

October 21, 2010

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

Re: WC Docket No. 07-52, Commission Inquiry Into Broadband Market Practices; MB Docket No. 09-182, 2010 Media Ownership Review; GN Docket No. 09-191, Preserving the Open Internet Broadband Industry Practices; GN Docket No. 10-25, Examination of the Future of Media and Information Needs of Communities in a Digital Age; MB Docket No. 10-56, Application of Comcast Corporation General Electric Company and NBC Universal Inc. for consent to assign license or transfer control of licensees; MB Docket No. 10-71, Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent.

Dear Chairman Genachowski:

As you are aware, last weekend a dispute between Fox and Cablevision led Fox to pull its programming from Cablevision viewers. While this kind of dispute has become a regular occurrence due to the dysfunctional retransmission consent regime, in a new twist, Fox began preventing Cablevision broadband customers from accessing Fox content on Hulu and Fox.com.<sup>1</sup> Fox's actions raise several policy concerns.

**The Comcast/NBC Merger Would Increase the Merged Company's Ability To Engage In Anti-Competitive Blocking of Access To Content To The Detriment Of Consumers And Competitors.**

Last weekend's blocking incident shows that programmers are willing and able to limit their online content only to ISPs who are willing to "pay to play." Along with NBC blocking access to Olympics coverage to customers of many ISPs,<sup>2</sup> ESPN blocking access to ESPN 3 to all but those ISPs who have paid them, the "TV Everywhere" scheme which limits online content to certain ISPs,<sup>3</sup> and Hulu's blocking of Boxee,<sup>4</sup> Kylo,<sup>5</sup> and Google TV,<sup>6</sup> Fox's blocking of

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<sup>1</sup> See John Eggerton, *Fox Still Off, DC Still Fired Up*, BROADCASTING & CABLE, Oct. 16, 2010, [http://www.broadcastingcable.com/article/458509-Fox\\_Still\\_Off\\_D\\_C\\_Still\\_Fired\\_Up.php](http://www.broadcastingcable.com/article/458509-Fox_Still_Off_D_C_Still_Fired_Up.php).

<sup>2</sup> See *Over-the-Air Viewers Left Out of NBC's Online Future*, PUBLIC KNOWLEDGE POLICY BLOG, Feb. 24, 2010, <http://www.publicknowledge.org/node/2920>.

<sup>3</sup> See Press Release, *Public Knowledge Criticizes "TV Everywhere,"* June 24, 2009, <http://www.publicknowledge.org/node/2493>.

<sup>4</sup> See *Oopsie! Zucker Caught Fibbing To Boucher About Hulu Blocking Boxee*, PUBLIC KNOWLEDGE POLICY BLOG, Feb. 4, 2010, <http://www.publicknowledge.org/node/2881>.

<sup>5</sup> See *Ex Parte Filing of Public Knowledge*, CS Docket 97-80, filed Sep. 1, 2010, <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020910700>.

Cablevision's broadband customers shows that the current generation of dominant content and content delivery networks are trying to control the next. This kind of blocking, which concerns anti-competitive conduct inflicted *on* ISPs or end-user applications, rather than committed *by* an ISP, is not a "network neutrality" concern as precisely understood. But network neutrality is not the end-all be-all of consumer protection, and these practices could threaten the integrity of the open Internet as much as anti-competitive behavior by telecommunications providers. Accordingly, incidents such as these should be investigated by the FCC, FTC, Justice Department, or other agencies, according to their jurisdiction.

NBC Universal has a 32% ownership stake in Hulu, and Fox's stake is comparable.<sup>7</sup> If Fox has the power to order Hulu to start blocking some Internet users from its site, then so does NBC. But whereas NBC only has incentive to block access to ISP/MVPDs during retransmission negotiations, a combined Comcast/NBC would have the incentive to block customers of competing MVPDs or competing "over-the-top" programming distributors independent of retransmission disputes. Alternatively, rather than block access entirely, Comcast/NBC would have strong incentive to impose discriminatory terms for access to Hulu to competing broadband access providers and MVPDs.<sup>8</sup> Therefore, it should deny the Comcast/NBC merger, or should impose conditions that would prevent Comcast/NBC from behaving in such an anti-competitive and anti-consumer fashion.

### **The Commission Must Address The Underlying Problem of Media Concentration And Prevent Further Concentration That Would Foreclose The Market From Competitors**

Only a handful of companies produce most commercial media in this country, and the market power they have gives them the means and the motive to behave anticompetitively, as Fox has in this instance.<sup>9</sup> Further media consolidations, such as the merger between programming providers/delivery networks Comcast and NBC, would only exacerbate an already untenable situation. If the Commission allows the merger between Comcast and NBC to proceed, it can expect to have more, and more damaging, retransmission consent and online video blocking disputes thrown on its lap.

In addition to denying or conditioning the Comcast/NBC transaction, however, the Commission must address the overall problem of media consolidation that allows a single commercial dispute between two companies to deprive millions of consumers of programming and impacts the evolution of the open internet ecosystem. For too long, the Commission has allowed consolidation in the MVPD market, the programming market, and the broadband access market, justified in no small part on the theory that "the Internet" would provide competition and

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<sup>6</sup> See Janko Roettgers, *Logitech Revue: The Wrong Choice for Cord Cutters*, NEWTEEVEE, Oct. 6, 2010, <http://newteevee.com/2010/10/06/logitech-revue-the-wrong-choice-for-cord-cutters>.

<sup>7</sup> Chadwick Matlin, *NBC Officially Owns 32 Percent of Hulu (Until Comcast Acquires It)*, THE BIG MONEY, Feb. 3, 2010, <http://www.thebigmoney.com/blogs/hulucination/2010/02/03/nbc-officially-owns-32-percent-hulu-until-comcast-acquires-it>.

<sup>8</sup> Historically, Comcast has used its control of content and new distribution technologies to disadvantage direct competitors. See, e.g., *Comcast/Time Warner/Adelphia Transaction*, 21 FCC Rcd 8203 (2006) at ¶¶167-69 (discriminatory terms with regard to access to PBS Kids and PBS Sprout Video-on-Demand (VoD) programming controlled by Comcast).

<sup>9</sup> See *Sister Spat*, SUSAN CRAWFORD BLOG, Oct. 19, 2010, <http://scrawford.net/blog/sister-spat/1408>.

access to diverse views. As the Fox/Cablevision dispute illustrates, rather than the Internet providing the cure to media consolidation, the few remaining media conglomerates can – and will – leverage their off-line market power to control the distribution and evolution of online media.

Left on its own, the market is moving in a direction that will increasingly drive programmers and cable operators like Cablevision to ever increasing levels of consolidation. (As libertarian analysts agree, it would not be accurate to call this market a “free” one since the government has proactively stepped in to give broadcasters extra legal advantages.<sup>10</sup>) This would be a worst-case scenario for consumers, who would suffer from higher prices and poor service, and for the health of the media, since a lack of plurality would limit the exposure of voters to alternative viewpoints. The Commission must consider this reality in the context of its pending Quadrennial Media Ownership review, as well as other proceedings that bear on video competition and media diversity.

### **Broadcasters Are Abusing the Government-Created Retransmission Consent System**

The current retransmission consent regime gives undue power to broadcasters. Cable systems have no choice but to carry certain broadcasters due to must-carry rules, and local broadcasters are protected from competition by many FCC rules (such as network program non-duplication, syndicated program exclusivity, and sports blackout requirements) that give these companies—who already enjoy free, exclusive access to billions of dollars worth of spectrum—unfair negotiating power. The millions of customers who have their access to valuable sports, entertainment, and news programming cut off are collateral damage in the broadcasters’ game of high-stakes brinksmanship. It is therefore valuable to recall that, before Congress and the FCC stepped in, cable systems did not need the “consent” of local broadcasters to boost their signals.<sup>11</sup> Given the unintended consequences of the current system, the Commission should strongly consider what regulatory or legislative fixes could rebalance the power between broadcasters and the cable industry.

One way broadcasters are abusing the government-created retransmission regime is by extending the fight to the Internet, as Fox demonstrated when it began blocking Cablevision broadband customers. It is not clear whether Fox was attempting to block customers of the Cablevision ISP *per se* or whether it was assuming that all Cablevision broadband customers were also Cablevision cable customers. Thus, there is no way to know whether it is Fox’s position that only customers of MVPDs that provide Fox programming may access Fox content online, or whether its policy is that only customers of ISPs who are affiliated with MVPDs who provide Fox programming may access Fox content online. In any event, Fox’s ISP-based blocking scheme is crude and causes many unintended consequences. For example, Cablevision broadband customers who subscribe to other MVPDs (such as Dish or DirecTV) that *do* provide Fox programming were blocked.<sup>12</sup> Fox also demonstrated that it has little regard for its traditional over-the-air viewers, since Cablevision broadband customers who watch broadcast

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<sup>10</sup> See RANDOLPH J. MAY, BROADCAST RETRANSMISSION NEGOTIATIONS AND FREE MARKETS (2010), [http://www.freestatefoundation.org/images/Broadcast\\_Retransmission\\_Consent\\_Negotiations\\_and\\_Free\\_Markets\\_101610.pdf](http://www.freestatefoundation.org/images/Broadcast_Retransmission_Consent_Negotiations_and_Free_Markets_101610.pdf).

<sup>11</sup> See *Fortnightly Corp. v. United Artists Television*, 392 U.S. 390 (1968).

<sup>12</sup> Public Knowledge has confirmed this with representatives of Cablevision.

television over the air were also blocked from Hulu. Furthermore, now that Cablevision broadband access to Fox content has been restored, many customers who use Cablevision's Internet services but do not subscribe to Cablevision's video offering have access to Fox content in apparent violation of Fox's policy.<sup>13</sup>

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The Commission should not view Fox's blocking of Cablevision customers, as a one-of-a-kind occurrence. Rather, it is a sign of things to come, unless the Commission reexamines its media ownership, merger, and retransmission consent policies.

Sincerely,

/s Harold Feld  
Legal Director  
Public Knowledge

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<sup>13</sup> Given the severe under- and over-inclusiveness of the means Fox used to block access to its content, the FCC should ask Fox whether its policy is to (1) block access to Fox content to all but those who also subscribe to MVPDs that provide Fox content, or (2) to block access to Fox content to all but those who use ISPs that have cut special deals with Fox. While neither of these policies is good for consumers, further analysis depends on knowing whom Fox thought it was blocking, and for what reason.