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August 19, 2010

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Federal Communications Commission
Office of the Secretary

VIA HAND DELIVERY

Marlene H. Dortch
Federal Communications Commission
Office of the Secretary
445 Twelfth Street, S.W.
Washington, D.C. 20554

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

Dear Ms. Dortch:

On behalf of Communications Workers of America ("CWA"), and in accordance with the First and Second Protective Orders adopted in this proceeding,[1] please find enclosed two copies of the CWA's Reply to Opposition and accompanying economic report prepared by Hal J. Singer ("Economist's Report") redacted for public inspection. A Highly Confidential version of CWA's Petition to Deny and the Economist's Report are being filed simultaneously with the Office of the Secretary under separate cover.

[1] *See In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licenses*, MB Docket No. 10-56, Protective Order, DA 10-370 (Mar. 4, 2010) ("First Protective Order"); *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licenses*, MB Docket No. 10-56, Protective Order, DA 10-371 (Mar. 4, 2010) ("Second Protective Order").

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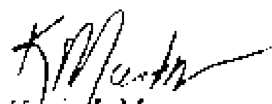
Two copies of the CWA Reply to Opposition and two copies of the Highly Confidential version of the Economist's Report are being simultaneously delivered to Vanessa Lemmé, Industry Analysis Division, Media Bureau, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554, and a Highly Confidential version is being sent to the Submitting Parties through counsel.

Respectfully submitted,



Kevin J. Martin
Counsel for Communications Workers of America

Enclosures

REDACTED -- FOR PUBLIC INSPECTION

Before the
Federal Communications Commission
Washington, DC 20554

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

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Federal Communications Commission
Office of the Secretary

REPLY TO COMCAST-NBC UNIVERSAL OPPOSITION
COMMUNICATIONS WORKERS OF AMERICA

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EXECUTIVE SUMMARY

The Federal Communications Commission (the "Commission") should adopt meaningful and enforceable remedies proposed by the Communications Workers of America ("CWA") in the above-captioned application for transfer of control of NBC Universal, Inc. ("NBCU") from General Electric Company ("GE") to Comcast Corporation ("Comcast") in order to safeguard consumers, competition and workers. Without these remedies, the proposed transaction will not serve the public interest and will result in significant anticompetitive harm to consumers in the traditional and online video markets.

Specifically, the Transaction will enhance Comcast's incentive and ability to engage in anticompetitive actions in today's video marketplace. Comcast's expansion of its premium content portfolio with the acquisition of NBCU will give it the ability to bundle its less desirable cable channels with its must-have programming to secure higher prices for, and earn more favorable placement of, its affiliated programming while disfavoring unaffiliated content. In addition, forced bundling raises other multichannel video programming distributors' ("MVPDs") costs, which in turn, translates into higher cable rates for consumers and diverts resources away from broadband deployment.

The combined Comcast-NBCU will have the ability to withhold from, or delay the licensing of critical must-have programming to its competitors, notably national and regional sports programming and local broadcasting programming. In its 2007 review of its program access rules, the Commission found that an MVPD's ability to compete will be significantly harmed if it is denied access to popular vertically integrated programming for which no good substitute exists.

The Transaction also will erode competition in advertising. Comcast's regional and local programming networks currently compete with NBC's 10 owned-and-operated ("O&O") stations for local advertising. The joint venture gives the new entity the incentive to merge these operations, and to exercise its market power by profitably raising the price of advertising, among other practices. This concentration in the local advertising market translates into less revenue for competing broadcasters to produce local news and hire workers, with a resulting negative impact on diversity, competition, and adequate staffing that drive quality news.

Further, Comcast's exclusionary practices in the online video market limit consumers' access to online video. Specifically Comcast's actions will result in foreclosure of Over-The-Top ("OTT") online video providers and the loss of online video as an alternative platform to the cable television model. Applicants would expand authentication and tying practices to harm or prevent the development of Internet video as a competitive alternative by limiting the ability of OTT providers to offer a package of video services and restricting consumer access to content.

The Transaction also poses harm to employees. The proposed acquisition of NBCU will likely result in the loss of good jobs. The Applicants fail to make any concrete, verifiable and enforceable commitments regarding jobs. Contrary to the Applicants' assertions, labor concerns do fall within the scope of the policies and objectives of the Communications Act.

The Applicants' assertions that the Transaction would benefit the public interest – including its voluntary public interest commitments – fail to ameliorate the harms to consumers that would result from approval of the Transaction in its present form. Because the proposed merger would result in considerable harm to consumers of cable television and online video services, the Commission should impose verifiable conditions to mitigate the anticompetitive harms, including:

A. Remedies That Would Protect Competition in the Traditional Video Market.

- Comcast-NBCU should be compelled to sell its affiliate networks to MVPDs on an unbundled basis, thereby barring Comcast from tying its marquee networks (an NBC affiliate, Regional Sports Networks or national sports programming) to lesser programming. Individual Comcast subscribers should have the ability to choose not to purchase individual networks that are part of the retail package and receive a discount equal to the bundled retail price less the wholesale price of the network.

- Comcast-NBCU should be prohibited from offering bulk discounts, either by express terms or through punitive pricing, which are frequently used to impair new entrants and smaller providers.

- With respect to the NBCU O&O affiliates: (1) Comcast should be compelled to enter binding baseball style commercial arbitration for disputes over retransmission consent; and (2) rival MVPDs should be allowed to carry the NBC affiliate during arbitration.

- To discourage Comcast-NBCU from discriminating in its carriage decisions on the basis of affiliation, the Commission should refine its current program-carriage adjudication process to include: an expedited complaint process, a baseball-style arbitration process, and a swift timetable for resolution of complaints

- Comcast-NBCU should be barred from tying the purchase of the new entity's cable television service to its set-top box.

B. Remedies That Would Protect Competition in the Online Video Market.

- Comcast-NBCU should be barred from tying access to online content to the purchase of a cable video subscription. Comcast must be required to discontinue its authentication requirement for accessing its online video library regardless of where the programming resides.

- The Commission should compel Comcast to sell Xfinity to all broadband users à la carte regardless of whether they subscribe to Comcast cable television.

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Comcast Corporation, Transferee	)	

REPLY TO COMCAST-NBC UNIVERSAL OPPOSITION
COMMUNICATIONS WORKERS OF AMERICA

I. INTRODUCTION

The Communications Workers of America ("CWA"), pursuant to Section 309(d) of the Communications Act of 1934, as amended,[1] and section 73.2584 of the Commission's Rules,[2] hereby submits this Reply ("the Reply") in response to the opposition[3] to CWA's Petition filed by NBC Universal, Inc. ("NBCU"), General Electric Company ("General Electric") and Comcast Corporation ("Comcast")[4] (collectively, the "Applicants") in the above-captioned proceeding.

[1] 47 U.S.C. § 309(d).

[2] 47 C.F.R. § 73.3584 (2009).

[3] *See Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. For Consent to Assign Licenses or Transfer Control of Licenses*, MB Docket No. 10-56, Opposition to Petitions to Deny and Response to Comments (July 21, 2010) (hereinafter the "Opposition").

[4] *Commission Seeks Comment on Applications of Comcast Corporation, General Electronic Company, and NBC Universal, Inc., to Assign and Transfer Control of FCC Licenses*,

As discussed more fully below, the Applicants have failed to demonstrate by a preponderance of the evidence that the transaction in its current form will serve the public interest, convenience, and necessity. As CWA demonstrates herein, and as numerous and diverse interested parties also have demonstrated, the proposed merger should be approved only if the Commission adopts meaningful and enforceable conditions to safeguard consumers, competition, and workers and to protect the public interest.

As CWA explained in its initial Petition, Comcast's proposed acquisition of NBCU would combine the assets of the nation's largest cable and Internet distributor with one of the nation's leading newsroom and production companies and create a media conglomerate of unprecedented scope and scale that would challenge the Commission's obligation to safeguard the public interest. Comcast's acquisition of NBCU would give the combined company increased market power to raise cable and advertising rates, exercise gatekeeper control over traditional and new media programming and distribution, diminish diversity and competition among media voices, and reduce jobs.

After the complex series of transactions are completed, Comcast will be able to provide its 23.5 million cable subscribers,[5] 16.4 million broadband customers and 8.1 million telephone subscribers[6] with an extraordinary supply of affiliated programming. Even before the merger,

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DA 10-47 (rel. Mar. 18, 2010) (hereinafter, the "Application" and the transaction referred to as the "Transaction," the "Combination" or the "Merger").

[5] *See* DSL Reports, Apr. 28, 2010, http://www.dslreports.com/shownews/Comcast-Continues-To-Beat-Telcos-In-Broadband-Growth.

[6] Comcast's Annual "TV Pulse Survey" Shows The Drama Genre and New Hawaii Five-O Are the Most-Anticipated 'What to Watch' This Fall TV Season, Press Release, Aug. 17, 2010, *available at* http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=1000; *see also* Comcast Reports First Quarter 2010 Results, Press Release, April 28, 2010, available at http://www.cmcsa.com/earningdetails.cfm?QYear=2010&QQuarter=1.

the assets of each entity are significant in their own right. For example, Comcast viewers have access to the company's 18 cable channels[7] that include USA Network, Versus, Golf, Style Network, PBS Kids Sprout, E! Entertainment Television, Inc., and G4 Media, Inc., along with 10 owned and operated Regional Sports Networks ("RSNs") in seven of the 10 largest television markets.[8] NBCU brings with it the NBC Television Network, which broadcasts 5,000 hours of television programming to 234 affiliated stations across the country, including 10 NBC owned-and-operated television stations reaching 27 percent of U.S. television households.[9] NBC also comprises: the national broadcast network Telemundo and 15 Telemundo owned-and-operated stations that reach 93 percent of Hispanic viewers in the United States; 32 online video properties that include CNBC.com, NBCOlympics.com and a stake in Hulu.com; at least 14 wholly owned cable networks (CNBC, NBC Sports, MSNBC, Syfy, Bravo, Oxygen and cable's top-rated USA Network)[10]; and additional cable networks in which they have an interest, as well as a vast film library from Universal Studios and Focus Features. NBCU also boasts the nation's oldest broadcast network, NBC, and the leading business news network, CNBC. NBC also owns the rights to arguably the most desirable lineup of national sporting events in the industry, including NBC Sunday Night Football, the premier primetime NFL game of the week, the U.S.

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[7] Application at 17-21.

[8] Comcast Sports Group – Televising Over 2,400 Live Sporting Events Annually, Available at http://www.comcast.com/medialibrary/1/1/about/pressroom/documents/PressKit.pdf.

[9] NBC Universal Company Overview, *available at* http://www.nbcuni.com/About_NBC_Universal/Company_Overview/.

[10] According to Nielsen Media Research for the period spanning June 30-Sept. 28, USA maintained its spot as the dominant cable channel, up 8 percent versus the same timeframe a year ago. See USA Network #1 On Cable in Q3, Aug. 2, 2010, *available at* http://www.huffingtonpost.com/2008/10/02/usa-network-1-on-cable-in_n_131134.html.

Open Championship, The Ryder Cup, the President's Cup, the Kentucky Derby, the Preakness Stakes, Wimbledon, the French Open and the Stanley Cup Final.[11]

II. THE TRANSACTION WILL ENHANCE COMCAST'S INCENTIVE AND ABILITY TO ENGAGE IN ANTI-COMPETITIVE ACTIONS THAT HARM CONSUMERS IN TODAY'S VIDEO MARKETPLACE.

A. Forced Bundling Will Harm Consumers By Reducing Competition.

In its Petition, CWA explained that combining the assets of Comcast, the nation's largest multichannel video programming distributor, with NBCU, a leading content provider, would create a single vertically integrated entity with unprecedented market power to raise cable rates, impair independent networks, block competition in the video marketplace and reduce jobs.[12] In support of these outcomes, CWA noted the lack of competition in the video marketplace today, as demonstrated by rising cable rates that consumers pay every year.[13] The FCC has also recognized that "[i]ncumbent cable operators are still by far the dominant force in the MVPD business, with … the ability to impose steadily rising prices."[14]

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[11] *Id.*

[12] Petition at 12.

[13] *In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, Report on Cable Industry Prices, MM Docket No. 92-266 ¶ 2, Chart 1 (2009), provided as Attachment A. It is noteworthy that cable's share of MVPD subscribers exceeds 75 percent in 52 out of the 210 Designated Market Areas ("DMAs"). *Tying Order* at 17,791, 17,827-28, n. 277. These include two of the top 50 most-populated DMAs, Philadelphia and Hartford-New Haven, where Comcast has more than 70 percent of the market share; *see also In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 06-189, Thirteenth Annual Report, (rel. Jan. 16, 2009) ("*Thirteenth Annual MVPD Report*"), ¶ 27 (noting that while the number of subscribers to basic and premium cable service declined in 2005, premium cable service subscriptions and subscriptions to digital video service increased.)

[14] *In the Matter of Exclusive Contracts for the Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order and Further Notice of Proposed Rulemaking, FCC MB Docket No. 07-51, 22 FCC Rcd 20,235, 20,251 ¶ 32 (rel. Nov.

CWA's Petition describes in detail the problems that new video entrants and small rural operators face when they are forced to purchase large bundles of channels that they and their customers do not want.[15] Comcast's ability to expand its premium content portfolio through its acquisition of NBCU will give it the ability to bundle its less desirable cable channels with its must-have programming to secure higher prices for and earn more favorable placement of its affiliated programming while disfavoring unaffiliated content. In addition, forced bundling raises other MVPDs' costs, which in turn translates into higher cable rates for consumers and diverts resources away from broadband deployment.

First, the Applicants argue that the Commission is considering the bundling issue in an ongoing rulemaking proceeding and that the Commission's resolution of this matter should remain confined to that proceeding.[16] Second, the Applicants argue that NBCU does not engage in such tying although it does concede that it provides MVPDs discounted prices if they purchase a larger package of NBCU programming networks. They contend that such packages or bundled discounts are generally procompetitive.[17]

The Applicants' assertions ignore the fact that the Commission has recognized the harms of such tying or forced bundling arrangements[18] and that the bundled discounts are only pro-

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13, 2007) ("*MDU Order*"), *petition for reh'g denied, Nat'l Cable & Telecomm. Ass'n v. F.C.C.* 567 F.3d 659 (D.C. Cir. 2009).

[15] Petition at 14.

[16] Opposition at 215 (citing MB Docket No. 07-198).

[17] *Id.*

[18] *See In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution; Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition, Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, Report and Order and Notice of Proposed Rulemaking, MB

consumer if the consumer wants the entire package. If consumers do not want the entire package, they are forced to pay for channels they did not want, leaving less money and space for other programmers. As CWA explains in its Petition, tying arrangements leave MVPDs with a dilemma: they must either refuse the tied programming package and potentially go without must-have programming, or they can agree to the tying arrangement and purchase programming that neither they nor their customers want.[19] "The MVPD and its subscribers are harmed by the refusal of the programmer to offer each of its programming services on a stand-alone basis."[20] The Commission also noted that "the competitive harm and adverse impact on consumers would be the same regardless of whether the programmer is affiliated with a cable operator or a broadcaster …"[21]

Moreover, the Commission recognized that small cable operators and MVPDs are particularly vulnerable to such tying arrangements because they do not have leverage in negotiations for programming due to their smaller subscriber bases.[22] Finally, contrary to Applicants' assertions, the Commission is not confined to addressing this anticompetitive behavior in the context of a rulemaking. Comcast's contentions that the issues raised by CWA

Dkt. Nos. 07-29, 07-198, 22 FCC Rcd 17,791, 17,827-28, n. 277 (2007) ("*Tying Order*"), *aff'd*, *Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306 (D.C. Cir. 2010) (noting complaints about the "practice of programmers requir[ing] carriage of less popular programming in specified (usually basic) tiers in return for the right to carry popular programming.")

[19] Petition at 14 citing *Tying Order, supra.*

[20] *Tying Order* at 72, n.120.

[21] *Id.*

[22] *Id.*

and other parties are more properly deferred to industry-wide rulemaking[23] fail to address the competitive harms of the Transaction and are inconsistent with the Act and with precedent.[24]

The Commission's public interest authority is broad enough under Section 303(r) of the Act to permit it to impose conditions to remedy transaction specific harms.[25] This is particularly important here given the sheer magnitude of the Transaction. The concerns about bundling will be exacerbated as one company will have an ownership interest in 54 cable channels with must-have programming across genres to include sports, news, broadcasting and Hispanic

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[23] *See* Comcast Opposition at 7 (program access and program carriage rulemaking); Opposition at 11-12 (net neutrality); Opposition at 16 (program carriage; media consolidation, minority ownership, and media ownership); Opposition at 153 (retransmission consent); Opposition at 158 (program access); Opposition at 179 n.612 (program carriage); Opposition at 196 (Internet network management principles); Opposition at 209 (program access); Opposition at 224 (media ownership); Opposition at 239 (independent programming).

[24] "Where appropriate, the Commission's public interest authority enables it to impose and enforce narrowly tailored, transaction-specific conditions that ensure the public interest is served by the transaction." *Adelphia, supra* at ¶ 26.

[25] *In re News Corp. and DirecTV Group, Inc. and Liberty Media Corp.*, 23 FCC Rcd 3265, 3280 (¶ 26) (2008). The Applicants attempt to deflect from the Commission's precedent of addressing transaction-specific harms in the context of its public interest review of the transaction. Opposition at 13 n.16. Existing Commission rules are an inadequate remedy to the unique harms this Transaction poses. The Commission has acted when faced with related, transaction-specific harms to the public interest in the past. *See e.g., Applications for Consent to the Assignment and/or Transfer of Control of Licenses: Adelphia Commc'ns Corp., Assignors, to Time Warner Cable, Inc., Assignees, Adelphia Commc'ns Corp., Assignors and Transferors, to Comcast Corp., Assignees and Transferees, Comcast Corp., Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corp., Transferee*, Memorandum Opinion and Order, 21 FCC Rcd 8203 ¶ 156 & App. B (2006) (imposing commercial arbitration remedy tailored to program access and carriage concerns with respect to regional sports networks); *cf. In the Matter of Time Warner Inc., et al.*, Decision and Order, 123 F.T.C. 171, 197, 1997 FTC LEXIS 13, at *50 (Feb. 3, 1997). Like the Commission's rules on program carriage, its recent Notice of Inquiry regarding media ownership rules is simply not a forum where the Commission is likely to be able to address the unique public interest harms of anticompetitive channel placement decisions incentivized by this Transaction before those harms become embedded as a result of the closing of the Transaction. *See In the Matter of 2010 Quadrennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Notice of Inquiry*, 25 FCC Rcd 6086 (2010).

programming. In addition to its substantially broad discretion under Section 303(r) of the Act, as a matter of generally settled administrative law, the Commission has broad discretion to act either through adjudication or rulemaking. As the Supreme Court noted in the Chenery case,

> [n]ot every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.[26]

Supreme Court precedent, precedent of the Commission in other types of adjudications, and, indeed, Commission precedent in prior license transfer application proceedings all confirm that the Commission's merger review can be the proper context to address the public interest harms of this transaction, even if some of the competitive harms it presents could eventually be addressed through rulemaking:

> License transfer applications, even those associated with significant mergers, are adjudications focused on particular parties. Some have argued that the Commission should avoid in such proceedings addressing significant issues that also apply to parties in the same industry other than the applicants, and should deal with such industry-wide issues exclusively in rulemakings. They point out the potential unfairness of subjecting the license transfer applicants to a different standard that is not applicable to their competitors and contend that rulemakings may offer a better opportunity for public comment focused on the adoption of an industry-wide policy rather than on the facts of a particular merger. While recognizing the relative advantages of rulemakings in many circumstances, the Commission also recognizes the well-established principle that administrative agencies have discretion to proceed by either adjudication or rulemaking to decide such issues, and that the Commission must fulfill its responsibility in an adjudication to decide the issues presented by that case. In this

[26] S.E.C. v. Chenery Investment Corp., 332 U.S. 194 (1947).

> case, the Commission is required to balance these considerations and resolve them with respect to several of the major issues presented by the facts, including one issue that is currently the subject of a notice of inquiry that may lead to a rulemaking proceeding.[27]

Additionally, the Commission has addressed the harms that such tying practices cause in the context of previous merger reviews.[28] For example, in considering the DirectTV-News Corp. merger, the Commission recognized that the "transaction [could] enhance News Corp.'s incentive and ability to persuade competitors to carry its affiliated programming."[29]

Only by imposing conditions on that merger did the Commission find that it remedied this potential harm.[30] Thus, the Commission is well within its right to address this impediment to competition as it reviews this Transaction.

B. The Applicants' Ability and Incentive to Withhold and Raise Prices of Critical Must-Have Programming Will Harm Consumers.

As CWA described in its Petition, the combined Comcast-NBCU will have the incentive and ability to withhold from, or delay the licensing of critical must-have programming to its competitors, notably national and regional sports programming and local broadcasting.

The Applicants contend that the combined entity will not have an increased ability or incentive to pursue anticompetitive foreclosure strategies against competing MVPDs.[31]

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[27] *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, and AOL Time Warner Inc., Transferee*, Memorandum Opinion and Order, 16 FCC Rcd 6547, 6550-51 (Jan. 11, 2001).

[28] *Gen. Motors Corp. & Hughes Elec. Corp., Transferors & The News Corp. Ltd., Transferee*, Memorandum Opinion and Order, 19 FCC Rcd 473, 593 ¶ 271 (2003) ("*NewsCorp. Order*").

[29] *Id.*

[30] *Id.*

Specifically, the Applicants assert that the combined entity's post-transaction conduct will not enhance Comcast's incentive or ability to engage in anti-competitive strategies with respect to its must-have programming of local broadcasting, national cable networks and regional sports programming.[32] The Applicants further dismiss Dr. Singer's example of Comcast's failure to reach agreement with DirecTV or Dish Network regarding Comcast SportsNet-Philadelphia as evidence that the combined company would withhold NBC O&O station signals from competing MVPDs.[33]

At the core of the proposed transaction is the Applicants' desire to increase leverage of their programming assets. Contrary to Applicants' claims, the merged entity will have the market power to foreclose the supply of, or raise the price at which it sells must-have programming to downstream competitors. Moreover, Comcast has a history of using access to must-have programming to decrease competition.

In its 2007 review of its program access rules, the Commission found that an MVPD's ability to compete will be significantly harmed if it is denied access to popular vertically integrated programming for which no good substitute exists.[34] Specifically, the Commission recognized that Comcast's withholding of programming from DBS providers "had a material adverse impact on competition" in Philadelphia and that the same anti-competitive effects would

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[31] Opposition at 128.

[32] Opposition at 132.

[33] Opposition at 138.

[34] *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Sunset of Exclusive Contract Provisions, Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Dkt. Nos. 07-29, 07-198, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 17791 ¶ 39 (2007)("*Sunset Order*").

result from withholding of "popular non-RSN [Regional Sports] networks."[35] The Commission further concluded that "[t]here is factual evidence that cable operators have withheld this programming from competitors and, in two instances – in San Diego and Philadelphia – there is empirical evidence that withholding has had a material adverse impact on competition in the video distribution market."[36] In the *Adelphia Order*, the Commission concluded that lack of access to RSN programming will significantly decrease an MVPD's market share because many consumers only purchase service from the cable operator that offers the RSN.[37] As Dr. Singer attests in his economic analysis, the Commission concluded that without access to the cable-affiliated RSN in Philadelphia, the percentage of television households that subscribe to DBS service in Philadelphia is 40 percent below what would otherwise be expected.[38]

As Dr. Singer attests, the Commission reached the same conclusion about anticompetitive harms resulting from exclusionary conduct relating to networks other than RSNs: "We also believe that a competitive MVPD's lack of access to popular non-RSN networks would not have

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[35] Reply Declaration of Hal J. Singer at 5, Aug. 19, 2010 (hereinafter "Singer Reply")(citing *Sunset Order*).

[36] *Id.*

[37] Singer Reply at 6; *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, from Adelphia Commc'ns Corp. to Time Warner Cable, Inc.*, Memorandum Opinion and Order, 21 FCC Rcd 8203, 8267-72 ¶¶ 140-51, Appendix D (2006) ("*Adelphia Order*"); *see also id.* at 8258-59 ¶ 124 ("RSNs are often considered 'must-have programming' ... Hence, an MVPD's ability to gain access to RSNs and the price and other terms of conditions of access can be important factors in its ability to compete with rivals.")

[38] *Id. citing Sunset Order*. Comcast continues to withhold access to SportsNet-Philadelphia. Dish Network announced earlier this month that it plans to file a complaint with the FCC after negotiations with Comcast to carry the Comcast SportsNet Philadelphia broke down. *See* Comcast, DISH Network Spar Over Philly Sports Channel, The Hill, Aug. 2, 2010, available at http://thehill.com/blogs/hillicon-valley/technology/112163-comcast-dish-network-spar-over-philly-sports-channel, (accessed Aug. 2, 2010) (noting "DISH Network has requested access to deliver Comcast SportsNet Philadelphia to our customers; however Comcast has refused to enter into good faith discussions," the company said in a statement.)

a materially different impact on the MVPD's subscribership than would lack of access to an RSN."[39] The Applicants claim that the "Philadelphia precedent" fails to recognize Commission precedent that withholding non-RSN networks yields anticompetitive effects.[40]

C. NBCU's Local Broadcast Affiliates Are Must-Have Programming.

CWA explained in its Petition that the FCC has recognized that "a temporary withdrawal of regional sports programming and local broadcast television station signals would cause a significant number of customers to shift from their current MVPD," implying that local broadcast programming is another "must have" input.[41] Thus, Comcast will realize a substantial increase in market power in relation to its MVPD rivals in the seven local markets in which NBCU owns both a broadcast affiliate and Comcast owns an RSN.[42]

Applicants dispute the must-have nature of local broadcast programming. In their Reply, Applicants' economists radically revise their estimates of the critical departure shares at which Comcast would have an incentive to deny access to an NBC local broadcast affiliate from those contained in their original economic report.[43] In doing so, Applicants cite "recent marketplace developments" described below to imply that the critical departure rates are higher than those estimated in the original report.[44] According to the revisions, non-Comcast customers would now have to defect at roughly {{ }} the rate they originally estimated to make

[39] *Id.*

[40] Opposition at 138.

[41] *NewsCorp. Order* at ¶ 60. Singer Declaration, p. 31, 32 ¶ 46.

[42] Singer Declaration, p. 10 ¶ 10.

[43] Mark Israel & Michael L. Katz, Feb. 26, 2010 at 46 (Table 2).

[44] Opposition at 134.

Comcast's restricting content access profitable. Dr. Singer notes that the revisions in critical departure shares are "conveniently" large enough to withstand the kind of share shifts that occurred when rivals were denied access to RSN programming.[45]

Applicants note that the "recent marketplace developments" leading to the recalculation of the critical departure rate result from the fact that {{

[46]}}

Applicants failed to produce a copy of that retransmission consent agreement.[47] Without access to its precise terms, one cannot be sure that NBCU's new retransmission agreement with DirecTV prevents the merged firm from raising prices on DirecTV or from requiring DirecTV to purchase lesser networks as a condition of getting the best price for NBCU's 10 O&O affiliates. For example, if the agreement fails to specify rates but instead contains language that the parties will "negotiate in good faith," then nothing would prevent Comcast from seeking extraordinary prices. Alternatively, if the agreement contains a termination right by NBCU, then again nothing would prevent Comcast from seeking price increases. Or perhaps the agreement grants DirecTV access to NBCU's must-have programming *conditional* on DirecTV paying inflated rates for NBCU's lesser programming; if so, and if DirecTV refuses to comply, then there is no assurance

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[45] Singer Reply at 13.

[46] Opposition at 134-35 {{ }}.

[47] The Commission's May 21st Information and Discovery Request to NBCU sought a copy of retransmission consent agreements, among other documents. However, NBCU failed to produce any retransmission consent agreements in response to the Commission's request.

that Dish Network's customers could switch to DirecTV to watch the withheld must-have programming. Even if the agreement locks down prices for NBCU's local O&O affiliates through 2016, the fact that NBCU rushed to finalize an agreement in the middle of 2010 for rates pertaining to 2012 through 2016 suggests that NBCU does not believe that Comcast can be trusted with future negotiations—in which case the prospect of foreclosure of both DBS rivals is simply kicked four years into the future.

Finally, even if the agreement preserves a disgruntled Dish Network customer's option to switch to DirecTV in search of the withheld content, it does nothing to preserve her option of switching to Verizon FiOS or AT&T U-Verse to obtain a triple-play bundle comparable to Comcast's—a valuable option that could be degraded if Comcast withheld NBC affiliates from AT&T or Verizon. DBS rivals are somewhat impaired in the ability to compete against cable operators because of their lack of a viable broadband option and certain cable operators' use of penalty pricing for standalone cable modem service.[48] Indeed, many analysts believe that, by virtue of FiOS's and U-Verse's comparable triple-play offerings, FiOS and U-Verse present the greatest competitive restraint on a cable operator's market power in the future.[49] Unfortunately, no NBCU-DirecTV retransmission agreement can preserve that option after the merger.

[48] For example, Comcast charges a penalty price for customers who seek to purchase standalone cable modem service. *See* Comcast products, *available at* https://www.comcast.com/shop/buyflow2/products.cspx ("This special price [for broadband Internet] is for customers who currently subscribe to Comcast Cable or Comcast Digital Voice® service.").

[49] Singer Reply 22 (citing See, e.g., *Ian Olgeirson, et al., Broadband Technology, SNL Kagan, Mar. 19, 2009, at 16 ("Cable's grip on the video market further loosened in the fourth quarter as telcos,* and to a lesser extent DBS, *continued to grab market share from the incumbents. According to SNL Kagan analysis of the sector, U.S. telco and DBS industries signed on an estimated 575,000 and 199,000 net new subscribers, respectively, while the cable lost 668,000 customers in the quarter.") (emphasis added).*

As Dr. Singer concludes, there is no basis for estimating a new critical departure rate.[50] Dr. Singer notes that the update to reflect the NBCU-DirecTV retransmission consent agreement represents a "radical revision" of the critical departure shares. Because of the agreement, Applicants inaccurately argue that non-Comcast customers would be less likely to defect to Comcast in response to the loss of a local NBC broadcast affiliate under these circumstances.[51] But such conclusions are inconsistent with Congressional and FCC findings on the importance of local broadcasting.[52] Dr. Singer notes, the Commission has found that local broadcast station programming is "highly valued by consumers, and entry into the broadcast station market is difficult."[53]

Furthermore, despite Applicants and their economists' assertions, the Commission should rely on more than just market share or viewership share of content to assess whether it

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[50] Singer Reply at 17 ¶ 19.

[51] *Id.*

[52] *2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Order On Reconsideration, MB Dkt. Nos. 06-121, 02-277, 04-228, MM Dkt. Nos. 01-235, 01-317, 00-244, 99, 360, 23 FCC Rcd 2010, 2050 ¶ 70 (2008) (noting that establishing and maintaining a system of local broadcasting that is responsive to the unique interests and needs of individual communities is an important policy goal); *see also 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Notice of Proposed Rulemaking, MB Docket No. 02-277, MM Docket Nos. 01-235, 01-317, 00-244, 03-130, 18 FCC Rcd 13620, 13643, ¶ 74 (2003), *aff'd in part and remanded in part*, *Prometheus*, 373 F.3d at 435, *stay modified on rehearing*, No. 03-3388 (3d Cir. Sept. 3, 2004), *cert. denied*, 545 U.S. 1123 (2005) (stating that "Federal regulation of broadcasting has historically placed significant emphasis on ensuring that local television and radio stations are responsive to the needs and interests of their local communities." Congress has likewise expressed its commitment to "a widely dispersed radio and television service" and has noted that the elimination of local service is a "matter of real and immediate public concern." *United States v. Southwestern Cable Co.*, 392 US 157, 173 & n. 38, 88 S.Ct. 1994, 2008 & n. 38, 20 L.Ed.2d 1001 (1968) (quoting S.Rep. No. 923, 86th Cong., 1st Sess. at 7 (1959)).

[53] Singer Reply at 7 ¶ 7 (citing *News Corp. Order* at ¶ 201).

constitutes "must-have" programming.[54] Rather, Dr. Singer notes that a network is must-have if denial of access to it would impair a rival's ability to compete effectively and competitors could not constrain prices of the firms that do have it.[55] To illustrate this point, Dr. Singer notes that RSNs did not attain their must-have status because telecasts of the Philadelphia Phillies, Flyers, and 76ers dominated prime-time ratings in the Philadelphia DMA.[56] Even so, Dish Network's and DirecTV's lack of access to those games resulted in reduced market shares (versus a world in which the DBS providers could have aired those games), and has significantly impaired their ability to restrain Comcast's prices there. In a similar fashion, denial of access to a local broadcast network would impair the ability of Comcast's rival to compete effectively.

As CWA concluded in its Petition, the newly merged entity would have the incentive and ability to withhold or significantly increase above the competitive level the price it charges its MVPD rivals for must-have local programming, resulting in less video competition and higher cable rates for consumers.[57] Ultimately, none of the Applicants' arguments dispute that their ability to take such anticompetitive actions will be increased, and that they have exercised that ability in the past to harm their MVPD rivals.

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[54] Singer Reply at 8 ¶ 9 (citing Opposition at 182; Israel-Katz Reply at ¶ 216).

[55] Singer Reply at 11, 12. Indeed, as noted earlier, the Commission has recognized the ability and incentive for vertically integrated cable companies to withhold must-have programming remains substantial. *See Cablevision Sys. Corp. v. F.C.C.*, 597 F.3d 1306 (D.C. Cir. 2010).

[56] *Id.* at 13.

[57] CWA Petition at 31.

D. The Transaction Will Erode Competition in Advertising.

Today, Comcast's regional and local programming networks compete with NBC's 10 owned-and-operated ("O&O") stations for local news and entertainment programming.[58] As CWA explained in its Petition, the joint venture gives the new entity the incentive to merge these operations, and to exercise its market power by profitably raising the price of advertising, among other practices.

The Applicants contend that that the transaction will not reduce competition in certain purported markets for television advertising and that CWA's statements to this effect are unsupported.[59] However, this erroneous claim ignores the fact that Comcast is often the largest provider of local advertising in these markets, which would increase Comcast's ability to raise local advertising rates with the acquisition of an NBC affiliate.[60]

In his Declaration, Dr. Singer pointed to NBCU's own comments in 2006 in the Commission's Media Ownership proceeding in which NBC noted that cable is the largest competitor for locally-targeted television advertising in some major markets, including Philadelphia and San Diego. According to NBC's estimates, Comcast's share of local advertising sales in 2006 would increase from 25 to 39 percent in Philadelphia, (greater than the ABC station by $26 million) and from 24 to 36 percent in San Francisco (greater than the Fox station by $70 million).[61] Comcast's local ad share has grown since then. In addition, an independent

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[58] Petition at 31.

[59] Opposition at 120.

[60] Petition at 32, Singer Reply, p. 11, ¶ 10.

[61] Id., *supra*, n. 19 (citing Comments of NBC Universal, Inc. and NBC Telemundo License Co., MB Docket Nos. 06-121; 02-277; 01-235; 01-317; and 00-244 (Oct. 23, 2006).

broadcaster will not be able to offer the volume discounts and package deals for advertising across dozens of channels that the merged entity will be able to offer.

As CWA rightly noted in its Petition, this concentration in the local advertising market translates into less revenue for competing broadcasters to produce local news and hire workers, with a resulting negative impact on diversity, competition, and adequate staffing that drive quality news.

III. COMCAST'S EXCLUSIONARY PRACTICES IN THE ONLINE VIDEO MARKET WILL HARM CONSUMERS THROUGH THE FORECLOSURE OF OVER-THE-TOP ONLINE PROVIDERS AND THE LOSS OF ONLINE VIDEO AS AN ALTERNATIVE PLATFORM TO THE CABLE TELEVISION MODEL.

Online video already is -- and continues to grow -- as a competitive alternative, but this joint venture would foreclose that evolution. As CWA explained in its Petition, it is concerned that a merged Comcast/NBCU will have the incentive and ability to harm or prevent the development of Internet video by limiting the ability of OTT service providers to access a wide array of video programming and by restricting consumer access to content.[62] A combined Comcast/NBC could limit consumers' online access to NBC content altogether or charge consumers higher prices to access that content unless they already subscribe to cable services. This is the TV Everywhere model that Comcast has already begun to deploy, bundling content with cable subscription, thereby forcing internet customers to buy cable television packages in order to see content online from NBC.

The TV Everywhere model, as described above, creates a mechanism for programmers and content providers to have a "walled garden" of online video content only available to those who pay their monthly cable subscriptions. In doing so, TV Everywhere denies independent video distributors and broadband consumers access to must-have programming, and creates a

[62] Petition at 39.