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Testimony of Michael J. Fiorile
Chair
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**An Examination of the Proposed Combination
of Comcast and NBC Universal**

February 4, 2010

Good morning, Chairman Boucher, Ranking Member Stearns, and Members of the Subcommittee. My name is Michael Fiorile. I am speaking to you today as Chair of the NBC Television Affiliates Board. Our association represents some 200 independently owned, local television stations in markets around the nation that are affiliated with the NBC network. These stations make a wealth of local and national programming freely available to their communities. I am also President and Chief Operating Officer of the Dispatch Printing Company, a family owned company that owns, among other local media outlets, WTHR, the NBC-affiliated station in Indianapolis. I appreciate the opportunity to appear before you today.

The proposed transfer of control of the NBC Television Network and the ten NBC owned-and-operated, major-market stations, as well as numerous other media interests, to the nation's largest cable operator presents fundamental questions about our shared future in the media landscape. It is an unprecedented combination involving two companies that create and distribute much of the best television programming in the United States. The local broadcast stations affiliated with the NBC network believe deeply in the value of the network and of the partnership between the network and its affiliates, which has been developed and fostered over

decades of effort. This partnership is one key factor that has enabled us to serve markets from Anchorage to Roanoke with free, high-quality local and national programming.

This transaction presents two questions to affiliates that are at the very core of our ability to continue to serve our communities effectively with free, local and national over-the-air programming.

First, will the partnership that has been so carefully fostered between NBC and its affiliates survive, and even thrive, in the years ahead, permitting us to continue to provide and enhance the excellent service that our communities expect?

Second, will NBC affiliates continue to have a positive working relationship with NBC under Comcast's control, or will the combination of our network with our largest distributor create undue leverage to the detriment of affiliates and, by extension, to the public we serve?

The answers to these questions have profound implications for the viewing public. The network-affiliate model, which combines the “efficiencies of national production, distribution and selling with a significant decentralization of control over the ultimate service to the public,”¹ is a key enabler of local community journalism and public service. That partnership produces a free and universally available package of local and national journalism, weather, sports, emergency information, and other programming and services that connect local viewers to one another and the country. Cable and other multichannel video programming distribution (“MVPD”) platforms provide few local services of this kind (other than, of course, through the retransmission of local television signals), and their services certainly are not available for free to viewers. Indeed, a 2008 study by the Pew Research Center for the People & the Press confirmed

¹ H. Rep. No. 200-887, 100th Cong., 2d Sess. 20 (1988).

that free, local television remained the most popular source of news in the United States, with most stations producing an average of 4.1 hours of local news per day.² Put simply, the combination of local and national programming aired by an NBC network affiliate is greater than the sum of its parts, enabling local stations to invest more heavily in local programming and services than would be possible without the draw of national network programming.

Thus, let there be no mistake: the stakes in this deal for local communities are high, both for affiliates and the public they serve.

Given the critical importance of a continued and successful partnership between NBC and its affiliates, we have been pleased to hear encouraging statements from Comcast and NBC Universal since announcement of the proposed transaction. A week ago, the parties filed their application for FCC approval of the transaction, in which “Commitment #1” is an assertion that “the combined entity remains committed to continuing to provide free over-the-air television through its O&O broadcast stations and through broadcast affiliates across the nation” and a pledge to “continue its cooperative dialogue with its affiliates toward a business model to sustain free over-the-air service.”³ This statement of intent — which has been reiterated in productive conversations that the NBC Television Affiliates Board has had with Comcast — has been a very welcome start to this process.

² See Press Release, Pew Research Center for the People & the Press, Public Evaluations of the News Media: 1985-2009, Press Accuracy Rating Hits Two Decade Low, at 4 (Sept. 12, 2009), available at <http://people-press.org/reports/pdf/543.pdf>; see also *id.* at 14 (noting that the vast majority of Americans “say that if all local television news programs went off the air—and shut down their web sites—it would be an important loss”).

³ Applications for Consent to the Transfer of Control of Licenses, General Electric Company, Transferor, to Comcast Corporation, Transferee, *Applications and Public Interest Statement*, at 40 (filed Jan. 28, 2010) (hereinafter, “Application”). The Application states that these commitments should be included in any Commission order granting the application and “would become binding on the parties upon completion of the transaction.” *Id.* at 38.

Moreover, we fully support and welcome the inclusion of the ten NBC television stations owned and operated by the network within the proposed transaction. We are optimistic that Comcast's control of local NBC television stations in major markets such as New York, Chicago, Washington, Philadelphia, Miami, Los Angeles, and San Francisco will create incentives for Comcast to invest in the NBC television network and local television generally.⁴

Our discussions with Comcast, however, have just begun, and we must now progress beyond general statements of intent. In the weeks ahead, the Affiliates Board and Comcast have much hard work before them to reach clear, specific, documented and enforceable conditions defining what it means in practice for the new Comcast-controlled NBC to be "committed" to the network-affiliate model and the free, over-the-air television platform that has served the public so well for so long — and that Comcast has appropriately stated it will continue. I do not yet know what form those conditions will take, or the precise vehicle or vehicles by which they will be memorialized and enforced.⁵ And at such an early stage in the discussion, I cannot yet know with certainty whether these discussions will even result in a common understanding as to appropriate conditions, which, to state the obvious, will be a prerequisite to our support for this transaction.

The Affiliates Board has heard concerns from affiliates nationwide that are inherent in a transaction under which the largest vertically integrated cable operator —

⁴ See, e.g., Comcast Corp., Transcript of Investor Presentation re: General Electric and Comcast Corp. Joint Venture Agreement, at 5 (Dec. 3, 2009) (commentary of Brian L. Roberts, Chairman and CEO of Comcast, noting the "[i]conic broadcasting network of NBC and their 10 local TV stations"), available at http://www.nbcutransaction.com/pdfs/Comcast_Transcript%2012.3.09.pdf.

⁵ We believe that the approach proposed in Comcast's application to the FCC has promise. Under that approach, commitments would become part of the FCC's Order approving the transaction and thereafter would be "binding on the parties upon completion of the transaction." See *supra* note 3. In effect, these commitments would become FCC-imposed conditions like those mandated in prior mergers of major media companies.

regardless of its identity or good track record — acquires one of the four major broadcast networks in the United States.

These concerns, as we see them today, can be grouped under three categories: *first*, protecting the value of the network and the availability of free, over-the-air programming to the public by preventing the siphoning of key programming from the network to Comcast-owned cable channels; *second*, preventing the bypass of affiliates, which would occur if Comcast were to provide the network programming for which affiliates have contracted “first call” rights to competing platforms in their respective markets; and *third* protecting the integrity of the retransmission consent principle.

1. Preventing Migration of NBC Network Programming to Pay Services. While we do not anticipate that Comcast would simply “turn NBC into a cable channel,”⁶ as some observers have speculated, it could nevertheless gradually migrate some or all of the most compelling sports, news and entertainment programming and talent away from free, over-the-air distribution on NBC to its newly owned cable channels that are made available only to paying subscribers, such as Bravo and USA Network. A related harm would arise if Comcast were to elect not to make the investments in new programming that are necessary to sustain network audiences at current levels or greater, choosing instead to focus its investments on cable channels.

⁶ See, e.g., Jonathan Storm, *Many Possibilities for Comcast and NBC*, Philadelphia Inquirer (Dec. 3, 2009) (opining that Comcast “could turn the NBC broadcast network into a cable TV jewel or bring it even lower than it already is as a cheeseball, all-reality-all-the-time programmer. Or it could just turn it off.”), available at <http://www.philly.com/inquirer/business/78395712.html>; Evan Hessel, *Why Comcast Wants NBC*, Forbes (Oct. 1, 2009) (“[Comcast] could also take the more drastic step of converting NBC, which despite a ratings slide over the past years still produces some of Hollywood’s most watched shows, into a cable channel only available as part of a pay TV subscription”), available at <http://www.forbes.com/2009/10/01/comcast-nbc-ge-business-media-cable.html>

This is not to suggest the absence of scenarios in which Comcast's operation of its cable channels could add to, rather than subtract from, the strength of the free, over-the-air broadcast network. Notably, a diversified media company such as Comcast may be well positioned to compete for rights to programming and talent that would benefit the free, over-the-air broadcast network and cable channels alike.

Yet the disappearance of popular news, sports, and entertainment programming from the NBC network would be unacceptably harmful. The net result of migration of content and investments from the NBC network to Comcast's cable channels would be to turn viewers away from NBC programming — harming NBC's local affiliates and diminishing their ability to provide quality local news, weather, and other programming relied upon by local communities, including subscribers of pay television services. The migration, for example, of NFL programming currently broadcast to the public for free by NBC affiliates over to Comcast's sports channel, Versus, could be a significant loss to the public and would be devastating to affiliates.⁷

On a positive note, as discussed above we believe it is important that Comcast retain ownership of the network's ten owned-and-operated NBC stations, providing it with incentive to preserve the strength of the NBC network and local stations. We do not, however, believe that this incentive alone will be enough to ensure against migration of critical network programming to Comcast's cable properties, and we therefore look forward in the weeks ahead to developing with Comcast concrete and enforceable conditions against such migration.

⁷ It is thus noteworthy that in its application to the FCC seeking approval of the transaction, Comcast states, "The transaction will allow for NBC's sports programming to be distributed on [Comcast-owned cable channels] Versus, Golf Channel, and Comcast's multiple [regional sports networks]." See Application at 50.

2. Preventing the Bypass of NBC Network Affiliates. One of the core elements of the network-affiliate relationship is the affiliate’s contractual right — embodied in every network affiliation agreement — to serve its local community as the first point of availability of network programming. While network entertainment, sports, and news programming may be available on other platforms at some point after their broadcast premiere, such as through streaming video sites, iTunes, and video-on-demand (“VOD”) services, the local affiliate provides viewers with the first opportunity to watch such programming. This longstanding contractual principle serves the network and affiliate well by maintaining the broadcast medium, with its unique reach and accessibility to viewers, as a strong and economically viable platform. An affiliate’s “first call” right to flagship network programming also serves the public well because it is a cornerstone for the localized services that stations provide to their home communities for free.

A cable operator with a television network, however, has unique incentives to undercut its affiliates to benefit its cable and Internet distribution outlets. Comcast has the means to bypass NBC affiliates on its own platforms or others for which it provides programming, if it were to so choose. According to its latest figures, Comcast has 23.8 million cable television subscribers; the company is thus “principally involved in the development, management and operation of cable networks and in the delivery of programming content.”⁸ Cable channels, particularly wholly owned channels, are more profitable than broadcast distribution because the owners of highly rated channels are able to command significant subscriber fees in addition to

⁸ See Comcast, Corporate Overview, <http://www.comcast.com/corporate/about/pressroom/corporateoverview/corporateoverview.html>; see also Comcast Corp. Investor Presentation, at slide 9 (Dec. 3, 2009) <http://www.nbcutransaction.com/investor.html>, (estimating that after consummation of the transaction, 80 percent of Comcast’s operating cash flow will be derived from the company’s cable distribution business).

selling advertising — a dual revenue stream⁹ that historically has not been available to broadcasters and is now only beginning to be available, but at depressed rates.

One mechanism by which this bypass could occur is through Comcast's highly developed VOD and broadband platforms. Comcast has attracted customers to its digital cable platform through its VOD offerings as well as an online video site, Fancast.¹⁰ Comcast has described that with Fancast, "We aim to be the one website where you can tune-in, watch, and engage around all the television you love and need to know about."¹¹ And on its investor website, Comcast asserts that "[w]ith 10,000 choices every month and even more on the way, [the Comcast VOD service] On Demand is a strong differentiator for our video service."¹² Moreover, when it announced the NBC Universal transaction, Comcast explained to investors that "content can benefit distribution,"¹³ and in the FCC application seeking approval of the transaction, Comcast acknowledges that "[t]he proposed transaction creates significant opportunities to extend [NBC's broadcast] news programming to other outlets, such as Comcast's local and regional cable networks, VOD, and online."¹⁴ Clearly, Comcast may have incentive to make its VOD platform, Fancast site and/or other wholly owned video outlets the "first stop" for popular NBC network programming.

⁹ See, e.g., Comcast Corp., Transcript of Investor Presentation, *supra* note 4, at 6 (commentary of Brian L. Roberts, Chairman and CEO of Comcast) ("We think cable networks [are] one of the best businesses in the media sector because each channel is its own multimedia brand, with a minimum of two robust revenue streams in affiliate fees and advertising and a great online presence.").

¹⁰ Comcast reports that monthly VOD views on its "On Demand" service increased from 75 million in December 2004 to 334 million in December 2008. See Comcast Investor Relations, Video, <http://www.cmcsk.com/video.cfm>

¹¹ Comcast Voices (blog of Comcast Corp.), *Fancast.com, Go Ahead and Watch Your Favorite Television Online* (May 6, 2009), <http://blog.comcast.com/2009/05/fancastcom-go-ahead-and-watch-your-favorite-television-online.html>

¹² Comcast Investor Relations, *supra* note 10.

¹³ Comcast Corp., Transcript of Investor Presentation, *supra* note 4, at 9.

¹⁴ Application at 40-41.

3. *Maintaining the Integrity of Retransmission Consent.* Every NBC affiliate has two sets of bet-the-company contractual relationships. The first is the affiliate's contract with its network. The second is its complement of retransmission consent contracts setting out the terms and conditions under which its signal is retransmitted on cable systems and other MVPDs. Understandably, then, any combination that would merge both of these relationships into a single entity would raise concerns about the accumulated leverage that could result from one company being the key to both of these relationships. Here, Comcast is the nation's largest cable provider, and it is the major cable partner for a significant number of NBC affiliates. The terms under which the broadcast signals of NBC affiliates are retransmitted by Comcast to its subscribers are critical to the health and well-being of the affiliates and the network-affiliate system that serves the public so effectively.

For example, a combined NBC-Comcast could seek to tie together retransmission consent payments with payments for network programming provided under an affiliation agreement, or force affiliates to accept unfavorable affiliation agreement provisions to obtain market-based retransmission consent payments. In either case, the combined entity would be using its unique leverage over affiliates to undermine their ability to negotiate fair retransmission consent agreements. We have no evidence that current management of Comcast and NBC would undertake these tactics. But management and corporate strategy can change, and we must take a long view of these issues to protect important principles and ensure that the public's access to high-quality NBC-affiliated television stations will not be put at risk.

This is not to say, of course, that the merger cannot be effectuated. Principles that are familiar to this Committee and to the FCC have been developed in other contexts to impose structural separation between subsidiaries whose operations should not be commingled for

certain public-policy purposes. We tentatively believe that a strong set of structural separation requirements for the subsidiaries of Comcast that will negotiate retransmission consent agreements and those that will administer the network's relations with affiliates can permit the combination to go forward while minimizing concerns about maintaining market-based negotiations for retransmission consent.

* * *

In the recently concluded transition to digital television, local television stations — including NBC affiliates — invested billions of dollars to build the infrastructure for state-of-the-art digital broadcasting. These investments have made possible, for the first time, a wealth of free, high definition and multicast programming,¹⁵ in addition to new innovations such as mobile DTV. (Incidentally, these investments also enabled the return of over 100 MHz of spectrum for 4G commercial wireless and public safety uses). The network-affiliate partnership can advance these new digital opportunities and services and build upon these investments. If the NBC network and its affiliates do this together we will continue a long tradition of cooperation and joint ventures that have benefited local communities.

The concerns I have described to you today are not, I am hopeful, insurmountable. With concrete and enforceable safeguards and conditions, this transaction should continue to serve the public interest and strengthen, not diminish, the network-affiliate partnership. We accept that the only certainty in our industry is that there will be continued change. We have been strong believers in the NBC Television Network, as well as free, local broadcasting. We need our network to be owned by a strong partner that will value it as much as we do and will value us. If the core attributes of our relationships with NBC and Comcast can be maintained

¹⁵ Local television stations are offering some 1,450 multicast streams to the public at this time.

under the new ownership structure, this transaction should strengthen and extend our combined ability to serve the American public with free services in new and interesting ways. We are cautiously optimistic that this goal can be achieved during the process of considering the merger, and that we can move forward together with a renewed sense of shared enterprise to serve the public.