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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Applications for Consent to the Transfer of Control of Licenses	)	MB Docket No. 10-56
	)	
General Electric Company, Transferor,	)	FILED/ACCEPTED
	)	
to	)	JUN 21 2010
	)	
Comcast Corporation, Transferee	)	Federal Communications Commission Office of the Secretary

PETITION TO DENY OF DISH NETWORK L.L.C. AND ECHOSTAR CORPORATION

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SUMMARY

This transaction poses grave threats to the continued expansion and vibrancy of what is arguably the most important development in video markets today – online video – as well as to the competitiveness of the multi-channel video distribution market. The proposed merger of Comcast and NBCU is a troubling vertical integration of a long-standing distributor and a traditional content provider. But in addition, and contrary to the assertions of the Applicants, it is a horizontal combination of two leading providers of a new product altogether – online video – who together would reduce competition, particularly from an industry that has driven competition in video and related markets for over a decade: Direct Broadcast Satellite ("DBS").

An essential question raised by the transaction is its implications for the availability of online video, meaning either (a) video that has been delivered via a broadband platform, such as a video-on-demand movie delivered to a set-top box over a broadband connection, or (b) a streamed or downloaded video product on a fixed or mobile screen, such as a live sporting event viewed on a living room television, personal computer, or handheld device. The DBS industry must provide a seamless product combining the best of traditional, linear video with online video in order to remain competitive, drive innovation and investment, and impel its competitors to do likewise. The combination of Comcast and NBCU poses a direct threat to the DBS industry's ability to offer a competitive product.

DISH Network and EchoStar offer online video to their subscribers today and are expanding such offerings, as evidenced by DISH On Demand, Sling, Google TV, and DISHOnline. Each such component of the online video experience is critical to maintaining DISH Network's and EchoStar's competitiveness, and is dependent on the subscriber's ability to access from a third-party provider an open, non-discriminatory broadband connection to the Internet.

The merged Comcast-NBCU would have a greater incentive and ability to discriminate against competitors in the online video and multichannel video programming distribution ("MVPD") markets than does either company pre-merger. Both Comcast and NBCU are significant market participants in online video today and each has displayed examples of a propensity to leverage its power to thwart competitors. The combination of these major online video providers, however, would give the combined entity a much greater incentive to protect existing and future revenue streams and a significantly heightened ability to reduce competition from the DBS industry and other would-be providers of online video services. A combined Comcast-NBCU would have the incentive and ability to take anticompetitive action against DISH Network's online video products by giving Comcast unique visibility into Hulu; combining Comcast's broadband gatekeeper position and NBCU's key role in video-on-demand; blending Comcast's broadband traffic management power and NBCU's online video content; joining Comcast's and NBCU's ability to interfere with EchoStar's "Sling" place-shifting technology; and leveraging the combined companies' ability to offer a multi-platform advertising product.

The Applicants claim that they do not compete with one another today – that there are separate product markets for linear multichannel video distribution and online content distribution. In documents filed at the Securities and Exchange Commission, however, Comcast has stated that its cable systems face the risk of competition from "online services that offer Internet video streaming, downloading and distribution of movies, television shows, and other video programming" and suggests that it faces direct competition from Hulu, Google, Joost, Amazon.com, and others.

The threat to future competition posed by the proposed merger of Comcast and NBCU should lead the Commission to reject the proposed transaction or, at the very least, impose strict conditions (listed in the Appendix) that would sufficiently prevent anticompetitive effects in the online video market. The ongoing competitiveness of the DBS industry is at stake.

A combined Comcast–NBCU also would threaten competition in the traditional MVPD market by leveraging the retransmission consent rights of the NBC owned-and-operated stations against Comcast's MVPD competitors, including DISH. The Commission's findings and remedial conditions in the News Corp.–Hughes merger are directly applicable here. Just as News Corp. had an incentive to delay or deny retransmission consent agreements for the FOX networks with unaffiliated MVPDs in order to drive subscribers to DIRECTV, a combined Comcast–NBCU would similarly have an incentive to delay or deny retransmission consent agreements between NBC and unaffiliated MVPDs in order to drive subscribers to Comcast. The Commission should impose exactly the same condition here that it did in the News Corp.–Hughes transaction: baseball-style arbitration with a standstill (*i.e.*, neither party may take down programming) for all NBC owned-and-operated stations negotiating retransmission consent with MVPDs.

Finally, a combined Comcast–NBCU would threaten competition in the MVPD market by granting exclusive distribution of NBCU content to Comcast customers or otherwise discriminating against competitors. Some exclusive deals and discriminatory conduct of this nature are already prohibited by the Commission's program access rules, but these rules are not sufficient and certainly do not preclude creative attempts at circumventing them. Comcast has used its control over "must have" content to reduce competition from its rivals in the past. It takes little imagination to envision how a company that behaves this way with respect to its current content holdings will behave after it acquires NBC and other flagship, must-have content. Comcast's ability to discriminate against its competitors will be greatly enhanced, as will its incentive to do so. Comcast–NBCU should not be allowed to deny key programming assets to its distribution competitors. To mitigate these harms, the Commission should apply all program access rules, as well as baseball arbitration, standstill, and "à-la-carte" requirements, to Comcast–NBCU's online video content; prohibit any exclusive content arrangements for any Comcast-affiliated content; clarify what ought to be clear by now – that the program access rules extend to video on demand and interactive programming; and close the "terrestrial loophole" for Comcast–NBCU as a condition in this proceeding by extending the conditions to all programming, no matter how delivered, regardless of the outcome of the Commission's recent rulemaking on that subject.

REDACTED – FOR PUBLIC INSPECTION

TABLE OF CONTENTS

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PETITION TO DENY OF DISH NETWORK L.L.C. AND ECHOSTAR CORPORATION

DISH Network L.L.C. ("DISH") and EchoStar Corporation ("EchoStar") oppose the horizontal consolidation in the online video market and the vertical consolidation in the MVPD market that would result from General Electric Company transferring to Comcast Corporation ("Comcast") a controlling interest in NBC Universal, Inc. ("NBCU").[1] The Federal Communications Commission ("Commission") has a statutory mandate to protect consumers and competition in emerging video markets and prevent future foreclosure of innovative new

[1] *See* Public Notice, Federal Communications Commission, Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. to Assign and Transfer Control of FCC Licenses, DA 10-457 (rel. Mar. 18, 2010); Applications for Consent to the Transfer of Control of License, General Electric Company to Comcast Corporation, Applications and Public Interest Statement, MB Docket No. 10-56 (filed Jan. 28, 2010) ("Application"). Comcast and General Electric are hereinafter referred to as "Applicants." DISH is a competitor in the MVPD market with Comcast, a purchaser of content both from NBCU and from Comcast, and a competitor in the online video market with NBCU and Comcast. EchoStar, too, competes in the online video market – among other things, it owns Sling Media. For these and other reasons described herein, both DISH and EchoStar are, therefore, parties in interest under Section 309(d)(1) of the Communications Act. 47 U.S.C. § 309(d)(1).

communications platforms, such as online video. It should do so in this proceeding. Moreover, the anticompetitive effects in the MVPD market of combining Comcast and NBCU closely resemble those found by the Commission in similar merger proceedings and should lead the Commission to take preventative action here – either by denying the application or imposing strict conditions.

I. COMCAST-NBCU WOULD REDUCE COMPETITION IN THE ONLINE VIDEO MARKET AND UNDERMINE THE DIRECT BROADCAST SATELLITE INDUSTRY'S COMPETITIVENESS

Video distribution no longer occupies discrete silos such as Multichannel Video Programming Distributors ("MVPDs") or websites offering video clips. The current video marketplace instead is an amalgamation of multiple distribution methods reaching multiple devices. It is rapidly evolving to allow consumers to watch what they want, when they want, where they want over multiple signal paths to a great many devices. Against this backdrop, DISH and EchoStar, as major participants in the Direct Broadcast Satellite ("DBS") industry, already an engine of competition benefiting millions of American video consumers, must offer a video product that combines traditional, point-to-multipoint linear television with the interactivity and choice afforded by the online experience.

Comcast and NBCU ("Applicants") attempt to define the relevant product market in this proceeding as two separate, distinct markets – traditional MVPD service, on the one hand, and video available on the Internet, on the other. But their analysis sidesteps an issue of the first importance: the availability to all MVPD competitors of online video, meaning either (a) video that has been delivered via a broadband platform, such as a video-on-demand ("VOD") movie delivered to a set-top box over a broadband connection, or (b) a streamed or downloaded video product on a fixed or mobile screen, such as a live sporting event viewed on a living room television, personal computer, or handheld device.[2] That is, in addition to functioning as a stand-alone product and possibly as a competitive substitute, online video functions as an indispensable complement to linear video channels. The DBS industry must provide a seamless product combining the best of traditional, linear video with online video in order to remain competitive, drive innovation and investment, and impel its competitors to do likewise. The combination of Comcast and NBCU poses a direct threat to the DBS industry's ability to offer a competitive product.

A. Direct Broadcast Satellite Relies on an Unfettered Online Video Market to Stay Competitive

DISH and EchoStar offer online video to their subscribers today and are expanding such offerings, as evidenced by DISH On Demand, Sling, Google TV, and DISHOnline. Each such component of the online video experience is critical to maintaining DISH's competitiveness and is dependent on the subscriber's ability to access an open, non-discriminatory broadband connection to the Internet. The DBS industry does not have a proprietary, retail consumer broadband product and therefore must rely on third-party high-speed Internet ("HSI") access providers.[3]

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[2] Given the changes sweeping through the video distribution business, this proceeding may prove to be the first opportunity for the Commission to make a detailed analysis of these matters relating to online video.

[3] DISH partners with WildBlue, a leading provider of satellite broadband access to homes and businesses, to offer high-speed Internet access to customers. WildBlue is a two-way satellite service that provides an always-on, high-speed data connection with speeds up to 30-times faster than dial-up. *See* Press Release, DISH Network, EchoStar Rolls out High-Speed Internet Service (Oct. 19, 2006), *available at* http://dish.client.shareholder.com/releasedetail.cfm?ReleaseID=243331.

DISH On Demand. DISH must offer a compelling VOD experience in order to remain competitive, as consumption of VOD content is growing rapidly. DISH On Demand[4] is a critical offering for DISH as cable, telco-TV, and satellite operators are expanding their on-demand offerings and VOD consumption has increased 38% in two years.[5] Given DBS' point-to-multipoint architecture and the limited caching ability of the set-top box ("STB"), the DBS industry relies on third-party broadband providers for downloading video files to the STB and providing return-path functionality.[6] A DISH customer attaches the STB to a broadband connection and, through the user interface on the television screen, selects movies, television shows, or other video content cached on distant servers and delivered to the STB via a broadband connection.[7] DIRECTV offers VOD using a similar, broadband-dependent architecture.[8]

Sling. Sling Media, a subsidiary of EchoStar, brings the home television experience to the computing and mobile device screens by creating a point-to-point connection between the STB in the home and a computing device anywhere in the world. This "place-shifting" technology depends on an open, unfettered broadband connection to the STB, which in turn allows the subscriber to view her home television on a computer screen, iPhone, or other device;

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[4] *See* DISH Network, Watch what you want, when you want, http://www.dish-systems.com/products/ondemand.php (last visited June 18, 2010) ("Watch the TV shows you want, when you want with DISH Network TV Entertainment On Demand").

[5] Declaration of Roger J. Lynch ¶ 8 ("Lynch Declaration").

[6] Declaration of Mark Jackson ¶¶ 7, 13, 25 ("Jackson Declaration").

[7] *Id.* ¶ 13.

[8] *See* What Is DIRECTV On Demand?, http://support.directv.com/app/answers/detail/a_id/1989/related/1 (last visited June 18, 2010) ("DIRECTV on DEMAND video service gives you access to thousands of hit shows and movies-including the latest blockbusters in stunning 1080p HD. The titles you select are downloaded to your DIRECTV Plus® HD DVR and available to watch whenever you want. It's like having a library of the best TV entertainment at your fingertips!").

change channels; operate the Digital Video Recorder ("DVR"); and otherwise have the home television experience on any portable or stationary broadband-enabled computing device.[9]

Google TV. The Google TV–DISH product, recently developed by the two companies, brings the Internet video and search experience to the home television, creating a seamless, integrated user experience between linear television programming and online video and other content. DISH and Google recently announced the service, the industry's first integration of multichannel television and rich web media content. With Google TV, DISH subscribers will be able to perform a unified search covering the listings in the program guide, the subscriber's DVR and the Internet, including by voice using an Android phone, as well as bringing many applications to the TV, such as Pandora and YouTube.[10] As the CEOs of Google and DISH stated at the launch of the new service,

> Google TV [will be] an open platform that seamlessly integrates multichannel television with rich web media content . . . [bringing] the full power of the Internet to the television viewing experience [and merging] traditional TV programming with the wide amount of content on the web, allowing viewers unprecedented access, control, and flexibility over all forms of digital content [such as searching] for content across DISH Network, the Internet and their DVRs [and overlaying] online content related to television shows, movies, actors and more; and also hyperlink web content back to multichannel TV.[11]

[9] Jackson Declaration ¶¶ 8-9; *see also* Sling Media Whitepaper, Placeshifting: Set Your TV Free (April 9, 2010) ("Placeshifted content can be live or recorded (DVR) programming, and can be enjoyed on the home network or away from home over the Internet. Most consumers do both – placeshifting in and around their home where they do not have a TV, as well as away from their home – at work, at a café, or in their hotel room while travelling. Consumers' TV subscription service and associated content follows them wherever they have an Internet connection.").

[10] *See* Lynch Declaration ¶¶ 3-4; Jackson Declaration ¶¶ 10-11.

[11] *See* Press Release, Google, Inc. & DISH Network, Google and DISH Network Collaborate to Develop Integrated Multichannel TV and Web Platform (May 20, 2010), *available at* http://www.google.com/press/pressrel/20100520_googletv-dishnetwork.html.

DISH's CEO, Charlie Ergen, noted that his company's "integration of Google TV marks the next evolution in television."[12] The Google TV experience is dependent on an open, unfettered broadband connection to the STB, enabling two-way high-speed access to the Internet.[13]

DISHOnline and Sling.com. Dishonline.com gives DISH subscribers a single destination on the Internet to access network television content; view authenticated cable network content (*e.g.*, a DISH subscriber to Showtime can access Showtime movies and TV shows online); control the DVR (*e.g.*, to record a program from anywhere in the world); and, with Sling technology, watch programs from their TV or DVR online.[14] Sling.com also offers aggregated video content.[15] The subscriber needs to access Dishonline.com and Sling.com over an open, unfettered broadband connection.

B. Direct Broadcast Satellite Must Make All Forms of Online Video Available to Its Subscribers to Stay Competitive

The aforementioned DISH and EchoStar online video experiences mirror a larger, industry-wide trend as online video becomes an integral part of any competitive pay-TV service. Online video is experiencing explosive growth. By the end of 2010, the total number of Internet-connected TVs will reach approximately 10 million, and revenues generated from Internet-connected video service will reach near $1 billion.[16] Furthermore, "[a]dvanced Internet video (3D and HD) will increase 23-fold between 2009 and 2014 . . . . [and] comprise 46 percent of

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[12] *Id.*

[13] Jackson Declaration ¶¶ 10-11.

[14] *See* Lynch Declaration ¶ 5; Jackson Declaration ¶¶ 5-6.

[15] *See* Sling Home Page, www.sling.com (last visited June 18, 2010).

[16] *See* Diane Mermigas, *The Walmart-Vudu Match Up: An End-Run Around Cable*, BNET, Feb. 23, 2010, http://industry.bnet.com/media/10006752/walmart-vudu-match-up-is-an-end-run-around-cable/.

consumer Internet video traffic."[17] Pay-TV services continue to evolve at a rapid pace and providers increasingly are integrating their vast offerings of linear channels with online content.[18] Almost 40 percent of "consumer broadband household respondents want a combination of linear TV and on-demand TV," nearly 75 percent want all of their video content to come from their pay-TV provider, and consumers specifically desire Internet video as a part of their TV offerings.[19]

Online video is a "must have" item. As illustrated in Figure 1, below, every major MVPD offers an online video service in addition to linear channels offered over wireline or satellite connections. Although VOD content[20] has been available for years, MVPDs also are

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[17] *See Cisco Systems, Cisco Visual Networking Index: Forecast and Methodology, 2009-2014* (June 2, 2010), *available at* http://www.cisco.com/en/US/solutions/collateral/ns341/ns525/ns537/ns705/ns827/white_paper_c11-481360.pdf.

[18] *See, e.g.*, Nat Worden & Sam Schechner, *Comcast Rolls Out Web-TV Service*, Wall Street Journal, Dec. 16, 2009; Rob Pegoraro, *Verizon Adding Widgets, Web Video to Fios TV*, WashingtonPost.com, July 15, 2009, http://voices.washingtonpost.com/fasterforward/2009/07/verizon_adding_widgets_web_vid.html; *see also Nielsen Media Research, Television Audience 2008* (finding that the average U.S. household received over 130 channels in 2008, up from 61 in 2000).

[19] *See* Press Release, In-State, Consumers Want the Best of Both Worlds: Pay TV and Over-the-Top Video (Mar. 10, 2010), *available at* http://www.instat.com/press.asp?ID=2757&sku=IN1004654CM.

[20] *See, e.g.*, Press Release, Comcast Corp., Comcast Kicks Off the New Year with More Choices Anytime (Dec. 28, 2009), *available at* http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=950 (announcing recent enhancements to Comcast's existing online video service, including new release movies available the same day as DVD release and expanded HD offerings); Press Release, AT&T, AT&T U-verse Expands Video On Demand Library With HD VOD Titles (Sept. 5, 2008), *available at* http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=26059 (describing enhancements to AT&T U-Verse VOD service to include expanded library of HD movies); Press Release, DIRECTV, DIRECTV On Demand Now Available Nationwide (June 30, 2008), *available at* http://dtv.client.shareholder.com/releasedetail.cfm?releaseid=318983; Press Release, Cablevision, Cablevision Significantly Expands Free Video On Demand Lineup with Programming from Eight Popular Networks (July 7, 2009), *available at* http://www.cablevision.com/about/news/article.jsp?d=070709; Press Release, Suddenlink, Video On Demand to Launch in West Texas (Sept. 18, 2008), *available at* http://suddenlinkfyi.com/2008/09/18/video-on-demand-to-launch-in-west-

beginning to offer their subscribers online access to certain content available in the linear channel lineup.[21]

Finally, online video will dominate the video market generally, if trends among young Americans portend how their generation will consume video in future years. Adults 18-29 years old are the heaviest users of online video today, with almost 90% of them consuming online video at some point in a given time period.[22] Online video must be a component of any successful video product in the future.

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texas/ (announcing new Suddenlink VOD service offering thousands of viewing choices, including movies, sports, news, music, and shows from popular cable networks).

[21] *See, e.g.*, Posting of Scott McNulty to The Official Comcast Blog, Fancast XFINITY TV National Beta Launch: A Guide to Get Started (Dec. 15, 2009), http://blog.comcast.com/2009/12/fancast-xfinity-tv-national-beta-launch-a-guide-to-get-started.html (announcing release of Fancast XFINITY TV national beta, which gives Comcast customers access to "thousands of hours of cable programming, most of which has never been available online before for no additional cost"); Press Release, Verizon, Verizon Launches Trial of FiOS TV Online, Extending Multi-Screen Leadership (Aug. 27, 2009), *available at* http://newscenter.verizon.com/press-releases/verizon/2009/verizon-launches-trial-of.html (announcing a trial to bring television programming online to FiOS TV subscribers); Press Release, AT&T, AT&T Launches AT&T Entertainment Website Featuring Online TV Content and Movies (Sept. 10, 2009), *available at* http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=27102 (announcing launch of AT&T Entertainment, a new Web site that offers subscribers access to "thousands of streaming TV shows and movies on your PC").

[22] *See* Pew Research Center, Pew Internet and American Life Project: The State of Online Video (June 3, 2010), *available at* http://www.pewinternet.org/Reports/2010/State-of-Online-Video.aspx.

Figure 1: Survey of Online Video Services Offered by Pay-TV Companies

Pay-TV Company	Online Video Service	Vertically-Integrated Broadband Providers
AT&T U-Verse	AT&T Entertainment	✓
Cablevision	PC to TV Media Relay	✓
Comcast	Fancast Xfinity	✓
DirecTV	DirecTV on DEMAND	X
DISH	DishOnline	X
Time Warner Cable	TWondemand	✓
Verizon	FiOS TV Online	✓

C. Comcast and NBCU Each Have Demonstrated the Ability and Propensity to Discriminate and Abuse Their Market Power in the Online Video Market

As established above, online video is a necessary ingredient to the competitiveness of the DBS industry. The anticompetitive effects of a combined Comcast–NBCU therefore come into sharp focus in the case of a DISH subscriber who must rely on the Applicants for a broadband connection to the Internet. This is especially true in light of the market power Comcast and NBCU each hold in the online video market today and the incentive and ability that the combined entity would have to reduce competition from the DBS industry post-merger.

Comcast

Comcast has demonstrated already a behavioral propensity to use its gatekeeper function as a dominant residential broadband provider to discriminate against certain forms of online video content. It dominates residential broadband access in the relevant geographic markets at issue in this proceeding and in many markets faces minimal, and ever diminishing, competition.

- *Local Market Dominance*

DISH and EchoStar, as stated above, view online video as an integral add-on to linear MVPD offerings. But the online video experience depends crucially on non-discriminatory broadband access. In that respect, the self-portrait of a benign Comcast disciplined by the foment of a competitive market in HSI services ignores the reality at the block-by-block level of a dominant gatekeeper at work.

Applicants correctly agree with the Commission's conclusion that the relevant geographic market for HSI service is local[23] but also claim that they lack market power by citing – curiously – their market share in HSI services nationally, apparently including areas where Comcast does not have any operations.[24] The Commission has made clear that the relevant geographic market for analyzing HSI access service is local.[25] This is especially true in the case of a DISH subscriber who must rely on Comcast for her STB's broadband connectivity.

[23] "[T]he Commission concluded that the relevant geographic market for high-speed Internet services is local . . . ." Application at 87-88; *see also* Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee, *Memorandum Opinion and Order*, 16 FCC Rcd. 6547, 6578 ¶ 74 (2001) ("*AOL-Time Warner Order*"); Applications for Consent to the Transfer of Control of Licenses from Comcast Corp. and AT&T Corp., Transferors, to AT&T Comcast Corp., Transferee, *Memorandum Opinion and Order*, 17 FCC Rcd. 23246, 23295-96 ¶ 128 (2002) ("*Comcast-AT&T Order*").

[24] *See, e.g.*, Application at 124-25 ("Comcast lacks the market power in high-speed Internet service [to make a] foreclosure strategy successful [because it] currently provides service to only about 20 percent of HSI customers in the United States . . . .").

[25] *See AOL-Time Warner Order*, 16 FCC Rcd. at 6578 ¶ 74 ("The relevant geographic markets for residential high-speed Internet access services are local. That is, a consumer's choices are limited to those companies that offer high-speed Internet access services in his or her area, and the only way to obtain different choices is to move. While high-speed ISPs other than cable operators may offer service over different local areas (e.g., DSL or wireless), or may offer service over much wider areas, even nationally (e.g., satellite), a consumer's choices are dictated

For the DISH subscriber who depends on Comcast for broadband to power her DISH online video services, it often is untenable to consider switching to a different HSI provider. First, as the Commission this year observed, in many local markets customers often have limited options for HSI service, and providers' sale of other services, such as voice and video, leads the providers' interests to diverge from those of their subscribers.[26] Second, as the Commission also observed, practical experience rebuts the notion that the ability to switch providers disciplines HSI providers:

> [E]ven if there is competition among broadband Internet access service providers, once an end-user customer has chosen to subscribe to a particular broadband Internet access service provider, this may give that broadband Internet access service provider the ability, at least in theory, to favor or disfavor any traffic destined for that subscriber.[27]

Finally, in stark contrast to Applicants' description of a fully competitive HSI market in every relevant local area, Wall Street analysts portray a much different story, with a growing trend toward cable dominance of the HSI market, as DSL slips in consumer appeal. "Cable is winning the broadband wars," declared Craig Moffett this year, and "Comcast's quarterly

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by what is offered in his or her locality.") (emphasis added); *see also Comcast–AT&T Order*, 17 FCC Rcd. at 23305 ¶ 149 (2002) (the relevant geographic market for the provision of broadband Internet access is local).

[26] Preserving the Open Internet, *Notice of Proposed Rulemaking*, 24 FCC Rcd. 13064, 13067 ¶ 7 (2009) ("*Open Internet NPRM*") ("In many parts of the United States, customers have limited options for high-speed broadband Internet access service. Moreover, broadband providers generally sell other services – such as voice and video – that face competition from content and applications offered by others over the Internet. As a result, broadband providers' interests in maximizing profits may not always align with the interests of end users and the public.").

[27] *Id.* at 13094 ¶ 73.

subscriber total is actually 16% higher than the sum total of Verizon and AT&T *combined*, on a footprint less than half as large."[28]

- *Ability to Discriminate*

Comcast has the technical ability to discriminate between, and offer preferential treatment to, certain types of content. Comcast can discriminate against certain Internet Protocol packets using deep packet inspection, jitter, port-blocking, and other means. The communication protocols used on the Internet describe how packets contain source and destination addresses. Source addresses can be linked to a specific website or a specific video service, sueh as DISH Online. Comcast can block specific ports used by devices for remote access on broadband, such as a Sling-enabled DISH STB, resulting in the end user's inability to remotely access her home television programming.

Additional information contained in the data stream and the packets themselves can be used to determine what kind of data is carried, and in some cases which customer application will be used. With this information, Comcast can choose to prefer or to delay certain packets over others. The servers for VOD, for example, will be at well-known IP addresses, making it easier for Comcast to slow or block access to those services.[29]

[28] *See* Craig Moffett, *Bernstein Research Flash*, at 1 (Apr. 30, 2010) ("The DSL business is now shrinking. AT&T's non-U-Verse DSL base shrank by 307K subscribers in 2009. Verizon's DSL business contracted by 405K customers last year. Cable is winning the broadband wars. Over the past three years, the TelCos' share of 'Big Four' broadband net additions – including fiber – has fallen from 57% to just 38% as measured on a trailing twelve month basis. Comcast and TWC are collectively capturing 62% of Big Four growth."); Craig Moffett, *Bernstein Research Flash*, at 1 (Apr. 28, 2010) ("Cable is – once again – unmistakably taking share in the broadband market. Consider that Comcast's quarterly subscriber total is actually 16% higher than the sum total of Verizon and AT&T *combined*, on a footprint less than half as large. Last year, their broadband total was only slightly larger than half their combined total.").

[29] Jackson Declaration ¶ 15.

Comcast can divide its broadband pipe into discrete "lanes" to which it may direct packet traffic, rendering some lanes slower due to congestion, over-promise, or whim. Comcast can specifically direct certain types of traffic based on message headers, devices' MAC addresses, or payload type to be delivered to the consumer at lower priority (as opposed to the open Internet's typical equal priority) or on a slower "lane," causing delay in timely video packets delivery. Such methods cause video stall and audio breaks, resulting in significant disruption to the end user's TV watching experience.[30]

The Commission acknowledges the ability of broadband access providers like Comcast to engage in such behavior, given that "[t]ools that enable network operators to prioritize or degrade transmissions of particular content, applications, and services are increasingly available and widely deployed."[31] These technical tools give Comcast the ability to differentiate based on service and price.[32]

- *Propensity to Discriminate*

Comcast has engaged in blatant discrimination against certain types of online video and end-use applications. In a well-known case, Comcast covertly interfered with the connections of

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[30] *Id.* ¶ 16.

[31] *Open Internet NPRM*, 24 FCC Rcd. at 13067, 13087 ¶¶ 8, 57 ("A broadband Internet access service provider can also differentiate among different packet streams or classes of traffic by scheduling the transmission of certain packets waiting in a buffer ahead of others, determining by algorithm which packets in a buffer are dropped (*i.e.*, discarded and not transmitted), blocking an entire packet stream by means of an admission control algorithm, transmitting data of more (or less) efficient routing, redirecting traffic to another site, or blocking traffic entirely.").

[32] *See id.* at 13087 ¶ 57 ("As Internet infrastructure and the content, applications, and services delivered over the Internet have evolved, network equipment makers have also responded with new technologies, including more sophisticated routers that enable network operators to distinguish among different classes of traffic and offer different qualities of service to different traffic (service differentiation), which enables charging different prices for different traffic (price differentiation).").

certain peer-to-peer applications used to download online video.[33] The Commission characterized Comcast's network management as "invasive and outright discriminatory," including Comcast's failure to disclose its practices to consumers.[34]

In DISH's direct experience, Comcast also has tried to withhold key products in order to undermine DBS competition. Prior to the Commission's recent action to close the so-called terrestrial loophole, Comcast withheld key sports programming from DISH, DIRECTV, and other MVPDs. In Philadelphia, where Comcast holds ownership stakes in professional sports teams, the local arena, the local regional sports network ("RSN"), and the local cable system, the company deliberately and systematically withheld local sports – a textbook example of must-have content – from DISH and other competitors, to the detriment of competition and consumers.[35] Comcast's abuse of its market power had a significant impact on competition from

[33] Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, *Memorandum Opinion and Order*, 23 FCC Rcd. 13028, 13028 ¶ 1 (2008) ("*Comcast Network Management Practices Order*").

[34] *Open Internet NPRM*, 24 FCC Rcd. at 13078-79 ¶ 37; *Comcast Network Management Practices Order*, 23 FCC Rcd. at 13033-44, 13051 ¶¶ 12-27, 42. The Commission concluded that Comcast's failure to disclose its practices misled the public. *See id.* at 13030-32 ¶¶ 6-9 ("When first confronted with these press reports, Comcast – the nation's second largest provider of broadband Internet access services – misleadingly disclaimed any responsibility for the customers' problems. For example, a Comcast spokesman stated: 'We're not blocking any access to any application, and we don't throttle any traffic.' . . . . The Associated Press subsequently conducted several nationwide tests to investigate the allegations that Comcast was interfering with its customers' use of peer-to-peer applications, including BitTorrent . . . Following these tests, Comcast changed its account and admitted that it targets peer-to-peer traffic for interference.").

[35] *See* Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements, *First Report and Order*, 25 FCC Rcd. 746, 766 ¶ 30 (2010) (footnotes omitted) ("*Terrestrial Loophole Order*") ("Comcast has withheld [SportsNet Philadelphia], which carries regional professional sports programming in Philadelphia, from DBS firms."); *see also* DIRECTV, Inc. v. Comcast Corp., 13 FCC Rcd. 21822 (1998); *EchoStar Commc'ns Corp. v. Comcast Corp.*, 14 FCC Rcd. 2089 (1999), *aff'd sub nom., DIRECTV, Inc. and EchoStar Commc'ns Corp. v. Comcast Corp.*, 15 FCC Rcd. 22802 (2000), *aff'd sub nom.,E choStar Commc'ns Corp. v. FCC*, 292 F.3d 749 (D.C. Cir. 2002).

the DBS industry within the local Philadelphia market.[36] Such actions spurred the Commission to amend its rules in the *Terrestrial Loophole Order* and prohibit Comcast and other cable operators from circumventing program access principles by withholding key content. This transaction would enhance Comcast's stranglehold over Philadelphia by adding to its arsenal NBC's owned-and-operated station in that market, WCAU TV-10.

NBC Universal

NBCU has likewise demonstrated a behavioral propensity to use its ownership of must-have content, including in the online video market, to mitigate competition and drive consumers to preferred providers. It is an online video distributor in its own right, and has already sought to leverage not only its key content but also its ownership stake in an online distribution platform to maintain its position of strength.

- *Market Power*

NBCU controls must-have programming assets and distributes those assets online. As the owner of a "Big 4" broadcast network, among other properties, NBCU controls programming that any competitive video distribution platform needs in order to compete. DISH and other MVPDs could not offer a substitutable, competitive product, inclusive of online video, without the NBC Network, NBCU non-broadcast networks, and Universal Studios movies.[37] NBCU

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[36] *See Terrestrial Loophole Order*, 25 FCC Rcd. at 768 ¶ 32 (concluding that "Comcast's withholding of the terrestrially delivered Comcast SportsNet Philadelphia RSN from DBS operators caused the percentage of television households subscribing to DBS in Philadelphia to be 40 percent lower than what it otherwise would have been [providing] evidence that unfair acts involving terrestrially delivered, cable-affiliated programming can have the effect in some cases of significantly hindering MVPDs from providing satellite cable programming and satellite broadcast programming").

[37] *See* Declaration of Dave Shull ¶¶ 6, 10 ("Shull Declaration"); Lynch Declaration ¶ 8; *see also* General Motors Corp. and Hughes Electronics Corp., Transferors and The News Corp., Transferee, for Authority to Transfer Control, *Memorandum Opinion and Order*, 19 FCC Rcd. 473, 564-66 ¶¶ 202-04 (2004) (footnotes omitted) ("[C]arriage of local television broadcast

uses multiple online video distribution platforms in which it holds a proprietary interest to deliver its content, including Hulu.com, NBC.com, and others. By its own admission, NBCU views the online video market as an important and increasingly critical one for the distribution of NBCU content.[38]

- *Propensity to Discriminate*

NBCU currently is engaged in the online distribution of its key programming assets and leverages its control over must-have programming to diminish competition among online video providers. Several examples illustrate this phenomenon. First, [redacted]

Second, [redacted] NBCU downgrades the quality of the video experience on DISH's online video platforms in comparison to NBCU's proprietary online video platforms, such as Hulu.com and NBC.com.[40] This appears to be an effort to drive online video users away from non-NBCU online video distribution platforms and towards NBCU's own properties.

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station signals is critical to MVPD offerings [and] DBS penetration has increased more rapidly in markets where local-into-local service is available."); *EchoStar Satellite L.L.C. v. Viacom, Inc.*, 2004 WL 439984 (N.D. Cal. Jan. 16, 2004) (issuing temporary restraining to require Viacom to continue to provide CBS programming for carriage on the DISH Network, finding that EchoStar would be immediately and irreparably injured if the programming were withdrawn); *see also* Complaint, *EchoStar Satellite L.L.C. v. Viacom, Inc.*, 2004 WL 439984 (N.D. Cal. Jan. 16, 2004).

[38] Letter from Jeff Zucker, President and CEO, NBC Universal, et al., to Kevin Martin, Chairman, FCC, et al., MB Docket Nos. 06-189, 07-42, at 1 (Nov. 20, 2007).

[39] [redacted].

[40] Shull Declaration ¶ 12; Lynch Declaration ¶ 6; Jackson Declaration ¶ 21.

Third, by virtue of its ownership stake in Hulu.com, NBCU seems to have taken a number of steps to throttle back the effectiveness of its online video competitors. Hulu requires the use of its proprietary online video player by DISH and other competitors in the online video market, diminishing the ability of online video competitors to use better video player software technology and restricting to Hulu owners access to all consumer metrics. It does not allow competitors' use of full metadata, such as show availability notes. It prohibits content distribution using new platforms and formats, such as the Apple iPad or HTML5. It controls all advertising inventory, diminishing, for example, DISH's ability to offer an advertising product comparable to its online video competitor's.[41] All these practices reveal a desire to hobble the effectiveness of online video competitors to NBCU and the other owners of Hulu.

Applicants claim that their 32% ownership interest in Hulu is not attributable since it is non-controlling.[42] We disagree. NBC, with FOX, is the largest investor in Hulu. Its stake is many times the 5% threshold for attribution under the Commission's program access rules.[43] For all the reasons described above, NBCU's ownership stake in Hulu gives it great power in the online video market and visibility into Hulu's operations, thereby guiding NBCU with respect to online video and its communications with fellow "Big 4" network owners in the development of industry-wide practices.

Even absent NBCU's ownership interest in Hulu, the company's behavior in the online video market reveals a propensity to withhold key online content in order to favor certain distributors. NBC restricted access to online coverage of the Winter Olympic Games, to which it

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[41] Jackson Declaration ¶ 21.

[42] Application at 95 ("Hulu's percentage [ownership] should not – under applicable antitrust principles – be attributed to the combined company, since the new firm will hold only a minority, non-controlling interest in Hulu.").

[43] *See* 47 C.F.R. §§ 76.1000(b), 76.501.

held the distribution rights, only to subscribers of certain cable or satellite service.[44] As U.S. Senate Antitrust Subcommittee Chairman Herb Kohl (D-WI) stated, the increasing importance of online video and its promise of increasing competition in video raises questions as to whether NBC's handling of online Winter Olympic Games content "may have the effect of limiting the prospects of such competition."[45] Senator Maria Cantwell (D-WA) agreed, arguing at a Senate Commerce, Science, and Transportation Committee hearing that NBC's behavior portends additional "mischief" in the context of this proposed merger.[46]

Applicants claim that availability "of professional video content for online distribution . . . does not constitute a barrier that places new entrants at a disadvantage relative to incumbent online video distributors."[47] As the above examples illustrate, NBCU's own behavior in the online video market undermines that contention.

D. The Merged Comcast–NBC Would Have a Greater Incentive and Ability to Discriminate Against Competitors in the Online Video Market than Does Either Company Pre-merger

The online video market, encompassing broadband-enabled VOD, video streaming to a STB or computing device, and place-shifting applications, presages the future of video and is critical to the continued competitiveness of the DBS industry. Both Comcast and NBCU are significant market participants in online video today and each has displayed a propensity to

[44] *See* Bruce Watson, *NBC Wipes Out on Its Olympic Strategy*, Daily Finance, Feb. 19, 2010, http://www.dailyfinance.com/story/media/nbc-wipes-out-on-its-olympics-strategy/19364519/.

[45] *See* Letter from Sen. Herb Kohl to Jeff Zucker, President and CEO, NBC Universal, at 2 (Feb. 26, 2010).

[46] *See* Consumer, Competition, and Consolidation in the Video and Broadband Market: Hearing before the S. Comm. on Commerce, Science, and Transportation (Mar. 11, 2010) (statement of Sen. Maria Cantwell), *available at* http://commerce.senate.gov/public/index.cfm?p=Hearings&ContentRecord_id=b6c5fd27-eb69-417f-9075-54712a42e1cc&ContentType_id=14f995b9-dfa5-407a-9d35-56cc7152a7ed&Group_id=b06c39af-e033-4cba-9221-de668ca1978a&MonthDisplay=3&YearDisplay=2010.

[47] Application at 98.

leverage its power to thwart competitors. The combination of these major online video providers, however, would give the combined entity an even greater incentive to protect existing and future revenue streams, and a significantly heightened ability to reduce competition from the DBS industry and other would-be providers of online video services.

- *Comcast–NBCU's VOD Content*

The increasing volume and importance of VOD to video providers presents the combined Comcast and NBCU with a heightened ability and incentive to undercut the DBS industry's and other competitors' provision of broadband-enabled VOD services. A DBS subscriber who uses Comcast for broadband connectivity to the STB and who, by definition, would download NBCU content as part of her DISH service, would present an attractive target. Comcast would have an incentive to degrade the speed and quality of NBCU VOD content delivered to the DISH subscriber compared to the experience of a Comcast subscriber.[48] NBCU would win either way, receiving revenue from the DISH subscriber who chooses to stay with a degraded service, or from the former DISH subscriber who switched to Comcast. Comcast would have a strong incentive to drive DBS subscribers away from DBS and towards Comcast. Thus, by using NBCU's critical VOD content, Comcast would have the ability to reduce competition from the DBS industry and others.

- *Comcast's–NBCU's Online Video Content*

Comcast and NBCU would have the incentive and ability to enhance the quality of NBCU online video content on both companies' online video distribution platforms, relative to that of competing online video providers. They could make NBCU content on Fancast/Xfinity more attractive than on DISHOnline. Comcast's ability to divide its broadband service into

[48] Lynch Declaration ¶ 8.