EXECUTIVE SUMMARY

Free Press, Media Access Project, Consumer Federation of America, and Consumers Union ("Public Interest Petitioners") respectfully submit this Reply in response to Comcast and NBCU's Opposition to our Petition to Deny their applications for transfer of control or assignment of various licenses to a new joint venture.

Public Interest Petitioners have offered significant evidence of the anticompetitive leverage and tactics this merger will generate if approved in its current form. Rather than rebutting these findings, Applicants have offered talking points, flawed data, and inconsistent statements. Applicants' own internal business plans confirm Public Interest Petitioners' fears that Comcast will use leverage gained from the merger to engage in anticompetitive tactics. They also cast serious doubt on the viability of Applicants' so-called "public interest commitments."

Applicants must show that the merger would enhance (rather than merely preserve) public interest goals. Even if Comcast and NBCU could demonstrate that the proposed transaction would be competitively "neutral," it still would be *insufficient* to warrant Commission approval. But by any standard the present transaction is far from competitively neutral. The merger of the largest cable operator and one of the nation's premier video content producers will fundamentally alter the structure of the video marketplace to the detriment of competition, innovation, and diversity in MVPD and programming markets, the emerging online video market, and local media markets. In particular, this Reply highlights the adverse affects on emerging online video markets and local media markets.

Online Video Markets

The merger poses a substantial risk to the development of the nascent market for online video by eliminating horizontal competition between Comcast's and NBCU's online video platforms, and hindering NBCU's incentives to make its programming available to platforms that compete with Comcast cable television services. By virtue of their combined control over broadband access, cable platforms, and a critical mass of content, Applicants will be uniquely situated to withhold content from emerging online video competitors. As the nation's largest broadband internet service provider, Comcast can also control access to, and the quality of, unaffiliated programming and online distributors. These factors demonstrate that the combined company will have both the incentive and the ability to influence the growth of online video to its own advantage, and to the detriment of competition and consumers.

Applicants claim in their Opposition and economic studies that online video is not a competitor to Comcast's cable or online video businesses. However, what matters is not the self-serving *ex post facto* rationalizations that are contained in the studies that Applicants have solicited for the purpose of this merger review. What matters is what Comcast has actually thought and done with regard to online video competition. To that end, it is clear from Comcast's internal documents that the company fears competition from new online competitors and has taken steps to limit that emerging competition. By acquiring access to popular content controlled by NBCU, Comcast will have much more incentive and ability to withhold content that emerging online video competitors need to establish themselves. Unfortunately, without online program access or enforceable network neutrality rules, the Commission is presently unable to prevent this type of

anticompetitive conduct. To the extent that Applicants acknowledge that there are problems in these areas, they suggest that they would be better dealt with as part of an "industry wide review." But Applicants' argument begs the question: if, as Applicants appear to acknowledge, certain protections are insufficient or non-existent, then shouldn't the Commission withhold approval of the merger until it has put those safeguards in place?

Applicants suggest that the transaction will lead to greater innovation in online video. These purported benefits are tenuous and indeterminate. Comcast and NBCU have not shown that a lack of vertical integration has materially impaired their ability to innovate or to deploy new services to consumers. Thus, we are at loss as to why Applicants think this Commission should approve a merger whose primary purpose is to grease the wheels of their negotiations with other businesses. More to the point, the purported innovation "benefits" would diminish overall innovation and competition in burgeoning markets. No other company will wield the same level of market power in <u>both</u> the content and distribution markets as Comcast and NBCU would post-merger. The integration of Comcast and NBCU content and platforms gives the merged company unique incentives to engage in protectionist conduct that would stifle – not promote – innovation and competition.

Local Media Markets

The joint venture will adversely affect local media markets by eliminating direct competition between Comcast's cable operations and NBC owned and operated broadcast stations. The merger will concentrate power over local advertising in markets where Comcast will acquire an NBC-owned television station in the Comcast's cable footprint.

The merger of the local Comcast cable operations with a top-4 local broadcaster, such as NBC, is likely to result in a significant decline in competition in the local ad market and excessive domination by the merged company – to the detriment of other local broadcasters (particularly, smaller, independent ones) which are already facing ad revenue declines in an economic downturn.

Applicants' voluntary commitments and side deals with stakeholders do not remedy the ill-effects of the merger in local media markets. Many are simply a promise to preserve the *status quo*, and do not affirmatively promote public interest goals. Others, to the extent they purport to promote affirmative public interest goals, are illusory and cannot be meaningfully monitored or enforced by the Commission or the public.

Applicants continue to assert that the proposed transaction will strengthen free over-the-air broadcasting because Applicants have entered into agreements with the affiliates of the "Big Four" broadcast networks. However, these agreements do not constitute actual "benefits." At best, they are attempts by non-NBC O&O stakeholders to neutralize the unfair dealing that is likely to result from the merger. This should not be confused with a legitimate benefit that affirmatively increases a public interest outcome. These agreements also raise numerous questions. It is not clear that Comcast and NBCU have filed all of the agreements they have entered into with outside parties. Applicants have yet to comply with the Commission's mandate that there be full disclosure of consideration given in exchange for withdrawing a threat to file a petition to deny or informal objection. Thus, the current record leaves unresolved several important new substantial and material issues of fact

The Applicants' voluntary "promise" to improve local programming on NBC O&O stations is dubious and unenforceable. It is especially telling that the Applicants do not make similar promises for Telemundo properties. Under NBCU's ownership, Telemundo's local operations have been significantly cut back, and NBCU has failed to comply with an FCC directive to sell off its Los Angeles triopoly. Applicants have now made what purports to be a promise to divest the Spanish language station KWHY-TV. However, the device they propose to employ – a trust – is a thinly-veiled attempt to retain the station indefinitely while stalling until such time as they can lobby the Commission to change its duopoly rules. The trust also fails to comport with the FCC's insulation standards designed to protect the Trustee from the influence of the trust Beneficiary.

The Commission should also disregard Applicants' assertions as to the generous "cash and in-contributions" they have made to various organizations. Comcast and NBCU's merger applications are not pending before the "Federal Cash-and-In-Kind-Contribution Commission," but the Federal Communications Commission. This type of financial support, while commendable, is irrelevant to the instant proceeding. The FCC's duty is to promote competition, diversity, and localism – its jurisdictional purview does not encompass charitable donations. If it did, large companies could simply buy their way out of merger review. Accordingly, the financial support that Applicants have given is not only an insufficient ground on which to grant the merger, it is a *highly improper* one.

Remedying Merger Harms

The harms resulting from this merger run so wide and so deep that we are skeptical that these harms can be remedied. Applicants' current voluntary commitments

are insufficient and unenforceable and do not tip the balance in favor of granting the applications. Moreover, there are critical assurances that Applicants still have not given to the Commission or the public with regard to the merger's impact on the Commission's core goals of competition, innovation, diversity, and localism. In this Reply, we highlight Applicants' omissions, and suggest proposals that potentially could remediate some small degree of the harms that would be created by approval of the proposed transaction. In doing so, we do not intend the list to be exhaustive, or to suggest that their fulfillment would be sufficient to attend to all the anticompetitive concerns that have been presented in this proceeding.

In conclusion, Public Interest Petitioners urge the Commission to carefully consider the detrimental affects of a Comcast/NBCU merger on competition and the public interest, and respectfully request that the Commission deny Applicants' merger applications and attendant broadcast license transfers and grant all such other relief as may be just and proper.