

August 22, 2013

Mignon Clyburn
Acting Chairwoman
Federal Communications Commission
445 12th St. SW
Washington, DC 20554

Re: Public Knowledge Petition in MB Docket No. 10-56, *Application of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licenses*

Chairwoman Clyburn:

We write today to request that the Commission act on Public Knowledge's over year-old petition to enforce the merger conditions imposed on Comcast as part of its merger with NBC-Universal. Continued inaction by the Commission in this matter not only increases the likelihood of harm to consumers, but also undermines the public's confidence in the Commission's willingness and ability to enforce merger conditions in the future. Comcast's recent announcement that it is further expanding its data caps to new markets makes Commission action all the more urgent.¹

In January of 2010, Comcast, General Electric, and NBC Universal (NBC-U) applied for a series of license transfers as part of a proposed merger between Comcast and NBC-U. After a lengthy investigation by the Commission and the Department of Justice (DOJ), the Commission granted the request subject to certain conditions. Both the DOJ and the Commission recognized that a combined Comcast-NBC-U would, by virtue of combining the nation's largest Internet Service Provider (ISP) and one of the nation's largest programmers, have an increased incentive and ability to prevent the growth of online video programming.²

In light of this incentive and ability, one of the conditions prohibited the merged entity from engaging in "unfair methods of competition or unfair or deceptive acts or practices, the purpose of effect of which is to hinder significantly or prevent any MVPD or OVD from providing Video Programming online to subscribers or customers."³

In March of 2012, Comcast announced its intention to engage in just such an act. Up to that point, all online video watched by Comcast internet subscribers was subject to a 250 GB per

¹ Comcast Expert, *Questions & Answers About Our New Data Usage Plan in Central Kentucky, Savannah, GA and Jackson, MS* (August 8, 2013), <http://customer.comcast.com/help-and-support/internet/data-usage-plans-expansion>.

² Public Knowledge Petition to Enforce Merger Conditions, *Application of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licenses*, MB Docket No. 10-56 (August 1, 2012) ("Petition") at 8-9.

³ Memorandum Opinion and Order, *Application of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licenses*, MB Docket No. 10-56 (January 20, 2011) at Condition G.1.a.

month data cap.⁴ After the announcement, online video viewed as part of Comcast's Xfinity online video service on an Xbox 360 or TiVo device would not count against that cap.⁵ This gave such affiliated content a clear, unfair advantage over any unaffiliated competitor.

By August of 2012, Public Knowledge filed a petition requesting the Commission enforce the conditions that it imposed upon Comcast as part of its merger.⁶ In the year since, the Commission has failed to act.

As Public Knowledge detailed in its original petition, data caps undermine the ability of video providers unaffiliated with ISPs to compete with those video providers that are also ISPs. Assumptions made by Comcast's own economists suggest that replacing HD video delivered via a cable subscription with HD video provided by a competing online video distributor would require 648 GB of data per month.⁷ Caps set at 250 or 300 GB per month make such competitive offerings impossible.

While Comcast announced a temporary suspension of its data cap enforcement in May of 2012,⁸ in recent weeks it has begun to expand its data cap test markets.⁹ Data caps will soon act as a significant barrier to residents in Central Kentucky, Savannah, GA, and Jackson, MS who wish to replace a Comcast cable television subscription with an offering from an online competitor. Comcast's description of these locations as pilots suggests that they will not be the last.

The Commission's decision to ignore this issue for over a year sends a clear signal to Comcast not to take merger conditions seriously. And the Commission's inaction on this petition, especially when compared to the Media Bureau's expedited consideration of requests made by Comcast, sends a clear signal to the public that its concerns are not a priority.¹⁰

The Commission has an obligation to protect consumers from precisely the harms that it and the DOJ identified in the process of reviewing the merger between Comcast and NBC-U. It also has an obligation to show that the conditions it imposed on the merger were more than mere window dressing. Instead, the Commission must show that it has the conviction to actually enforce merger conditions – not merely to impose them.

⁴ *Petition 3.*

⁵ *Petition 4.*

⁶ *Petition.*

⁷ *Petition 3, 10*

⁸ Cathy Avgiris, *Comcast to Replace Usage Cap with Improved Data Management Approaches*, Comcast Voices (May 17, 2012), <http://corporate.comcast.com/comcast-voices/comcast-to-replace-usage-cap-with-improved-data-usage-management-approaches>.

⁹ Comcast Expert, *Questions & Answers About Our New Data Usage Plan in Central Kentucky, Savannah, GA and Jackson, MS* (August 8, 2013), <http://customer.comcast.com/help-and-support/internet/data-usage-plans-expansion>.

¹⁰ Ex Parte letter of Public Knowledge, *Application of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licenses*, MB Docket No. 10-56 (August 19, 2013).

Finally, the Commission's inaction undermines public confidence in merger conditions generally, and conditions more broadly. If the Commission is unwilling to even begin to examine a clear violation of its condition in this situation, why should the public draw comfort from conditions imposed in any proceeding going forward?

For all of these reasons, Public Knowledge urges the Commission to act upon its August 2012 Petition to Enforce Merger Conditions.

Sincerely,

 /s/
Michael Weinberg
Vice President
Public Knowledge