



**WRITERS  
GUILD OF  
AMERICA, WEST**

August 13, 2012

**VIA ECFS**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

**Re: Applications of Comcast Corporation, General Electric Company and  
NBCUniversal Inc. for Consent to Assign Licenses and Transfer Control of  
Licenses, MB Docket No. 10-56**

Dear Ms. Dortch:

Writers Guild of America, West Inc. (WGAW) joins Public Knowledge in requesting the Commission enforce the conditions it imposed upon Comcast as part of Comcast's merger with NBC-Universal (NBCU). Comcast's discriminatory use of data caps to disadvantage competitors' online video offerings constitutes an unfair method of competition that violates the Commission's Merger Order.

Online or over-the-top (OTT) video services provide an innovative way for consumers to receive video programming on demand and on multiple devices. It also represents a much needed competitive platform for content creators to distribute their works. The WGAW, which represents television, film and digital media writers, has been a strong advocate for protecting competition in this rapidly developing market.<sup>1</sup> Since the repeal of the Financial Interest and Syndication Rules, consolidation among broadcast and basic cable networks and studios has all

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<sup>1</sup> See Comments of the Writers Guild of America, West, Inc., In the Matter of Annual Assessment of Competition in the Market for Delivery of Video Programming, MB Docket No. 07-269, June 8, 2011, and Comments of the Writers Guild of America, West, In the Matter of Applications of Comcast Corporation, General Electric and NBC Universal, Inc., for Consent to Assign Licenses or Transfer Control of Licenses, MB Docket No. 10-56, June 21, 2010, and Reply Comments of the Writers Guild of America, West, In the Matter of Preserving the Open Internet Broadband Industry Practices, GN Docket No. 09-191, WC Docket No. 07-52, April 26, 2010.

but eliminated independently produced content on television. With a handful of companies controlling much of what consumers see on television, the Internet has emerged as the viable alternative for diverse and independent video programming. Already this potential is being realized with original programming on Hulu and YouTube. In addition, Netflix has commissioned 4 original series that will debut television-length episodes on its platform. OTT services are proving that they can compete with television programming. Consumers have demonstrated a clear appetite for these alternatives with Netflix alone reporting nearly 24 million streaming subscribers in the United States.

However, OTT services rely on broadband Internet Service Providers (ISPs) such as Comcast to reach consumers. While the Commission has recognized the importance of protecting competition on the Internet through both the Open Internet rules and conditions imposed in the Comcast-NBCU merger, it is clear that Comcast does not intend to follow such rules. As a result, it is of vital importance that the Commission act to stop Comcast from violating its Merger conditions. Such action is needed to protect and enhance competition because Comcast's preferential treatment of its own video service threatens the viability of unaffiliated video providers.

In the WGAW's initial filing in this proceeding we wrote,

“This merger gives Comcast both the means and the incentive to behave in an anti-competitive manner. First, as the largest provider of residential Internet services it is in a unique position to violate the principle of net neutrality by throttling or blocking access to competing online video services. These actions could serve to steer Internet traffic to sites of Comcast's choosing, allowing Comcast to serve as a gatekeeper of the Internet.”<sup>2</sup>

The Commission echoed this concern finding that the merger would “increase Comcast's incentive to discriminate against unaffiliated content and distributors in its exercise of control over consumers' broadband connections.”<sup>3</sup>

To address this harm Comcast agreed not to prioritize affiliated Internet content over unaffiliated Internet content in its provision of broadband Internet access services.<sup>4</sup> In addition, the company agreed that “any Comcast or Comcast-NBCU broadband Internet access service offering that involves caps, tiers, metering, or other usage-based pricing shall not treat affiliated network traffic differently from unaffiliated network traffic.”<sup>5</sup> Further still, the Commission's Merger conditions required,

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<sup>2</sup> See Comments of the Writers Guild of America, West, *In the Matter of Applications of Comcast Corporation, General Electric and NBC Universal, Inc., for Consent to Assign Licenses or Transfer Control of Licenses*, MB Docket No. 10-56, June 21, 2010, pp 18.

<sup>3</sup> *Application of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, Memorandum Opinion and Order, MB Docket No. 10-56, FCC 11-4, at ¶93.

<sup>4</sup> *Application of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, Memorandum Opinion and Order, MB Docket No. 10-56, FCC 11-4, at ¶94.

<sup>5</sup> *Ibid.*

“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 consumers.”<sup>6</sup>

These were necessary protections to prevent Comcast from using its market power to stifle competition.

Despite these protections, Comcast has chosen to exempt its OTT video service, Xfinity, from its own data caps, in direct violation of the Commission’s Order. Comcast imposes data caps on consumer Internet usage. In March 2012, Comcast announced it would offer its Xfinity app on the Xbox 360 and TiVo platforms. Comcast also announced that use of the Xfinity app on these platforms would not count towards usage under the company’s data cap. Meanwhile, all other video apps, including competitors such as Netflix, would continue to count against data cap usage.

Comcast’s use of data caps appears to serve no other purpose than to stifle competition. As the company has admitted, data caps are not a means of dealing with congestion on its network. It stated in a letter to the Commission, “That [250 GB monthly] cap does not address the issue of network congestion, which results from traffic levels that vary from minute to minute.”<sup>7</sup> Network engineers, in one of the few analyses of real world Internet traffic, found that congestion only occurs at specific times and data caps punish users who do not contribute to congestion. As one of the authors of the study concluded, “Data caps, therefore, are a very crude and unfair tool when it comes to targeting potentially disruptive users.”<sup>8</sup> If data caps are not used for relieving network congestion, that raises the likelihood that they are being used for anti-competitive purposes.

If Comcast imposes data caps or usage based billing for any reason, it should apply those restrictions equally on all traffic. However, it has chosen to exempt its Xfinity service from the data cap while applying the cap to use of competing online video services. The design of such a policy is clearly to stifle competing video services and the application of it to video consumption on the Xbox and TiVo is not an accident. Both of these devices connect the Internet to the television and as such, represent a direct threat to Comcast’s cable services. In fact, roughly 25% of Netflix traffic came from Xbox devices in 2011.<sup>9</sup> By limiting consumer usage of non-Xfinity apps while allowing unlimited consumption of Xfinity content, Comcast is using its market power in broadband Internet access services to unfairly disadvantage competition in the upstream online video market.

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<sup>6</sup> *Application of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, Memorandum Opinion and Order, MB Docket No. 10-56, FCC 11-4, pp. 126.

<sup>7</sup> *Re: In the Matter of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications*, File No. EB-08-IH-1518. September 19, 2008.

<sup>8</sup> Benoît Felten. “Do data caps punish the wrong users?” Fiberevolution.com, November 28, 2011, <http://www.fiberevolution.com/2011/11/do-data-caps-punish-the-wrong-users.html>.

<sup>9</sup> M.H. Williams, “PS3 Tops Xbox 360 for Netflix Usage,” *Business Insider*, May 18, 2011, <http://www.businessinsider.com/ps3-tops-xbox-360-for-netflix-usage-2011-5>.

Comcast's discriminatory use of data caps is precisely the type of behavior the WGAW was concerned about. It is also behavior that the Commission acted to prevent with the conditions included in the Merger Order. Comcast is in clear violation of these conditions. As Public Knowledge outlines in its petition, the Xfinity App is a broadband service which the company is treating differently than other unaffiliated services. Given Comcast's actions and the harm to competition in the online video market, we join Public Knowledge in requesting the FCC take action under the Merger Order.

Such action is necessary to protect competition. The broadband Internet access market is concentrated, with the 4 largest ISPs accounting for 65% of the market.<sup>10</sup> Comcast alone accounts for 22% of the market.<sup>11</sup> Allowing Comcast to discriminate in its treatment of Internet traffic would harm content creators and consumers and set a dangerous precedent. For many Americans, the market is a local duopoly between a cable and telephone provider, both of which are increasingly imposing data restrictions. Therefore, many consumers cannot simply switch ISPs to avoid degraded online video service. Meanwhile, wireless broadband providers offer more expensive service with much lower data caps that effectively preclude any significant online video consumption.

Comcast must not be allowed to unfairly leverage its position as an Internet provider to undermine video competitors. The Commission should order Comcast to immediately stop exempting its Xfinity service from any data cap and investigate whether caps or usage based billing in general hinder online video distributors from providing video programming to consumers.

Thank you,

A handwritten signature in black ink, appearing to read "Ellen Stutz". The signature is fluid and cursive, with a long horizontal stroke at the end.

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<sup>10</sup> SNL Kagan, "2012Q1 High Speed Data Subscribers," accessed August 4, 2012.

<sup>11</sup> *Ibid.*