

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter Of)	
)	
Application of Comcast Corp., General)	MB Docket No. 10-56
Electric Company, and NBC Universal)	
Inc., to Assign Licenses or Transfer)	
Control of Licenses)	

**RESPONSE TO COMMENTS OF
THE GREENLINING INSTITUTE**

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SUMMARY

Before the Federal Communication Commission (“FCC”) may approve this transaction, the Applicants must prove that it will serve the public interest not only in terms of competition, but also diversity and localism. However, none of the Comments submitted claimed that the transaction would promote diversity or localism. Rather, many documented the Applicants’ poor track records in promoting diversity in ownership, content or employment and demonstrated that the transaction, even with voluntary commitments, would continue this trend. Comments also pointed out how the merger would drastically reduce the amount and quality of local news, political coverage and community responsive programming.

A few Comments admit that there will be harms to competition, but urge the FCC to limit its inquiry to the merger guidelines used by the Department of Justice. These Comments also posit, without support, that there will be pro-competitive efficiencies created by the merger. In contrast, numerous Petitions to Deny and Comments present evidence of the extensive harms to competition. Several Comments discuss past anti-competitive activities by Applicants in the video distribution and video programming markets and explain how the proposed vertical integration will increase the likelihood of such activities. Numerous Comments also discuss Applicants’ history of obstructing innovation and harming competitors, especially in the emerging online video market. The proposed merger will only increase the incentive and leverage of Applicants to continue these anti-competitive practices.

While a few Comments contend that the FCC should refrain from “regulation by condition,” the overwhelming majority argue for the imposition of transaction specific conditions that are tailored to address impact of this transaction. Given the extensive potential harms to competition, diversity and localism, the FCC should and may properly exercise its authority and impose meaningful and enforceable conditions. The FCC should also provide more opportunities to engage the public, including holding additional public forums, especially one in California which will acutely feel the negative impacts of an unregulated approval process.

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I. INTRODUCTION

Greenlining Institute hereby files this Response to Comments pursuant to the Federal Communication Commission's ("FCC's") Public Notice of March 18, 2010¹. On January 28, 2010 Comcast Corporation ("Comcast"), General Electric Company ("GE"), and NBC Universal, Inc. ("NBCU" and, collectively with Comcast and GE, the "Applicants") jointly submitted applications to the FCC seeking to transfer various licenses to a limited liability company, structured as a joint venture between Comcast and GE (the "Joint Venture" or "JV").² Specifically, the Joint Venture would retain the NBCU name, would be managed by Comcast, and would be would be 49 percent owned by GE and 51 percent owned by Comcast, who also holds various right of first refusal and redemption rights enabling it to obtain 100 percent ownership.³ Thus, while styled as a joint venture, this transaction will, in effect, be a merger between NBCU and Comcast

¹ FCC Public Notice, DA 10-457 (March 18, 2010) (Seeking Comment on Applications of Comcast, GE and NBCU; Establishes Pleading Cycle), *amended by* FCC Public Notice, DA 10-636 (May 5, 2010) (Announcing Revised Pleading Schedule).

² *Applications for Consent to the Transfer of Control Licenses, General Electric Company, Transferor, to Comcast Corporation, Transferee, Applications and Public Interest Statement* (filed Jan. 28, 2010) ("Application").

³ *Id.* at 1, 12, 14-15

II. THE FCC REVIEW SHOULD BE BROADER THAN A MERE COMPETITION ANALYSIS.

Before the FCC may grant an application for the transfer of control of any authorization and licenses it must find that the transfer will on balance “serve the public interest, convenience and necessity.”⁴ The Applicants “bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, will serve the public interest.”⁵ This statutory requirement is imposed to promote the interests of American citizens and includes the “well settled Communications Act values of competition, diversity, localism, and a deep respect for the First Amendment.”⁶ Thus, during the course of its review the FCC must consider whether the transaction will harm not only competition but also diversity and localism.

A. The FCC’s Review Must Address the Public Interest Harms to Diversity and Localism.

Three of the Comments argued that the FCC’s review should be limited to an analysis of the competitive impacts of the transaction.⁷ For example, one Commentator argued the FCC should disregard “excessive and unrelated information including company positions on media ownership diversity. . . .”⁸ Greenlining strongly disagrees with this contention and urges the FCC to take note of the many Petitioners and Commentators who outline the myriad public interest harms, such as those to diversity and localism, which may result from this transaction.⁹

⁴ The Communications Act, 47 U.S.C. § 301(d) (2009).

⁵ *DirectTV- Liberty Media Order*, 23 FCC Rcd at 3265 ¶ 22. *See also*, *SBC-AT&T Order*, 20 FCC Rcd at 18300 ¶ 16; *Verizon-MCI Order*, 20 FCC Rcd at 18443 ¶ 16; *Comcast-AT&T Order*, 17 FCC Rcd at 23255 ¶ 26; *EchoStar-DIRECTTV HDO*, 17 FCC Rcd at 20574 ¶ 25.

⁶ *Hearing on Consumers, Competition, and Consolidation in the Video and Broadband Market Before the S. Comm. on Commerce, Science, and Transportation* 111th Cong. 2 (2010) (statement of Julius Genachowski, Chairman of the FCC) available at <http://commerce.senate.gov/public/?a=Files.Serve&File_id=948a15c8-1698-4321-b30c-cb6b3b9b08bb>.

⁷ Comments of Americans for Tax Reform under the Aegis of Digital Liberty Project and American Shareholders Association, M.B. Docket 10-56 (June 21, 2010) [hereinafter “Digital Liberty Comments”]; Comments of the Free State Foundation, M.B. Docket No. 10-56 (June 21, 2010) [hereinafter “Free State Comments”]; Comments of Christopher S. Yoo, M.B. Docket No. 10-56 (May 20, 2010) [hereinafter “Yoo Comments”].

⁸ Digital Liberty Comments, *supra* note 7, at 2.

⁹ Petition to Deny of Greenlining Institute, M.B. Docket No. 10-56 (June 21, 2010). *See, e.g.*, Joint Petition to Deny of Consumer Federation of America, Consumers Union, Free Press, and Media Access Project at 9, M.B. Dkt. No. 10-56 (June 21, 2010) [hereinafter “Joint Petition to Deny of Consumer Federation of America, *et al.*”]; Petition to Deny of Bloomberg L.P. at 19-22, M.B. Docket No. 10-56 (June 21, 2010); Petition to Deny of the National Coalition of African American Owned Media at 14-15, M.B. Docket No. 10-56 (June 21, 2010); Petition to Deny or In the Alternative Impose Conditions of Communications Workers of America at 5-6, MB Docket No. 10-56 (June 21, 2010); Comments of Common Sense Media, MB Docket 10-56 (June 21, 2010) (concerned with impact of media on children and families); Comments of the National Association of Telecommunications Officers and

Moreover, the FCC has long recognized that the public interest analysis contains considerations of diversity and localism, and not merely competition.¹⁰ There is no justification for departing from this longstanding precedent. As this transaction in its current form will directly and negatively impact diversity and localism, the FCC must consider these issues.

B. The FCC’s Competition Review Should Not be Limited to the Merger Guidelines

The FCC’s review of the harms to competition is not the same as that conducted by the Department of Justice (“DOJ”). In contrast to what two Commentators argued, the FCC should neither base its review solely upon the horizontal merger guidelines nor rely substantially upon the DOJ’s analysis.¹¹ The FCC has recognized that its analysis of competition is necessarily broader than and should not be a mere duplicate of the strict competition analysis conducted by the Department of Justice.¹² Greenlining supports the Petitioners and Commentators who argued that the FCC’s duty to protect competition is broader than that of the DOJ and that the horizontal merger guidelines are merely a starting point of the analysis.¹³ Thus the FCC should continue its

Advisors, MB Docket 10-56 (June 21, 2010) [hereinafter “Comments of NATOA”] (concerned with Public, Educational and Government (“PEG”) channels); Comments and Merger Conditions Proposed by Alliance for Communications Democracy, MB Docket No. 10-56 (June 21, 2010) (Localism and diversity concerns related to PEG channels); Comments of Entertainment Studios, Inc., MB Docket No. 10-56 (June 21, 2010); Comments of the Writers Guild of America, West, MB Docket No. 10-56 (June 21, 2010) [hereinafter “WGAW Comments”] (concerned with diverse and independent viewpoints in the media); Opposition to Comcast Acquisition of NBC Universal of Mabuhay Alliance, MB Docket No. 10-65 (March 15, 2010) *as amended by* Petition Opposing Comcast Acquisition of NBC Universal on Behalf of Asian American and Request to Stop Merger Proceedings Until there are Widespread Public Hearings of Mabuhay Alliance (March 22, 2010) *and* Opening Comments of Mabuhay Alliance (June 17, 2010) [hereinafter collectively “Comments of Mabuhay”]; Comments of the NBC Television Affiliates, MB Docket No. 10-56 (June 21, 2010) (Localism concerns regarding the network-affiliate relationship); Comments of the Greater Metro Telecommunications Consortium (Denver, Colorado), MB Docket No. 10-56 (June 21, 2010); *and* Comments of the City of Detroit, Michigan in Opposition to Comcast’s Application and Proposed Joint Venture, MB Docket No. 10-56 (June 21, 2010).

¹⁰ *In the Matter of General Motors Corporation and Hughes Electronics Corporation and The News Corporation Limited*, Memorandum Opinion and Order, 19 FCC Rcd 473 ¶ 16 (2004) [hereinafter “*News Corp./Hughes Order*”]; *In the Matter of Application for Consent to the Transfer of Control of Licenses from MediaOne Group to AT&T Corp.*, Memorandum Opinion and Order, 15 FCC Rcd 9816 ¶ 11 (citing *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, for Consent To Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission’s Rules*, Memorandum Opinion and Order, 14 FCC Rcd 14712 ¶ 50-51 (1999)).

¹¹ Yoo Comments, *supra* note 7, at 6; Free State Comments, *supra* note 7, at 15.

¹² *In the Matter of Consent to Transfer of Control of Licenses from Comcast Corporation and AT&T Corporation to AT&T Comcast Corporation*, Memorandum Opinion and Order, 17 FCC Rcd 23246 ¶ 28 (Citing *Satellite Business Systems*, 62 FCC 2d 997, 1088 (1977), *aff’d sub nom United States v. FCC*, 652 F.2d 72 (DC Cir. 1980) (*en banc*); *Northeast Utilities Service Co. v. FERC*, 993 F.2d 937, 949 (1st Cir. 1993)).

¹³ Petition to Deny of Public Knowledge at 2, M.B. Docket No. 10-56 (June 21, 2010); Petition to Deny of Bloomberg L.P. at 23-24, M.B. Docket No. 10-56 (June 21, 2010); Petition to Condition or Deny of Earthlink, Inc.

expansive competition review to determine whether, on balance, this transaction will serve the public interest.

III. NEITHER THE APPLICANTS NOR THE COMMENTS ADEQUATELY DEMONSTRATE THAT DIVERSITY, LOCALISM AND COMPETITION WILL BE PROMOTED BY THIS TRANSACTION.

It is worth noting that very few of the Comments claimed the transaction would promote diversity, localism or competition. More specifically, only six supported the merger without arguing for the imposition of any conditions; three of which were vendors of Comcast.¹⁴ In contrast, well over thirty commentators outlined harms that might result if the transaction is approved without adequate conditions.¹⁵ Moreover, as the many Petitions to Deny aptly demonstrate, in its current form the merger will promote neither competition, nor diversity, nor localism.¹⁶

A. The Comments Demonstrate that Diversity and Localism Will Not be Fostered by this Transaction.

It is significant that not a single formal comment claimed that the proposed transaction would foster diversity or localism.¹⁷ Rather as Greenlining and many commentators recognized the transaction, even with the so called “Voluntary Public Interest Commitments” has the

at 7-8, M.B. Docket No. 10-56 (June 21, 2010); Comments of DirectTV, Inc. at 4, MB Docket No. 10-56 (June 21, 2010); Comments of the American Cable Association at 7, MB Docket No. 10-56 (June 21, 2010)

¹⁴ Digital Liberty Comments, *supra* note 7, at 2 (concerns about diversity are excessive and unrelated); Free State Comments, *supra* note 7, at 3 (the FCC should limit its review to the economic analysis of competitive impacts); Yoo Comments, *supra* note 7, at 6 (the framework for evaluating the impact of any merger is the Merger Guidelines of the Federal Trade Commission and Department of Justice); Comments of Cisco Systems, Inc., MB Docket No. 10-56 (June 21, 2010) (as a vendor of Comcast, Cisco believes merger will spur innovation); Comments of Motorola, Inc., MB Docket No. 10-56 (June 21, 2010) (a partner of Comcast in launching TV Everywhere argues merger will hasten “anytime, anywhere” video content); Comments of Arris Group, Inc., MB Dkt. No. 10-56 (June 21, 2010) (as a vendor of Comcast, believes merger will spur innovation).

¹⁵ See *supra* note 9 (outlining the Comments discussing the harm to localism and diversity) and *infra* notes 24-45 (outlining the Comments discussing the harm to competition).

¹⁶ See, e.g., Joint Petition to Deny of Consumer Federation of America, Consumers Union, Free Press, and Media Access Project, M.B. Dkt. No. 10-56 (June 21, 2010) (discussing the negative impacts of the merger on competition, diversity, and localism); Petition to Condition or Deny of Earthlink, Inc. at i, M.B. Docket No. 10-56 (June 21, 2010) (concluding that “the transaction will result in less competition, diminished choice, decreased information diversity, reduced broadband network investment, and higher costs for consumers.”); Petition to Deny of Bloomberg L.P., M.B. Docket No. 10-56 (June 21, 2010) (concludes that the merger will reduce competition and the number of diverse independent new sources); Petition to Deny of the National Coalition of African American Owned Media, M.B. Docket No. 10-56 (June 21, 2010) (concludes that the merger will have the incentive and ability to cause harm and discriminate against independent programmers, in particular African American owned programming and networks).

¹⁷ For the purposes of this discussion, “Brief Comments” as classified by the FCC’s Electronic Comment Filing System and Congressional and other political responses are not considered.

potential to eliminate diverse ownership, viewpoints and content.¹⁸ As the Writers Guild of America, West, points out “Comcast fails to offer any commitments regarding program source diversity” and the only purported benefit of the transaction “is unlikely to represent greater content diversity for viewers.”¹⁹ In addition, many commentators noted Comcast and NBCU’s poor track records in promoting diversity in ownership, content or employment.²⁰ Diverse ownership and diversity in employment is crucial because these are two ways to ensure diverse content and the airing of positive images, rather than negative stereotypes.

Moreover, many argued that even with the “Voluntary Public Interest Commitments” the merger will drastically reduce the amount and quality of local news, political coverage and community responsive programming, such as Public, Educational, and Governmental channels.²¹ The overwhelming consensus is that localism will be harmed by the merger as currently structured. The City of Detroit, calling Comcast a “scofflaw” put it quite bluntly: “Comcast has been a serial violator of the Federal Cable Act and many of those public interest obligations, and of its PEG commitments in particular.”²² Even the NBC affiliates were concerned that Comcast would “erode the localized service that has been a cornerstone of the network-affiliate partnership since its inception.”²³ Entrusting the NBC network to a company that does not

¹⁸ See, e.g., Petition to Deny of Greenlining Institute, *supra* note 9, at 3-16; WGAW Comments, *supra* note 9, at 8-9; Comments of Entertainment Studios, *supra* note 9, at 4-7 (the merger will exacerbate the dismal state of African American media ownership); Opposition to Comcast Acquisition of NBC Universal of the Black Economic Council, MB Docket No. 10-56 (Mar. 29, 2010) *as amended by* Initial Comments on Behalf of the Black Community in Opposition to Comcast/NBC Universal Acquisition (June 22, 2010) [hereinafter collectively “Comments of BEC”] (arguing Comcast has failed to demonstrate how the merger is in the interests of the black community); Comments of Mabuhay, *supra* note 9; Comments of the Latino Business Chamber of Greater Los Angeles: 47 Million Latinos Unlikely to Benefit from Comcast Acquisition of NBC Universal, MB Docket No. 10-56 (March 26, 2010) *as amended by* Opposition by Latino Business Community to Comcast/NBC Merger (June 18, 2010) [hereinafter collectively “Comments of Latino Business Community”]; Comments of the Caucus for Producers, Writers & Directors, at 5, MB Docket No. 10-56 (June 17, 2010) (the merger of Comcast and NBC will force even more independent producers out of the market and reduce diverse content).

¹⁹ WGAW Comments, *supra* note 9, at 8-9. See also *id.* at 10 (“While Comcast views the merger as eliminating barriers to distribution, the WGAW is concerned that the actual effect will be to devalue content.”).

²⁰ Petition to Deny of Greenlining Institute, *supra* note 9, at 9-11, 13-16, 20-21; Comments of Latino Business Community, *supra* note 18, at 2; Comments of BEC, *supra* note 18, at 3; Comments of Entertainment Studios, *supra* note 9, at 6-7; Comments of Mabuhay, *supra* note 18, at 2.

²¹ See, e.g., Petition to Deny of Greenlining Institute, *supra* note 9, at 16-27; Comments of the City of Detroit, *supra* note 9, at 2 (concerned about PEG channels); Comments of Alliance for Communications Democracy, *supra* note 9, at 13-14 (requests commitments to mitigate harm to PEG channels); Comments of NATOA, *supra* note 9 (requests commitments to mitigate harm to PEG channels and data reporting to monitor); Comments of Denver, *supra* note 9 (requesting commitments to mitigate harm to PEG channels and data reporting); Comments of Common Sense Media, *supra* note 9, at 2 (requests conditions to assist children and family programming); Comments of the NBC Television Affiliates, MB Docket No. 10-56 (June 21, 2010).

²² Comments of Detroit, *supra* note 9, at 3, 11.

²³ Comments of the NBC Television Affiliates, *supra* note 21, at 2.

respect the needs of the public it serves is reprehensible, because the owner of broadcast stations has an even higher duty to ensure programming is responsive to local needs. Comcast must demonstrate that this merger will promote localism, but as the many comments demonstrate, it failed to do so.

Simply put, the potential harms to the public interest are vast, not only to competition, but also to diversity and localism. Ensuring a competitive media marketplace, as discussed below, can ameliorate some of these harms, but not all of them. Thus, the FCC must not approve this transaction unless it also imposes meaningful and enforceable conditions targeted to protecting diversity and localism.

B. The Comments Demonstrate that Competition Will Be Harmed by the Proposed Venture.

The FCC received a flood of evidence demonstrating that the proposed venture would result in much harm to competition. The few comments in support of the merger admit that there will be harms to competition, only arguing that the expected harms may not result in violations under a traditional, limited antitrust analysis.²⁴ However, the FCC must protect against the serious harms to competition in the video distribution market, the video programming market and the nascent online video market.

Comments in support of the venture claim that consumers will benefit from “pro-competitive” efficiencies resulting from vertical integration of one of the nation’s four main broadcast networks with the nation’s largest home video distribution company.²⁵ However, these Comments in support do not actually explain or analyze the supposed efficiencies or how they will benefit consumers in any detail.²⁶ Numerous Commentators do analyze the venture and discuss how control by Comcast over increased programming resources will not result in efficiencies directed to consumers, but rather efforts to derive the most profits from consumers.²⁷ As the American Antitrust Institute stated, the “profit-maximization incentives, Comcast’s

²⁴ Yoo Comments, *supra* note 7, at 6-7; Free State Comments, *supra* note 7, at 2-4; Digital Liberty Comments, *supra* note 7, at 1-2.

²⁵ Yoo Comments, *supra* note 7, at 7, 30-31; Free State Comments, *supra* note 7, at 5.

²⁶ Yoo Comments, *supra* note 7, at 31 (“Commentators have frequently discussed how vertical integration in the cable industry can create efficiencies. It is not necessary to rehearse the many ways that vertical integration can create efficiencies that promote competition and benefit consumers.”).

²⁷ Joint Petition to Deny of Consumer Federation of America, *et al.*, *supra* note 9, at 13; Comments of the American Antitrust Institute at 11-13, M.B. Docket No. 10-56 (June 21, 2010); Comments of DirectTV, *supra* note 13, at 52-61; Declaration of Dr. Mark Cooper, Fellow Donald McGannon Center for Communications Research, Fordham University at 92, MB Docket No. 10-56 (June 21, 2010) [hereinafter “Cooper Declaration”].

majority ownership of the JV, and primary motivation for the JV to create content/distribution platforms all point to why joint profit maximization is likely.”²⁸ Instead of realizing efficiencies from its ownership of new sources of programming, Comcast will use these programming assets to raise prices and potentially drive rivals out of the multichannel video programming distribution (“MVPD”) market.

A few Commentators make the claim that the proposed venture will not increase the likelihood of vertical foreclosure in the MVPD market.²⁹ However, several Comments detail Comcast’s history of engaging in temporary foreclosure by denying affiliated video programming content from MVPD competitors.³⁰ Moreover, the FCC must protect consumers against a range of foreclosure anti-competitive activities by vertically integrated companies. As described below, Comcast can use other anti-competitive strategies, such as raising prices for its affiliated programming or bundling desirable programming with less desirable programming³¹. The final result for consumers is higher prices for home video service.

The proposed merger will only increase the likelihood of foreclosure strategies, as Comcast will gain control over a wealth of must have NBCU content. Raising prices for Comcast’s new wealth of affiliated video programming is a particular danger of the proposed vertical integration. As DirecTV points out, existing economic analyses used by the FCC cannot adequately measure the effects of vertical integration on raised prices for programming, even though the FCC recognizes the potential public harm of raised prices resulting from vertically integration.³² Comcast has all the incentive to raise prices for its programming, as it would simply result in an internal transfer of funds, but would result in higher profits for them, and increased costs for competitors. Moreover, existing program access rules designed to prevent discriminatory pricing can be easily sidestepped, especially when dealing with smaller cable companies.³³ The increased costs for MVPD competitors, especially smaller companies, will not only be passed on to consumers, but also may have detrimental effects on the broadband

²⁸ Comments of the American Antitrust Institute, *supra* note 27, at 6.

²⁹ Yoo Comments, *supra* note 7, at 27-33; Free State Comments, *supra* note 7, at 6-9.

³⁰ *See, e.g.*, Petition to Deny of the Communications Workers of America, *supra* note 9, at 20-2; Comments of DirecTV, *supra* note 13, at 8-9.

³¹ Joint Petition to Deny of Consumer Federation of America, *et al.*, *supra* note 9, at 42.

³² Comments of DirecTV, *supra* note 13, at 15-16 (citing *News Corp./Hughes Order*, *supra* note 10, at Appendix D, ¶12)

³³ *See* Comments of the American Cable Association, *supra* note 10, at 22, 26.

market. WealthTV points out that small, rural cable companies that face increased programming costs will have less resources to invest in broadband deployment.³⁴

Comments also describe how the proposed venture will give the Applicants much more incentive to discriminate against competing sources of video programming.³⁵ Comcast can feature its growing wealth of affiliated programming on its most popular tier of video service, increasing its viewership and advertising revenue, while denying such beneficial exposure to unaffiliated video programming.³⁶ Additionally, Comcast will be in a stronger position to demand an interest in video programming as a condition of carriage, thus resulting in further media consolidation.³⁷ The end result will be the same for consumers – they will have less diverse programming available to them on the basic level of MVPD service.

A few Commentators lauded the role Comcast has played in developing the MVPD and broadband market and predict that the merger will lead to further innovation.³⁸ However, all of these Commentators are vendors to Comcast and their claims of innovation seem more like mere descriptions of continuing business relationships.³⁹ In contrast to these subjective claims of innovation, numerous Commentators documented the history of both Comcast and NBCU in stifling innovation by competitors, especially in the nascent online video market.⁴⁰

The proposed merger eliminates the competition between Comcast and NBCU in the emerging online video market and presents numerous opportunities for Applicants to continue their anti-competitive behavior against online video rivals.⁴¹ For example, the proposed merger

³⁴ Petition to Deny of WealthTV, L.P. at 24, MB Docket No. 10-56 (June 21, 2010).

³⁵ See, e.g., Joint Petition to Deny of Consumer Federation of America, *et al.*, *supra* note 9, at 38-39, 43; Comments of The Tennis Channel, Inc. at 4, MB Docket No. 10-56 (June 21, 2010).

³⁶ Joint Petition to Deny of Consumer Federation of America, *et al.*, *supra* note 9 at 47-48; Petition to Deny of WealthTV, *supra* note 34, at 16-19.

³⁷ See, e.g., Cooper Declaration, *supra* note 17, at 102-03; Petition to Deny of the Communications Workers of America, *supra* note 9, at 37.

³⁸ Comments of Cisco Systems, *supra* note 14, at 1-8; Comments of Motorola, *supra* note 14, at 1-2; Comments of Arris Group, *supra* note 14, at 1-2.

³⁹ Comments of Cisco Systems, *supra* note 14, at 1-8; Comments of Motorola, *supra* note 14, at 1-2; Comments of Arris Group, *supra* note 14, at 1-2.

⁴⁰ See, e.g., Joint Petition to Deny of Consumer Federation of America, *et al.*, *supra* note 9, at 28 (describing Comcast's throttling of peer to peer file sharing applications over their broadband network); Petition to Deny of DISH Network, L.L.C. and EchoStar Corporation at 16-17, MB Docket No. 10-56 (June 21, 2010) [hereinafter "DISH/EchoStar Petition"]; Petition to Deny of Public Knowledge, *supra* note 13, at 11 (describing how NBCU blocks and downgrades online video viewership on technology platforms that compete with its affiliated online video platforms); Cooper Declaration, *supra* note 27, at 15-16, 18-19 (describing how the cable industry, including Comcast, has devised their set-top boxes so that online video viewership is obstructed).

⁴¹ Joint Petition to Deny of Consumer Federation of America, *et al.*, *supra* note 9, at 23; Comments of the American Antitrust Institute, *supra* note 27, at 13-15.

will increase the ability and incentive for Applicants to use technology to *prevent* online video viewers from accessing affiliated video programming on rival video platforms.⁴² Thus, technology will be utilized to thwart innovation, not to encourage it. Comcast can use its strong leverage to enter in exclusivity agreements with video programmers, ensuring that content is only available on online video platforms affiliated with Comcast.⁴³ Finally, Applicants can restrict “must have” NBCU programming such as the 2012 Olympics so that online viewership is restricted to Comcast cable subscribers.⁴⁴ Indeed, Comcast, with its online video platform has adopted obstruction of innovation and competition as a business strategy, directed at marginalizing rivals who have not signed onto the TV Everywhere model.⁴⁵ Thus, only one model for online video will be supported and competing technologies and innovations will be eliminated.

The FCC must not be limited to a traditional, strict antitrust analysis in examining the proposed merger’s effects on competition. Indeed, the venture does not lend itself to such an analysis considering the manner in which the public interest harms cross various markets. For example, Comcast’s acquisition of significant video programming assets will have huge effects on the online video market, as Comcast in addition to being the largest MVPD provider in the nation is also its most dominant broadband provider. The FCC must not approve this venture unless it establishes conditions to protect competition in all affected markets.

IV. IF THE FCC IS TO APPROVE THIS MERGER, THE IMPOSITION OF TRANSACTION SPECIFIC CONDITIONS IS APPROPRIATE AND NECESSARY TO MITIGATE PUBLIC INTEREST HARMS.

As noted above, Applicants have failed to mitigate the public interest harms that will flow from this merger and moreover, have failed to demonstrate that any public interest benefits will result. They make vague and unsubstantiated claims about increased efficiency and innovation, which many understood to be evidence of anti-competitive intent. As the FCC has noted however, “as the harms to the public interest become greater and more certain, the degree and certainty of the public benefits must also increase commensurately in order for us to find that

⁴² DISH/EchoStar Petition, *supra* note 39, at 20; Petition to Deny of the Communications Workers of America, *supra* note 9, at 49-50; Petition to Condition or Deny of Earthlink, Inc., *supra* note 13, at 22.

⁴³ Petition to Condition or Deny of Earthlink, Inc., *supra* note 13, at 23; Joint Petition to Deny of Consumer Federation of America, *et al.*, *supra* note 9, at 24-25.

⁴⁴ Petition to Deny of the Communications Workers of America, *supra* note 9, at 45.

⁴⁵ *Id.* at 45-46. *See also* Joint Petition to Deny of Consumer Federation of America, *et al.*, *supra* note 9, at 18.

the transaction on balance serves the public interest, convenience and necessity.”⁴⁶ Here, we have an unsubstantiated claim of public benefit and a large degree of harm. Thus, the FCC must either deny the transaction or impose substantial conditions to mitigate the degree of harm to the public interest.

Three commentators argued that the FCC should not impose transaction specific conditions in the context of this merger.⁴⁷ Professor Yoo argued that merger conditions “threaten to skew the competitive landscape” because they “apply only to the merging parties without covering any other industry participants.”⁴⁸ Greenlining agrees that merger conditions do affect the competitive landscape, but submits that this is not a reason to refrain from imposing them. This merger will fundamentally alter both the MVPD and OVPD media markets. The imposition of transaction specific conditions ensures that the changes to these markets will not cripple competition and decrease diversity and localism. Moreover, Comcast will not be merely one player among many, but will be the leader driving this change; in other words, post-merger there will be no other similarly situated companies. Therefore, it is appropriate that conditions apply to Comcast-NBCU alone. If other participants subsequently enter the market, or if the market structure changes such that a rulemaking is necessitated, the FCC could then craft rules that obviate the transaction specific conditions imposed herein. But what the FCC should not do is adopt a wait-and-see approach in which harms to competition, localism and diversity run rampant.

Moreover, Free State Foundation argued that the FCC should eschew the practice of “regulation-by-condition” because it “has been a method by which the FCC has imposed policies on merging parties that the Commission should only [sic] impose[], if at all, through rulemaking.”⁴⁹ The problem with this argument is that rulemaking can only address the current status quo and can not prospectively forecast market conditions. The FCC, however, has long

⁴⁶ *In the Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries*, Memorandum Opinion and Order, 12 FCC Rcd 19985 at ¶ 157 (1997). The FCC reaffirmed this in 1999 and then again in 2000. *In re Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines*, Memorandum Opinion and Order, 14 FCC Rcd 14712 at ¶256 (1999) [hereinafter “SBC-Ameritech Order”]; *In the Matter of Applicants for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, Memorandum Opinion and Order, 15 FCC Rcd 9816 at ¶ 154 (2000) [hereinafter “MediaOne-AT&T Order”].

⁴⁷ Yoo Comments, *supra* note 7, at 3-4; Digital Liberty Comments, *supra* note 7, at 3; Free State Comments, *supra* note 7, at 11-13.

⁴⁸ Yoo Comments, *supra* note 7, at 3, 4.

⁴⁹ Free State Comments, *supra* note 7, at 12.

had this forward looking predictive ability in the context of imposing conditions upon merging parties.⁵⁰ Recently the FCC held that the public interest authority enables it to analyze “the transaction’s effect on future competition” and impose, where appropriate, “narrowly tailored, transaction-specific conditions that ensure that the public interest is served by the transaction.”⁵¹ Thus, not only is it within the FCC’s regulatory purview, it is also highly appropriate that the FCC analyze the effects this merger will have on the future of the MVPD and the nascent online video markets in order to fashion appropriate conditions.

V. CONCLUSION

Applicants propose to create the most powerful vertically and horizontally integrated media giant ever, combining the nation’s most dominant video distribution company with one of the nation’s main broadcast television networks. Greenlining is not alone in highlighting the myriad public interest harms that will result if the transaction is approved in its current form. The petitions to deny coupled with the comments outlining concerns about the transaction vastly outnumber the comments in support of the transaction. In total there are eleven petitions to deny, over thirty comments in opposition or requesting conditions, and only six comments in support. Those voicing concern include groups representing labor, diverse communities, parents associations, municipalities, competitors, media industry groups and consumer groups. The breadth and depth of the public outcry highlights the far reaching and severe consequences that will be felt across the nation if the transaction is approved.

In his opening remarks to the Chicago Public Forum on the Comcast-NBCU transaction, Commissioner Michael Copps hit on many important issues, two of which bear reiterating here.⁵² First, in light of the serious harm that will result from an unregulated approval of this transaction, adequate safeguards need to be put in place. However, as Commissioner Copps noted, currently “the assurances and conditions we have received on this Comcast/NBCU proposal don’t pass the

⁵⁰ *SBC-Ameritech Order*, 14 FCC Rcd 14712 at ¶ 51 and n.130 (citing to a long history establishing that the Commission may render informed predictions about future market conditions in order to impose conditions); *MediaOne-AT&T Order*, 15 FCC Rcd 9816 at ¶ 12.

⁵¹ *In the Matter of News Corp. and DirectTV, transferors, and Liberty Media Corp., transferee, for Authority to Transfer Control*, Memorandum Opinion and Order, 23 FCC Rcd 3265 at ¶25, 26 (2008).

⁵² Statement of FCC Commissioner Michael J. Copps, *FCC Public Forum to Discuss the Comcast-NBCU-GE Joint Venture*, Northwestern University Law School, Chicago, IL (July 13, 2010), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-299758A1.pdf

red-face test.”⁵³ Any conditions attached to this transaction must be meaningful and enforceable. Secondly, in order to fashion appropriate conditions the FCC must consider “input from citizens across the land who know better than anyone if media is or is not serving their needs.”⁵⁴ The overwhelming response of citizens is that the media is not serving their needs. The FCC should engage the public further in order to determine how to protect their rights.

The Chicago public forum was laudable, however it is only a first step. Greenlining notes that Chairman Genachowski was absent from that hearing. Therefore, Greenlining urges the FCC to hold additional hearings across the country so that all Commissioners, including Chairman Genachowski, may be apprised of the public’s concerns. Specifically, Greenlining recommends that the FCC hold a hearing in California. California, a majority minority state, is home to two of the top ten, and four of the top thirty largest media markets in the country. Therefore, Californians will acutely feel the harms this transaction may bring to the basic tenets of the public interest: localism, diversity, and competition.

⁵³ *Id.* at 2.

⁵⁴ *Id.* at 1.