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TESTIMONY OF SAMUEL R. DESIMONE, JR.

GENERAL COUNSEL AND SECRETARY
EARTHLINK, INC.

REGARDING

COMCAST AND NBC UNIVERSAL: WHO BENEFITS?

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Good morning, Chairman Boucher, Chairman Rush, other members of the Committee, thank you for inviting me to testify today on behalf of EarthLink.

My name is Samuel R. DeSimone, Jr. and I am General Counsel and Secretary of EarthLink, Inc. EarthLink is one of the nation's largest independent[1] Internet Service Providers (ISPs), with approximately 750,000 broadband and 900,000 dial-up Internet access subscribers. Since the dawn of retail broadband in 1998, EarthLink has actively pursued the rollout of broadband Internet access services to Americans throughout the country, building value-added consumer offerings that utilize wholesale broadband transmission inputs from Broadband Providers. Today, EarthLink delivers broadband to hundreds of thousands of American consumers, who enjoy EarthLink's nationally-recognized and award-winning broadband Internet

[1] An "independent" ISP is a provider of Internet access and related services that is not affiliated with a facilities-based provider of telephone, cable or satellite services.

access services.[2] EarthLink has the experience and history promoting broadband innovation and choice for consumers that few, if any, companies can rival. For years, EarthLink has been at the forefront of the effort to ensure that consumers have the opportunity to experience innovative, affordable and competitive ISP services.

I. INTRODUCTION: STAKES ARE HIGH FOR CONSUMERS AND THE GROWTH OF THE INTERNET.

The proposed combination of Comcast-NBCU would create a communications and information behemoth that will alter the American media landscape. The "new" Comcast would control a vast swath of the media, including the nation's largest cable network, numerous cable channels, broadcast programming, national, regional and local programming networks, major market broadcast stations, interactive video services, video on-demand and pay-per-view services, online video distribution, online interactive services and programming guides, theatrical motion picture production and content, wireless Internet services, and substantial Internet content.

The dramatic increase in the scope and scale of Comcast's control over programming and content, combined with its dominant gateway control over the broadband access network, raises the risk that the transaction will result in less competition, diminished choice, decreased information diversity, reduced broadband network investment, and higher costs for consumers. At a time when broadband-driven online platforms are beginning to usher in a new era for

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[2] Among EarthLink's awards are: *Highest in Customer Satisfaction Among Dial-Up Internet Service Providers*, J.D. Power and Associates, in 2007 and 2008; *Top Three in Customer Satisfaction Among DSL Providers, East and West Regions*, J.D. Power and Associates, 2008; *Highest in Customer Satisfaction Among Residential Internet Service Providers, West Region*, J.D. Power and Associates, 2009; *Top Three in Customer Satisfaction Among Residential Internet Service Providers (tied with Verizon), South Region*, J.D. Power and Associates, 2009.

consumers to view, share and interact with innovative video programming, there is a serious risk that this promise could be cut short.

In economic terms, as explained in the attached report of Professor Simon Wilkie, the proposed combination has both vertical and horizontal impacts upon competition that undermine the public interest.

II. THE MERGER COULD HARM CONSUMERS IN AT LEAST THREE WAYS

1. Reduced Internet Services Available to Consumers

The merger will create even stronger incentives for Comcast to deny wholesale broadband access on reasonable terms to competing ISPs, which can offer consumers a choice of Internet providers. These enhanced economic incentives to block ISP competition flow from Comcast's needs to protect its incumbent cable revenues as well as NBC revenues from the threat of the Internet. Today, consumers have very few choices when it comes to the broadband pipe into the home. Unfortunately, the merger will only make it worse for consumers who want a different choice -- and some competition -- of ISPs.

The last-mile high-speed Broadband Access Service market today is characterized by a lack of competition, high entry barriers, and high end-user switching costs. FCC data consistently show that Broadband Access Service is overwhelmingly offered and provided only by either the incumbent wireline telephone carrier or the incumbent cable company, presenting a classic economic case of duopoly, with market control by just two dominant providers.[3] The most recent data of the FCC confirms that, while approximately two-thirds of residential high-

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[3] *See, e.g., FTC v. H.J. Heintz*, 246 F.3d 708, 724 (D.C. Cir. 2001) ("In a duopoly, a market with only two competitors, supracompetitive pricing at monopolistic levels is a danger."); United States Dept. of Justice Antitrust Div. and Federal Trade Commission, *1992 Horizontal Merger Guidelines,* 57 Fed. Reg. 41552, § 0.1 (1992) ("where only a few firms account for most of the sales of a product, those firms can exercise market power, perhaps even approximating the performance of a monopolist. . .").

speed connections are at 3 Mbps or higher, only the cable and incumbent telephone companies offer such services, with little evidence that mobile data offerings offer a competitive alternative at this time.[4] The FCC's *National Broadband Plan* also found that this market is substantially non-contestable: "Building broadband networks—especially wireline—requires large fixed and sunk investments. Consequently, the industry will probably always have a relatively small number of facilities-based competitors, at least for wireline service."[5]

The U.S. Department of Commerce's NTIA agrees that consumers frequently have limited, and often no, choice among broadband access providers.[6] The U.S. Department of Justice has further concluded that consumers seeking to use the most bandwidth-intensive applications may have only a single viable choice of broadband access provider.[7] Importantly, and as the FCC described in its *National Broadband Plan*, the current broadband duopoly is receding to a monopoly market, as approximately 75% of U.S. consumers "will likely have only one service provider (cable companies with DOCSIS 3.0-enabled infrastructure) that can offer very high peak download speeds."[8] Further, the significant switching costs associated with this market, including long-term contracts with consumers, the bundling of voice and video services, specialized CPE that must be installed to change providers all lend advantages to the early-on legacy entrants and limit consumer choice.

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[4] *See High-Speed Services for Internet Access: Status as of December 31, 2008*, FCC Report, Chart 11, 13 and Table 6 (rel. Feb. 2010).

[5] Federal Communications Commission, *Connecting America: The National Broadband Plan* at p. 36, GN Dkt. 09-51 (rel. Mar. 16, 2010) ("*National Broadband Plan*").

[6] *See* Letter from Lawrence Strickling, Assistant Secretary for Communications and Information, Dept. of Commerce, NTIA, to Julius Genachowski, Chairman, FCC, at 3, GN Dkt. 09-51 (filed Jan. 4, 2010) ("*NTIA NBP Letter*"); *id*. at 6 (broadband is at best a duopoly in many areas of the country).

[7] *See Ex Parte* Submission of the Department of Justice to FCC, at 14, GN Dkt. 09-51 (filed Jan. 4. 2010).

[8] *National Broadband Plan* at p. 42.

For consumers, this has meant that even as broadband providers' deployment costs continue to fall,[9] consumer prices have increased,[10] with the greatest increases in markets where only one broadband provider offers service.[11]

Comcast's refusal to offer EarthLink wholesale services in the majority of its footprint has essentially excluded EarthLink and other independent ISPs from providing consumers a choice of competitive broadband services in many markets where Comcast is the only high-speed option. EarthLink's current contractual arrangement with Comcast is limited geographically in scope to the Boston, Seattle, and Houston markets, as well as a few other relatively small metropolitan areas, which represent only a small fraction of consumers passed by Comcast. Moreover, the pricing of this limited arrangement renders the wholesale service uneconomic for consumers. As a result, competition and consumer choice is further constrained.

2. Reduced Access to Online Content

The growth of broadband Internet usage is converging traditional television and online video, creating new platforms for video programming distribution. No longer limited to the traditional linear video programming from broadcasters and multichannel video program distributors (MVPDs), consumers are increasingly turning online to enjoy a wide range of "over-

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[9] *See Costs of Providing Broadband Dropping*, Broadband DSL Reports (May 4, 2009), *available at* http://www.dslreports.com/shownews/Cost-Of-Providing-Broadband-Dropping-102253 (noting, for example, an 18% drop in Time Warner Cable's costs of providing service from 2008 to 2009).

[10] *See* Saul Hansell, *As Costs Fall, Companies Push to Raise Internet Price*, New York Times (Apr. 19, 2009), *available at* http://www.nytimes.com/2009/04/20/business/20isp.html?_r=1 (while it costs Comcast an average of $6.85 per home to double Internet capacity within a neighborhood, its upgraded higher speed services are priced at over three times existing 8 Mbps services).

[11] *See* John B. Horrigan, *Home Broadband Adoption 2009*, Pew Research Center Publications (Jun. 17, 2009), *available at* http://pewinternet.org/Reports/2009/10-Home-Broadband-Adoption-2009/3-Connections-costs-and-choices/5-Choice-and-price.aspx?r=1. ("Among broadband subscribers who report that one company serves their area, the average monthly bill is $44.70. Among broadband subscribe[r]s who report that more than one company serves their area, the average monthly bill is $38.30.").

the-top" video, including user-generated content, web-originated entertainment, educational programs, and news, political, religious, and public affairs programming. Online video program distributors (OVPDs) and other online video programming sources like MUZU TV, Vimeo, Veoh, Vudu, Sony, YouTube, blip.tv, Netflix and a growing number of others offer a range of content, choice and interactivity that is often superior to linear television. The consumer impact is already beginning to be felt: 800,000 households have dropped their cable television subscription entirely in favor of online options and this number is expected to grow to 1.6 million by 2011.[12]

For the public, the evolution of online video is increasing innovation, facilitating user interaction, sharing and creation of video, enhancing consumer experiences, and driving greater broadband adoption and usage. In addition to accessing professional video, online users can also tap into amateur videos on an enormous range of topics when choosing what to watch. Users are also able to upload their own responsive videos to what they see on the OVPD services (*e.g.*, responding to political programming with a different opinion, or uploading a "sequel" to professional programming); post instant commentary and reviews of programming; share content with others; and integrate video into other online content such as social media, web forums, and other online communities.

The costs and ease of market entry in the OVPD market substantially enhances diverse and minority viewpoints. Since online video runs "over the top" of an existing broadband network, it does not require the massive expenditure of technology, capital, and time typical to provide MVPD services. Barriers to entry are lowered further by elimination of prolonged

[12] Erick Schonfeld, *Estimate: 800,000 U.S. Households Abandoned Their TVs for the Web*, TechCrunch (Apr. 13, 2010), *available at* http://techcrunch.com/2010/04/13/800000-households-abandoned-tvs-web/.

placement negotiations with program networks and broadcast stations, and/or MVPDs. Further, since the content is online and publicly-available, the OVPD market has low service switching costs for consumers. OVPDs can also help free consumers from the service bundles commonly encountered with MVPD service.

It is reasonable to expect the post-merger Comcast to formulate business strategies and actions that address these exciting *but threatening* online developments. Comcast makes significant revenues from the operations of its traditional cable television business. Moreover, both Comcast and NBCU earn significant revenues from payments for programming carriage from MVPDs. In short, Comcast's economic incentives are such that it fares far better by ensuring that online video does not develop as a substitute for cable television service.

Post-merger, Comcast has the ability to take a number of actions to address the growing online threat, including: (i) tying consumers' access to online content to retention of a cable television subscription so that consumers can neither "cut the cord" nor "break the bundle;" (ii) engaging in broadband network practices that block, degrade, or discriminate against online traffic to or from OVPD competitors and consumers; (iii) setting the capacity of bandwidth allocated to its Broadband Access Service at such a low level, or engaging in similar network configurations (while reserving capacity for its affiliated IPTV offerings), so as to effectively foreclose unaffiliated OVPD services; (iv) withholding or raising OVPD rivals' costs of access to Comcast and NBCU affiliated programming and content; (v) obtaining contract restrictions from providers of unaffiliated video programming as part of cable carriage arrangements that prevent unaffiliated video programmers from offering programming to OVPD competitors; and (vi) increasing the price for standalone broadband access service, especially in areas where it is the only feasible high-speed provider, to discourage its use for online video.

Whether singly or in combination, these actions may significantly harm consumers and impede broadband adoption and use. Further, with fewer online outlets available, these actions could also have negative impacts on independent programmers, and the diversity of information sources and perspectives available to the American public. With fewer voices, and fewer OVPD channels for expression, local, minority and underrepresented groups in the U.S. will be particularly harmed.

3. **Higher Prices and Less Choice for Consumers**

In these difficult economic times, consumers are looking to reduce costs by using an attractively-priced, standalone broadband Internet service rather than subscribing to a more expensive bundle offered by incumbent providers such as Comcast. This trend will increase as online video develops further. Moreover, the resulting competition and content diversity of broadband video could help to keep cable prices in check and support innovation and investment by all broadband content and service providers, helping to drive broadband deployment, adoption, and competition.

Unfortunately, for the reasons discussed above and in Professor Wilkie's attached report, the merger may increase Comcast's incentives to offer only the bundle and to prevent independent ISPs from offering a standalone broadband alternative. This will mean that consumers cannot "break the bundle" of high priced offerings when consumers only want – or can only afford – one or two services in the bundle. Comcast will also have an even greater incentive to stop customers from "cutting the cord" – choosing online video rather than a cable television subscription -- to save on cable television subscriptions that consumers may no longer be able to afford.

III. A SIMPLE AND LOW-COST STRUCTURAL SOLUTION: WHOLESALE STAND-ALONE ACCESS FOR ISPs

EarthLink believes there is a simple, cost-effective, and proven remedy to address several of the potential harms resulting from the Comcast-NBCU merger. Federal regulators should condition approval of the transaction upon the provision by Comcast of nondiscriminatory wholesale standalone Broadband Access Service to at least four independent ISPs across the Comcast broadband territory at reasonable rates and terms. This condition would use the successful broadband access condition adopted by the FTC in the AOL-Time Warner merger approval as a model, as it has proven to be a success for broadband consumers and an efficient nudge toward market-based arrangements that meet consumer needs. Notably, this wholesale access condition would also pay Comcast a reasonable fee for use of its broadband access service, thus expanding Comcast's network to new users that cannot afford Comcast bundles and enhancing broadband adoption on terms that are commercially reasonable for both Comcast and the independent ISP. Consumers, however, are the greatest beneficiary – they will have a choice of ISP, and have the chance to save money by choosing just broadband access service.

Further, such a condition mitigates Comcast's strong incentives to pursue a strategy to prevent unaffiliated OVPDs from establishing a foothold, and would nudge Comcast toward an open model. At the same time, the condition will allow unaffiliated ISPs to support the market for online programming and content by providing an independent avenue for distribution. Additionally, competitive broadband alternatives increase the incentives of all broadband providers to offer better services in order to compete. Over time, the success of independent ISPs will contribute to reducing Comcast's incentives to tie the availability of online content to a cable subscription, benefiting all consumers. Further, independent broadband access providers will increase the ability of consumers to "cut the cord" by eliminating cable television service. This, in turn, will restrain Comcast from raising cable prices in order to retain consumers.

Additionally, the condition will also increase the diversity of information sources, a basic tenet of communications policy. Ensuring that independent voices have distribution options outside of Comcast, including through unaffiliated OVPDs and ISPs, increases the diversity of viewpoints and independent programming for all consumers. This is especially important for underserved minority and disadvantaged populations who rely on the Internet to distribute their messages. The emergence of online video and development of unaffiliated OVPDs has the potential to allow independent voices to reach large and diverse audiences.

IV. CONCLUSION

Thank you again for the opportunity to testify today. I look forward to answering any questions you may have.