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

In the Matter of	)	
	)	
Applications for Consent to the Transfer of Control of Licenses	)	MB Docket No. 10-56
	)	
General Electric Company, Transferor,	)	
	)	
To	)	
	)	
Comcast Corporation, Transferee	)	

COMMENTS OF THE NBC TELEVISION AFFILIATES

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SUMMARY

The stakes in this transaction for the network-affiliate partnership — and thus for the communities that the affiliates serve — are high. The transaction before the Commission would make Comcast the owner of the NBC Television Network, which is affiliated with more than 200 local broadcast stations throughout the nation, and NBC's owned and operated stations ("O&Os") in some of the country's largest markets. As Congress and the Commission have recognized, a strong network-affiliate partnership produces a free and universally available package of local and national journalism, weather, sports, emergency information, and other programming and services that connect local viewers to one another and the country. Thus, a critical question as the Commission reviews the transaction is whether Comcast will uphold the network-affiliate partnership and the benefits it has long delivered to the public.

Given Comcast's success as a media enterprise, a Comcast-owned NBC has the potential to be a strong and responsible partner to the affiliates and their viewers. Yet it cannot be ignored that Comcast is the nation's largest multichannel video programming distributor ("MVPD") and an owner of many cable programming networks. Ownership of a major broadcast network by a major, vertically-integrated MVPD carries inherent risks that must be addressed before such a transaction can be approved. Most notably:

> ***Risk #1: Sports Migration***. Given its ownership of cable channels, including the Versus sports channel, Comcast would have the incentive to grow those properties by migrating popular sports programming away from free, over-the-air broadcast to cable channel distribution.
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> ***Risk #2: Linking Network Affiliation Negotiations with Comcast Retransmission Consent Negotiations***. With joint control over the network and Comcast cable systems, Comcast could force NBC affiliates in markets served by its cable systems to accept (a) unreasonable terms of retransmission consent in exchange for keeping network affiliation, and/or (b) unreasonable terms of affiliation as a penalty for receiving otherwise fair terms of retransmission consent. Comcast could also use one negotiation (*e.g.*, an affiliation renewal) as a way to retaliate against an affiliate for something that happened in the other (*e.g.*, a retransmission consent disagreement with Comcast).

<u>Risk #3: Undermining affiliates' presence in local markets through affiliate-bypass strategies</u>. Comcast's status as the nation's largest MVPD gives it unique incentives to cause a direct (*i.e.*, cable-only) feed of the network to be imported to its cable systems, or to otherwise "bypass" local affiliates. Such bypass strategies would undermine the affiliate's presence in local markets and hobble the affiliate's ability to negotiate fair terms of retransmission consent with Comcast.

Fortunately, none of these risks is insurmountable. Through imposition of targeted conditions on approval of the transaction, the Commission can address the three central risks posed by Comcast's ownership of the country's largest MVPD, multiple cable programming services, and one of the "Big Four" television networks and its broadcast properties. Addressing transaction-specific risks through imposition of targeted conditions is, of course, consistent with Commission precedent in other major media transactions.

Provided that these conditions are in place, the NBC Television Affiliates (the "Association") supports approval of the transaction. In fact, with the three principal risks addressed, we believe this transaction has the potential to strengthen the network in ways that would further the distribution of quality content on free, over-the-air television and enhance the community service NBC and its affiliates bring to the public in markets across the country.

In addition, the Association supports inclusion of the O&Os as part of this transaction. We are optimistic that Comcast's control of local NBC television stations in major markets such as New York, Chicago, Washington, Philadelphia, Miami, Los Angeles, and San Francisco will provide positive incentives for continued support of the free, over-the-air network-affiliate model and local television.

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COMMENTS OF THE NBC TELEVISION AFFILIATES

The more than 200 local broadcast stations affiliated with the NBC Television Network provide valuable services to the communities they serve through high quality programming — including strong local news and informational programming — and close community ties. The continued ability of the affiliates to provide local community journalism and public service is enhanced by a workable partnership with a strong and responsible network partner.

To ensure that the NBC Television Network under the ownership of Comcast Corp. ("Comcast") continues to support that partnership and the public interest benefits it produces, the NBC Television Affiliates (the "Association") urges that approval of the transaction be subject to three transaction-specific conditions. These conditions will prevent (1) Comcast's migration of highly valued sports programming to cable-only distribution, (2) Comcast's linking of network affiliation and retransmission consent negotiations to force unreasonable terms on NBC affiliates in the many markets in which Comcast owns cable systems, and (3) Comcast's use of control over the network to engage in affiliate "bypass" strategies (*e.g.*, by causing the network to deliver a direct, cable-only NBC feed to Comcast's cable systems), thereby providing undue leverage to Comcast in retransmission consent negotiations — all three of which would erode the localized service that has been a cornerstone of the network-affiliate partnership since its inception.

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The network-affiliate model, which combines the "efficiencies of national production, distribution and selling with a significant decentralization of control over the ultimate service to the public,"[1] is a key enabler of local community journalism and public service. That partnership produces a free and universally available package of local and national journalism, weather, sports, emergency information, and other programming and services that connect local viewers to one another and the country. Cable and other multichannel video programming distribution ("MVPD") platforms provide few local services of this kind (other than, of course, through the retransmission of local television stations), and their services certainly are not available for free to viewers.[2] Put simply, the combination of local and national programming aired by an NBC affiliate is greater than the sum of its parts.

The stakes in this transaction for the network-affiliate partnership — and thus for the communities that the affiliates serve — are high. The transaction replaces the affiliates' existing network partner with Comcast, the nation's largest MVPD and an owner of many cable

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[1] H. Rep. No. 200-887, 100th Cong., 2d Sess. 20 (1988).

[2] A 2008 study by the Pew Research Center for the People & the Press confirmed that free, local television remained the most popular source of news in the United States, with most stations producing an average of 4.1 hours of local news per day. *See* Press Release, Pew Research Center for the People & the Press, Public Evaluations of the News Media: 1985-2009, Press Accuracy Rating Hits Two Decade Low, at 4 (Sept. 12, 2009), *available at* http://people-press.org/reports/pdf/543.pdf; s*ee also id.* at 14 (noting that the vast majority of Americans "say that if all local television news programs went off the air—and shut down their web sites—it would be an important loss").

programming networks. Ownership of a major broadcast network by a major, vertically-integrated MVPD carries inherent risks that must be protected against before such a transaction can be approved. Most notably:

> ***<u>Risk #1: Sports Migration</u>***. Given its ownership of cable channels, including the Versus sports channel, Comcast would have the incentive to grow those properties by migrating popular sports programming away from free, over-the-air broadcast to cable channel distribution.
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> ***<u>Risk #2: Linking Network Affiliation Negotiations with Comcast Retransmission Consent Negotiations</u>***. With joint control over the network and Comcast cable systems, Comcast could force NBC affiliates in markets served by its cable systems to accept (a) unreasonable terms of retransmission consent in exchange for keeping network affiliation, and/or (b) unreasonable terms of affiliation as a penalty for receiving otherwise fair terms of retransmission consent. Comcast could also use one negotiation (*e.g.*, an affiliation renewal) as a way to retaliate against an affiliate for something that happened in the other (*e.g.*, a retransmission consent disagreement with Comcast).
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> ***<u>Risk #3: Undermining affiliates' presence in local markets through affiliate-bypass strategies</u>***. Comcast's status as the nation's largest MVPD gives it unique incentives to cause a direct (*i.e.*, cable-only) feed of the network to be imported to its cable systems, or to otherwise "bypass" local affiliates. Such bypass strategies would undermine the affiliate's presence in local markets and hobble the affiliate's ability to negotiate fair terms of retransmission consent with Comcast.

Fortunately, none of these risks is insurmountable. Through imposition of targeted conditions on approval of the transaction, the Commission can address the three central risks posed by Comcast's ownership of the country's largest MVPD, multiple cable programming services, and one of the "Big Four" television networks and its broadcast properties. Addressing transaction-specific risks through imposition of targeted conditions is, of course, consistent with Commission precedent in other major media transactions.

Provided that such conditions are in place, the Association supports approval of the transaction. In fact, with the three principal risks addressed, we believe this transaction has the potential to strengthen the NBC Television Network in ways that would further the distribution of quality content on free, over-the-air television and enhance the community service NBC and its affiliates bring to the public in markets across the country

In addition, the Association supports inclusion of the ten local stations owned and operated by the network (the "O&Os") as part of this transaction. We are optimistic that Comcast's control of local NBC television stations in major markets such as New York, Chicago, Washington, Philadelphia, Miami, Los Angeles, and San Francisco will provide positive incentives for continued support of the free, over-the-air network-affiliate model and local television.

I. PROVIDED THAT PROPER CONDITIONS ARE IMPOSED, THE TRANSACTION HAS THE POTENTIAL TO STRENGTHEN THE ABILITY OF LOCAL NBC AFFILIATES TO SERVE THE PUBLIC.

In filing for FCC approval of the transaction, Comcast's offered as "Commitment #1" an assertion that "the combined entity remains committed to continuing to provide free over-the-air television through its O&O broadcast stations and through broadcast affiliates across the nation" and pledged to "continue its cooperative dialogue with its affiliates toward a business model to sustain free over-the-air service."[3] Moreover, Comcast CEO Brian Roberts has said that affiliates will have the "the full support of Comcast, a company that . . . [can] invest in and grow the broadcast businesses it is acquiring, in partnership with the local affiliates."[4] These statements of intent — which the Association builds on and seeks to make concrete by proposing

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[3] Applications for Consent to the Transfer of Control of Licenses, General Electric Company, Transferor, to Comcast Corporation, Transferee, *Applications and Public Interest Statement*, at 40 (filed Jan. 28, 2010) (hereinafter, "Application"). The Application states that these commitments should be included in any Commission order granting the application and "would become binding on the parties upon completion of the transaction." *Id*. at 38.

[4] *Consumers Competition, and Consolidation in the Video and Broadband Market, Hearing Before the S. Comm. on Commerce, Science and Transportation*, 111th Cong. (March 11, 2010) (Brian Roberts Opening Statement).

more specific conditions to advance the goal of sustaining free, over-the-air service — have been a welcome start to the merger review process.

Broadcasting is unique among other media in its commitment to local reporting, its ubiquity, and its credibility in its local communities.[5] With a strong network partner, stations will have the continued ability to invest in local journalism and news at a level that simply is not provided by cable, DBS, other MVPDs, or Internet sources.[6] Likewise, affiliates will be supported in their continued delivery of timely and often life-saving emergency information, together with high-quality programming from sports and weather to network and syndicated programming. So long as the Commission adopts specific and enforceable conditions to address the three principal risks posed to the network-affiliate relationship and the public by the transaction, the Association supports the transaction and is optimistic about Comcast's ownership of NBC.

II. APPROVAL OF THE TRANSACTION SHOULD BE SUBJECT TO CONDITIONS TO ADDRESS THE THREE PRINCIPAL RISKS POSED BY OWNERSHIP OF A MAJOR BROADCAST NETWORK BY A MAJOR MVPD.

The proposed transaction raises three core concerns that the Commission ought to address by imposing conditions, such as the ones suggested in the Appendix. The concerns stem from Comcast's control over the largest MVPD in the country and a number of cable networks. By giving Comcast control over the network and additional cable networks, the proposed transaction will create incentives and opportunities to advance Comcast's non-broadcast

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[5] Pew Research Center for the People & the Press, *Public Evaluations of the News Media: 1985-2009, Press Accuracy Rating Hits Two Decade Low*, at 4 (Sept. 12, 2009) (observing that 44 percent of respondents believe that local television stations "do the most to uncover local news stories").

[6] *See* Pew Research Center, *Understanding the Participatory News Consumer: How Internet and Cell Phone Users Have Turned News Into A Social Experience*, at 4 (March 1, 2010) ("Pew Participatory News Consumer Study") (noting that "Internet users use the web for a range of news, but local is not near the top of the list," with 38 percent reporting that they would like to see more coverage of their neighborhoods or local communities).

businesses at the expense of free over-the-air broadcasting and the American public. In particular, Comcast will have incentives and opportunity to migrate network sports programming to its cable networks; to undercut the ability of NBC affiliated stations to negotiate competitive terms of affiliation and retransmission consent; and to undermine affiliates' presence in local markets through importation of direct or distant linear feeds of network programming.

While the Association and Comcast have had productive discussions and reached agreement on a number of matters pertaining to ownership of the NBC Television Network by Comcast, the three risks identified herein raise unique concerns for the future of the network-affiliate partnership and the public it has served so well for so long. The Association therefore believes that the Commission, and not just private agreement, should govern enforcement of measures to protect against these risks. Accordingly, the Association's support for approval of the transaction is conditioned upon the Commission's imposition of conditions of the type described at Appendix A.

A. Maintaining the Availability of Compelling Sports Programming on the Airwaves.

The acquisition of a major television network by a major multichannel video programming distributor raises the key question of whether the distributor will continue to make programming, including sports programming, available for free, over-the-air. As the House Committee on Energy and Commerce recognized in connection with the 1992 Cable Act, "A significant reduction in the quality of quantity of sports programming available on free television, whether professional or collegiate, would be of great concern."[7] The migration of sports programming could relegate the public's access to important sporting events, such as the

[7] H.R. Rep. No. 102-628, at 126 (June 29, 1992).

Olympics and the Super Bowl, to pay television services. The loss, for example, of highly-rated NFL programming currently carried on NBC to Comcast's sports channel, Versus, would be a major loss to the public. The concern relates to "consumers paying for events previously available free on broadcast television, thereby reducing consumer access to such events" and rendering "certain sports programming . . . available only to [paying] subscribers of given technologies — whether cable . . . or DBS."[8] Moreover, as the Commission has previously noted, "broad and economical access to a variety of sports programming is instrumental to the Commission's goal of ensuring the availability of diverse programming."[9]

Importantly, migration hurts the public directly not only by eliminating free, over-the-air access to premier sports programming, but also by weakening affiliates' economic viability and thereby diminishing the services affiliates are able to provide to their communities.[10] Sports migration would diminish the ability of affiliates to invest in and thus provide quality local news, weather, and other programming relied upon by local communities — regardless of whether viewers in those communities must or choose to receive that programming free, over-the-air or choose to receive it through subscription platforms such as Comcast.

The threat of sports migration is of particular concern now because the proposed transaction will give Comcast the ability to take actions that promote its cable interests at the

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[8] *Id*. at 126-27 (June 29, 1992).

[9] Final Report, *Implementation of Section 26 of the Cable Television Consumer Protection and Competition Act of 1992, Inquiry Into Sports Programming Migration*, PP Docket No. 93–21, 9 FCC Rcd. 3440, at para. 180 (June 30, 1994).

[10] *See, e.g.*, *Competition in the Media and Entertainment Distribution Market: Hearing Before the H. Comm. on the Judiciary*, 111th Cong. (Feb. 25, 2010) (Congressman Bob Goodlatte) (noting concern that migration "would decrease viewers and revenues and thus could severely impact the ability of these local stations to deliver local news and information").

expense of free, over-the-air television. Comcast could gradually migrate some or all of the most compelling sports programming away from free, over-the-air distribution on NBC to cable channels that are made available only to paying subscribers. Comcast has two national cable sports networks and it might have the ability and incentive to use its national platform to launch new sports networks. The Congressional Research Service has warned, for example, that, "as Comcast incorporates its cable sports properties and its broadcast sports properties, it might decide to shift some of those from broadcast to cable, especially if it seeks to turn its Versus network into a viable competitor to ESPN."[11] Indeed, in its application to the FCC seeking approval of the transaction, Comcast acknowledged that "[t]he transaction will allow for NBC's sports programming to be distributed on [Comcast-owned cable channels] Versus, Golf Channel, and Comcast's multiple [regional sports networks.]"[12] A related threat is the possibility that Comcast could elect not to make investments in sports programming for the network, choosing instead to focus its sports program investments for its cable channels.

Members of Congress, including Congressman Henry Waxman, Chairman of the House Energy and Commerce Committee and Senator Herb Kohl, Chairman of the Senate Antitrust Committee, have underscored the importance of the issue by asking pointed questions about sports migration in congressional hearings concerning the present proceeding.[13] To

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[11] Charles B. Goldfarb, Congressional Research Service, *The Proposed Comcast-NBC Universal Combination: How It Might Affect the Video Market* at 25 (Feb. 2, 2010); *see also* Andrew Vanacore, "Broadcasters' woes could spell trouble for free TV," *Yahoo! News,* Dec. 29, 2009, (warning that Comcast could turn NBC into a cable channel).

[12] Application at 50.

[13] *See An Examination of the Proposed Combination of Comcast and NBC Universal: Hearing Before the H. Subcomm. on Communications, Technology, and the Internet*, 111th Cong. (Feb. 4, 2010) (Congressman Henry Waxman) ("The future of free, over-the-air broadcast television is also tested by this transaction. Many are concerned that this transaction could result in the best of NBC's programming being transitioned to pay TV service."); *The Comcast/NBC Universal Merger: What Does the Future Hold For Competition and Consumers?: Hearing Before the S. Subcomm. on Antitrust, Competition Policy and Consumer Rights*, 111th Cong. (Feb. 4, 2010)
(continued…)

address these concerns, at Appendix A the Association proposes a condition that would help to ensure the continued availability of sporting events and comparable programming on free, over-the-air television, while providing business flexibility for Comcast.

B. Preserving a Free Market for Retransmission Consent Agreement

Every NBC affiliate has two sets of bet-the-company contractual relationships. The first is the contract with its network. The second is its complement of retransmission consent contracts:

Affiliation Agreements. The contractual relationship between network and affiliate provides the basis for the symbiotic partnership between the network and affiliates whereby the network provides national programming and the affiliate creates local content and packages it to create a product that is bigger than the sum of its parts. The decentralization of control over the selection of content promotes localism, while the efficiencies of national television program production, distribution and sales enable stations to provide very high quality content in the smallest of communities.

(Senator Herb Kohl) ("Do we have reason to worry that Comcast in the future will move the best programming ideas to NBC cable networks, and won't Comcast have an incentive to do this? Because obviously it charges its customers for cable? Over-the-air is free."). *See also An Examination of the Proposed Combination of Comcast and NBC Universal: Hearing Before the H. Subcomm. on Communications, Technology, and the Internet*, 111th Cong. (Feb. 4, 2010) (Congressman John Dingell) ("Mr. Roberts, does Comcast's public interest filing with [the] FCC include proper assurances that Comcast will not migrate critical network programming away from free-over-the-air broadcasting to Comcast's cable properties . . . ?"); *Consumers Competition, and Consolidation in the Video and Broadband Market, Hearing Before the S. Comm. on Commerce, Science and Transportation*, 111th Cong. (March 11, 2010) (Senator Maria Cantwell) ("[S]ome people have even said that we in the not-too-distant future will be watching the Super Bowl on cable, which means that we'll paying for the Super Bowl as opposed to having an advertising model, which would give access to a broader number of people."). Senator Herb Kohl has urged the Commission to condition any approval of the transaction on the following: "A requirement that Comcast not migrate the principal programming of the NBC broadcast network to any cable network in which Comcast has a financial interest for ten years." Letter from Senator Herb Kohl, Chairman, Subcommittee on Antitrust, Competition Policy and Consumer Rights, to the Honorable Christine Varney, Assistant Attorney General, Antitrust Division, and The Honorable Julius Genachowski, Chairman, Federal Communications Commission (May 26, 2010).

Retransmission Consent Agreements. Broadcast stations reach the many viewers who subscribe to cable and satellite services through this contractual mechanism, whereby an affiliate authorizes the MVPD to retransmit its signal in exchange for cash and/or non-cash compensation. Comcast, in particular, has a significant role because it is the nation's largest MVPD and the major cable distributor for many NBC affiliates.

Any combination that would merge the network affiliation and cable retransmission relationships into a single entity would raise concerns about the accumulated leverage that could result from one company being the key to both of these relationships. That concern is especially pronounced when the new owner of the network is the nation's largest MVPD — with 23.8 million subscribers, an entity that, by its own description, is "principally involved in the development, management and operation of cable networks and in the delivery of programming content."[14]

By allowing Comcast, directly or indirectly, to use its newly-acquired control of the NBC Television Network to benefit its cable systems in retransmission consent and network affiliation negotiations, Comcast would be able to harm NBC affiliates and the communities they serve wherever the company has cable systems. For example, a combined NBC-Comcast could retaliate against an affiliate in affiliation negotiations based on its retransmission consent negotiations with Comcast, or force affiliates to accept unfavorable affiliation agreement provisions as a penalty for obtaining market-based retransmission consent payments.

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[14] Comcast, Corporate Overview, http://www.comcast.com/corporate/about/pressroom/corporateoverview/corporateoverview.html (last visited June 14, 2010).

If Comcast were to exploit such leverage to diminish the ability of affiliates to recover retransmission consent fees, it would undermine the health of local stations and the ability of stations to provide quality local news programming. Local broadcasters rely on revenue from retransmission consent to invest in local news programming.[15] According to data compiled for the National Association of Broadcasters, across all markets, the median local station derives 6.3% of its total revenues from retransmission consent fees. This is the second largest single source of revenue for stations, behind only advertising.[16] Especially in the face of declining advertising revenue, broadcast stations need and use retransmission consent fees to sustain their local news operations—the lifeblood of local service.

Indeed, in 2009, despite extremely tight budgets, local stations actually *increased* the amount of local news programming they ran by an average of 24 minutes per weekday due in large part to a steady, non-advertising revenue stream of retransmission consent fees.[17] The ability of NBC affiliated stations to negotiate for fair retransmission consent compensation is critical to the quality and amount of high quality programming that local NBC stations can produce and broadcast. NBC affiliates in Comcast markets would be unfairly hampered in their ability to serve their communities and to compete with other stations in the market, which, unlike many NBC affiliates, will not be negotiating network affiliation with their largest cable partner.

Members of Congress have recognized and raised concerns about the ability of local NBC stations to recover competitive retransmission consent fees in the context of the

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[15] *See* NAB Comments, *Examination of the Future of Media and Information Needs of Communities in a Digital Age*, GN Docket No. 10-25 (filed May 7, 2010).

[16] *See* NAB Opposition of the Broadcaster Associations, *Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71 (filed May 18, 2010).

[17] *See* Robert Papper, *TV and Radio Staffing and News Profitability Survey 2010*, RTDNA/Hofstra University Survey (forthcoming).

proposed transaction. For example, Senator Kay Bailey Hutchison has expressed concern about the ability of affiliates "to negotiate the terms for retransmission of their broadcast signal with the very same company that provides its programming."[18] Congressman John Dingell likewise asked pointed questions directed at the possibility that Comcast might "force network affiliates to accept unfavorable affiliation agreement provisions to obtain market-based retransmission consent payments."[19]

In light of the incentives and opportunity the transaction creates for Comcast to tie together network affiliation and retransmission consent negotiations, the Commission should adopt a strong set of procedural safeguards to separate the subsidiaries of Comcast that will negotiate retransmission consent agreements from those that will administer the network's relations with affiliates. Accordingly, the Association urges the Commission to adopt a condition, such as the one appended as Condition 2, to impose structural safeguards that prohibit Comcast from discriminating against affiliates in the terms of retransmission consent based on the terms of affiliation and vice versa.

C. Protecting the Integrity of Affiliate Markets.

One of the core elements of the network-affiliate relationship is the affiliate's contractual right to serve its local community as the primary and generally only point of availability of network programming on the television platform. Affiliates pay for this right, in

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[18] *Consumers Competition, and Consolidation in the Video and Broadband Market, Hearing Before the S. Comm. on Commerce, Science and Transportation*, 111th Cong. (March 11, 2010) (Senator Kay Bailey Hutchison).

[19] *See, e.g., An Examination of the Proposed Combination of Comcast and NBC Universal: Hearing Before the H. Subcomm. on Communications, Technology, and the Internet*, 111th Cong. (Feb. 4, 2010) (Congressman John Dingell) ("Will Comcast commit not to tie together retransmission consent payments with payments for network programming under an affiliation agreement, yes or no? . . . Will Comcast commit not to force network affiliates to accept unfavorable affiliation agreement provisions to obtain market-based retransmission consent payments, yes or no?").

part, by carrying network advertisements contained within network programming. Although network entertainment, sports, and news programming may be available on other platforms at some point after their broadcast premiere, such as through streaming video sites, iTunes, and video-on-demand services, the local affiliate is the initial source of network programming on television — whether the viewer watches the affiliate over the air or as retransmitted on cable, satellite or another MVPD. This longstanding principle serves the network and affiliate well by maintaining the broadcast medium, with its unique reach and accessibility to viewers, as a strong and economically viable platform.

With Comcast controlling the NBC Television Network, however, Comcast could undermine affiliate market integrity by effectively turning NBC into a cable network, bypassing the local affiliate and supplying its cable operations a direct linear feed of network programming. Such action by Comcast would undermine the economic viability of the affiliate and over time erode its ability to invest in local news, weather and other programming beneficial to viewers.

Congress and the Commission have consistently recognized that market integrity promotes localism. In 1988, the Commission explained:

> In a word, the relationship between broadcast network and its affiliates is one of intense symbiosis. It is fundamentally premised both on the network's ability to acquire exclusive rights from its suppliers, and on the affiliated stations' ability to enjoy program exclusivity in their respective marketplaces. This vital feature of the system of free over-the-air television has been true for over forty years.[20]

At the same time, the Commission explained that "[l]ack of exclusivity protection distorts the local television market to the detriment of the viewing public, especially those who

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[20] *In Re Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, Report and Order, 3 FCC Rcd 5299 ¶ 116 (1988), *aff'd*, 890 F.2d 1173 (D.C. Cir. 1989).

do not subscribe to cable."[21] That harm is precisely what could result if Comcast has unfettered ability to bypass local affiliates as the source of network programming to the television audience.

Comcast may use this bypass strategy to gain inappropriate leverage over affiliates and avoid entering into retransmission consent agreements on market-based terms and conditions. Historically, the network's owners have recognized the importance of market-based retransmission consent negotiations and supported its affiliates in obtaining fair terms of retransmission consent. As NBC Universal, Inc. explained in comments to the Commission in 2005, "Retransmission consent is the right of a local station to negotiate a fair return in exchange for granting a license to a multichannel video programming distributor . . . like a cable or DBS operator to include that station in the programming packages that it then sells to consumers."[22] Yet with this transaction, the network's owners would no longer have incentive to promote market-based retransmission consent negotiations, but rather would benefit directly from skewing that market by delivering over its cable systems a direct or distant linear feed of network programming (*i.e.*, NBC as a pay-only cable channel). To counteract this incentive, the Commission should adopt a condition limiting Comcast's ability to import the network's programming directly to its cable systems. Proposed language is provided in the Appendix as Condition 3(c).

Comcast could also bypass local affiliates by allowing the signals of other affiliate stations to be imported during or in anticipation of a retransmission consent dispute. Network nonduplication rights — pursuant to which the affiliate receives the contractual, enforceable

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[21] *Id*. at ¶ 74.

[22] *See* Comments of NBC Universal, Inc., *Implementation of Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, MB Docket No. 05-28, at 2 (filed March 1, 2005).

right to prevent cable systems from retransmitting duplicative network programming from an out-of-market station — have historically been granted by NBC and other networks and is a cornerstone of the network-affiliate distribution system. Yet, as a major cable operator, Comcast will have incentives (not present with other broadcast television network owners) to deny NBC affiliates network nonduplication rights in future network-affiliate contract negotiations.

This potential for harm, which only exists because the network will be controlled by a cable distribution system, contravenes the public interest. The Commission recognized as much in its 2005 *Report to Congress on Retransmission Consent and Exclusivity Rules*, in which it rejects proposals to allow MVPDs to abrogate and bypass network nonduplication rights of stations if they could not reach agreement on retransmission consent with local stations.[23] The Commission accordingly should impose a condition that protects against these harms and requires the NBC Television Network to continue to make decisions about affiliate market integrity on the basis of network considerations, rather than Comcast's cable considerations. The appended Conditions 3(a) and 3(b) provide proposed language to that end.

III. THE TRANSACTION SHOULD NOT BE SUBJECT TO A STATION DIVESTITURE CONDITION.

The Association fully supports inclusion of the ten NBC O&Os as part of this transaction. We are optimistic that Comcast's control of local NBC television stations in major markets such as New York, Chicago, Washington, Philadelphia, Miami, Los Angeles, and San Francisco will create positive incentives for Comcast to strengthen the quality of the NBC

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[23] See Report to Congress, Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004, 2005 WL 220070, at ¶¶ 50-51 (Sept. 8, 2005).

Television Network through its programming decisions and to support a business model that enables broadcasters to provide strong local journalism and other services.

While ownership by Comcast of the O&Os does not alleviate the three principal risks arising from Comcast's competing incentives as the nation's largest MVPD — only conditions such as those described here can address those risks — Comcast's stake in over-the-air television stations will provide some incentives for continued support of the free, over-the-air network-affiliate model and local television. Thus, the Association would oppose any effort to have Comcast divest the O&Os as a condition of the transaction. Divestiture would be contrary to the goal of maintaining NBC as a strong and responsible network that is committed to free, over-the-air service to local communities.

IV. THE PROPOSED CONDITIONS ARE CONSISTENT WITH COMMISSION PRECEDENT IMPOSING CONDITIONS ON MERGERS THAT RAISE TRANSACTION-SPECIFIC CONCERNS.

The Commission has long recognized that conditions may be necessary in transactions creating or enhancing vertically-integrated media companies. Thus, adoption of conditions such as those proposed in the Appendix would be wholly appropriate and consistent with precedent.

For example, the Commission conditioned its 2004 approval of a joint application filed by General Motors Corporation ("GM"), Hughes Electronics Corporation ("Hughes") and The News Corporation Limited ("News Corp.") in order to address concerns that the combination of News Corp.'s content and DirecTV's distribution system would enable the combined entity to discriminate against unaffiliated programming services or other MVPDs.[24]

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[24] *General Motors Corporation, Hughes Electronics Corporation, and The News Corporation Limited*, Memorandum Opinion and Order, MB Docket No. 03-124, 19 FCC Rcd 473, Appendix F (Jan. 14 2004).

The adopted conditions included provisions to prevent News Corp. or DirecTV from discriminating against unaffiliated programming services in the selection, price, terms or conditions of carriage; to prevent News Corp. from offering its programming on an exclusive basis; and to prevent DirecTV from entering into exclusive distribution arrangements with affiliated programming.[25]

As in the News Corp/DirecTV merger, the transaction under consideration gives Comcast new opportunities to misuse its programming assets (*i.e.*, the NBC Television Network) to unfairly advantage its distribution assets (*i.e.*, its cable systems). Comcast itself has recognized that it is appropriate to protect over-the-air viewers through its commitment to "to continu[e] to provide free over-the-air television through its O&O broadcast stations and through broadcast affiliates across the nation" and its pledge to "continue its cooperative dialogue with its affiliates toward a business model to sustain free over-the-air service."[26] The commitments it submitted are a step in the right direction, but they are not sufficiently defined to protect the public interest from the unique potential for harm created by the transaction. The Appendix includes proposed language for three conditions that would address issues of central importance to the public interest. These conditions have been carefully crafted to fairly accommodate the interests of the public, the affiliates, Comcast, and the network. They are reasonable, practical, and carefully balance Comcast and network considerations with the public interest.

[25] *Id.*

[26] Application at 40.

CONCLUSION

To ensure that the ownership of the NBC Television Network and its owned-and-operated stations by Comcast preserves and promotes, rather than degrades, the network-affiliate partnership through which local communities have been served for decades, the NBC Television Affiliates urges the Commission to condition approval of the transaction on three, transaction-specific conditions of the type proposed at Appendix A.

Respectfully submitted,

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Appendix A

The NBC Television Affiliates supports the application in MB Docket No. 10-56 subject to adoption of conditions of the type described herein (the "Conditions").

Definitions. For purposes of these Conditions, any reference to (i) "Comcast" includes all Comcast Corporation operations and entities owned in whole or in part or managed by Comcast Corporation and their successor and assigns unless otherwise specified, (ii) a "cable system" or "cable systems" includes any form of multichannel video programming distributor system ("MVPD"), as defined under Section 602 of the Communications Act of 1934, as amended, (iii) an "NBC Local Affiliate" includes any entity, other than NBC Universal, that at any point while the Condition is in effect owns or operates one or more local television stations affiliated with the Network, and (iv) the "Network" or "NBC" is the NBC Television Network.

In addition, for purposes of Condition 1, "Major Sporting Events" shall be defined as major professional sports, Olympic events, and any college or amateur sporting events with ratings generally consistent with major professional sports and shall not include any sporting events that currently are distributed exclusively on a non-broadcast cable channel.

Condition 1: Major Sporting Events

To maintain the public's free, over-the-air access to Major Sporting Events:

A. Major Sporting Events for which the Network holds broadcast rights as of the date of consummation of the Transaction ("Current Major Sporting Events"), shall continue to be broadcast on the Network, and Comcast shall not migrate such Events to any linear programming channel in which Comcast has an ownership interest (a "Comcast Channel"), until the earlier of (i) the date Comcast ceases to control the Network, (ii) with respect to each Comcast Channel, the date Comcast ceases to have an ownership interest in such Comcast Channel, (iii) the expiration or termination of the contracts under which the Network has acquired the rights to broadcast such Current Major Sporting Events, or (iv) seven (7) years after the consummation of the Transaction. Notwithstanding the foregoing, this Section A of this Condition shall not prohibit Comcast from distributing Major Sporting Events on Comcast Channels or from migrating Current Major Sporting Events to Comcast Channels, provided that the Network maintains a substantially comparable quantity and quality of Current Major Sporting Events programming on the Network and available for broadcast by NBC Local Affiliates calculated on a Major-Sporting-Event by Major-Sporting-Event basis (for example, maintaining comparable quantity and quality of NFL games after such additional distribution compared to before, major Olympic events before and after such distribution, and the like).

B. Until the earlier of (i) the date Comcast ceases to control the Network, (ii) with respect to each Comcast Channel, the date Comcast ceases to have an ownership interest in such Comcast Channel, (iii) seven (7) years after the consummation of the Transaction, or (iv) the date on which Major Sporting Events cease to be distributed on the ABC, CBS, and Fox television networks, Comcast, in negotiations to acquire licenses for the national distribution of Major Sporting Events on Comcast Channels, shall use commercially reasonable efforts to negotiate a provision for a reasonable portion of distribution on the Network in a manner that is available to the NBC Local Affiliates under the terms of their affiliation agreements. Notwithstanding the foregoing, this Section B of this Condition shall not impose any obligations on Comcast with respect to (x) renewals, amendments, or extensions of existing agreements for the distribution of Major Sporting Events on any Comcast Channel, (y) agreements for the distribution of Major Sporting Events on regional sports networks (i.e., linear programming channels with limited territorial licenses to exhibit Major Sporting Events), or (z) agreements for the distribution on any Comcast Channel of Major Sporting Events packages that were previously exclusively exhibited on non-broadcast cable channel(s).

C. Section B of this Condition shall not apply to any contract for distribution of a Major Sporting Event if the NBC Local Affiliates, after reasonable notice and good faith negotiations with the Network, have declined to provide commercially reasonable financial support to the Network. For purposes of this Section C, whether terms are commercially reasonable shall be determined by reference to the value of support that is provided by affiliates of the ABC, CBS, and Fox Television Networks to their respective network(s) to support the rights fees for Major Sporting Events, taking into account the relative value of such sports programming and the value of any benefits received by such affiliates in exchange for such support.

Condition 2: Separate Negotiation of Agreements

The Network will remain solely responsible for negotiating network affiliation agreements with individual NBC Local Affiliates. Comcast Cable Communications, LLC, any of its direct or indirect subsidiaries owning, operating, or managing cable systems, and any of its affiliates that do not have an interest in NBC Universal (collectively, "Comcast Cable") will remain solely responsible for negotiating retransmission consent agreements with individual NBC Local Affiliates. Such retransmission consent negotiations, on the one hand, and affiliation agreement negotiations, on the other hand, will be conducted separate from, and without influence on, one another. In furtherance of the foregoing:

A. Comcast shall not use its control of NBC to engage in conduct that discriminates against any NBC Local Affiliate in the terms and conditions for affiliation or other business arrangements (including news gathering arrangements) with the Network as a result of negotiations or relationships between an NBC Local Affiliate and Comcast Cable. Network affiliation shall not be withheld from an affiliate, nor shall the terms and conditions of affiliation offered or provided to any affiliate be based upon the terms and conditions of retransmission consent between such affiliate and Comcast Cable, including as a result of (i) the positions or approaches taken by the affiliate in retransmission consent negotiations with

Comcast Cable or (ii) the failure of such affiliate and Comcast Cable to agree upon terms and conditions of retransmission consent.

B. Comcast shall not engage in conduct that discriminates against any NBC Local Affiliate in the terms and conditions for retransmission consent between Comcast Cable and any NBC Local Affiliate as a result of negotiations or relationships between such NBC Local Affiliate and the Network regarding station affiliation agreements. Comcast Cable shall not refuse to negotiate in good faith with any NBC Local Affiliate, nor shall the terms and conditions of retransmission offered or provided to such NBC Local Affiliate be based upon (i) the positions or approaches taken by the Affiliate in affiliation negotiations with the Network, (ii) the terms and conditions of network affiliation agreement(s) between such affiliate and the Network, or (iii) the failure of such affiliate and the Network to agree upon terms and conditions of network affiliation.

C. Nothing in this Condition shall be construed to limit actions by the Network or by Comcast that are in the ordinary course of their independent negotiations and/or relationships and that do not tie together Network affiliation and retransmission consent negotiations.

D. The entirety of this Condition shall remain in effect until, and shall expire upon, the date (if any) on which the Network is no longer jointly owned with Comcast Cable.

<u>Condition 3</u>: Affiliate Market Integrity

As stated in the commitment made in the public interest filing at the FCC, Comcast remains committed to provide ad-supported broadcast television through its O&O broadcast stations and through NBC Local Affiliates across the nation. In recognition of the role that NBC Local Affiliates serve in the provision of free, local over-the-air television:

A. Comcast shall honor NBC's agreements and side letters that preserve existing non-duplication protections against importation of another affiliate broadcast station signal into an NBC Local Affiliate's market. The Network will continue to provide these protections and execute any necessary agreements after expiration of current agreements and side letters to maintain these network non-duplication protections for NBC Local Affiliates for so long as the FCC maintains network non-duplication rules.

B. Decisions involving exclusivity issues, as well as the decision by the Network whether to exercise any of its rights with respect to the distribution of Network programming consistent with the affiliation agreement, shall continue to be left to the Network and shall continue to be made solely on the basis of Network considerations and without regard to Comcast Cable considerations. The obligations of this Section B of this Condition will be in effect for a period of seven (7) years after consummation of the Transaction.

C. Comcast will not use its control of the Network to transmit a same-day linear feed of Network programming on a Comcast, Comcast-managed, or Comcast-affiliated cable system in the television market of an NBC Local Affiliate in the event that such NBC Local Affiliate withdraws its consent in the course of a retransmission dispute with such Comcast, Comcast-managed, or Comcast-affiliated cable system. The obligations of this Section C of this Condition will be in effect until the later of ten (10) years after consummation of the Transaction or the date on which any one (1) of the ABC, CBS, and Fox networks offer or authorize one (1) or more major cable system operators to carry direct, same-day linear feeds of the programming such networks provide to their affiliates on cable television systems located in the television markets of their affiliates.