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

In the Matter of	)	
	)	
Applications of Comcast Corporation,	)	
General Electric Company	)	
and NBC Universal, Inc.	)	
	)	MB Docket No. 10-56
	)	
For Consent to Assign Licenses or	)	
Transfer Control of Licensees	)	
	)	

To the Commission:

REPLY TO OPPOSITION TO PETITIONS TO DENY AND RESPONSE TO COMMENTS

of

THE FAIR ACCESS TO CONTENT & TELECOMMUNICATIONS COALITION
THE NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION
THE WESTERN TELECOMMUNICATIONS ALLIANCE

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EXECUTIVE SUMMARY

The FACT coalition, the National Telecommunications Cooperative Association, and the Western Telecommunications Alliance submit this Reply to the "Opposition to Petitions to Deny and Response to Comments" (the "Opposition") jointly submitted by Comcast Corporation ("Comcast "), General Electric Company ("GE"), and NBC Universal, Inc. ("NBCU"), (collectively, the "Applicants") on or about July 21, 2010 in the above-styled proceeding (the "Transaction").

The Transaction would result in an unprecedented communications giant (the "Venture") that would place an exceptional array of broadcast, linear cable, online, video-on-demand, and pay-per-view content under the control of the Nation's largest MVPD and largest broadband operator, Comcast. Absent the imposition of conditions as called for in the FACT Comments and the NTCA/WTA Petition, as modified and restated herein (collectively, the "Conditions"), the Transaction is not in the public interest.

First, the Conditions must assure competitive MVPDs and broadband operators that they will have nondiscriminatory and reasonable access to all forms of video content controlled by the Venture. Specifically, the Conditions must ensure nondiscriminatory access to cable, online, and broadcast content. Furthermore, the Conditions must dilute the Venture 's unprecedented market power that it could exercise through VOD/PPV properties like iN DEMAND, and through content distribution properties such as Comcast Media Center and Headend-In-The-Sky.

In addition, the Conditions must prevent the Venture from engaging in the practice of forced tying of channels, whether by express terms or punitive pricing. Forced tying raises costs, often in a discriminatory manner, for providers, and subsequently raises the rates that consumers must pay. Despite the Applicants' claim to the contrary, members of the Coalition have encountered this practice firsthand, to the detriment of their member providers, the customers they serve, and the goals of the Commission. Similarly, the Conditions must prevent the Venture from continuing to dictate the levels of carriage of specific channels. Conditions must also prevent the Venture from forcing the carriage of online content by requiring a per-subscriber fee for access to online programming, regardless of whether or not subscribers view this content. Finally, Conditions must ensure that any migration of broadcast content to cable or online channels will not result in consumer harm.

In order to achieve these ends, the following Transaction-specific conditions are proposed:

1. A requirement, separate and apart from the Commission's existing program access rules,[1] that the Venture license all of its content, including broadcast, linear cable, VOD, PPV and online content, on fair, reasonable and non-discriminatory licensing terms and in no event less favorable than the terms on which Comcast's own cable systems license such content.

2. A requirement that all applicable Access Rules apply to all Comcast – NBCU owned channels both retroactively and prospectively (i.e., to contracts entered into pre- and post-Merger).

3. A requirement that the NBC and Telemundo broadcast networks grant retransmission consent rights on a "most favored nation" basis to all MVPDs, and a prohibition against the tying of broadcast content to any other video programming offered by the Venture .

4. A requirement for Comcast to divest itself of ownership of iN DEMAND and CMC or, alternatively, that Comcast be prohibited from tying content offered on iN DEMAND (e.g., MLB, NHL, and Venture-owned studios' films) and/or CMC as a condition of licensing, either by contract requirement or pricing penalties.

5. A prohibition against the Venture from engaging in the forced tying of multiple channels, including a prohibition against forced tying via pricing differentials, as a condition to acquiring any programming offered by the Venture. Furthermore, a prohibition against the Venture from dictating, either explicitly or through punitive pricing, the channel

[1] Title 47 CFR Sec. 76.1000, et seq. ("Access Rules").

placement of any Venture content (such as requiring placement on a specific tier of service) on an MVPD system.[2]

6. A prohibition against Comcast and the Venture imposing conditions or requirements on any MVPD or broadband providers that limits the ability to offer online content in any market.

7. A prohibition against the Venture from compelling MVPDs or broadband providers to carry and pay for any online content as a condition of carriage for the licensing of any other Comcast /NBCU content.

8. Appropriate restrictions on the migration of sports and other programming from the NBC broadcast network to any basic or premium cable or online channels controlled by the Venture.

In this Reply, the Coalition demonstrates that the proposed Conditions are appropriate, necessary, transaction-specific, and consistent with and essential to the public interest. The Commission should reject as invalid the Applicants' arguments to the contrary.

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[2] The FACT Comments had originally contained nine recommended Conditions. The Coalition has, in this Reply, consolidated two Conditions into this single Condition 5.

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

REPLY TO OPPOSITION TO PETITIONS TO DENY AND RESPONSE TO COMMENTS OF THE FAIR ACCESS TO CONTENT & TELECOMMUNICATIONS COALITION THE NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION THE WESTERN TELECOMMUNICATIONS ALLIANCE

The Fair Access to Content & Telecommunications Coalition ("FACT"), which includes the National Rural Telecommunications Cooperative ("NRTC"),[3] the Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO"),[4] and the

[3] NRTC is a non-profit corporation organized as a buying cooperative and made up of some 1500 rural telephone and electric cooperatives and companies. NRTC has delivered advanced telecommunications technology to its members since 1986 including C-band television, direct broadcast service television and, more recently, Internet protocol television (IPTV) distribution rights.

[4] OPASTCO is a national trade association representing approximately 470 small incumbent local exchange carriers (ILECs) serving rural areas of the United States. Its members, which include both commercial companies and cooperatives, together serve more than 3 million customers. All OPASTCO members are rural telephone companies as defined in 47 U.S.C. §153(37).

Rural Independent Competitive Alliance ("RICA");[5] joined by the National Telecommunications Cooperative Association ("NTCA"),[6] and the Western Telecommunications Alliance ("WTA")[7] (collectively, the "Coalition") pursuant to Section 309(d) of the Communications Act of 1934, as amended (the "Communications Act"),[8] and Section 73.3584(b) of the Commission's Rules,[9] hereby reply to the Opposition to Petitions to Deny and Response to Comments filed in the above-captioned application for transfer of control of NBC Universal, Inc. ("NBCU") from General Electric Company ("GE") to Comcast Corporation ("Comcast ") (collectively, the "Applicants").[10]

I. INTRODUCTION AND OVERVIEW

FACT, NTCA and WTA, in their respective Comments and Petition to Deny, have demonstrated that the proposed Transaction would create a vertically integrated company (hereinafter the "Venture") with the ability and incentive to foreclose cable, online, video-on-

[5] RICA is a national association of nearly 80 competitive local exchange carriers (CLECs) that are affiliated with rural ILECs and provide facilities based service in rural areas.

[6] NTCA represents more than 580 rural rate-of-return regulated telecommunications providers. All of NTCA's members are full service local exchange carriers and many of its members provide wireless, cable, Internet, satellite, and long distance services to their communities; each member is a "rural telephone company" as defined in the Communications Act of 1934, as amended.

[7] WTA is a trade association that represents approximately 250 rural telephone companies operating west of the Mississippi River. Most members serve fewer than 3,000 access lines overall, and fewer than 500 access lines per exchange.

[8] 47 U.S.C. § 309(d) (2006 & Supp. III).

[9] 47 C.F.R. § 73.3584(b) (2009).

[10] See Applications for Consent to the Transfer of Control of Licenses, General Electric Company, Transferor, to Comcast Corporation, Transferee, Public Notice, MB Docket No. 10-56, DA 10-457 (Mar 18, 2010) (hereinafter, the applications are referred to as the "Applications," the transaction referred to herein as the "Transaction" or the "Merger," and the parties thereto referred to as "Applicants" or "Venture").

demand, pay-per-view and broadcast programming both for traditional multichannel video distributors ("MVPDs") and online distributors, to discriminate against unaffiliated programming channels, and limit the ability of programming channels to distribute such programming via online Internet systems. The Applicants have failed to overcome their burden to prove that the Transaction is in the public interest,[11] absent imposition of the Conditions.

The Applications seek approval to vertically integrate NBCU, a leading programming provider, with the nation's dominant cable and broadband provider, Comcast. Permitting the Transaction to occur through a grant of the Applications without substantive and meaningful conditions as recommended by the Coalition will cause harm to the public interest. The Applicants' arguments to the contrary are incorrect statements of law, misrepresentations of fact, and self-serving depictions of the public interest.

The Coalition urges the Commission to impose the eight Conditions called for herein on any approval of the Applications to ensure that the public interest harms to consumers are ameliorated. The following reflects the combined conditions proposed by the FACT Comments and NTCA/WTA Petition. Those Conditions are as follows:

1. A requirement, separate and apart from the Commission's existing program access rules,[12] that the Venture license all of its content, including broadcast, linear cable, VOD, PPV and online content, on fair, reasonable and non-discriminatory licensing terms and in no event less favorable than the terms on which the Comcast's own cable systems license such content.

2. A requirement that all applicable Access Rules apply to all Comcast – NBCU owned channels both retroactively and prospectively (i.e., to contracts entered into pre- and post-Merger).

[11] 47 U.S.C. §§ 309, 310(d).

[12] Title 47 CFR Sec. 76.1000, et seq. ("Access Rules").

3. A requirement that the NBC and Telemundo broadcast networks grant retransmission consent rights on a "most favored nation" basis to all MVPDs, and a prohibition against the tying of broadcast content to any other video programming offered by the Venture .

4. A requirement for Comcast to divest itself of ownership of iN DEMAND and CMC or, alternatively, that Comcast be prohibited from tying content offered on iN DEMAND (e.g., MLB, NHL, and Venture-owned studios' films) and/or CMC as a condition of licensing, either by contract requirement or pricing penalties.

5. A prohibition against the Venture from engaging in the forced tying of multiple channels, including a prohibition against forced tying via pricing differentials, as a condition to acquiring any programming offered by the Venture. Furthermore, a prohibition against the Venture from dictating, either explicitly or through punitive pricing, the channel placement of any Venture content (such as requiring placement on a specific tier of service) on an MVPD system.[13]

6. A prohibition against Comcast and the Venture imposing conditions or requirements on any MVPD or broadband providers that limits the ability to offer online content in any market.

7. A prohibition against the Venture from compelling MVPDs or broadband providers to carry and pay for any online content as a condition of carriage for the licensing of any other Comcast /NBCU content.

8. Appropriate restrictions on the migration of sports and other programming from the NBC broadcast network to any basic or premium cable or online channels controlled by the Venture .

The scope of the proposed Transaction cannot be overstated: it is of historic magnitude and unique. Never before has a merger placed such a vast amount of video content under the control of a company that is not only the nation's largest MVPD cable distributor,[14] but also its largest broadband provider.[15] Furthermore, the Merger would transpire at a time of significant change in the video distribution business with two relatively new and rapidly emerging distribution technologies: Internet protocol television ("IPTV") and Internet (online) video.

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[13] The FACT Comments had originally contained nine recommended Conditions. The Coalition has, in this Reply, consolidated two Conditions into this single Condition 5.

[14] See http://www.ncta.com/Stats/TopMSOs.aspx

[15] "The Venture Continues To Beat Telcos In Broadband Growth," Karl Bode, DSL Reports, April 28, 2010.

IPTV services are critical to the competitive viability of many rural telephone companies and will offer consumers greatly enhanced services, particularly in rural America. IPTV has come into being as a viable competitor to cable and satellite MVPDs only within the past two to three years. Online video distribution is growing at phenomenal rates and is poised to become another viable competitor to cable and satellite MVPD services.

There is, however, within this Merger great and real potential to disrupt and impede these emerging competitors. Consideration of the Applications demands particular care against the backdrop of these emerging video services. Conditions on the merger are essential to ensure that the anticompetitive opportunities and incentives this unique Transaction brings do not become reality, and that the market power of Venture is appropriately constrained.

Furthermore, this proceeding *is* the proper forum for addressing all issues associated with the proposed Conditions. Contrary to the Applicant's assertions, those issues are Transition-specific and not matters for general rulemakings. Without the Conditions constraining the anticompetitive abilities of the Venture, approval of the Applications would be contrary to Section 309 of the Communications Act[16] which requires the Commission to determine whether a grant of these specific Applications will serve the public interest.[17]

The Commission must determine whether the Applicants have demonstrated that the proposed Merger will serve the public interest, convenience, and necessity.[18] Given the substantial harms that the proposed Merger would cause, the only way this test can be passed is if the Merger is subject to a number of enforceable conditions. Through imposition of the

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[16] 47 U.S.C. §309.

[17] Id.

[18] FACT comments, pp. 9-10.

Conditions recommended by the Coalition, the Commission can help ensure that the anticompetitive harms posed by the Transaction do not become reality. Only by imposition of the Conditions can a grant of the Applications be in the public interest.

II. CONDITIONS MANDATING NONDISCRIMINATORY ACCESS TO ALL FORMS OF CONTENT ARE NECESSARY TO PREVENT THE MERGER FROM IMPEDING COMPETITION IN THE VIDEO MARKET, CONTRARY TO THE PUBLIC INTEREST

If the Merger took place as proposed, the Venture's unprecedented level of control of various forms of content would lead to substantial consumer harms. Various conditions, detailed below, would be necessary before the Merger could pass the public interest test.

> Condition 1: A requirement, separate and apart from the Commission's existing program Access Rules, that the Venture license all of its content, including broadcast, linear cable, VOD, PPV and online content, on fair, reasonable and non-discriminatory licensing terms and in no event less favorable than the terms on which the Comcast's own cable systems license such content.
>
> Condition 2: A requirement that all applicable Access Rules apply to all Comcast – NBCU owned channels both retroactively and prospectively (i.e., to contracts entered into pre- and post-merger).

A. Merger Conditions Must Ensure Nondiscriminatory Access to Cable Content

As many of the parties submitting Comments and Petitions to Deny in this proceeding have noted, the proposed Transaction would place an unprecedented volume of essential cable, broadcast and online content under the control of the nation's largest cable MVPD and largest broadband operators. While Comcast may dispute its incentive to foreclose or unfairly condition access to the content it would control, there will be an indisputable ability and incentive to do so, creating a threat to consumers that is not prevented by Access Rules or adequately addressed in any pending proceedings at the Commission. Therefore, these harms must be ameliorated by the appropriate Conditions sought by the Coalition.

Applicants assert that the Venture will not have the market power to implement a successful temporary or permanent foreclosure strategy.[19] That contention is simply not supported by market realities. If an IPTV operator or other type of telco video competitor is not licensed to carry (or if carriage rights are delayed) the USA Network, CNBC, the Comcast Sports Networks (in markets where applicable), VERSUS, or the NBC broadcast network, it is unlikely that the affected telco will be able to effectively compete in its market against an incumbent MVPD holding such rights. There are no adequate substitutes for this content. If this content is not available on the telco's video system, subscribers will not sign up for service, or will switch to the MVPD that does offer these "must-have" channels. Withholding or delaying access to such content, or granting it only under onerous or discriminatory terms, will foreclose the market to the competitive telco video service.

The Applicants state: "If NBCU were to withhold a cable network on a nationwide basis, it would reduce the audience of that network on a nationwide basis, *but only potentially benefit Comcast in those areas in which Comcast operates a cable system.*"[20] (Emphasis added.) With cable systems covering some 25% of the U.S. market, there are indeed <u>many</u> markets where Comcast would benefit. This is particularly troublesome with respect to telco video providers which are typically entering those markets as new competitors to Comcast and other cable systems.[21] By simply withholding or delaying access to Venture content, or only granting access under discriminatory conditions, Comcast could effectively forestall or prevent the entry of a

[19] Opposition at p. 153.

[20] Opposition at p. 154.

[21] As discussed at Section II.D, *infra,* many of those rural cable systems, even if not The Venture -owned, rely on the The Venture Media Center / HITS or purchase content through The Venture .

telco competitor in any of its markets or in markets where Comcast has a content licensing or delivery relationship with an incumbent cable operator.

The Coalition further urges that the Condition imposed with respect to nondiscriminatory access include a provision requiring the licensing of Venture content on "most-favored-nation" pricing and terms (*i.e.*, pricing and terms that are available to all MVPDs, whether affiliated with the Venture or not, regardless of subscriber base size). If the Venture is permitted to create a volume-based rate card, Comcast will be able to use such a loophole to its own great advantage against small market entrants. Rural telcos are at a significant competitive disadvantage as they are typically independents with small subscriber bases in rural markets that can never achieve the volumes of Comcast or other large MSOs. While this is a problem of general application that needs to be addressed by the Commission, it is also Transaction-specific given the fact that Comcast is the greatest beneficiary of the volume discount loophole. The Applications present an opportunity to the Commission to address the pricing disparity faced by rural telcos with respect to Venture-owned content and is an appropriate matter to be addressed in the Applications.

Furthermore it must be made clear that in the event the Transaction is approved the Access Rules and any Conditions imposed will apply to existing contracts between NBCU and MVPDs. All or nearly all of the members of the Coalition organizations currently engaged in telco video distribution hold contracts with NBCU for its content, and it is important that the Commission make it clear that such contracts, even if entered into prior to the Merger, are subject to the Access Rules and Conditions imposed in this proceeding and applied to such contracts on a retroactive basis should the NBCU content become vertically integrated with the Comcast. As the Coalition makes clear in this Reply, there are issues associated with the existing NBCU programming license agreements that need to be addressed in the context of the Merger and the Venture should not be entitled to claim that the Access Rules or Conditions do not apply to contracts already in effect as of the date of the Merger.

The Conditions recited herein are appropriate and necessary. As noted in FACT's Comments, there have been only two program access cases taken through the Commission.[22] The time and cost of pursuing a program access complaint at the Commission make it an ineffective and inadequate remedy for the threat of foreclosure. The Commission can easily correct this problem with respect to the Venture's content with the imposition of these Conditions on the Transaction.

B. Merger Conditions Must Ensure Nondiscriminatory Access to Online Content

Applicants contend that the market for online video services is "complementary, not competitive" to traditional MVPD services[23] and downplays the significance of online video as a potential competitor or replacement medium.[24] This position flies in the face of growing data – both empirical and anecdotal – that indicate a rapidly growing market and a clear and significant movement toward acceptance of online video as an alternative to cable or other MVPD viewing.

The reality is that there is a significant rate of growth in online viewing that may very well exceed any prior consumer-preference shifts in video technology. In his Comments in this proceeding, Dr. Mark Cooper has correctly noted that the Internet will dramatically reduce the stranglehold that cable has on video distribution.[25] As Dr. Cooper cites, even comments filed at

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[22] FACT Comments at p. 28, fn. 37.

[23] Opposition at p. 86.

[24] Id.

[25] Cooper Comments p. 2.

the Commission by NBCU reflect the fact that "[t]he Internet as a distributor of high-quality video programming has reached the tipping point."[26]

The Coalition's members, as distributors of video as MVPDs and as broadband operators, would submit to the Commission that whether online video is complementary or competitive to cable service at this particular point in time is not the critical issue. The fact is that in order to be an effective competitor as MVPDs and as broadband operators, rural telcos must have access to video for distribution via both mediums. The withholding of online content, or the granting of access only under onerous or discriminatory terms, is a significant threat to the development of the online video market and to telcos seeking to compete with cable as MVPDs and/or broadband service providers.

Comcast and the Venture will have both the ability and the incentive to constrain the availability of online content in any market where Comcast is competing with a telco for video and/or broadband service. Furthermore, if the Venture, with its market power, impairs the ability of any unaffiliated content provider to distribute content online, there is the potential for that content to be unavailable generally to broadband operators, whether competing with Comcast or not. When content owners are prevented from distributing via third party portals, such as YouTube.com, the competitive impact is national in scope and does not only affect Comcast cable markets.

As Dr. Cooper states:

> Comcast is leveraging its distribution bottleneck to add more complex layers to its bundled video product, seeking exclusives on Internet distribution and

[26] Reply Comments of NBC Universal, In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, MB Docket No. 07-269, Aug. 28, 2009.

> to tie traditional multi-channel video programming distribution to Internet TV distribution.[27]

That is the concern of rural telcos. If Comcast is already engaging in foreclosure activities through either its authentication requirements, walled-garden type service in TV Everywhere, or through pressure on unaffiliated content providers, there will be the potential for even greater foreclosure once the merger is accomplished and the Venture controls such a vast array of content. Although Comcast has asserted in its Opposition that the issue of restraints on online distribution "have nothing to do with the present transaction,"[28] Comcast has admittedly sought to prevent content owners from distributing online and in the event the Transaction is approved without conditions, its motivation to engage in such conduct, as owner of far more content, will only grow.

There is no indication that Comcast's efforts to restrain online video are waning. In a recent article in an online newsletter, VideoNuze, it is noted that Cox Cable has integrated TiVo online services with Cox's own on-demand service and has retained the ability of its subscribers to access TiVo's online over-the-top video. The article's author, Will Richmond, compares Cox's employment of TiVo to that of Comcast, which employs a similar TiVo system, but blocks access to TiVo's online content. Mr. Richmond comments on his own experience with Comcast noting:

> Cox's move breaks new ground among major cable operators, which have resisted mixing their walled-garden video with Internet-based sources. For instance, I'm a Comcast digital video subscriber and have had TiVo-branded DVR service included in my digital set-top box for a while now, but all of the online sources TiVo enables on its retail boxes have been disabled since day 1.

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[27] Cooper at p. 5.

[28] Response at p. 188.

> That has forced me to find add-on solutions (in my case with Roku) that enable Netflix Watch Instantly viewing on my TV.[29]

In responding to claims that Comcast has compelled unaffiliated content licensors to contractually agree to not distribute their content online, Applicants do not deny such practices and ambiguously state that Comcast, "generally does not seek to prevent content owners from distributing online,"[30] and in a footnote contends that "Comcast no longer proposes this language"[31] (i.e., language that restrains unaffiliated content owners from distributing online). It is thus clear that Comcast has, in fact, restrained online distribution and, absent conditions on the Transaction, there is no assurance that it will not engage in such behavior post-Merger. Comcast even asserts that its practices (of restricting online distribution) "are entirely consistent with a vibrant online video distribution marketplace."[32] There is simply no logical foundation for a claim that restraining online distribution of content is good for the online marketplace.

As the Commission is aware, the existing Access Rules do not expressly extend to online content delivery. It is imperative, therefore, that an appropriate condition be imposed on the Transaction to ensure that neither Comcast nor the Venture engages in any actions that impair the availability of online video content – whether the content is controlled by the Venture or by unaffiliated providers.

Comcast is misguided when it states that "it would be premature to place restrictions on Applicants at this point in time as doing so would have significant and long-lasting ramifications

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[29] See "Cox Embraces Over-the-Top in Unique Deal with TiVo", VideoNuze, http://www.videonuze.com/blogs/?2010-08-12/Cox-Embraces-Over-the-Top-Video-In-Unique-Deal-With-TiVo/&id=2670, August 12, 2010, (emphasis added).

[30] Opposition at p. 188.

[31] Id. at footnote 642.

[32] Id. at p.189.

on the entire video distribution industry."[33] This is indeed the point in time when failing to impose such a condition will have long-lasting and perhaps devastating effects on the rapidly emerging online video business. As Comcast itself contends that it no longer engages in such practices, a formalized condition prohibiting such conduct should not be detrimental to the Applicants. Appropriate conditions will prevent the Venture from impeding the development of online video and preserve that medium's ability to continue becoming an effective marketplace competitor. This will also help spur the adoption of broadband.

Additionally, in the context of access to online content, the Coalition urges the Commission to closely examine the impact of the Transaction on Hulu, the Internet source for episodic television replay. The Hulu partnership of NBC, Fox, and ABC is one where partner influences could limit the distribution and pricing of content available through the Hulu portal. As discussed, *infra*, it is also possible that Hulu would become part of a forced bundle of content properties forced on competing companies that acquire content from the Venture. Continued ownership of Hulu post merger would create a conflict of interest for the merged company and clear conditions limiting the Venture's power vis-à-vis Hulu, if not ordered divestiture, are necessary.

C. <u>Merger Conditions Must Ensure Nondiscriminatory Access to Broadcast Content</u>

In order to prevent the Venture from obtaining an excessively high level of market power with regard to broadcast content, the following condition is necessary:

> <u>Condition 3</u>: A requirement that the NBC and Telemundo broadcast networks grant retransmission consent rights on a "most favored nation" basis to all MVPDs, and prohibition against the tying of broadcast content to any other cable programming offered by the Venture .

[33] Id. at p. 203.

While there may be debate regarding which cable content or online content to be controlled by the Venture is "must-have" for MVPDs to offer in order to compete in any given market, the fact that broadcast network content is "must-have" is incontrovertible. Likewise, there can be no contradiction to the fact that the nine regional sports networks ("RSNs") owned by Comcast are "must-have" in their respective markets.[34] The lack of access to either broadcast or RSN networks greatly impairs an MVPD's ability to effectively compete in the applicable market. The joining of the NBC network with Comcast RSNs will create significant market power in the licensing of such content to unaffiliated MVPDs and give the Venture the ability to charge much higher rates and to impose unfair conditions of carriage. The effect of such joint ownership has been seen in the marketplace. As the ACA noted in its Response to Comments in this proceeding; "The available evidence suggests that joint control or ownership of multiple Big 4 stations in the same DMA can increase retransmission consent fees by 20% and possibly much more."[35]

NBCU currently owns and operates NBC network broadcast affiliates in 10 major markets in the United States. It also has 224 NBC-affiliated broadcast stations where it undoubtedly has significant influence. In each of the markets covered by those NBC network affiliates, the programming is certainly "must-have" for any MVPD serving the markets.[36]

While the days of "free" over-the-air television that may be retransmitted by an MVPD without cost may be a thing of the past, the issue at hand is simply one of fairness. The Coalition

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[34] See, e.g., In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, MB Docket No. 03-124, 19 FCC Rcd 473 (2004) ("Hughes Order") at 496-97.

[35] "Response to Comments," American Cable Association, Filed July 21, 2010, MB Docket No. 10-56 ("ACA Response") at p. v.

[36] See Hughes Order at 565, ¶201.

Members are not seeking a guarantee of "free" retransmission rights, but they do want to be assured that they will be treated in a non-discriminatory manner. The best way to ensure that is to impose a condition that guarantees the ability to acquire retransmission rights on terms that provide for "most favored nation" treatment for all MVPDs and to ensure that the Venture, through its ownership of NBC, cannot take unfair advantage of competitive MVPDs. Furthermore, given the lengths to which the Applicants have gone to downplay the possibility of the Venture foreclosing, limiting, or overpricing access to retransmission rights for the NBC network[37] for a multitude of reasons, there should be no objection on the part of the Applicants to an appropriate condition that would entrench such assurances.

D. Conditions must dilute Comcast's unprecedented market power through VOD/PPV properties like iN DEMAND, and of content distribution properties such as CMC and HITS

The Transaction would also result in unacceptably high levels of market power in the video-on-demand and pay-per-view markets, as well as in the content distribution market. Therefore, conditions should require Comcast to divest itself of interests in these entities, or at the very least, extend tying prohibitions to content distributed by these ventures, as follows:

> Condition 4: A requirement for Comcast to divest itself of ownership of iN DEMAND and CMC or, alternatively, that Comcast be prohibited from tying content offered on iN DEMAND (e.g., MLB, NHL, and Venture-owned studios' films) and/or CMC as a condition of licensing, either by contract requirement or pricing penalties.

In the Opposition, Comcast asserts that the petitioners and commenters in this proceeding misunderstand Comcast's relationship with iN DEMAND.[38] Applicants assert, without explanation, that Comcast owns 53.7% of iN DEMAND, but does not "exercise control over the company" and profess that management is through a Management Committee with two

[37] Opposition at 140 – 153.

[38] Id. at 281.

additional cable owners, Cox and Time Warner/Brighthouse and that, "Voting on the Management Committee tracks each member's ownership percentage..."[39] It is not clear how Comcast owns the majority interest and has a percentage vote based on that ownership, yet does not control the company. But even assuming for the sake of argument that there is some structure that prevents Comcast from exercising control of iN DEMAND, there remains considerable grounds for concern about the ownership level held by Comcast within the context of the Transaction, the fact that the balance of ownership rests in two other cable giants, and the fact that iN DEMAND, post-Transaction, will have a majority owner with ownership in such a vast stable of programming, including Universal Studios, Focus Features and a sizeable interest in MGM Studios. Additionally, iN DEMAND is the exclusive provider of content from Major League Baseball ("Extra Innings"), the National Basketball Association ("League Pass"), the National Hockey League ("Center Ice"), and Major League Soccer ("Direct Kick"), giving iN DEMAND and its owners significant market power already.

The telco video providers represented by the Coalition are deeply concerned by Comcast's potential control of content from cable, broadcast, and Hollywood studios combined with the content already exclusively controlled by iN DEMAND. There is a clear potential for abusive practices through the tying of content. If, for example, a competitive telco operator desires the sports programming offered exclusively by iN DEMAND, that operator should not be compelled to also purchase its studio (film) content from iN DEMAND. The Commission must ensure nondiscriminatory and competitive access to VOD and PPV content offered by iN DEMAND post-Transaction.

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[39] Id.

Both the FACT Comments and the NTCA/WTA Petition express the concern that the critical facility Comcast Media Center ("CMC") which operates a service called headend-in-the-sky or "HITS," could be used as additional anticompetitive leverage post-Transaction.[40] In its Comments, FACT referred to CMC as an "essential facility."[41] Applicants disputed that claim, asserting that it cannot be an essential facility because Comcast has licensed its national cable channels (except for Sprout) to competitors Avail/TVN and EchoStar VIP for transport.[42] That position ignores the reality that small cable and telco video systems that have made the investment of over $1 million for a CMC HITS head-end receive facility cannot readily convert from that existing facility to an Avail/TVN or EchoStar VIP system without devastating capital costs and disruption of services. Telcos entering the video market today have a choice in the way they receive their satellite signals, but once that choice and its corresponding capital investments are made and operations have begun, the method of delivery is indeed an "essential facility" for the affected system. Additionally, while Avail/TVN and EchoStar VIP do have transport rights to most Comcast and NBCU video channels today, there is no assurance that such rights will remain in place in the future.

The point of concern regarding CMC/HITS is that it is a potential choke-point of market power that Comcast can utilize to compel purchase of Venture-owned content or to impede the entry of MVPD competitors. This must be addressed if the Transaction is to be approved. There are no existing program access regulations that will protect the customers of small MVPDs from

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[40] FACT Comments at pp. 22 – 23; NTCA/WTA Petition at p. 10.

[41] FACT Comments at 23.

[42] Opposition at 279, fn. 937.

abuses of market power through CMC/HITS in the absence of either strong and clear conditions, or the required divestiture of CMC.

III. MERGER CONDITIONS MUST PRECLUDE ANY FORM OF FORCED TYING, FORCED CHANNEL PLACEMENT, OR FORCED CARRIAGE OF ONLINE CONTENT

As illustrated below, the Applicants' contention that MVPDs are not required to purchase programming under onerous tying arrangements is not accurate. Given past experience, combined with the harms to consumers that would occur should the merged entity continue such practices, the following conditions are necessary to protect the public interest:

> Condition 5: A prohibition against the Venture from engaging in the forced tying of multiple channels, including a prohibition against forced tying via pricing differentials, as a condition to acquiring any programming offered by the Venture. Furthermore, a prohibition against the Venture from dictating, either explicitly or through punitive pricing, the channel placement of any Venture content (such as requiring placement on a specific tier of service) on an MVPD system.

> Condition 6: A prohibition against Comcast and the Venture imposing conditions or requirements on any MVPD or broadband providers that limits the ability to offer online content in any market.

A. Merger conditions must prevent the Venture from continuing the practice of forced tying

As rural telcos have sought to enter the video distribution market, they have been faced with excessive carriage demands by many large programmers, including NBCU. However, the Applicants contend:

> NBCU does not "coerce" or "force" MVPDs to select any particular combination or bundle of channels. To the contrary, upon an MVPDs request, NBCU will offer any of its non-broadcast networks on a standalone basis (except with respect to HD simulcast...) and will negotiate a rate that reflects the value of any such networks on a stand-alone basis. This approach is reflected in the fact that most MVPDs choose to carry only a subset of NBC networks. Ironically, this is also true of the smaller MVPDs who claim the greatest 'harm' from wholesale bundling.[43]

[43] Id. at 213.

In the experience of Coalition member companies, that contention is not accurate. Counsel for the Coalition conveyed to the NRTC the above claims made by Comcast – NBCU regarding their tying practices. In the affidavit attached hereto as Appendix A (the "Forrer Affidavit"), Madeleine Forrer, Vice President of Video Services for NRTC, disputes those claims, stating that carriage of multiple unwanted channels are "effectively forced upon NRTC in order to obtain licensing for the more popular and desired services of NBCU".[44]

The Forrer Affidavit goes on to note such carriage requirements make it "highly difficult for telcos with fewer than 2 million subscribers to effectively compete with incumbent cable MVPDs, which are neither required to carry the channels or carry them all on the most highly penetrated tier."[45]

The Applicants have asserted that: "Comcast and NBCU have offered and will continue to offer their networks for sale on an individual basis; no MVPD is required to carry any one channel to obtain another."[46] The Forrer Affidavit responds to that statement, "Despite NRTC's best efforts to secure more flexible carriage requirements and be relieved of the tying requirements, NBCU has <u>never</u> offered NRTC an alternate rate card that would allow a member to carry a single channel or some subset of programming"[47] As this example from the Forrer Affidavit illustrates, NBCU representatives have made it very clear that carrying the entire NBCU lineup on the most highly penetrated tier is their sole objective, and they have offered or accepted no other arrangements.

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[44] Forrer Affidavit at ¶ 8.

[45] Id. at ¶ 9

[46] Opposition at p. 218.

[47] Forrer Affidavit at ¶ 11.

Against the backdrop of the Forrer Affidavit, the Commission must view the assertions made by the Applicants regarding NBCU's tying practices with great skepticism, if not complete incredulity. It may be conceivable that NBCU has offered its content in an unbundled manner to *some* MVPDs on fair terms, but that is not been true with respect to NRTC or telco video providers entering the market in recent years.

Another statement the Coalition Members find to be a misrepresentation is in the assertion that, "While NBCU does not engage in tying, it does often offer MVPDs discounted prices if they purchases a larger package of NBCU programming networks."[48] As reflected in the Forrer Affidavit, the experience of NRTC and other rural telcos seeking content licensing from NBCU is that *no reasonable options* exist to downsize the packages offered or to take channels on a stand-alone basis.[49] What the members of the Coalition have experienced is a take-all or take-none position from NBCU.

The Applicants' claim that "bundled discounts… are generally pro- competitive"[50] is first of all based on the false premise that a "bundled discount" is an option for the content. The NBCU bundle is not truly an option – it is effectively a mandate, at least for rural telcos, either through the stonewalling of discussions regarding options or through the imposition of punitive pricing. Furthermore, the effect of this tying as compelled by NBCU is anything but pro-competitive. As pointed out in the FACT Comments[51] and confirmed in the Forrer Affidavit[52] ,

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48 Opposition at 215.

49 Forrer Affidavit at ¶ 11.

50 Opposition at p. 215.

51 FACT Comments at p. 15.

52 Forrer Affidavit at ¶ 13

NRTC's smallest expanded basic package must contain at least 70 channels due to forced tying and carriage on that level of service (eight of which are channels tied by NBCU), compared to an incumbent rural cable system being able to carry 50 or fewer channels on expanded basic. The result is that the rural telco must charge at least $50 per subscriber per month retail for expanded basic service, while the incumbent cable system can typically offer expanded basic service at $35. That price disparity, particularly in lower income rural markets, is significant and anti-competitive.

Post-Transaction, the Venture will control a greatly expanded stable of must-have content, including the NBCU cable channels, the Comcast regional sports networks, and the NBCU broadcast networks. Additionally, the Venture will have equitable interests in other channels that are essential to a competitive MVPD, such as A&E (16%), The Weather Channel (25%), Biography (16%), History (16%), Sprout (40%), and Lifetime (16%).[53] This combination of programming channels poses a great threat of forced channel-tying to the detriment of competitive distributors and consumers.

As the American Cable Association correctly stated:

> The Applicants' post-combination market power will afford them the ability to diminish competition and harm consumers along several critical dimensions. The horizontal combination of NBCU and Comcast "must have" programming will create the incentive and ability to raise costs for all MVPDs to purchase both types of programming.[54]

The Applicants assert that, "The pending transaction is not the place to address any industry-wide concerns about the wholesale bundling of video content."[55] While the Coalition

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[53] See www.the Venture .com/nbcutransaction.

[54] "Response to Comments", American Cable Association, Filed July 21, 2010, MB Docket No. 10-56 ("ACA Response") at p. 9.

[55] Opposition at p. 218.

does not disagree that there is an industry-wide problem vis-à-vis wholesale tying that needs to be addressed by the Commission, the concern that the Coalition is voicing here is Transaction-specific. It is Coalition members' experience with the wholesale tying practices of NBCU, with its current channels, viewed against the potential for dealing with the proposed Venture, which would have interests in fifty-four channels. Clearly, this concern is highly specific to this Transition.

The Commission has recognized the anti-competitive harm that can flow from tying of popular content to unwanted content and has sought to address that concern.

> When programming is available for purchase only through programmer-controlled packages that include both desired and undesired programming, MVPDs face two choices. First, the MVPD can refuse the tying arrangement, thereby potentially depriving itself of desired, and often economically vital, programming that subscribers demand and which may be essential to attracting and retaining subscribers. Second, the MVPD can agree to the tying arrangement, thereby incurring costs for programming that its subscribers do not demand and may not want, with such costs being passed on to subscribers in the form of higher rates, and also forcing the MVPD to allocate channel capacity for the unwanted programming in place of programming that its subscribers prefer. In either case, 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. We note 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 or is affiliated with neither a cable operator nor a broadcaster, such as networks affiliated with a non-cable MVPD or a non-affiliated independent network. Moreover, we note 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. (References omitted.)[56]

The problem and concern raised by the conduct of the Applicants and the potential for abuse in the Transaction is specific to the Applications, but the conduct presents the precise circumstances about which the Commission voiced that concern. To date, the Commission has

[56] In the Matter of Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements, MB Docket No. 07-198, 22 FCC Rcd 17791, Report and Order and Notice of Proposed Rulemaking, Released October 1, 2007, at ¶ 119, p. 72.

not adopted specific rules under Section 628(b) to address tying, although it has reserved the right to do so.[57] Yet in the absence of such a rule, the imposition of a Condition prohibiting such conduct is appropriate and necessary in this instance to protect the public interest.

The Applicants have asserted, albeit contrary to actual practice vis-à-vis Coalition Members, that Comcast and NBCU permit all content to be purchased on a stand-alone basis for full and non-discriminatory access to their programming.[58] By imposing and accepting a condition on the Transaction that codifies that commitment, the Commission and the Venture, respectively, can address the concern expressed by the Commission, *supra*, and make the Applicants' assertion one of truth, not fiction.

B. <u>Merger conditions must prevent the Venture from continuing the practice of dictating levels of Carriage</u>

With a condition proscribing tying, an appropriate and logical corollary is a condition that restricts the ability of the Venture to dictate the level of carriage of any programming channels offered by the Venture. There are two competitive benefits to such a restriction.

First, as noted above, new market entrants, such as telco video operators, are being compelled by programmers to place far more programming channels in the expanded basic tier than are incumbent rural cable operators – typically about 20 more channels more. This discriminatory treatment creates a pricing disparity of as much as $15 per subscriber per month at the retail level and impedes the ability of new competitors to enter or succeed in the market.

Second, a prohibition against a forced level of carriage will help bring diversity to channel line-ups. The practice of programmers, such as NBCU, dictating channel placement on the expanded basic tier has the effect of forcing operators to place independent channels on

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[57] See *First Report and Order*, 8 FCC Rcd at 3373.

[58] Opposition at p. 218.

higher tiers. As noted in the FACT Comments, some independent channels, such as RFD-TV and Blue Highways TV, that are aimed at and programmed for a rural audience, often cannot find a channel slot in the lower (expanded basic) tier due to the fact that NBCU and other multi-channel providers have, in addition to tying, demanded carriage on expanded basic for all their channels, thus squeezing out independent networks.[59] Further, because the cost of the lower expanded basic tier is increased by tying and forced carriage, it becomes economically more difficult for subscribers to take both the expanded basic level and also elect to subscribe to optional tiers of service. Therefore, a condition that would prevent the Venture from dictating the level of carriage is needed to protect consumers.

C. <u>Merger conditions must prevent the Venture from forcing carriage of online content</u>

There is deep concern among the Coalition Members regarding the forced carriage of online content. This practice, which impedes broadband penetration as well as video competition, should be precluded as a condition of the merger:

> <u>Condition 7:</u> A prohibition against the Venture from compelling MVPDs or broadband providers to carry and pay for any online content as a condition of carriage for the licensing of any other Comcast /NBCU content.

As noted in the FACT Comments and the NTCA/WTA Petition, there is a real danger that the merged company will, when licensing, tie its web content to video content. Not only would an MVPD be possibly required to take and pay for undesired video programming, it would also have to pay for and provide its subscribers access to the merged company's online content. As noted in the FACT Comments, the NTCA/WTA Petition and the ACA Comments,[60]

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[59] FACT Comments at p. 16. See also Forrer Affidavit at ¶ 14.

[60] See FACT Comments at pp. 20 - 21; NTCA/WTA Petition at pp. 5 – 6; and ACA Comments at p. 20.

content providers are already coercing broadband providers to pay per-subscriber fees to make online content available to all of a telco provider's broadband customers. These payments must be made whether or not the customer subscribes to the telco's video service, whether or not the broadband customer is situated within the telco's video service territory, and whether or not the customer utilizes the broadband content. Given the scope of online and cable content that the Venture would control, there is every reason to believe that the merged company will have the incentive and ability to tie its video content to its web content in "take it or leave it" agreements – thus further driving up the price of both broadband and video service for many consumers, while making it more difficult for competitive telco video operators to expand and improve upon the broadband and video services they offer. Therefore, a condition prohibiting this practice is necessary to protect the public interest.

D. Merger conditions must ensure that any migration of broadcast content to cable or online channels will result in no consumer harm

The Applicants have provided faint assurance that sports programming currently carried on the NBC broadcast network will not be migrated to Venture -owned networks. Therefore, the following condition is appropriate:

> Condition 8: Place appropriate restrictions on the migration of sports and other programming from the NBC broadcast network to any basic or premium cable or online channels controlled by the Venture.

Comcast professes to have agreed with NBC affiliate stations not to migrate key broadcast content away from that medium. However, what Comcast reveals with respect to sports migration does not reflect any great certainty, as it states:

> ...the agreement provides that, *subject to certain conditions*, major sporting events for which NBC holds broadcast rights will continue to be broadcast on the NBC network, and *with certain qualifications*, Comcast

> will not migrate such events to any linear channel in which Comcast has an ownership interest.[61] (Emphasis added.)

The Coalition urges the Commission to closely examine such "conditions" and "qualifications" to ensure that any voluntary safeguards are fully adequate to protect MVPDs that have negotiated retransmission rights with the NBC network and the viewing public that the many major sporting events carried on NBC today are not usurped by Comcast and placed on an affiliated pay channel. Even if such clear assurances are clear, the Commission should impose limitations on the migration of key NBC and Telemundo network content via the recommended Condition 7, *supra*. Given the statements of the Applicants in the Opposition, such a condition should not be objectionable.

IV. THE COMMISSION SHOULD DISREGARD INVALID ARGUMENTS THAT THE COALITION'S CONDITIONS ARE NOT SPECIFIC TO THIS TRANSACTION

The argument asserted by the Applicants that the appropriate place to address concerns about program carriage rules is in FCC rulemaking proceedings rather than in this Transaction is not valid.[62] The Access Rules do not encompass the unique anticompetitive market concerns stemming from this Transaction, and there is no guarantee that the Access Rules can be modified in such timely fashion as to prevent the harm that the Merger threatens. While the Coalition agrees that broad modifications to the Access Rules in general are needed, future rulemakings are not necessarily appropriate or timely for addressing the harms specific to this Transaction. Channel tying and forced placement (both cable and online content), access to online content, nondiscriminatory access to VOD and PPV content, access to the NBC broadcast content, and other concerns raised by the Coalition and others in regard to the Applications are all appropriate

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[61] Opposition at p.157.

[62] Opposition at 7, 13.

and timely for consideration in the context of the Merger. If approved by the Commission and Department of Justice, the Merger will become effective promptly thereafter and there is no assurance that the anti-competitive harms raised in this proceeding can or will be addressed in time to be prevented in the absence of the Conditions. The overwhelming likelihood is that there cannot and will not be general modifications to the Access Rules or other applicable law or regulation to prevent and/or redress the potential damage to telco video and broadband competitors.[63]

As it did in past orders[64] the Commission should extend unique program carriage protections with respect to channel carriage requirements by simply prohibiting take-one/take-all purchasing requirements and fashion appropriate and readily available remedies to stem such practices with respect to the Venture's media properties.

V. CONCLUSION

There can be no question that the Transaction would result in an unprecedented communications giant with a vast array of broadcast, linear cable, online, video-on-demand, and pay-per-view content under the control of the Nation's largest MVPD and largest broadband operator, Comcast. Absent the imposition of conditions as called for in the FACT Comments

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63 In the Matter of Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements in MB Docket No. 07-198, has been pending at the Commission since October 2007, and there is no assurance that relief can come in that proceeding in such timely manner as to protect Coalition Members from the anti-competitive harms threatened by the Transaction.

64 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;

and the NTCA/WTA Petition, as modified and restated herein (collectively, the "Conditions"), the Transaction is not in the public interest.

It is imperative that competitive MVPDs and broadband operators have nondiscriminatory access to all forms of video content controlled by the Venture. Conditions must be imposed to ensure nondiscriminatory access to cable, online, and broadcast content. The Conditions must dilute the Comcast's unprecedented market power that it could exercise through VOD/PPV properties like iN DEMAND, and through content distribution properties such as Comcast Media Center and Headend-In-The-Sky.

The Conditions must prevent the Venture from engaging in the practice of forced tying, a practice that raises costs, often in a discriminatory manner, for providers, and subsequently raises the rates that consumers must pay. Despite the Applicants' claim to the contrary, members of the Coalition have encountered this practice firsthand, as clearly reflected in the practices of NBCU vis-à-vis NRTC's licensing experiences as discussed in the Forrer Affidavit.

Conditions must prevent the Venture from continuing to dictate the levels of carriage of specific channels and prevent the Venture from forcing the carriage of online content by requiring a per-subscriber fee for access to online programming, regardless of whether subscribers view this content.

Finally, Conditions must ensure that any migration of broadcast content to cable or online channels will not result in consumer harm. In order to achieve these goals, the Coalition proposes the following Conditions:

1. A requirement, separate and apart from the Commission's existing program access rules, that the Venture license all of its content, including broadcast, linear cable, VOD, PPV and online content, on fair, reasonable and non-discriminatory licensing terms and in no event less favorable than the terms on which Comcast's own cable systems license such content.

2. A requirement that all applicable Access Rules apply to all Comcast – NBCU owned channels both retroactively and prospectively (i.e., to contracts entered into pre- and post-Merger).

3. A requirement that the NBC and Telemundo broadcast networks grant retransmission consent rights on a "most favored nation" basis to all MVPDs, and a prohibition against the tying of broadcast content to any other video programming offered by the Venture .

4. A requirement for Comcast to divest itself of ownership of iN DEMAND and CMC or, alternatively, that Comcast be prohibited from tying content offered on iN DEMAND (e.g., MLB, NHL, and Venture-owned studios' films) and/or CMC as a condition of licensing, either by contract requirement or pricing penalties.

5. A prohibition against the Venture from engaging in the forced tying of multiple channels, including a prohibition against forced tying via pricing differentials, as a condition to acquiring any programming offered by the Venture. Furthermore, a prohibition against the Venture from dictating, either explicitly or through punitive pricing, the channel placement of any Venture content (such as requiring placement on a specific tier of service) on an MVPD system.[65]

6. A prohibition against Comcast and the Venture imposing conditions or requirements on any MVPD or broadband providers that limits the ability to offer online content in any market.

7. A prohibition against the Venture from compelling MVPDs or broadband providers to carry and pay for any online content as a condition of carriage for the licensing of any other Comcast /NBCU content.

8. Appropriate restrictions on the migration of sports and other programming from the NBC broadcast network to any basic or premium cable or online channels controlled by the Venture.

The Coalition has demonstrated that the proposed Conditions are appropriate, necessary, transaction-specific, and consistent with and essential to the public interest. A grant of the Applications in the absence of the Conditions is not in the public interest.

[65] The FACT Comments had originally contained nine recommended Conditions. The Coalition has, in this Reply, consolidated two Conditions into this single Condition 5.

For all of the foregoing reasons, the Commission should condition its grant of the Applications, if at all, only as set forth herein.

Respectfully submitted,

By: ______________________

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Date: August 19, 2010

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CERTIFICATE OF SERVICE

I, Jillian Gibson, hereby certify that on this 19th day of August, 2010, I caused true and correct copies of the foregoing Reply to Comcast-NBCU Opposition to be served by postage pre-paid first-class U.S. Mail on the following individuals:

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APPENDIX A

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

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

AFFIDAVIT OF MADELEINE FORRER

I, Madeleine Forrer, hereby submit the following Affidavit in support of the Reply submitted by the Fair Access to Content & Telecommunications Coalition ("FACT"), the National Telecommunications Cooperative Association and the Western Telecommunications Alliance (the "Reply") in response to the Opposition to Petitions to Deny and Response to Comments (the "Opposition") filed by Comcast Corporation ("Comcast"), General Electric Company, and NBC Universal, Inc. ("NBCU"), stating as follows:

1. I am the Vice President, Video Services, for the National Rural Telecommunications Cooperative ("NRTC"), a member of FACT. I have served in that position since May 2007.

2. NRTC is non-profit cooperative based in Herndon, Virginia, which provides various telecommunications equipment and services, principally to rural telephone and electric cooperatives and companies.

3. Since 2006, NRTC has acted as a video content aggregator for rural telephone interests (telcos), acquiring rights to distribute video programming over traditional cable and Internet protocol television (IPTV) systems. As the Vice President of Video Services for NRTC, my duties include the negotiation and securing of distribution rights from all programming

service providers offered by NRTC. The video content agreements between NRTC and NBCU were concluded before my tenure, but I have reviewed the history of negotiations between our companies and spoken with staff members at NRTC who were involved in the original negotiations. Additionally, over the past three years, I have personally dealt with NBCU with respect to NRTC's carriage obligations, as more fully described in this Affidavit.

4. I am familiar with the contents of the foregoing Reply and certain statements made by Comcast and NBCU regarding licensing practices engaged in by NBCU as represented in the Opposition.

5. In the Opposition, the Applicants (at footnote 726) challenge the contention of FACT that NRTC has been compelled by NBCU to carry multiple channels on the expanded basic level in order to obtain rights to the desired channels. Applicants have made the following claims regarding the forced tying of multiple channels of NBCU content:

> "NBCU does not 'coerce' or 'force' MVPDs to select any particular combination or bundle of channels. To the contrary, upon an MVPDs request, NBCU will offer any of its non-broadcast networks on a standalone basis (except with respect to HD simulcast…) and will negotiate a rate that reflects the value of any such networks on a stand-alone basis. This approach is reflected in the fact that most MVPDs choose to carry only a subset of NBC networks. Ironically, this is also true of the smaller MVPDs who claim the greatest 'harm' from wholesale bundling." (See Opposition at page 213.)

and

> "While NBCU does not engage in tying, it does often offer MVPDs discounted prices if they purchase a larger package…" (See Opposition at page 215.)

6. Based upon NRTC's experience dealing with NBCU in the negotiation of video distribution rights and my personal experience in working with NBCU, I can state without equivocation that the above-quoted statements of the Applicants misrepresent the real situation.

7. NBCU's original proposal to NRTC was for carriage of seven basic channels on expanded basic, one channel on Lifeline, carriage of NBCU Hispanic channels, carriage of HD channels, a commitment to carry a yet-to-be launched channel, and an obligation to pay a monthly Olympics surcharge fee throughout the term. Although NBCU had at one time indicated that it would negotiate terms for carriage of fewer channels, their deeds have never matched their words. NRTC has been consistently unable to obtain any productive response or alternative rate card despite numerous requests. NBCU representatives at one time made it clear to NRTC that we would not like the rate card for any lesser level of carriage and, essentially, NRTC encountered a stone wall at NBCU any time there was an effort by NRTC to reduce the carriage obligation or to negotiate alternative terms.

8. NRTC and its members do not desire and have never desired to carry all NBCU channels on the expanded basic tier, yet such carriage has been effectively forced upon NRTC in order to obtain licensing for the more popular and desired services of NBCU. To my knowledge and experience, incumbent cable providers against which NRTC members compete are permitted to carry these services on optional tiers, if at all.

9. In an environment where limited bandwidth continues to be an issue, where programming prices are so high, it is highly difficult for telcos with fewer than 2 million subscribers to effectively compete with incumbent cable MVPDs, which are neither required to carry the channels or carry them all on the most highly penetrated tier.

10. Another misrepresentation by the Applicants is found in the assertion:

> Comcast and NBCU have offered and will continue to offer their networks for sale on an individual basis; no MVPD is required to carry any one channel to obtain another. (See Opposition at page 218.)

11. Despite NRTC's best efforts to secure more flexible carriage requirements and be relieved of the tying requirements, NBCU has never offered NRTC an alternate rate card that would allow a member to carry a single channel or some subset of programming. In spite of repeated pleas from NRTC to NBCU explaining the situation that rural telcos face, NBCU representatives have made it very clear that carrying their entire basic lineup (except for Oxygen) on the most highly penetrated tier is an absolute requirement and no alternatives are offered.

12. There are significant negative and anticompetitive effects resulting from the channel tying in which NBCU has engaged.

13. First, as noted in the original FACT Comments, NRTC's rural telco members typically must carry 70 or more channels on expanded basic and are those forced to offer a package at about $50 per subscriber, per month. At the same time, incumbent cable operators are permitted to place many more channels on optional tiers or to opt out of carrying certain services. This results in competitors to NRTC members offering about 50 channels on expanded basic at a retail price of about $35 per subscriber, per month.

14. Second, the tying of programming on the expanded basic level, such as effectively compelled by NBCU, squeezes out alternative independent channels. Most NRTC members have been forced to decline carriage of independent services, some of which could be very popular in rural markets, or to place those channels on higher, optional tiers in order to be as cost competitive as possible.

15. Given the licensing practices of NBCU as they exist today, with tying of channels, NRTC and its rural telco members are gravely troubled by the prospect of a new merged entity in Comcast and NBCU with control of or interests in more than 50 video channels. Based upon my experience in dealing with NBCU, a clear condition prohibiting the tying of

channels and/or forced carriage on expanded basic level as condition of licensing any channels controlled by the merged entity.

16. To the best of my knowledge and belief, the foregoing is true and correct.

August 19, 2010

Madeleine Forrer