Before the
Federal Communications Commission
Washington, D.C. 20554

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

Petition to Enforce Merger Conditions

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Summary and Introduction

Public Knowledge requests that the Commission move to enforce the conditions it imposed upon Comcast as part of Comcast's merger with NBC-Universal. Comcast's decision to exempt its online video service from its own data caps is precisely the type of behavior contemplated and barred by the Commission in the Merger Order. As such, the Commission must move to end the behavior and prevent it from being repeated in the future.

Although Comcast's decision may very well also be a violation of the Commission's Open Internet Order, it is critical for the Commission to first address this problem within the context of the recent merger between Comcast and NBC-Universal. While the Open Internet rules were intended as rules of general applicability for a multitude of possibilities, the situation presented here is *precisely* that envisioned by the Commission when it described the potential harms to competition that could result from the merger. The Commission therefore has a unique responsibility to address Comcast's conduct in the context of the merger order, to avert the very harm the Commission accurately foresaw.

In evaluating the merger, the Commission highlighted specific concerns associated with the combination of the nation's largest internet service provider and one of the nation's largest content companies. These went above and beyond the more generalized problems that drove the Open Internet Order. The behavior highlighted in this petition is the realization of those specific concerns, and therefore should be considered under the rules most directly related to them. Critically, no activity in this docket would bar additional enforcement actions under the Open Internet Order.

Argument

I. Comcast's Treatment of its Xfinity Video App on Xbox and TiVo is Both Discriminatory and Illegal

Comcast's special treatment of its Xfinity video app realizes the fears the Commission expressed regarding Comcast's merger with NBC-Universal. As such, the Commission has an obligation to bring it to an end.

A. Comcast is Exempting its Own IP Delivered Video Service From its Data Caps

Consumers have long been able to access internet video content on both their Xbox 360 game consoles and their TiVo DVRs. Both platforms allow consumers to download and install apps for online video services such as Netflix, YouTube, and Amazon Prime. These apps deliver video by way of the consumer's broadband connection and make it easy to watch internet-delivered video on their television. In fact, for many consumers this "over the top" (OTT) video experience is evolving into a competitor to, and a replacement for, traditional MVPD pay television service.[1] While the business models of these apps vary and some require an additional subscription, they all require a broadband internet connection in order to function.

[1] *Preserving the Open Internet*, GN Docket No. 09-191; *Broadband Industry Practices*, WC Docket No. 07-52, "Report and Order," FCC 10-201 (Dec. 23, 1020) at 22 (Open Internet Order); Complaint of United States, *et al*., *United States v. Comcast Corp.*, (D.C. Cir. 2011) at 5 (DOJ Complaint).

Since 2008, Comcast has imposed a data cap of 250 GB per month on its residential video customers.[2] As a general matter all OTT video, like all data, has counted against a Comcast consumer's data cap. If a consumer used more than the allocated 250 GB per month of data for two consecutive months, that consumer would be expelled from the network for a full year.[3] By Comcast's own admission, the cap was not imposed to address network congestion[4] and was, until quite recently, below the 288 GB per month of data it projected was needed to replace a cable television subscription with OTT offerings.[5]

Recently, Comcast announced that it was raising its data cap to 300 GB per month.[6] Instead of being expelled from the network a consumer who goes over the limit will be charged $10 for each additional 50 GB.[7]

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[2] Jacqui Cheng, *It's Official: Comcast Starts 250GB bandwidth caps October 1*, ars technica, Aug. 8, 2008, http://arstechnica.com/old/content/2008/08/its-official-comcast-starts-250gb-bandwidth-caps-october-1.ars.

[3] Letter from Public Knowledge and New America Foundation's Open Technology Initiative to Sharon Gillett, Chief, Wireline Competition Bureau, FCC (May 6, 2011) *available at* http://www.publicknowledge.org/letter-to-FCC-on-ATT-Data-Caps.

[4] Letter of Comcast Corporation, *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications,* File No. EB-08-IH-1518*; Broadband Industry Practices; Petition of Free Press et al. for Declaratory Ruling that Degrading and Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet and Exception for "Reasonable Network Management,"* WC Docket No. 07-52, at p. 1, fn. 3, Sept. 19, 2008 ("Comcast Filing").

[5] Notably, the estimate of 288 GB was based on a confidential mix of standard and high definition programming in 2010. It therefore may significantly underestimate current needs, which include a higher percentage of high definition video. For example, streaming only HD video for the number of hours per month assumed by Comcast at the bitrate assumed by Comcast would require 648 GB. Mark Israel and Michael L. Katz, "The Comcast/NBCU Transaction and Online Video Distribution," Submitted by Comcast Corporation, MB Docket No. 10-56 (May 4 2010) at 33, http://fjallfoss.fcc.gov/ecfs/document/view?id=7020448236; http://apps.fcc.gov/ecfs/document/view?id=7020448237.

[6] Cathy Avgiris, *Comcast to Replace Usage Cap With Improved Data Usage Management Approaches*, ComcastVoices, May 17, 2012,

In March of this year Comcast announced that it was bringing its own OTT video app to the Xbox 360 and TiVo platforms.[8] This app delivers on-demand video over IP and requires both an Xfinity broadband subscription *and* an Xfinity cable television subscription. The video is delivered through the consumer's home network to the Xbox 360 or TiVo device.

Comcast also announced that this new Xfinity video app would not count against a consumer's monthly data cap. As a result, a consumer trying to decide between a number of OTT video options on her Xbox 360 or TiVo knows that all of her choices count against her Comcast broadband data cap – except the choice offered by Comcast.

B. Comcast's Discrimination Against All Other OTT Video Services Harms Innovation and Consumers

By exempting its own OTT video service – and only its own OTT video service – from data caps, Comcast is discriminating against every unaffiliated OTT video service. This harms innovation and harms consumers.

OTT video has greatly expanded the amount and types of video content available to consumers. Instead of squeezing into the lineup of MVPDs, creators can connect to

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http://blog.comcast.com/2012/05/comcast-to-replace-usage-cap-with-improved-data-usage-management-approaches.html.

[7] *Id.*

[8] Major Nelson, *Comcast XFINITY TV, HBO GO and MLB.TV now available on Xbox LIVE*, Mar. 27, 2012, http://majornelson.com/2012/03/27/comcast-xfinity-tv-hbo-go-mlb-tv-now-available-on-xbox-live/; *For the first time ever XFINITY On Demand from Comcast now available to San Francisco Bay Area TiVo and Comcast Customers!*, TiVo Blog, Apr. 9, 2012, http://blog.tivo.com/2012/04/xfinity-on-demand-from-comcast-tivo-premiere/.

the public directly. This has fostered the creation of niche programming and allowed new creators to build fan bases.

It has also lead to the rise of innovative and competitive video distributors. Netflix, Hulu, Dailymotion, YouTube, Amazon, Revision 3 – all use different models to offer consumers different types of video content over their broadband connection. These services introduce innovation themselves and have begun to force MVPDs such as Comcast to innovate in response.[9] Ultimately, this innovation results in more competition, which benefits consumers.[10] Competition drives prices down while driving quality up.

Discriminating against non-affiliated OTT video undermines those trends. Comcast's decision to exempt its own app from the cap creates two kinds of OTT offerings: Comcast's and the rest. The only reason that Comcast is able to differentiate its OTT offering in this way is because it owns the network that all OTT providers rely on to reach consumers. Comcast must not be allowed to leverage its control over last mile connections to gain advantages in unrelated markets.

C. Comcast's Actions Demand Enhanced Scrutiny

While discrimination by any ISP raises concerns, Comcast's unique history and structure demand an enhanced level of scrutiny from the Commission.

Comcast has a history of manipulating its network in a manner that directly contradicts the principles of an open, competitive internet.[11] When confronted with

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[9] DOJ Complaint at 21.
[10] *See*, *e.g.* DOJ Complaint at 14.
[11] *See*, *e.g. Broadband Industry Practices, Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy*

accusations of wrongdoing, Comcast has also obfuscated the true nature of its behavior.[12] In light of this, the Commission would be wise to pay particular attention to concerns raised about Comcast's behavior and be wary of accepting technical justifications at face value.

In addition to its history of problematic network management, Comcast's current market position demands a heightened level of scrutiny towards its behavior. As the Commission is well aware, Comcast is a vertically integrated entertainment conglomerate. In addition to its internet access and MVPD offerings, Comcast owns what was once NBC-Universal, thus expanding its position in the content business. This troika of interests gives Comcast an enhanced motivation and ability to act contrary to the public interest. This level of control across industries can also make identifying such behavior even more difficult.

As the Commission has recently demonstrated by holding Comcast to its commitment to offer standalone broadband,[13] and as Project Concord has shown with its dispute with Comcast over programming access,[14] it takes some resolve to hold Comcast to the letter and spirit of its merger commitments. But where, as here, Comcast is taking actions that not only violate its merger conditions but threatens the growth of online video more generally, that resolve becomes all the more necessary.

Statement and Does Not Meet an Exception for "Reasonable Network Management," Memorandum Opinion and Order, WC Docket 07-52, ¶ 32 (Aug. 20, 2008), http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-183A1.pdf.

[12] *See id.* at 6-9.

[13] *See* Stacey Higginbotham, *Comcast pays $800,000 to U.S. for hiding stand-alone broadband*, GigaOM, June 27, 2012, http://gigaom.com/2012/06/27/comcast-pays-800000-to-u-s-for-hiding-stand-alone-broadband/.

[14] *See* Ira Teinowitz, *Comcast faces NBC merger complaint*, TheDeal, March 8, 2012, http://www.thedeal.com/content/regulatory/comcast-faces-nbc-merger-complaint.php.

1. Leveraging Control of Internet Connections Has Long Been a Concern of the Commission

The Commission recognized the ability of broadband providers to act contrary to the public interest well before the merger between Comcast and NBC-Universal. In 2004, then-Chairman Michael Powell spoke about how Internet Freedom (including the freedom to access content) served "as an insurance policy against the potential rise of abusive market power by vertically integrated providers."[15] The following year the Commission adopted a policy statement that took a step towards formalizing those protections.[16]

More recently, in its Open Internet Order the Commission plainly stated that a "broadband provider might use this power [to control the transmission of network traffic over a broadband connection] to benefit its own or affiliated offerings at the expense of unaffiliated offerings."[17] Specifically, the Commission observed that "[t]oday, broadband providers have incentives to interfere with the operations of third-party Internet-based services that compete with the providers' revenue-generating telephony and/or *pay television services*."[18]

Of course, that is precisely what Comcast is doing today. Comcast is using its control over the transmission of network traffic to disadvantage unaffiliated competitors to Comcast's pay television service and OTT video offering. Every video app on an

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[15] Michael K. Powell, Chairman, Federal Communications Commission, *Remarks at the Voice of the Net Conference* (Oct. 19, 2004), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-253325A1.pdf.
[16] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33 *et al*., Policy Statement, (Sep. 23, 2005).
[17] Open Internet Order at 21.
[18] *Id.* at 22 (emphasis added).

Xbox 360 or TiVo is a potential competitor (in whole or in part) to Comcast's MVPD service. And every one of those unaffiliated apps must contend with Comcast's data cap. Only Comcast's own video app is exempted from the data cap.

2. Comcast's Merger with NBC-Universal Elevated Those Concerns

These general concerns were made specific during Comcast's merger with NBC-Universal. Now, in addition to the opportunity to leverage its control over network connections to advantage its MVPD service, a merged Comcast/NBC-Universal has an opportunity to leverage its control over network connections *and* its expanded control over content to advantage its MVPD service.

This ability is not merely theoretical. After an investigation, the Commission found this threat to be real: "[the merged entity] would also have the incentive and ability to hinder the development of rival online video offerings and inhibit potential competition from emerging online video distributors that could challenge Comcast's cable television business."[19] Furthermore, the Commission determined that the merger would "increase Comcast's incentive to discriminate against unaffiliated content and distributors in its exercise of control over consumers' broadband connections."[20]

The Commission was not alone in concluding that the merger increased the likelihood that Comcast would manipulate its network contrary to the public interest. During its own parallel investigation into the merger, the Department of Justice (DOJ) recognized that internet-delivered video – precisely the type of service that would use

[19] *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees*, MB Docket No 10-56, Memorandum Opinion and Order (Jan. 20, 2011) at 3 (FCC Merger Order).
[20] *Id.* at 93.

apps on an Xbox 360 or TiVo to reach consumers – was "likely the best hope for additional video programming distribution competition in Comcast's cable franchise area."[21] Comcast's internal documents "consistently portray[ed] the emergence of OVDs as a significant threat."[22] These new entrants would give consumers more options and also force Comcast to improve its own services.[23]

The DOJ noted that Comcast's position as both internet access provider and MVPD created a motive to act against the public interest: "[b]ecause Comcast is the country's largest ISP, an inherent conflict exists between Comcast's provision of broadband service to its customers, who may use this service to view programming provided by [online video distributors], and its desire to continue to sell them MVPD service."[24] As of today, Comcast has resolved that conflict by using its control of internet access to undermine non-affiliated online video content and distributors.

D. Comcast is in Violation of the Commission's Merger Conditions

Comcast's decision to discriminate against all nonaffiliated video apps violates Condition G.1.a. set forth by the Commission in its Merger Order:

> "Neither Comcast nor C-NBCU shall engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or prevent any MVPD or OVD from providing Video Programming online to subscribers or customers."

[21] DOJ Complaint at 5.
[22] DOJ Complaint at 14.
[23] See DOJ Complaint 14-15.
[24] Competitive Impact Statement of United States, *et al*., *United States v. Comcast Corp.*, (D.C. Cir. 2011) at 11.

This condition directly addresses unfair practices that significantly hinder any OVD from providing content to subscribers or customers. That is precisely what is happening with the Xfinity app.

Comcast's practice of counting all unaffiliated, but not its own, content against a customer's data cap significantly hinders an OVD from providing content to customers. A customer could watch Xfinity-delivered online video 24 hours a day for an entire month and not run into a problem. With any other online video service, a customer could hit her cap before the end of the first week.[25] While this may be an extreme example, it vividly illustrates how Comcast's behavior significantly hinders the ability of any company that is not Comcast to reach consumers.[26] Caps transform video from an all you can eat experience to one that must be carefully monitored and limited.

Crucially, the Condition does not require that Comcast acts with malicious intent – or any intent at all – to be in violation. Therefore, there is no need to make an explicit finding regarding Comcast's specific motivation for this policy. As long as the unfair act has the effect of hindering distribution, that act violates the condition.

There can be no question that exempting Xfinity video is unfair. In fact, it represents precisely the type of behavior that the Commission has been worrying about for almost a decade. The only reason that Xfinity video is exempted from the data cap is that it is distributed by the same company providing the broadband internet access service

[25] For example, a consumer streaming Netflix at its high quality HD rate (2.3 GB per hour) would hit the 300 GB cap approximately 5.5 days into the month. A consumer streaming HD video at Comcast's assumed rate of 6,000 Kbps (2.7 GB per hour) would hit the 300 GB cap approximately one day sooner.

[26] Comcast's 2010 household usage estimate was 8 hours of television per day. At 2.3 GB per hour, a full OTT replacement for high definition television would weigh in at 552 GB per month. At 2.7 GB per hour, a full OTT replacement for high definition television would weigh in at 648 GB per month.

used to deliver it. Even if the app were to use a slightly different delivery path for content than other online video distributors, that other path is only possible because Comcast also owns the delivery infrastructure.

The combination of the Xfinity app and the data cap exemption is precisely the type of unfair practices that Comcast promised not to engage in as a condition of its merger.

II. Comcast's Xfinity App is a Broadband Service

If Comcast can simply label a broadband Internet service a "cable" service and thus exempt it from oversight, as it has tried to do here, then all of the Commission's attempts to protect the Open Internet, promote competitive online video service, and enhance consumer choice will be for nothing.

By Comcast's reasoning any service it offers, provided it is made available only to cable TV subscribers, is part of its cable offering, governed only by Title VI of the Communications Act.[27] This cannot be the case.

A. Comcast's Xfinity App is a Broadband Service Because It Is Only Available to Broadband Subscribers Using Broadband Devices

The Xfinity app is plainly a broadband service: it is delivered over the same broadband connection as other internet services to internet-connected devices, and consists of streaming video using the Internet Protocol. That said, behind-the-scenes

[27] Of course, in the final analysis whether or not the Xfinity app on the Xbox is a "Title VI" service does not matter. A service can be *both* a broadband service *and* a Title VI service. And to the extent that the Xfinity app *is* a Title VI service, it is subject to various Commission rules forbidding discrimination against rival video services. *See* 47 U.S.C. § 548.

engineering and billing details should have no bearing on the regulatory treatment of a service. Because the Xfinity app appears to consumers to be a broadband video service, it is one.

Comcast argues that the Xfinity app is only part of its "cable" offering, governed only by Title VI of the Communications Act, and not subject to any Internet openness protections.[28] This argument is undermined by the fact that Comcast requires consumers to subscribe to Comcast internet service in order to access it, using a device which is designed to access internet content.

From a viewer's perspective there is no real difference between the Xfinity app and a competing internet video app – both are simply apps that the consumer launches that stream video over a broadband connection. The fact that Comcast locates its servers on its own network or engages in discriminatory billing practices does not change the basic character of its service.

B. Title VI Services and Broadband Services are not Mutually Exclusive

Title VI is a type of service, and broadband is a type of delivery method. The two are not mutually exclusive, and there is no reason why a service cannot both be a Title VI service and a broadband service subject to the Commission's Open Internet rules, Comcast's merger commitments, and related protections. Title VI is a technology-neutral section that governs multichannel video programming distributors (MVPDs), regardless of what kind of delivery method they use. MVPDs provide a video service by various means. Analog cable systems are MVPDs. So are digital cable systems, IPTV systems like those offered by AT&T, Verizon's FiOS television service, and direct broadcast

[28] http://xbox.comcast.net/faqs.html

satellite (DBS) systems like DirecTV and Dish. Indeed, as Public Knowledge has argued, there is no reason an "MVPD" service cannot be offered purely "over the top."[29]

By contrast, a "broadband" service is simply a service offered via broadband delivery. A broadband service might fall into any regulatory category, such as Title II or Title VI. An MVPD service can easily be offered via broadband delivery, and an MVPD service offered via broadband is not somehow immune from any of the open Internet protections that apply to broadband services generally.

III. The Commission Must Establish Remedies that End Comcast's Discrimination and Prevent Future Harms from Comcast's use of Data Caps

The Commission must order Comcast to stop exempting only its own Xfinity video app from its data caps. Going forward, the Commission should prohibit Comcast from implementing discriminatory data caps again.

The Commission could fashion this relief in several ways, ranging from prohibiting Comcast from using unreasonably low data caps, to requiring Comcast to subject its own services to the data caps it uses for similarly-situated services, to requiring Comcast to let its customers choose which services will be exempt from its data caps.

When crafting remedies to address and prevent the competitive harms of Comcast's discriminatory data cap policy, the Commission should consider a set of factors to determine whether Comcast's data caps policy or its implementation

[29] *See* Comments of Public Knowledge, *Interpretation of the Terms "Multichannel Video Programming Distributor" and "Channel" as Raised in Pending Program Access Proceeding*, MB Docket No. 12-83 (filed May 14, 2012), available at http://www.publicknowledge.org/interpretation-mvpd.

illegitimately harm consumers and competitors. The Commission need not necessarily take any one factor as dispositive in a given case, although some factors may weigh more heavily than others.

First, data cap policies that affect one service or set of services but not others should be a red flag to the Commission. The Commission should then look to whether the policy has a discriminatory effect against services or companies that compete against any of Comcast's services. This could apply if Comcast's data cap policy advantages affiliated companies simply by virtue of their affiliation to Comcast, or if Comcast and other internet service providers mutually advantage their respective services to the detriment of services unaffiliated with any internet service provider. The Commission should also be wary of data cap policies that permit companies to pay Comcast to exempt themselves from a data cap, since those policies could have a discriminatory effect by disproportionately impacting services that are not affiliated with Comcast.

Second, the Commission should consider whether Comcast's data cap is set at such a low level that a large percentage of customers are likely to hit that cap. This fact bears on the likelihood that Comcast's data caps are only serving to remove incentives for Comcast to invest in its own network and to push customers away from services that directly or indirectly compete with Comcast's services for customers' time and resources (for example, by discouraging online video games in favor of Comcast's paid TV services).

Third, the Commission should consider the legitimate justifications—or lack thereof—for Comcast's data caps. Here, the Commission should investigate the actual impact of Comcast's data caps on network congestion, how often customers hit their caps,

and how often customers would hit their caps if Comcast's other services were also subject to the data cap.

Conclusion

Comcast is currently in violation of the Commission's merger order and is actively undermining video competitors. The Commission should therefore order Comcast to immediately stop exempting only its Xfinity service from the data caps it imposes on its customers' activity. Going forward, the Commission should prohibit Comcast from using unnecessarily discriminatory data caps, as determined by the factors explained above.

Respectfully Submitted,

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_____/s/_____

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