate the market.

- The ACA estimates that the vertical competitive effects of this transaction will yield consumer harm of $176.5 million per year and the horizontal competitive effects of this transaction will yield consumer harm of $140.3 million per year for

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cross-platform and mobile features. As a result of these changes, we have rebranded our products using the following names: XFINITY TV, XFINITY Internet, and XFINITY Voice. XFINITY is about offering our customers more choice, more control, more speed, and more HD than ever before. It's also our promise to customers that we will keep innovating to deliver the best possible experience." http://customer.comcast.com/Pages/FAQViewer.aspx?seoid=xfinity

[24] / Applicants' Reply to Opposition, August 19, 2010 ("Applicants' Reply to Opposition"), Appendix A, at 23.

[25] / Free Press, et al., at 15; *see also* Rate Counsel, at 15-17 (discussing the structure of the broadband market).

a total consumer harm of $316.8 million per year. The ACA computes a nine-year net present value of consumer harm at $2.6 billion.[26]

- *Rogerson III* also demonstrates that the "transaction will cause the following: $192.5 million of harm through its effect on the fees charged for NBCU national cable networks, $80.4 million dollars of harm through its effect on the fees charged for Comcast RSNs and $43.9 million dollars of harm through its effect on the retransmission consent fees charged for NBC O&Os."[27]
- The Rogerson III study shows also that "a reasonable estimate of the annual dollar benefit that the transaction will create due to reduced double marginalization is $25.2 million per year with a present discounted value over nine years of $204.1 million" and that therefore the "present discounted value of the net consumer harm of the transaction, calculated by subtracting the benefit from the harm, is $2.4 billion."[28]
  - The benefit of the transaction occurs because post-transaction, Comcast's marginal cost of providing cable service would decline because it would not need to pay a per-subscriber fee for access to NBCU's national cable networks (other than through an internal transfer among divisions), and, therefore, theoretically, Comcast could lower the subscription prices that it charges its own customers.[29] *Rogerson III* refers to this as "reduced double marginalization."

The FCC should dismiss Comcast's attempt to dodge economic concerns that are intrinsically related to the transaction.

Rate Counsel urges the Commission to reject the Applicants' position that industry-wide concerns (such as regulation in the nascent online video market) should be addressed in an industry-wide proceeding rather than in this merger proceeding.[30] Even if the FCC were to agree with this position, then the FCC should *first* address these industry-wide concerns and *then* consider the merits of the transaction. In other words, it would be imprudent and contrary to the public interest to approve the merger with full knowledge that the transaction would exacerbate existing concerns. Unless and until adequate safeguards exist to enable robust competition in the nascent online market, a merger of the scale and scope of the Comcast-NBC merger would simply lead to irreversible harm without offsetting benefit. Approving the merger and *then* seeking to establish adequate safeguards that enable the online video market to flourish would be a

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[26] / *Rogerson III,* at 2.

[27] / *Id.*, at 17.

[28] / *Id.*, at 3.

[29] / *Id.*, at 19.

[30] / *See, e.g.*, Applicants' Reply to Opposition, at 4 (reference to "industry-wide issues)," at 6 (reference to concerns raised about program access, retransmission consent, program carriage, which the Applicants state "are not specific to the transaction)," at 10 (reference to concerns raised by, among others, Rate Counsel about "industry-wide issues beyond the scope of this proceeding" including such issues as net neutrality, retransmission consent, program access, and cable rates), and at 21 (reference to "industry-wide").

nonsensical order of policy-making, akin to locking the barn door after the horse has bolted. As was stated in one of the filings submitted to the FCC:

> Comcast's acquisition of NBCU programming, though a critical weapon, is not the only one in its arsenal. Comcast can complement its ability to withhold its own affiliated content with its ability to leverage bottleneck control over unaffiliated content and coerce those programmers into exclusive deals that prevents them from making their content available to Comcast's online-only competitors. These strategies allow Comcast to eliminate potential competition while preserving the lucrative cable TV revenue stream indefinitely. Applicants do not acknowledge the enormous influence that Comcast - as the largest cable provider in the nation with veritable monopoly control of certain local regions - has over unaffiliated programmers that rely on Comcast for the largest percentage of their MVPD subscriber fees. With a national MVPD market share of nearly 24 percent, Comcast's estimated subscriber fee payments represent anywhere from 6 to 18 percent of revenues for the top twenty most-carried cable channels. Because programmers are so reliant on Comcast for these revenues, it would be naive to suppose that programmers do not respond to Comcast's pressures to limit the distribution of their content to emerging online competitors.[31]

Furthermore, as Free Press, et al. observes, it is not clear that the FCC possesses the requisite information to determine whether Comcast's contracts restrict programmers' ability to distribute their content via the Internet.[32] The ability of rival online providers to succeed in the fledgling online video market is dubious if they lack access to NBCU content (or if they lack reasonably priced, timely access to such content). Furthermore, because the FCC lacks an enforceable network neutrality regulatory framework,[33] the FCC lacks the ability to prevent Comcast/NBCU from discriminating against rival online providers.[34]

In assessing the merits of the proposed transaction, it is critically important to acknowledge the limitations of the *existing* regulatory safeguards as they relate to the FCC's ability to detect and to prevent anticompetitive behavior.

Precisely because the FCC's ability to enforce net neutrality is ambiguous and precisely because it has not yet implemented adequate safeguards to protect competition in the emerging online video market, it would be unsound public policy to approve the

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31 / Free Press, et al., at 14-15, cites omitted.

32 / *Id.*, at 17-18.

33 / On April 6, 2010 the U.S. Court of Appeals for the District of Columbia vacated the 2008 FCC order that banned Comcast from blocking its broadband subscribers' use of BitTorrent (online file sharing technology). *Comcast Corporation v. Federal Communications Commission*, United States Court of Appeals for the District of Columbia Circuit, Case No. 08-1291. A draft "network neutrality" proposal is currently circulating at the FCC and the consideration of an Open Internet Order is on the tentative agenda for the FCC's December 21, 2010 open meeting. FCC News Release, November 30, 2010. It is premature, however, to gauge how effective the proposal, *if implemented*, would be to deter anticompetitive conduct.

34 / Free Press, et al., at 19.

transaction, which would increase the incentives and opportunities for Comcast to take advantage of regulatory loopholes. Unless and until the FCC possesses the requisite regulatory tools to protect consumers, innovation, and competition, it would be irresponsible to approve a merger that would simply strain further the inadequate safeguards that now exist. Comcast's own conduct belies the Applicants' glib assertion that: "Given the highly competitive and open nature of the Internet, it would be impossible for the combined entity to 'foreclose' the distribution of independent content."[35] Therefore, if Comcast seeks to leapfrog beyond the resolution of vitally important matters such as the preservation of net neutrality, then it should and could address concerns with specific and enforceable conditions, which would provide consumers with important protection pending the resolution of these larger matters.

The transaction would quash innovation and competition in the online video market.

Barriers to entry in the online market could be low, leading to diversity and competition and choice for consumers but only if content is available on reasonable terms and conditions to all. The cable pipe model is not the only way, but in an effort to protect that control, Comcast possesses a huge incentive to discourage rival online providers. Programmers are not likely to take steps to alienate Comcast because Comcast provides them with huge retransmission fees and so programmers are unlikely to make their content available readily to rivals. As one industry expert observes:

> Comcast rightly perceives online video distribution to be a potential substitute for its cable television business. Cord-cutting is growing quickly, with 800,000 Americans having already abandoned their cable subscription. At least 1.6 million Americans will do so by 2011. In 2001, when asked to choose between giving up their Internet connection and giving up television, 72% of Americans said they would give up the Internet connection and just 26% said they would give up television. Now, just 48% say they would give up the Internet and 49% say they would give up television. Comcast cannot block the eventual emergence of online video distribution as a substitute for the brand-name programming cable distribution they directly or indirectly control, but they can slow it down.[36]
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> The emergence of online distributors of must-have content not tied to Comcast or Time Warner is inherently disruptive of both the programming and cable distribution models: if over-the-top video distribution succeeds, Comcast will lose its cable subscribers and will become just a pipe; programmers will lose their guaranteed and ever-increasing payments

[35] / Applicants' Reply to Opposition, Appendix A, at 23.

[36] / http://scrawford.net/blog/comcast-nbcu-forum-today-in-chicago/1372/ Susan Crawford was until December 2009 President Barack Obama's Special Assistant for Science, Technology, and Innovation Policy http://en.wikipedia.org/wiki/Susan_P._Crawford

> from Comcast. Both industry segments lose if over-the-top video succeeds; both win if they can act together to slow its progress.[37]

The impact of the transaction on the emerging online video market is clear: The addition of NBCU content will vastly enhance Comcast's market power to the detriment of consumers.[38]

Seemingly threatened by the presence of Netflix, Comcast recently required Level 3 to pay for the transmission of Internet online movies and other content. As explained by Level 3: "On November 19, 2010, Comcast informed Level 3 that, for the first time, it will demand a recurring fee from Level 3 to transmit Internet online movies and other content to Comcast's customers who request such content. By taking this action, Comcast is effectively putting up a toll booth at the borders of its broadband Internet access network, enabling it to unilaterally decide how much to charge for content which competes with its own cable TV and Xfinity delivered content. This action by Comcast threatens the open Internet and is a clear abuse of the dominant control that Comcast exerts in broadband access markets as the nation's largest cable provider.[39]

The FCC's existing program access and program carriage rules are inadequate to protect against the heightened anticompetitive conduct that the transaction would likely yield.

The Commission's existing rules are insufficient to deter post-merger anticompetitive conduct. Furthermore, the lack of rules to protect online program access and network neutrality further jeopardizes consumers if the transaction were to occur.[40] As Free Press et al. explain, the issues, although industry-wide, bear directly on the merits of the proposed transaction and therefore cannot be separated from a review of the public interest of the proposed merger.[41] The effectiveness of existing rules (or rather the lack of effectiveness of existing safeguards) to protect consumers and competition is intrinsically related to the merits of the proposed transaction. The merger would entrench further an already formidable incumbent cable company.

The Applicants have failed to demonstrate that the purported benefits of the merger (such as innovation) could not and would not occur absent the merger. Free Press, et al. aptly states "we are at a loss as to why Comcast thinks that this Commission should approve a merger whose primary purpose is to grease the wheels of its negotiations with other businesses."[42] Further, as FreePress observes, "while Comcast is willing to utilize children's programming to drive up usage of its VOD [video on demand] platform for those families that can afford it, it makes no commitment to increasing the quantity and quality of children's programming for those families that rely on over-the-air

37 / *Id.*

38 / See also Free Press, et al., at 6.

39 / Press Release, Nov. 29, 2010, 4:38 p.m. EST, "Level 3 Communications Issues Statement Concerning Comcast's Actions" http://www.marketwatch.com/story/level-3-communications-issues-statement-concerning-comcasts-actions-2010-11-29?reflink=MW_news_stmp.

40 / Free Press, et al., at 30.

41 / *Id.*, at 32.

42 / *Id.*, at 37.

broadcasting."[43] Furthermore, because NBC would be guaranteed distribution over Comcast, it has no incentive to innovate or improve.[44]

The transaction would provide Comcast with unsurpassed market power with unique control over content and distribution. The Applicants fail to rebut concerns raised about the dubious benefits for local programming.[45] Furthermore, they fail to explain why they are not making any commitments to increase local programming for Telemundo.[46]

Vague, unenforceable promises that seek to mollify opposition to the transaction do not provide adequate protection for consumers nor do they represent a positive benefit relating to the transaction.

As Free Press observes, the fact that for eight years, Comcast has held three broadcast television stations in the Los Angeles market, in violation of the Commission's multiple ownership rules, undermines the credibility of any pre-transaction promises that Comcast may make.[47] Rate Counsel urges the Commission to dismiss any promises that are not grounded in measurable, enforceable conditions.

Comcast is a formidable broadband provider and the proposed transaction would further entrench its monopoly position in relevant geographic markets.

Comcast has deployed DOCSIS 3.0 in 83% of its footprint,[48] which, in many markets, allows it to offer significantly higher broadband speeds than any alternatives that may exist.[49] Rate Counsel has raised concerns about the structure of the broadband market (at best a duopoly, which does not provide effective competition) in numerous

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43 / Free Press, Cooper/Lynn Declaration, at 37

44 / Free Press, et al., at 38.

45 / *Id.*, at 42-43.

46 / *Id.*, at 44.

47 / *Id.*, at 48.

48 / Comcast Earnings Presentation, October 26, 2010, http://files.shareholder.com/downloads/CMCSA/1070215990x0x412538/b73fe8d8-e02d-491e-a1e1-70a5389c67a0/Comcast_EarningPres_10.26.10.pdf. at 3. Demand for Comcast's high-speed Internet increased 12.6% for the quarter, and year-to-date, Comcast added 766,000 high speed Internet customers. Comcast Q3 Earnings Call, Michael J. Angelakis, October 27, 2010, http://files.shareholder.com/downloads/CMCSA/1070215990x0x412843/e50cee22-146c-4215-8b2c-16e257e72d92/CMCSA_Transcript_10.27.10.pdf, at 4.

49 / The FCC's statistics provide evidence of the relative popularity of cable modem access. Based on the most recent data reported by the FCC regarding Internet access (which corresponds with December 2009), of the 80,662,000 total fixed broadband connections nationwide, 30,971,000 (or approximately 38%) were DSL, and 43,128,000 (or approximately 53%) were cable modem. *Internet Access Services: Status as of December 31, 2009*, FCC Industry Analysis and Technology Division, Wireline Competition Bureau, December 2010, Table 7. The balance of the fixed broadband connections consist of fiber to the home, satellite, fixed wireless, and power line and other. Additionally, there were 52,486,000 mobile wireless connections. *Id.*

filings submitted to the FCC, most recently in its July filing.[50] The lack of broadband competition and the essential characteristic of broadband together provide a relevant and sobering backdrop for an assessment of the harm that the proposed merger poses. Comcast's control of both the pipe and the content, which the merger would enhance, creates opportunities and incentives for discrimination and monopoly pricing.

Consumers benefit from high-speed broadband access, but this benefit does not in any way diminish the fact that Comcast, as a monopoly provider of high-speed broadband access in many markets (and as one of a duopoly in some markets) can extract monopoly rents through supracompetitive prices. Furthermore, Comcast's dominant position in the broadband market relates directly to the ways in which the transaction would further entrench its position. As Comcast has explained to its investors, one of the reasons that it has deployed high speed broadband is to support online video.[51] Comcast is formidable as a distributor of content and as an online competitor: its Xfinity™ has more than 150,000 video choices, more than 2,000 movies, and more than 20,000 television episodes.[52] Comcast is actively "locking" in customers: "All of our digital video customers will receive a customer ID to access Xfinity TV for no extra cost."[53]

Rate Counsel disagrees with those who would have the government wait for evidence of harm before intervening (the "ex post" approach):[54] in a fledgling market, Comcast's harm would have irrevocable repercussions, squashing innovation and competitive alternatives before rivals can establish themselves. Therefore, "ex ante" regulation is justified.

Comcast's resources for presenting its view to regulators overshadow those of groups representing consumer interests.

Comcast informed its investors that it spent $21 million in the third quarter of 2010 in expenses relating to the proposed transaction.[55] Year-to-date, Comcast has incurred $154 million in expenses relating to the NBCU transaction.[56] Rate Counsel urges the Commission to direct the Applicants to submit a detailed disaggregation of these expenses, including any payments made to organizations relating to seeking their support for (or absence of opposition to) the proposed transaction. Furthermore, this figure alone underscores the enormity of the resources that Comcast possesses to use not

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50 / Rate Counsel July Comments, at 15-17. See also Free Press, Declaration of Mark Cooper and Adam Lynn in support of Public Interest Petitioners' Reply to Opposition ("Cooper/Lynn Declaration"), at 29-31.

51 / Comcast Q3 Earnings Call, Neil Smith, October 27, 2010, at 13.

52 / Comcast Earnings Presentation, October 26, 2010, http://files.shareholder.com/downloads/CMCSA/1070215990x0x412538/b73fe8d8-e02d-491e-a1e1-70a5389c67a0/Comcast_EarningPres_10.26.10.pdf, at 4.

53 / Statement Comcast Q3 Earnings Call, of Brian L. Roberts, Chairman and Chief Executive Officer, October 27, 2010, at 2.

54 / *See, e.g.*, "Antitrust and Vertical Integration in 'New Economy' Industries," Bruce M. Owen, November 2010, submitted by the Technology Policy Institute as *an ex parte* filing on November 9, 2010.

55 / Comcast Q3 Earnings Call, Michael J. Angelakis, Chief Financial Officer, October 27, 2010, at 3.

56 / *Id.*

only to obtain regulatory approval but also subsequently to resist compliance with any conditions that may apply. The resources of consumer groups, which provide the Commission with critically important perspectives on this transaction and on Comcast's actual behavior, pale in comparison. Consumers, therefore, rely on the Commission's thorough and well-reasoned analysis and review of this major transaction to ensure that the public interest is well served. Accordingly, Rate Counsel urges the Commission to view carefully, and without haste, the facts of the proposed transaction, not simply as "spun" by the Applicants.

Rate Counsel seeks to prevent extraction of supracompetitive rates by Comcast.

Cable companies do not compete with each other but rather dominate their respective geographic territories. The proposed transaction would enhance Comcast's market power and make far less likely that consumers could benefit from innovation and lower prices. The FCC should ensure that its regulatory regime fosters innovation, competition, and diversity in the newly emerging and potentially significant online video market. The proposed transaction would inhibit such a climate by enabling Comcast to monopolize the market before it has even had the opportunity to fully experience innovation. The diverse flow of information and consumers' access to that information represent a fundamental element of the United States, which differentiates this nation from some other countries with rapidly growing economies. Ensuring that consumers' access to information is not controlled by a diminishing number of companies is vitally important to the well-being of the country, and therefore, the stakes of this transaction are enormous. The "product" at stake has wide-ranging repercussions throughout the economy and society.

The transaction would further entrench Comcast's market dominance.

The requirement to purchase conventional cable service in order to obtain access to video content on the Internet is a step backward for competition, innovation, and consumer choice. Yet, the proposed transaction would facilitate such behavior, providing both greater opportunity and greater incentive to thwart such choice. The transaction would further entrench Comcast's market dominance in the broadband distribution market, facilitate its anticompetitive conduct (e.g., raising rival's costs, tying and bundling, degrading rivals' quality), and could raise its rates, extracting even higher monopoly rents from its consumers. Diversity of programming would be diminished, with the result that, post-merger, consumers would pay more for less content diversity.

Conditions

In their Reply to Opposition, the Applicants fault Rate Counsel and others because they "used the second stage of the pleading cycle – reserved for 'responses to comments and oppositions to petitions [to deny]' – to file opening comments" that, among other things "propose a raft of new conditions."[57] Rate Counsel recommends that the FCC reject the Applicants' ill-substantiated recommendation that Rate Counsel's and others' pleadings be afforded no weight because they are "untimely."[58] The Applicants'

[57] / Applicants' Reply to Opposition, at 11, citing, among others Rate Counsel, at 39-43 and the FCC's Public Notice, released May 5, 2010.

[58] / Applicants' Reply to Opposition, at 11.

proposed transaction is complex, far-reaching and merits thorough analysis and review by the Commission. The Applicants have failed to demonstrate that the transaction is in the public interest. Rate Counsel's reply comments are intended to assist the Commission in identifying ways to mitigate harms, and it would be ill-advised and contrary to the public interest for the Commission to elevate process above substance in its consideration of ideas and concerns. As discussed earlier, Comcast's resources for making its case dwarf those of consumer advocates, and therefore it is entirely appropriate for the FCC to consider all concerns, whether submitted as initial comments, reply comments, or *ex parte* filings.

The proposed transaction would yield substantially more harm than benefits. Despite numerous detailed filings that have been submitted to the FCC during the past eleven months, which unambiguously demonstrate the substantial harms that would occur to diversity, innovation, rates, consumers, and competition and which also demonstrate the inadequacy of existing FCC regulations to deter anticompetitive conduct and excessive prices, the Applicants have failed to offer meaningful and enforceable commitments to improve the public interest of their proposed transaction.

Instead, recent conduct by Comcast simply underscores its indifference to regulators[59] and the likelihood of post-transaction conduct. As is described above, Comcast recently required Level 3 to pay for the transmission of Internet online movies and other content.[60]

Furthermore, the stalemate in negotiations in October 2010, between Cablevision and News Corp., regarding the retransmission of Fox broadcast stations in New York, New Jersey, and Philadeplphia illustrates further consumers' potential vulnerability to industry disputes should the transaction occur. Although Comcast cannot be held responsible for Cablevision's conduct, the industry incident underscores the failure of the existing retransmission consent system to protect consumers from the increased opportunity and incentives for Comcast to pull its broadcast signals from rival operators' systems, should the transaction occur.[61]

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[59] / "For NBC Sale, Tensions Rise in Washington," Brian Stelter, *The New York Times*, November 21, 2010 (reporting on, among other things, Comcast's announcement of new management slate for its post-merger entity).

[60] / Press Release, Nov. 29, 2010, 4:38 p.m. EST, "Level 3 Communications Issues Statement Concerning Comcast's Actions" http://www.marketwatch.com/story/level-3-communications-issues-statement-concerning-comcasts-actions-2010-11-29?reflink=MW_news_stmp. On November 30, 2010, *TR Daily* reported that, in a public statement, Level 3 Assistant Chief Legal Officer John Ryan said, "It is regrettable that Comcast has sought to portray this simply as a commercial disagreement or a peering dispute. They miss the point and are attempting to distract from the fundamental issue" and also said that the "fundamental issue is whether Comcast, as the largest cable company in the country with absolute control over access to its cable TV and broadband access subscribers, has the right to unilaterally set a 'price' for that access that effectively discriminates against competitors of Comcast's cable and Xfinity content."

[61] / "Cablevision, Fox dispute continues with no progress," Tuesday, October 19, 2010, 9:45 PM Updated: Wednesday, October 20, 2010, 6:29 AM, Venuri Siriwardane, *The Star-Ledger* http://www.nj.com/news/index.ssf/2010/10/cablevision_fox_dispute_contin.html As reported in the *Star-Ledger* article: "Such feuds over retransmission fees are becoming increasingly commonplace, with five blackouts this year alone — the most since 2000. They have affected about 19 million viewers across the

Applicants' resistance to conditions,[62] while not surprising, should not deter the FCC from establishing enforceable measures to protect consumers and competition. In comments previously submitted to the FCC, Rate Counsel identified and discussed conditions that should apply to any approval of the proposed transaction.[63] There is widespread support for conditions in order to rein in the anticompetitive and anti-consumer behavior and incentives that a post-transaction Comcast likely would possess.[64] Safeguards and conditions are critical to offset the merged entity's substantial bargaining power and to protect consumers.

Furthermore, as Rate Counsel explained in its reply comments, the conditions that the Commission has imposed on prior transactions (such as News Corp.-DirecTV and Adelphia-Time Warner-Comcast) do not protect consumers served by smaller MVPDs, for which baseball-style arbitration is too expensive, and also, which have addressed issues relating to vertical integration, but not to horizontal integration.[65]

Rate Counsel reiterates its support for the conditions proposed in its reply comments[66] and also fully supports the conditions that Free Press, et al. sets forth in its Reply to Opposition.[67] Rate Counsel also supports the conditions proposed recently by the Writers Guild of America, West ("WGAW"), some of which overlap with those

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country. And they have blocked access to widely viewed events such as the Academy Awards and professional sports games. 'This is really the new world order,' said Tuna Amobi, a media analyst at Standard & Poor's. 'The brinksmanship is really escalating, and it's only going to get uglier.' At stake are millions of dollars in fees and lost advertising and the specter of government intervention as carriage disputes become increasingly nasty, analysts say." *See also* Free Press *ex parte*, October 20, 2010.

62 / *See, e.g., ex parte* filing by Michael H. Hammer, Counsel for Comcast Corporation, November 26, 2010, referring to a conference call on November 24, 2010, among FCC Staff, Comcast, and NBCU in which "Applicants described the many complexities with any condition that would require the licensing of programming to online video distributors" as well as the "difficulties with applying an arbitration process to online distribution." See also, "Comcast, NBC argue against sharing with Internet TV," Cecilia Kang November 24, 2010, *Washington Post.*

http://voices.washingtonpost.com/posttech/2010/11/comcast_nbc_argue_against_cond.html

63 / Rate Counsel, *see, e.g.*, 39-46.

64 / For example, in an *ex parte* filing submitted November 29, 2010, 43 small and medium-sized MVPDs supported the remedies proposed by the American Cable Association, including, among other things, baseball-style commercial arbitration for carriage disputes and alternative binding dispute resolution processes. *Ex parte*, at 2. See also, EarthLink, *ex parte*, November 10, 2010, at 7, recommending that the transaction be conditioned on the availability of nondiscriminatory wholesale broadband access services so that consumers can "break the bundle."

65 / Rate Counsel, at 37; see also *ex parte* filing of the American Cable Association, National Rural Telecommunications Cooperative, Organization for the Promotion and Advancement of Small Telecommunications Companies, , Rural Independent Competitive Alliance, National Telecommunications Cooperative Association, Western Telecommunications Alliance, November 22, 2010, at 1-2.

66 / Rate Counsel, at 39-46.

67 / Free Press, et al. caution that "the harms resulting from this merger run so wide and so deep that we are skeptical that they can be remedied." Free Press, et al., at 64. With this caveat, Free Press, et al., identify conditions that address online video and MVPD markets. *Id.*, at 64-70.

discussed in Rate Counsel's reply comments. Specifically, the WGAW recommends and Rate Counsel supports the following:[68]

- Require Comcast-NBCU networks to devote not less than 25% of the primetime schedule to programming that independent producers own and produce, that is, producers that are studios or production companies that are not owned or affiliated with a major broadcast or cable network or MVPD provider.
- Preserve Internet availability of NBC video content on non-Comcast-NBC websites at fair and reasonable rates, terms, and conditions.
- Prohibit Comcast from bumping unaffiliated cable networks out of its basic cable tier to make room for affiliated networks.
- Require that the distribution of content that related parties produce be subject to an arm's length transaction standard.
- Require Comcast to remain neutral in the distribution of Internet content over its network.
- The Commission should work with the Department of Justice to create merger conditions that will be enforced. Behavior, not ownership, is the crucial problem in this context. Because Comcast will be one of very few (perhaps no more than two or three) ways to ship large quantities of bits in America, Comcast should not be allowed to discriminate in favor of its own business plan or affiliated content.

Rate Counsel also supports the conditions espoused by an industry expert, which also overlap in part with those set forth in Rate Counsel's reply comments, and which are quoted verbatim below:[69]

- Network neutrality conditions should be put in place that do not allow for discrimination by Comcast in favor of particular content or applications. "Managed services" should either be eliminated or defined as narrowly as possible so as not to include video aggregation services.
- The current program-carriage regime should be overhauled. Independent programmers' material should continue to be carried during the pendency of program-carriage complaint processes if it is already being carried. Baseball-style arbitration should take the place of the current complaint process. Comcast demands for equity in independent channels should be generally outlawed. Comcast should not be allowed to condition carriage in any way on extra-carriage agreements, including but not limited to any agreement not to post content online.
- Comcast should not be allowed to tie access to online content to purchase of a Comcast cable video subscription. Program access rules should be overhauled and applied equally to online as well as offline distributors, across all distribution media. Comcast should be required to unbundle channels for access by competing distributors, online and off, at the wholesale level. A key and difficult

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68 / *Ex Parte*, Writers Guild of America, West, November 18, 2010.

69 / http://scrawford.net/blog/comcast-nbcu-forum-today-in-chicago/1372/

element of this remedy will be to set prices for content at a level that is realistic and avoids Comcast's ability to charge itself a high price that then must be absorbed by its competitors. Hal Singer has suggested that the wholesale price for a given channel be reflected in an amount that a consumer can be refunded for that channel's place in a retail bundle should the consumer elect not to buy the channel when buying the bundle.

- The Commission should continue with its work on set-top boxes, and require Comcast to work with it in facilitating the creation of open interfaces that will allow access to pay-TV content by subscribers using any device, any combination of communication modalities (Internet, subscription TV, wireless telephone), and any layering of functionalities. Consumers should be able to use and comment on pay-TV content, once they have paid for access to it, as part of applications that companies other than Comcast or the programmers have developed.
- Experience with prior mergers for which FCC exacted conditions demonstrates that DOJ should be involved in enforcement. Examples include failures to enforce fiber commitments in SBC-Pacific Telesis, SBC-SNET, and NYNEX-Bell Atlantic; competition commitments in SBC-Ameritech, Bell Atlantic-GTE (Verizon); and promised cost savings in AT&T-BellSouth.

The FCC should anticipate and be prepared for noncompliance with conditions.

Finally, if the FCC is contemplating approving the merger, even if it conditions such approval upon specific commitments, the FCC nonetheless should be fully prepared for Comcast to flout and challenge the FCC's regulatory oversight. Therefore, any approval of the transaction should include substantial penalties for non-compliance and also should include an option for the FCC to require structural separations (for example between the broadband pipe and the content delivered over the pipe) at a later date if the transaction yields harms that outweigh benefits. Furthermore, the onus for demonstrating compliance with regulatory requirements should be borne by Comcast and not by its consumers and competitors. Comcast possesses substantial resources that it can deploy to thwart regulatory oversight, and, therefore, any FCC approval should anticipate such conduct.

Summary

In summary, the transaction would enhance substantially Comcast's ability, opportunity, and incentive to wield its market power to the detriment of competition and consumers for a "product" that has far-reaching repercussions throughout our society. The merger would harm the nascent online video market precisely at a time when the FCC should be establishing safeguards to ensure that providers can innovate without concern of reprisal by entrenched companies such as Comcast. As ACA has thoroughly demonstrated with its detailed economic analyses (see e.g. *Rogerson III*), the benefits of the proposed transaction pale in comparison with the vast harm.

As EarthLink explains: "At a time when the societal importance of broadband has 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."[70] The FCC should reject the proposed transaction. Comcast's "fait accompli" view toward this major transaction – that is, its view that it is somehow "entitled" to merge with NBCU[71] – is an affront to consumers and to competitors. Rate Counsel urges the Commission to reject improper pressure by the Applicants for premature and unwarranted approval of the proposed transaction, which is skewed disproportionately in favor of Comcast and would lead to unprecedented harm for emerging markets and for consumers. Rate Counsel repeats its earlier recommendation:[72]

> 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.

If, despite the fundamental flaws in the proposed transaction, the FCC nonetheless intends to approve the merger, Rate Counsel urges the Commission to impose enforceable conditions that counter the substantial risks posed by the horizontal and vertical integration resulting from the proposed transaction, and that do not shift the cost of compliance to Comcast's rivals. 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. Rate Counsel supports conditions, proposed by numerous parties, so that consumers benefit from program diversity, low prices, competition in broadband delivery, video delivery, and in video programming, and uninterrupted access to programs while disputes are being resolved. Conditions are essential to:

- Ensure continued access on a non-discriminatory basis;
- Ensure continued protection of net neutrality;
- Protect programming content and access to PEG and other minority diverse programming;
- Ensure continued universal broadband deployment;

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70 / *Ex parte*, EarthLink, Inc., November 10, 2010, at 1.

71 / "For NBC Sale, Tensions Rise in Washington," Brian Stelter, *The New York Times*, November 21, 2010 (reporting on, among other things, Comcast's announcement of new management slate for its post-merger entity).

72 / Rate Counsel, at 1-2.

- Ensure divestiture of Hulu and Comcast Media Center by the merged company;
- Prevent stifling of the emerging online video market;
- Ensure reasonable rates, terms, and conditions;
- Ensure consumer choice in the services that they wish to purchase; and
- Encourage robust competition in broadband, video, and programming markets.

Absent conditions such as those set forth in Rate Counsel's reply comments, in this *ex parte* filing, and identified by numerous other parties, consumers will be irrevocably harmed by the merged entity's ability and willingness to thwart the development of competitive online video and broadcast markets.

Respectfully submitted,

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