Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc., to Assign and Transfer Control of FCC Licenses	)	MB Docket No. 10-56

COMMENTS

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SUMMARY

Announced last December, the $30 billion combination proposed by Comcast Corp., ("Comcast"), NBC Universal, Inc. ("NBCU"), and the General Electric Company (jointly the "Applicants") is an unprecedented marriage of key ("must have") programming assets controlled by Comcast and NBCU and the substantial distribution assets of Comcast. In these comments, the American Cable Association ("ACA") demonstrates that the combination of these assets will result in Comcast and the new Joint Venture gaining significant additional market power, providing them with the incentive and ability to charge supra-competitive prices or otherwise exercise their market power to harm multi-channel video programming distributors ("MVPDs"). The public interest harms will be greatest for the smaller cable providers that comprise the ACA's membership and for those areas where NBC's Owned-and-Operated ("O&O") stations and Comcast's Regional Sports Networks ("RSN") both are supplied, although the harms also will be felt by MVPDs serving many other areas of the country. Because these harms are so significant, the Commission cannot approve the proposed combination without adopting specific and meaningful relief. The relief proposed by the Applicants, which indicates they are aware that the proposed combination involves at least some competitive problems, either does not address these harms or, if it does, is inadequate.

The following sections summarize the horizontal and vertical harms of the proposed combination and then review the critique of the remedies offered by the Applicants.

Horizontal Harm. The proposed combination creates horizontal competitive concerns because key programming assets now separately owned by NBCU and

Comcast will be joined post-transaction in a joint venture. More specifically, today NBCU and Comcast each own video programming assets – NBCU's 10 O&O stations and its block of national cable programming and Comcast's nine RSNs. The FCC has concluded that the O&O stations and the RSNs are "must have" programming for MPVDs. That is, if these networks are withheld from an MVPD, it would have a competitively significant effect on the MPVD through a material loss of customers. In addition, because NBCU's block of popular national cable networks exhibits characteristics similar to that of other "must have" programming, the block would confer comparable amounts of market power.

Under standard economic theory, if two different programmers own two different networks (or blocks of networks) that each create market power, combined ownership of both will generally create significant additional market power. That is what would occur from the proposed combination of NBCU's and Comcast's programming assets, which would allow the new Joint Venture to charge much higher programming fees. These fee increases will be substantially passed through to subscribers in the form of higher subscription prices. In these comments, the ACA offers evidence in support of this claim and the magnitude of the harm.

The retransmission consent market supplies the best available evidence on the effect of combined ownership or control on programming fees. This is because retransmission consent markets are local and the extent to which multiple Big 4 stations in the same market are jointly owned or controlled varies from market to market. The available evidence suggests that joint control or ownership of multiple Big 4 stations in the same DMA can increase retransmission consent fees by 20% and possibly much more. This level exceeds the threshold for harm in the *Horizontal Merger Guidelines* used by the United States Department of Justice and the Federal Trade Commission.

The greatest threat of horizontal harm from this proposed combination occurs in regions of the country served by an NBC O&O and a Comcast RSN. In such regions, NBCU's control over retransmission consent for the NBC signal and control over its popular national cable networks will be combined with Comcast's control over its RSN. Approximately 12% of all TV households in the United States, spread over six different metropolitan areas, are located in DMAs with these characteristics. These are Chicago, IL, Philadelphia, PA, San Francisco-Oakland-San Jose, CA, Washington, DC, Miami-Fort Lauderdale, FL, and Hartford and New Haven, CT.

The transaction also threatens horizontal harm in regions served by a Comcast RSN but not served by an NBC O&O. In such regions, NBCU's control over its popular national cable networks will be combined with Comcast's control over its RSN, enhancing the Joint Venture's ability to raise programming fees. Approximately 28% of TV households are located in DMAs with these characteristics. Therefore, regions containing approximately 40% of all TV households are threatened with the horizontal harm from this transaction.

Vertical Harm. Vertical harm will arise from the proposed combination when the programming assets of NBCU are combined with Comcast's ownership of the country's largest cable company. This union will increase Comcast-NBCU's ability to command higher programming fees from MVPDs that compete with Comcast. These fee increases will be substantially passed through to subscribers in the form of higher subscription fees.

The economic theory underlying the ACA's analysis is as follows. So long as the joint venture and Comcast are able to coordinate their actions to take advantage of opportunities to maximize their combined profits, the Joint Venture and Comcast will collectively make decisions to maximize their combined profits. The reason that programming fees will rise is because the Joint Venture will seek to recoup through its negotiations for programming the opportunity cost of not acquiring new customers from rival MVPDs through the permanent withholding of programming. Increases in opportunity cost have the same impact on programming fees as increases in direct costs. In the absence of other information, a standard and well-accepted practice in economic theory is to predict that the negotiated price between a buyer and seller will rise by half the amount of any cost increase.

The impact of the transaction will be most significant in DMAs served by an NBC O&O where Comcast has a significant presence as the incumbent cable provider. Approximately 12% of all TV households in the United States, spread over six metropolitan areas, are located in such DMAs. These are Chicago, Philadelphia, San Francisco-Oakland-San Jose, Washington, DC, Miami-Fort Lauderdale, and Hartford and New Haven, which happen to be the same markets that will also suffer the most significant horizontal harm from the transaction. Under plausible parameter values, the retransmission consent fees charged by NBC O&Os will increase by approximately 100% in these DMAs.

The transaction also would have a significant impact on the fees that the joint venture charges for NBCU's national cable networks. Under plausible parameter values, the fees for this programming will increase by approximately 18-20% for large, national pay-TV providers who compete against Comcast, such as DirecTV, DISH Network, Verizon's FiOS and AT&T's U-verse.

Cable overbuilders will experience higher programming fee increases to the extent that Comcast passes a greater fraction of their subscribers. Under plausible parameter values, if Comcast passes almost all of an overbuilder's customers, the overbuilder's retransmission consent fees will increase by 100% and its fees for NBCU's national cable networks will increase by 44%. However, cable overbuilders will still experience significant price increases even if the share of their customers passed by Comcast drops to much more modest levels. ACA has identified 40 of its members who are Comcast rivals in all or some of their service areas.

The Applicants' Proposed Conditions Will Not Remedy the Harms. First, the Applicants propose no conditions to address the horizontal harms demonstrated herein. In addition, neither the Applicants' proposed voluntary conditions nor a process to resolve disputes through arbitration – a requirement imposed by the FCC in previous transactions with vertical competitive harms – is an adequate remedy – particularly for smaller and medium-sized operators. The Applicants' suggestion that the FCC's program access rules, even when extended to retransmission consent negotiations, are adequate to ensure fair dealings are unpersuasive because these regulations place no restriction on quantity discounts, provide no automatic right to continued carriage of programming during the pendency of a complaint, cannot address arbitrary internal transfer pricing, and may not apply to online distribution of programming. Moreover, binding arbitration has proven not to be a cost-effective option for smaller and medium-sized pay-TV providers.

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COMMENTS

Pursuant to the Public Notice issued by the Federal Communications Commission ("FCC" or "Commission") in the above-captioned proceeding on March 18, 2010,[1] the American Cable Association ("ACA"),[2] by its attorneys, hereby files its comments on the applications filed by Comcast Corporation ("Comcast"), General Electric Company ("GE"), and NBC Universal, Inc. ("NBCU") (jointly, the "Applicants") for consent to assign and transfer control of certain spectrum licenses to a new limited liability company that would constitute a joint venture of GE and Comcast. As the Commission noted in regard to the breadth of the proposed transaction, "[It] would

[1] *Commission Seeks Comment on Applications Filed by Comcast Corporation, General Electric Company, and NBC Universal, Inc. to Assign and Transfer Control of FCC Licenses*, Public Notice, MB. Docket No. 10-56, DA 10-457 (rel. Mar. 18, 2010) ("*Public Notice*").

[2] The ACA represents more than 900 small and medium-sized cable companies serving smaller markets and rural areas throughout the United States. ACA's membership encompasses a wide variety of businesses – family-owned companies serving small towns and villages, multiple system operators serving predominantly rural markets in several states, and hundreds of companies in between. Together, these companies serve more than 7 million households and businesses. All ACA members transact with Comcast, NBCU and their affiliates for "must have" cable and broadcast programming, and other popular and important video offerings.

combine the broadcast, cable programming, motion picture studio, theme park, and online content businesses of NBCU with the cable programming and certain online content businesses of Comcast."[3] Because the proposed combination involves such key assets, the ACA maintains and will demonstrate herein that, if consummated, it would significantly harm the public interest, including by having deleterious horizontal and vertical competitive effects, and it urges the Commission to not approve the proposed transaction without imposing remedies to address all the harms. In this filing, which includes an extensive economic analysis by Professor William P. Rogerson,[4] the ACA describes these harms in detail and with evidentiary support.

I. INTRODUCTION.

Because its 900 small and medium-sized cable companies either acquire programming from NBCU or Comcast or both, compete in the video programming distribution market with Comcast's cable systems, or, in select instances, both acquire programming and compete in distribution, the ACA has a substantial interest in this proceeding. More specifically, today, ***all*** ACA members transact, directly or indirectly, with the Applicants and their affiliates for access to broadcast and cable programming networks. These transactions include deals for carriage of "must have" programming, including NBC network broadcast programming, Comcast regional sports networks ("RSNs"), and suites of NBCU cable programming networks such as USA, Syfy, MSNBC, Bravo, CNBC, and Oxygen, and other core programming. All ACA members also transact with Comcast for carriage of its increasingly popular cable channels including Versus, E!, Golf and Style.

[3] *Public Notice* at 1.

[4] *See* William P. Rogerson, *Economic Analysis of the Competitive Harms of the Proposed Comcast NBCU Transaction* (June 21, 2010), attached hereto as Exhibit A ("*Rogerson*").

Further, more than 40 ACA members compete directly with Comcast cable systems – small companies going head-to-head with the nation's largest multichannel video programming distributor ("MVPD").

Viewed separately, Comcast and NBCU each wield substantial market power over ACA members in the upstream video programming market. As will be demonstrated in these comments, in combination, the market power of the Applicants in this market will increase materially. The Applicants will then exercise that market power over MVPDs that seek to acquire such programming for linear and online distribution. Additionally, the Applicants will have new incentives and abilities to significantly harm MVPDs that both compete directly with Comcast's cable systems and must bargain for NBCU programming. Smaller MVPDs and the customers in markets they serve are most vulnerable to these harms.

In today's market, losing carriage of an RSN, an NBC local broadcast station, or a suite of popular NBCU cable programming networks is significantly harmful to the prospects of smaller MVPDs and their customers. If the transaction is approved without sufficient relief, it would be many times more devastating. This is the core of the ACA's concern about the proposed combination.

As noted above, the proposed transaction is much more than a vertical integration of Comcast's cable assets with NBCU's programming assets. It involves a horizontal combination of programming assets that can then be employed vertically, threatening significant public interest harms to MVPDs and their customers:

> **Horizontal harms.** Combining control over "must have" Comcast RSNs and NBC broadcast programming creates the incentive and ability to raise costs for both types of programming, especially in markets where MVPDs distribute the signals of both a Comcast RSN and an NBC owned & operated local

television station ("O&O"). Further, Comcast/NBCU will gain control of NBCU's suite of national cable programming networks, which, when considered together, command even higher ratings than "must have" NBC broadcast programming. Through control of these "must have" bundles of programming, Comcast/NBCU's incentive and ability to raise fees extends to all Comcast RSN markets. Increasing costs for existing programming raises costs to consumers, weakens the ability of smaller MVPDs to compete, and drains company resources away from broadband deployment – all significant public interest harms the Commission must address.

Vertical Harms in Linear Programming Distribution. For smaller cable companies competing directly with Comcast, the proposed transaction would provide Comcast control of NBCU's programming assets and gives it additional incentive and ability to harm MVPDs that compete with Comcast's cable systems by increasing the cost of access to "must have" content and other popular channels. The consequences of raising rivals' costs are well established – prices increase, competition suffers, and consumers pay more – all significant public interest harms the Commission must address.

Vertical Harms in Online Distribution. The proposed transaction also threatens harms in the rapidly developing and complementary online marketplace where access to popular content will become critical for smaller MVPDs to compete. The same dynamics summarized above extend to online distribution of Comcast/NBCU-controlled programming, where the combined entity would have the incentive and ability to raise costs.

In these Comments, the ACA demonstrates that these harms are specific and substantial, and, as such, inevitably lead to the conclusion that the proposed transaction is contrary to the public interest and relief is warranted prior to the Commission approving the petition. In fact, the Applicants effectively admit that the proposed transaction raises significant public interest concerns and proffer their own, albeit inadequate, relief, simply proposing to apply current program access rules to retransmission consent negotiations. As detailed in these Comments, the program access and other voluntary commitments proposed by the Applicants do not address adequately, if at all, the substantial public interest harms threatened by this transaction. The ACA calls upon the Applicants to consider the concerns of small and medium-sized cable companies, and agree to undertakings that include meaningful constraints on the transaction-specific harms detailed in these Comments. If the Applicants do not do so, the Commission should not approve the transaction without imposing appropriate relief.

II. STANDARD OF REVIEW.

Under Section 310(d) of the Communications Act,[5] the Commission must determine whether the Applicants have demonstrated that the proposed transfer of control of certain FCC licenses and authorizations held by NBCU and Comcast as part of the proposed transaction will serve the public interest, convenience, and necessity.[6] In making this determination, the Commission must first assess whether the proposed transaction complies with the specific provisions of the Act, other applicable statutes, and the Commission's rules. If the proposed transaction would not violate a statute or rule, the Commission next must consider whether it could result in public interest harms by substantially frustrating or

[5] 47 U.S.C. § 310(d).

[6] Section 310(d) of the Act, 47 U.S.C. § 310(d), requires that the Commission consider applications for transfer of Title III licenses under the same standard as if the proposed transferee were applying for licenses directly under Section 308 of the Act, 47 U.S.C. § 308. *See, e.g.*, *In the Matter of Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, To Sirius Satellite Radio Inc., Transferee, MB Docket No. 07-57,* Memorandum Opinion and Order, 23 FCC Rcd 12348, 12363, ¶ 30 (2008) (*XM-Sirius Order*); *In the Matter of News Corp. and DIRECTV Group, Inc. and Liberty Media Corp. for Authority to Transfer Control*, 23 FCC Rcd 3265, 3276, ¶ 22 (2008) ("*Liberty Media-DIRECTV Order*"); *In the Matter of Applications for Consent to the Assignment and/or Transfer of Control of Licenses Adelphia Communications Corporation, (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees; Adelphia Communications Corporation, (and subsidiaries, debtors-in-possession), Assignors and Transferors, to Comcast Corporation (subsidiaries), Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corporation, Transferee*, Memorandum Opinion and Order, 21 FCC Rcd 8203, ¶ 23 (2006) ("*Adelphia Order*"); *In the Matter of SBC Comm. Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18290, 18300, ¶ 16 (2005) ("*SBC-AT&T Order*"); *In the Matter of Verizon Comm., Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18433, 18443, ¶ 16 (2005) ("*Verizon-MCI Order*"); *In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee*, MB Docket No. 03-124, Memorandum Opinion and Order, 19 FCC Rcd 473, 485, ¶ 18 (2004) (*News Corp.-Hughes Order*). *See also In the Matter of SkyTerra Communications, Inc., Transferor and Harbinger Capital Partners Funds, Transferee Applications for Consent to Transfer of Control of SkyTerra Subsidiary, LLC,* IB Docket No. 08- 184 et al., *Memorandum Opinion and Order and Declaratory Ruling,* DA 10-535, ¶ 10 (rel. Mar. 26, 2010).

impairing the objectives or implementation of the Communications Act or related statutes.[7] The Commission then employs a balancing test weighing any potential public interest harms of the proposed transaction against any potential public interest benefits.[8] The Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, will serve the public interest.[9] If the Commission is unable to find that the proposed transaction serves the public interest for any reason, or if the record presents a substantial and material question of fact, the application must be designated for hearing.[10]

The Commission's public interest evaluation necessarily encompasses the "broad aims of the Communications Act,"[11] which include, among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private sector deployment of advanced services, ensuring a diversity of license holdings, and generally managing spectrum in the public interest.[12] The Commission's public interest

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[7] *See, e.g.*, *XM-Sirius Order*, 23 FCC Rcd at 12364, ¶ 30; *Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3276-77 ¶ 22; *SBC-AT&T Order*, 20 FCC Rcd at 18300, ¶ 16; *Verizon-MCI Order*, 20 FCC Rcd at 18443, ¶ 16.

[8] *See, e.g.*, *XM-Sirius Order*, 23 FCC Rcd at 12364, ¶ 30; *Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3277, ¶ 22; *SBC-AT&T Order*, 20 FCC Rcd at 18300, ¶ 16; *Verizon-MCI Order*, 20 FCC Rcd at 18443, ¶ 16; *News Corp.-Hughes Order*, 19 FCC Rcd at 483, ¶ 15.

[9] *See, e.g.*, *XM-Sirius Order*, 23 FCC Rcd at 12364, ¶ 30; *Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3277 ¶ 22; *SBC-AT&T Order*, 20 FCC Rcd at 18300, ¶ 16; *Verizon-MCI Order*, 20 FCC Rcd at 18443, ¶ 16; *In the Matter of Application of EchoStar Communications Corporation (a Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Delaware Corporations) (Transferors) and EchoStar Communications Corporation (a Delaware Corporation) (Transferee)*, CS Docket No. 01-348, Hearing Designation Order, 17 FCC Rcd 20559, 20574, ¶ 25 (2002) (*EchoStar-DirecTV Order*).

[10] 47 U.S.C. § 309(e); *see also XM-Sirius Order*, 23 FCC Rcd at 12364, ¶ 30; *Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3277, ¶ 22; *Adelphia Order,* 21 FCC Rcd at 8217-18_¶ 23; *SBC-AT&T Order*, 20 FCC Rcd at 18300, ¶ 16; *Verizon-MCI Order*, 20 FCC Rcd at 18443, ¶ 16; *EchoStar-DirecTV Order*, 17 FCC Rcd at 20574, ¶ 25.

[11] *See, e.g.*, *XM-Sirius Order*, 23 FCC Rcd at 12364, ¶ 31; *Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3277 ¶ 23; *News Corp.-Hughes Order*, 19 FCC Rcd at 483, ¶ 16; *EchoStar-DIRECTV Order*, 17 FCC Rcd at 20575, ¶ 26.

[12] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 ("*1996 Act*"), *codified at* 47 U.S.C. § 157; 47 U.S.C. §§ 254, 332(c)(7); *1996 Act*, Preamble; *XM-Sirius Order*, 23 FCC Rcd at 12365, ¶ 31; *Liberty Media-DIRECTV Order,* 23 FCC Rcd at 3277-78, ¶ 23.

analysis may also entail assessing whether the transaction will affect the quality of communications services or will result in the provision of new or additional services to consumers.[13] In conducting this analysis, the Commission may consider technological and market changes, and the nature, complexity, and speed of change of, as well as trends within, the communications industry.[14]

The Commission's competitive analysis, which forms an important part of the public interest evaluation, is informed by, but not limited to, traditional antitrust principles.[15] The Commission and the DOJ each have independent authority to examine the competitive impacts of proposed communications transactions involving transfers of Commission licenses, but the standards governing the Commission's competitive review differ somewhat from those applied by the DOJ.[16] Like the DOJ, the Commission considers how a transaction will affect competition by defining a relevant market, looking at the market power of incumbent competitors, and analyzing barriers to entry, potential competition and the efficiencies, if any, that may result from the transaction. The DOJ's review, however, focuses on whether a transaction may substantially lessen competition or tend to create a monopoly.[17] Under the Commission's review, the Applicants must show that the transaction

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[13] *See, e.g., XM-Sirius Order*, 23 FCC Rcd at 12365, ¶ 31; *Liberty Media-DIRECTV Order,* 23 FCC Rcd at 3277-78, ¶ 23.

[14] *See, e.g., XM-Sirius Order*, 23 FCC Rcd at 12365, ¶ 31; *Liberty Media-DIRECTV Order,* 23 FCC Rcd at 3277-78, ¶ 23*.*

[15] *See, e.g.*, *XM-Sirius Order*, 23 FCC Rcd at 12365, ¶ 32; *Liberty Media-DIRECTV Order,* 23 FCC Rcd at 3278, ¶ 24; *Adelphia Order,* 21 FCC Rcd at 8218, ¶ 25; *News Corp.-Hughes Order*, 19 FCC Rcd at 484, ¶ 17; *EchoStar-DIRECTV Order*, 17 FCC Rcd at 20575, ¶ 27.

[16] *See, e.g.*, *XM-Sirius Order*, 23 FCC Rcd at 12365, ¶ 32; *Liberty Media-DIRECTV Order,* 23 FCC Rcd at 3278, ¶ 24; *Verizon-MCI Order*, 20 FCC Rcd at 18444, ¶ 18; *SBC-AT&T Order*, 20 FCC Rcd at 18302 ¶ 18. *See also In the Matter of Satellite Business Systems*, 62 FCC 2d 997, 1088 (1977), *aff'd sub nom. United States v. FCC*, 652 F.2d 72 (D.C. Cir. 1980) (*en banc*); *Northern Utilities Service Co. v. FERC*, 993 F.2d 937, 947-48 (1st Cir. 1993) (public interest standard does not require agencies "to analyze proposed mergers under the same standards that the Department of Justice . . . must apply").

[17] 15 U.S.C. § 18.

affirmatively will serve the public interest; otherwise the application is set for hearing. Whereas the DOJ's review is also limited solely to an examination of the competitive effects of the acquisition, without reference to other public interest considerations,[18] the Commission's competitive analysis under the public interest standard is somewhat broader.

The Commission's analysis recognizes that a proposed transaction may lead to both beneficial and harmful consequences.[19] For instance, combining assets may allow a firm to reduce transaction costs and offer new products, but it may also create market power, create or enhance barriers to entry by potential competitors, and create opportunities to disadvantage rivals in anticompetitive ways.[20] The Commission's public interest authority enables it, where appropriate, to impose and enforce narrowly tailored, transaction-specific conditions that ensure that the public interest is served by the transaction.[21]

Section 303(r) of the Communications Act authorizes the Commission to prescribe restrictions or conditions not inconsistent with law that may be necessary to carry out the provisions of the Act.[22] Indeed, unlike the role of antitrust enforcement agencies, the Commission's public interest authority enables it to rely upon its extensive regulatory and enforcement experience to impose and enforce conditions to ensure that the transaction will

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[18] *See, e.g.*, *XM-Sirius Order*, 23 FCC Rcd at 12366, ¶ 32.

[19] *See, e.g.*, *XM-Sirius Order*, 23 FCC Rcd at 12366, ¶ 33; *Adelphia Order,* 21 FCC Rcd 8219, ¶ 25; *SBC-AT&T Order*, 20 FCC Rcd at 18302, ¶ 18; *Verizon-MCI Order*, 20 FCC Rcd at 18444-45, ¶ 18.

[20] *See*, *e.g.*, *XM-Sirius Order*, 23 FCC Rcd at 12366, ¶ 33; *Liberty Media-DIRECTV Order,* 23 FCC Rcd at 3278-79, ¶ 25; *Adelphia Order,* 21 FCC Rcd 8219, ¶ 25.

[21] *See*, *e.g.*, *XM-Sirius Order*, 23 FCC Rcd at 12366, ¶ 33; *Liberty Media-DIRECTV Order,* 23 FCC Rcd at 3279, ¶ 26.

[22] 47 U.S.C. § 303(r); *see also XM-Sirius Order*, 23 FCC Rcd at 12366, ¶ 33; *Liberty Media-DIRECTV Order,* 23 FCC Rcd at 3279, ¶ 26; *U.S. v. Southwestern Cable Co*., 392 U.S. 157, 178 (1968) (holding that section 303(r) permits the Commission to order a cable company not to carry broadcast signal beyond station's primary market); *United Video, Inc. v. FCC*, 890 F.2d 1173, 1182-83 (D.C. Cir. 1989) (affirming syndicated exclusivity rules adopted pursuant to section 303(r) authority). Similarly, Section 214(c) of the Act authorizes the Commission to attach to the certificate "such terms and conditions as in its judgment the public convenience and necessity may require." 47 U.S.C. § 214(c); *see also SBC-AT&T Order*, 20 FCC Rcd at 18303 ¶ 19; *Verizon-MCI Order*, 20 FCC Rcd at 18445, ¶ 19.

yield overall public interest benefits.[23] Further, the Commission has held that it will impose conditions to remedy harms that arise from the transaction and that are related to the Commission's responsibilities under the Act and related statutes.[24]

For the reasons explained below, on balance, the proposed transaction threatens significant public interest harms that are not outweighed by the projected public interest benefits of the combination. Accordingly, should the Applicants fail to address these threatened harms, the Commission must consider the imposition of conditions to ensure that the transaction will be, on balance, consistent with the public interest.

III. THE PROPOSED TRANSACTION THREATENS SERIOUS PUBLIC INTEREST HARMS.

The proposed transaction involves both a horizontal combination of programming assets from Comcast and NBCU and a vertical integration of these assets with Comcast's distribution assets. Because these programming assets have been considered "must have" or equivalent thereto (*i.e.*, a source of market power), their combination raises significant anticompetitive concerns, which, as demonstrated below, will be employed by the combined entity to harm other MVPDs, particularly those in competition with Comcast's cable systems, and consumers. Not surprisingly, smaller MVPDs and the markets they serve are most vulnerable to these outcomes. These in essence are the critical public interest harms generated by the proposed combination from the perspective of the ACA and its members. In the following sections, the ACA will describe these harms in detail, providing evidence in support of their existence and magnitude.

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[23] *See, e.g.*, *XM-Sirius Order*, 23 FCC Rcd at 12366, ¶ 33; *Liberty Media-DIRECTV Order,* 23 FCC Rcd at 3279 ¶ 26; *News Corp.-Hughes Order*, 19 FCC Rcd at 477, ¶ 5; *see also Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1049 (7th Cir. 1992) (discussing Commission's authority to trade off reduction in competition for increase in diversity in enforcing public interest standard).

[24] *See, e.g.*, *Liberty Media-DIRECTV Order,* 23 FCC Rcd at 3279 ¶ 26; *SBC-AT&T Order*, 20 FCC Rcd at 18303, ¶ 19; *Verizon-MCI Order*, 20 FCC Rcd at 18445, ¶ 19.

A. "Must Have" Programming: The Key to Assessing Harms Arising from the Transaction.

Analysis of the competitive harms flowing from the proposed combination first requires an understanding of the video programming market and the Commission's determinations on "must have" programming. In 2002, the Commission reexamined the developments and changes in the MVPD marketplace in the 10 years since the enactment of Section 628. In the context of that review, the Commission recognized that "there is a continuum of vertically integrated programming, ranging from services for which there may be substitutes (the absence of which from a rival MVPD's program lineup would have little impact), to those for which there are imperfect substitutes, to those for which there are no close substitutes at all (the absence of which from a rival MVPD's lineup would have a substantial impact)."[25] The Commission found that an MVPD's ability to compete effectively with an incumbent cable operator is significantly harmed if it is denied access to "must have" vertically integrated programming, *i.e.*, programming for which there is no good substitute.[26] The Commission found that "certain programming services, such as sports programming, or marquee programming, such as HBO, may be essential and for all practical purposes, 'must haves' for program distributors and their subscribers…."[27]

Although the Commission has declined to adopt a generally applicable rule, it routinely considers RSNs to be "must have" programming.[28] As the Commission has noted, "the basis for the lack of adequate substitutes for regional sports programming lies in the

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[25] *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628(C)(5) of the Communications Act,* 17 FCC Rcd 12124, 12139 ¶ 33 (2002) ("*2002 Program Access Order*").

[26] *2002 Program Access Order*, 17 FCC Rcd at 12139, ¶ 33.

[27] *2002 Program Access Order*, 17 FCC Rcd at 12156, ¶ 69.

[28] *See, e.g., News Corp.-Hughes Order*, 19 FCC Rcd at 496-97, ¶ 44.

unique nature of its core component: RSNs typically purchase exclusive rights to show sporting events, and sports fans believe that there is no good substitute for watching their local and/or favorite team play an important game."[29] The Commission has evaluated several examples of the detrimental impact the withholding of RSNs has on the market share of MVPDs that do not carry such programming.[30] The "must have" status of RSNs is confirmed by the real-world experience of ACA's member companies. For example, Steve Friedman, Chief Operating Officer of Wave Broadband, which carries Comcast SportsNet Bay Area, Comcast SportsNet California, and Comcast SportsNet Northwest, states that it is a practical imperative that Wave carry Comcast's RSN in Wave's service territories.[31]

The Commission also has held that local broadcast station programming "is critical to MVPD offerings."[32] For example, in imposing retransmission consent conditions in the News Corp/DirecTV merger, the Commission found that "News Corp. currently possesses significant market power in the DMAs in which it has the ability to negotiate retransmission consent agreements on behalf of local broadcast television stations."[33] The Commission further stated that "[its] conclusions apply to any O&O station as well as any local broadcast station affiliate on whose behalf News Corp. negotiates retransmission consent

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[29] *Adelphia Order*, 21 FCC Rcd at 8258-59, ¶ 124 (*citing News Corp.-Hughes Order*, 19 FCC Rcd at 535, ¶ 133).

[30] *See, e.g., Adelphia Order*, 21 FCC Rcd at 8270-72, ¶¶ 146-151 (evaluating the impact of lack of access to certain RSNs in Philadelphia, Pennsylvania, San Diego, California, and Charlotte, North Carolina).

[31] Declaration of Steve Friedman, Chief Operating Officer, Wave Broadband, ¶ 6 ("*Friedman Declaration*"), attached hereto as Exhibit B. *See also* Declaration of Robert Gessner, President, Massillon Cable TV, Inc., ¶ 6 ("*Gessner Declaration*"), attached hereto as Exhibit C.

[32] *News Corp.-Hughes Order*, 19 FCC Rcd at 565, ¶¶ 201-202.

[33] *News Corp.-Hughes Order*, 19 FCC Rcd at 565, ¶ 201.

agreements."[34] Again, this conclusion is borne out by the experiences of ACA's small MVPD members.[35]

Although the Commission has never classified particular national cable networks or blocks of national cable networks as "must have" programming, it has clearly enunciated the principle that national cable networks of comparable popularity to the Big 4 networks (ABC, CBS, Fox, and NBC) and RSNs could also qualify as "must have" programming.[36] The Commission has noted that ownership of a national cable network or block of national cable networks with comparable ratings to those of the Big 4 networks or RSNs would likely convey a similar level of market power.[37] ACA's members confirm this conclusion. For example, Robert Gessner, President of Massillon Cable TV, Inc., states that "the NBCU cable networks USA, Syfy, Bravo, MSNBC, CNBC, The Weather Channel, Universal HD and the Olympic Games… are all cable channels that customers expect to have access to when they subscribe to Massillon's cable service."[38]

In evaluating program access issues the Commission has repeatedly recognized that the popularity of particular programming and the potential inability of competitive MVPDs to access that programming may significantly impede MVPDs' ability to provide commercially attractive MVPD service.[39] Moreover, the Commission has stated that, "While ratings are not a perfect predictor of consumer response to the withholding of a network, they do

[34] *News Corp.-Hughes Order*, 19 FCC Rcd at 565, n.577.

[35] *See Friedman Declaration*, ¶ 7; *Gessner Declaration*, ¶ 5.

[36] *See, e.g., In the Matter of Review of the Commission's Program Access Rules and Examination of Program Tying Arrangements*, First Report and Order, 25 FCC Rcd 746, 770 ¶ 34 (2010) ("*2010 Program Access Order*") (*citing In the Matter of Review of the Commission's Program Access Rules and Examination of Program Tying Arrangements*, Report and Order, 22 FCC Rcd 17791, 17816*,* ¶ 38 ("*2007 Program Access Order*")).

[37] *2007 Program Access Order*, 22 FCC Rcd at 17817-18,¶ 39.

[38] *Gessner Declaration*, ¶ 7.

[39] *See, e.g., 2010 Program Access Order*, 25 FCC Rcd at 770, ¶ 34; 2007 Program Access Order, 22 FCC Rcd at 17811, ¶ 30 and 17814-16, ¶¶ 37-38.

provide us with sufficient evidence to conclude that some nationally distributed networks are sufficiently valuable to viewers such that some viewers may switch to an alternative MVPD if the popular programming were not made available on their current MVPD."[40]

B. Programming and Distribution Assets: Overlaps and Integration from the Proposed Combination.

1. Programming Assets.[41]

NBCU. NBCU "is a preeminent media, entertainment, and communications company."[42] NBCU owns a significant repertoire of video programming assets, including the NBC Television Network, "the nation's first television broadcast network and home of one of the crown jewels of NBCU, NBC News," in addition to highly popular national cable networks.[43] As the Applicants explain, the "NBC Television Network's strength derives from combining NBC's strong national identity, the programming of its O&Os . . . and its more than 200 independently owned affiliated stations in communities across America."[44] NBCU owns and operates television network affiliates in New York City, Los Angeles, Chicago, Philadelphia, San Francisco, Washington, D.C., Dallas-Ft. Worth, Miami, San Diego, and Hartford and New Haven.[45] NBCU's broadcast assets also include Telemundo, the second-

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[40] *2007 Program Access Order*, 22 FCC Rcd at 17818, ¶ 39.

[41] In the *News Corp.-Hughes Order*, the Commission concluded that it "will separate the video programming products offered by News Corp. into three broad categories: (1) national and non-sports regional cable programming networks; (2) regional sports cable networks; and (3) local broadcast television programming." 19 FCC Rcd at 504, ¶ 60 (citations omitted). We agree with that determination, and will analyze the proposed transaction accordingly. As noted in Professor Rogerson's analysis and elsewhere in these Comments, for purposes of our analysis, the program offerings should be considered substitutes since the marginal value of a program is lower conditional on already carrying another program.

[42] *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses or Transfer Control of Licensees*, Applications and Public Interest Statement, at 26 (filed Jan. 28, 2010) ("*Application*").

[43] *Application* at 26.

[44] *Application* at 27.

[45] *Application* at 29.

largest U.S. Spanish-language broadcast network, which reaches 93 percent of U.S. Hispanic viewers.[46] NBCU's Telemundo network affiliates, available through 15 O&O stations and 45 broadcast affiliates are increasingly important channels for subscribers.[47] As for national cable programming networks, NBCU owns a large number of the most highly-rated national cable programming networks, including USA (1), Syfy (18), MSNBC, Bravo, mun2, Oxygen, and CNBC.[48] The sum of the primetime ratings for the top four NBCU national cable networks is 4.1,[49] compared to primetime ratings for the "Big 4" networks of 4.0 (CBS), 3.4 (Fox), 3.0 (ABC) and 2.8 (NBC).[50] Thus, the block of programming consisting of NBCU's top four cable networks has higher prime-time ratings than three of the Big 4 networks, including NBC itself.

Comcast. Like NBCU, Comcast owns a significant number of video programming networks. First and foremost, Comcast owns nine RSNs all of which are available in major metropolitan areas. These RSNs include Comcast SportsNet California, Comcast SportsNet Mid-Atlantic, Comcast SportsNet New England, Comcast SportsNet Northwest, Comcast SportsNet Philadelphia, Comcast Sports Southwest, Cable Sports Southeast, Comcast SportsNet Bay Area, and Comcast SportsNet Chicago. Comcast also

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[46] *Application* at 28.

[47] *Application* at 28.

[48] *See* Kevin Allocao, "Cable Network Ratings: FNC #2, MSNBC #26, CNN #32, HLN #37 in Prime", TVNEWSER (Mar. 16, 2010) (*citing* Top 30 Basic Cable Network Ratings for the week of 3/8/2010-3/14/2010 from Nielsen Media Research) ("*Basic Cable Network Ratings*"), *available at* http://www.mediabistro.com/tvnewser/ratings/cable_network_rankings_fnc_2_msnbc_26_cnn_32_hln_37_in_prime_155302.asp (last visited June 21, 2010). The Nielsen Media Research primetime ranking is in parenthesis.

[49] *See Basic Cable Network Ratings*. The primetime ratings for NBCU's four most popular national cable networks are: USA (1.9), SyFy (.8), Bravo (.8), and MSNBC (.6).

[50] *See* Bill Gorman, *It's Over! Final Broadcast Primetime Network Ratings for 2009-2010* Season, TV by the Numbers (May 28, 2010), *available at* http://tvbythenumbers.com/2010/05/28/its-over-final-broadcast-primetime-network-ratings-for-2009-10-season/52692 (last visited June 21, 2010).

owns national cable networks such as E! Entertainment (28), TV One, Versus, Style, The Golf Channel, and G4.[51]

2. Distribution Assets.

Comcast. In addition to its programming assets, Comcast is also the largest MVPD in the United States, providing cable service to 23.8 million customers in 39 states.[52] Comcast also leads the United States as the largest residential broadband provider, serving 15.7 million customers.[53]

C. Pre-Combination Market Power of NBC/NBCU/Comcast in Programming Markets.

As noted above, NBCU and Comcast each own significant video programming assets. These assets include NBC O&O broadcast stations, NBC's national cable networks, and Comcast's RSNs. Through these "must have" programming assets, NBCU and Comcast separately possess ample market power, especially when dealing with smaller MVPDs.[54]

Local broadcast television stations. NBCU controls 10 television broadcast stations (the O&Os) in 10 major metropolitan areas throughout the country.[55] Through affiliate agreements, NBCU also exerts substantial influence over an additional 200 NBC affiliate stations.[56] The Commission has concluded that Big 4 network local television

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[51] *See Basic Cable Network Ratings*. The Nielsen Media Research primetime ranking is in parenthesis.

[52] *Application* at 17. In examining the competitive harms from the proposed transaction, the Commission also needs to account for Comcast's attributable interest in US Cable of Coastal Texas, LP, MidContinent Communications, as well as Bresnan Broadband Holdings if the proposed sale of this property is not consummated. (*See Application* at n. 17.)

[53] *Application* at 19.

[54] *See, e.g.*, *Friedman Declaration*, ¶¶ 4-9.

[55] *Application* at 18,

[56] *Application* at 27.

station signals are critical "must have" programming for MVPDs and their customers, providing broadcasters with significant market power.[57]

For example, in imposing retransmission consent conditions in the News Corp./DirecTV merger, the Commission concluded that "carriage of local television broadcast station signals is critical to MVPD offerings."[58] The Commission found that "News Corp. currently possesses significant market power in the DMAs in which it has the ability to negotiate retransmission consent agreements on behalf of local broadcast television stations."[59] The Commission further stated that, "Our conclusions apply to *any O&O station* as well as any local broadcast station affiliate on whose behalf News Corp. negotiates retransmission consent agreements."[60] As the owner and operator of local broadcast stations in 10 major metropolitan areas, NBC possesses significant market power in the upstream market for video programming.

National cable programming networks. NBCU and Comcast each own multiple national cable networks. In evaluating program access issues, the Commission has noted "the popularity of the particular programming that is withheld and how the inability of competitive MVPDs to access that programming…may impact their ability to provide commercially attractive MVPD service."[61] Moreover, the Commission has stated that, "While ratings are not a perfect predictor of consumer response to the withholding of a network, they do provide us with sufficient evidence to conclude that some nationally distributed networks are sufficiently valuable to viewers such that some viewers may switch

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[57] *See News Corp.-Hughes Order*, 19 FCC Rcd at 565, ¶¶ 201-202.

[58] *News Corp.-Hughes Order*, 19 FCC Rcd at 565, ¶ 202.

[59] *News Corp.-Hughes Order*, 19 FCC Rcd at 565, ¶ 201.

[60] *News Corp.-Hughes Order*, 19 FCC Rcd at 565, n.577 (emphasis added).

[61] *2010 Program Access Order*, 25 FCC Rcd at 770, ¶ 34.

to an alternative MVPD if the popular programming were not made available on their current MVPD."[62]

As noted previously, the combined primetime ratings for NBCU's top four national cable networks during the week of March 8, 2010 was 4.1 – higher than the 2.8 primetime rating for the NBC broadcast network during the 2009-2010 ratings season.[63] The Commission should conclude that the aggregate market power associated with owning all of the NBCU national cable programming networks – the "NBCU bundle" – align to that of a national broadcast network.

Regional Sports Networks. Ownership of nine RSNs also confers significant market power on Comcast in major markets.[64] The Commission has concluded that "RSNs typically offer non-replicable content and are considered 'must have' programming by MVPDs."[65] The Commission has evaluated several examples of the detrimental impact withholding of RSNs have on the market share of MVPDs that do not carry such programming.[66] Through its ownership of nine RSNs with non-replicable content, Comcast clearly possesses significant market power.

D. The Proposed Combination of Programming Assets Will Significantly Increase Horizontal Market Power and the Proposed Combination of Programming and Distribution Assets Will Significantly Increase Vertical Market Power, Resulting in Transaction-Specific Harms, Especially for Smaller MVPDs and Their Consumers.

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[62] *2007 Program Access Order*, 22 FCC Rcd at 17818, ¶ 39.

[63] *Rogerson* at 10, n.15.

[64] *See Friedman Declaration*, ¶ 6.

[65] *2010 Program Access Order*, 25 FCC Rcd at 782, ¶ 52 (citations omitted).

[66] *See, e.g., Adelphia Order*, 21 FCC Rcd at 8270-72, ¶¶ 146-151 (evaluating the impact of lack of access to certain RSNs in Philadelphia, Pennsylvania, San Diego, California, and Charlotte, North Carolina).

The programming assets of NBCU and Comcast today provide each with significant amounts of market power. Combining these assets so that they are owned and controlled by a single entity will increase materially the bargaining power of the Comcast/NBCU entity. The proposed combination then will seek to extract this market power in selling this programming to MVPDs located in areas where these programming assets are supplied and especially to MVPDs in these areas that compete with Comcast cable systems.

1. Discussion of Horizontal Effects.

The Applicants contend that "the proposed transaction presents no 'horizontal' competitive concerns" because "the competitive overlaps between Comcast's and NBCU's businesses are extremely limited, and the combined company will continue to face vigorous competition in each market in which the parties' activities arguably overlap."[67] As to the market for cable video programming, the Applicants allege that "the proposed transaction will not materially increase concentration in the market for video programming supplied to MPVDs under any plausible market definition."[68] They then provide as support for this conclusory statement a brief discussion of concentration levels for national cable network programming.[69] The ACA strongly disagrees with the Applicants' analysis and conclusions regarding the horizontal effects of the proposed combination in the market for video programming supplied to MVPDs. In this section, it will explain the flaws in the Applicants' analysis and demonstrate that the horizontal harms that flow from the Applicants' enhanced market power from controlling "must have" programming are so significant that the proposed

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[67] *Application* at 89.

[68] *Application* at 90.

[69] *Application* at 90-92.

transaction should not be approved without the adoption of remedies to ameliorate these harms.

As explained below and in the accompanying analysis by Professor Rogerson, by combining control over Comcast's "must have" RSNs and NBCU's network programming, the post-transaction Comcast/NBCU will have the ability to command higher prices for both types of programming, especially in markets where MVPDs distribute both a Comcast RSN and an NBCU O&O station.[70] Higher programming fees will result in higher cable service subscription fees for consumers.[71] Further, through this transaction Comcast will gain control of NBCU's powerful suite of cable programming, which, when considered together with Comcast's existing cable programming, will command even higher ratings than "must have" NBCU network programming. Thus, through control of "must have" bundles, Comcast/NBCU will have the incentive and ability to raise prices beyond that which Comcast RSN and NBCU O&O stations could command in separate negotiations. Increasing MVPDs' costs for existing programming will raise prices to consumers, weaken the ability of smaller MVPDs to compete, and drain resources from broadband deployment – all significant public interest harms the Commission must address.

The basic theory of horizontal harm identified by Professor Rogerson is that combined ownership of the programming assets identified above will further increase the joint entity's bargaining power and allow it to charge higher fees for this programming.[72] These programming fee increases will be passed on as a matter of course to subscribers in

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[70] *See Rogerson* at 9-18.

[71] *See Friedman Declaration*, ¶ 14.

[72] *Rogerson* at 11.

the form of higher subscription prices.[73] Professor Rogerson notes that when a programmer and an MVPD negotiate the fee that the MVPD will pay the programmer, they basically are deciding how to divide the joint economic gains created from having the MVPD carry the programming.[74] Application of the standard modeling approach used in economic literature to this situation "immediately demonstrates that a programmer selling two different networks will be able to charge more by bundling the networks together so long as the networks are substitutes in the sense that the marginal value of either of the networks to the MVPD is lower conditional on already carrying the other network."[75]

Professor Rogerson offers an example to illustrate this point.[76] Assume that a MVPD can carry two networks and that it would earn a profit of $1.00 per subscriber if it carried just one of the networks and that it would earn a profit of $1.50 per subscriber if it carried both of the networks. Thus, the marginal value of adding a network is $1.00 if the other network is not being carried, but is only $.50 if the other network is already being carried. Stated differently, the marginal value to the MVPD of either network is lower conditional on already carrying the other network, *i.e.,* the two networks are "substitutes."[77] Also assume that each programmer's cost of providing the network is zero so that the joint gain if the MVPD carries the network is simply equal to the MVPD's profit and that the MVPD and the programmer have equal bargaining power such that they choose a price to evenly split the joint profit.[78]

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[73] *Rogerson* at 11. As Prof. Rogerson notes, the harm arises from the fact that the programming is under the combined control of the joint venture and the precise ownership shares of Comcast and GE in the joint venture are irrelevant. *Rogerson* at 11.

[74] *Rogerson* at 11.

[75] *Rogerson* at 11.

[76] *Rogerson* at 12-14.

[77] This does not mean that the MVPD only wishes to purchase one of the two programs.

[78] *Rogerson* at 12.

If two different programmers each own one of the two networks, when the MVPD negotiates with either of the two programmers, the marginal profit of adding a network will be equal to $.50 per subscriber and the negotiated fee will be $.25 (half of $.50).[79] The total fees paid for both networks will be $.50 ($.25 + $.25).[80] If the same programmer owns both networks, however, the joint profit of adding both networks is $1.50.[81] Therefore, so long as the programmer sells both networks together (*i.e.*, in a bundle), the negotiated fee will be $.75 (half of $1.50).[82]

Consequently, a single network owner will be able to negotiate higher total fees than will two independent network owners. As Professor Rogerson concludes, "The basic economic reason is simply that, when negotiations for each network occur separately, each programmer is only able to extract some share of the joint profit from adding the last network. However, when negotiations occur for a bundle of networks, the programmer is able to extract a share of the joint surplus from adding the entire bundle."[83] Standard economic principles provide that a significant share of any increase in programming fees will be passed through to subscribers in the form of higher subscription prices. Indeed, in the News Corp./DirecTV merger, the Commission itself acknowledged that higher programming fees are "passed on to consumers in the form of higher rates."[84]

Professor Rogerson's horizontal theory of harm can be tested by examining data on how combined ownership of multiple blocks of "must have" programming affects

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[79] *Rogerson* at 12.

[80] *Rogerson* at 12.

[81] *Rogerson* at 12.

[82] *Rogerson* at 12-13.

[83] *Rogerson* at 13.

[84] *News Corp.-Hughes Order*, 19 FCC Rcd at 566, 568, ¶¶ 204, 209.

programming fees. Here, NBCU's "must have" programming consists of retransmission consent rights for the NBC local television signal in the 10 areas served by an NBCU O&O station – and the block of NBCU's national programming.[85] Comcast's "must have" programming consists of its nine RSNs, which also are sold locally or regionally. Professor Rogerson observes that evidence from the market for retransmission consent offers the best available proxy for these transactions for NBCU and Comcast programming.[86] This is because retransmission consent markets involve transactions for must have networks in which the ownership or control of Big 4 networks varies either separately or jointly among DMAs.

To examine price differentials in retransmission consent markets based on separate or joint ownership or control, the ACA has gathered evidence from a number of sources. For example, cable operator Suddenlink Communications gathered evidence on how the magnitude of retransmission consent fees it pays for Big 4 stations is affected by the ownership/control of the stations. In a recent filing with the Commission, Suddenlink reported the following.

> Suddenlink has examined its own retransmission consent agreements and has concluded that, where a single entity controls retransmission consent negotiations for more than one "Big 4" station in a single market, the average retransmission consent fees Suddenlink pays for such entity's "Big 4" stations (in all Suddenlink markets where the entity represents one or more stations) is 21.6% higher than the average retransmission consent fees Suddenlink pays for other "Big 4" stations in those same markets. This is compelling evidence that an entity combining the retransmission consent efforts of two "Big 4" stations in the same market is able to secure a substantial premium by leveraging its ability to withhold programming from multiple stations.[87]

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[85] There are sufficient reasons to conclude that because of its substantial market presence, the entire group of NBCU's national cable networks would constitute "must have" programming.

[86] *Rogerson* at 14-15.

[87] *In the Matter of Mediacom Communications Corporation v. Sinclair Broadcast Group, Inc.*, Retransmission Consent Complaint, CSR-8233-C, CSR-8234-M, *Ex Parte* Comments of Suddenlink Communications, at 5 (filed Dec. 14, 2009).

Similarly, in the Commission's pending retransmission consent proceeding,[88] three small cable operators – CableAmerica, USA Companies, and Pioneer Telephone Cooperative – reported the variance in prices between negotiations involving one Big 4 station and those involving joint negotiations of two Big 4 stations. The operators reported that retransmission consent fees are 161%, 133%, and 30% higher, respectively, for Big 4 stations in the same DMA that are subject to joint control or ownership, than for separately owned or controlled broadcast affiliates.[89] To gauge the relevance of such increases, the ACA notes that the federal antitrust agencies generally consider that a proposed merger results in significant competitive harm when there is more than a 5% increase in price.[90]

Also, the United States Department of Justice ("DOJ") has initiated at least one antitrust action based on the theory that anti-competitive increases in retransmission consent fees will result from the combined control of multiple Big 4 broadcast stations in the same market. The DOJ alleged that three Big 4 broadcast stations in the Corpus Christi DMA illegally conspired to raise retransmission consent fees by jointly negotiating retransmission consent.[91] The matter was resolved when the three broadcast stations

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[88] *In the Matter of Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, Petition for Rulemaking, MB Docket No. 10-71 (filed Mar. 9, 2010).

[89] *In the Matter of Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, Petition for Rulemaking, MB Docket No. 10-71, *Ex Parte* of Cable America (filed May 28, 2010); *Ex-Parte* of USA Companies (filed May 28, 2010); and *Ex Parte* of Pioneer Telephone Cooperative (filed June 4, 2010). *See also* Kim McAvoy, *Virtual Duopolies Coming Under Fire*, TVNewsCheck, (June 9, 2010) (Commission's quadrennial media ownership proceeding may also examine allegations of small MVPDs that various forms of broadcaster negotiating alliances among two local broadcast television stations - "virtual duopolies" - are driving up the costs of retransmission consent), *available at* http://www.tvnewscheck.com/articles/2010/06/09/daily.2/ (last visited June 21, 2010).

[90] *See Horizontal Merger Guidelines*, U.S. Department of Justice and the Federal Trade Commission, Rev. Apr. 8, 1997, at 7, *available at* http://www.justice.gov/atr/public/guidelines/horiz_book/hmg1.html (last visited June 21, 2010).

[91] *See U.S. v. Texas Television, Inc., Gulf Coast Broadcasting Co., and K-Six Television, Inc.*, Complaint, (filed Feb. 2, 1996), *available at* http://www.justice.gov/atr/cases/f0700/0745.pdf (last visited June 21, 2010). *See*

entered into a settlement agreement to halt the practice and refrain from engaging in such practices in the future.[92]

Finally, in a recent comprehensive report on retransmission consent, the Congressional Research Service described a number of retransmission consent disputes and made the following observation while discussing programmer-distributor conflicts:

> In the earlier section presenting specific examples of programmer-distributor conflicts, it was striking how often the broadcaster involved in a dispute owned or controlled more than one broadcast station in a small or medium sized market. It appears that where a broadcaster owns or controls two stations that are affiliated with major networks, that potentially gives that broadcaster control over two sets of must-have programming and places a distributor, especially a relatively small cable operator, in a very weak negotiating position since it would be extremely risky to lose carriage of both signals.[93]

From this evidence, the Commission can readily conclude, as does Professor Rogerson, that the proposed combination would significantly increase the ability of Comcast/NBCU to increase programming costs for MVPDs, including ACA's members.[94]

As noted by Professor Rogerson, the horizontal harm of the NBCU/Comcast combination will be most significant in geographic areas served by an NBCU O&O station

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also U.S. v. Texas Television, Inc., Gulf Coast Broadcasting Co., and K-Six Television, Inc., Competitive Impact Statement, *available at* http://www.justice.gov/atr/cases/f0700/0746.pdf (last visited June 21, 2010).

[92] *See U.S. v. Texas Television, Inc., Gulf Coast Broadcasting Co., and K-Six Television, Inc.*, Final Judgment, (filed Feb. 2, 1996), available at: http://www.justice.gov/atr/cases/f0700/0748.htm (last visited June 21, 2010).

[93] Charles B. Goldfarb, CRS Report for Congress, *Retransmission Consent and Other Federal Rules Affecting Programmer-Distributor Negotiations: Issues for Congress*, RL 34078, at CRS-70 (July 9, 2007), *available at* http://www.policyarchive.org/handle/10207/bitstreams/19204.pdf (last visited June 21, 2010).

[94] It is important to note that in recent FCC proceedings, Comcast and one its economic experts, Professor Katz, have expressed serious concerns that joint ownership or control of multiple Big 4 stations in the same DMA may result in higher retransmission consent prices. *See In the Matter of Mediacom Communications Corporation v. Sinclair Broadcast Group, Inc*., Retransmission Consent Complaint, CSR-8233-C, CSR-8234-M, Comments of Comcast Corporation, Submission of Michael Katz, Jonathan Orszag, and Theresa Sullivan, "An Economic Analysis of Consumer Harm From the Current Retransmission Consent Regime" at 27 (filed Nov. 25, 2009) ("To the extent that broadcast stations entering into LMAs are substitutes from the perspective of MVPDs, such joint negotiations eliminate competition and raise the stations' bargaining power, which will result in consumer harm.").

and a Comcast RSN.[95] Professor Rogerson indicates there are 6 DMAs – Chicago, Philadelphia, San Francisco, Washington, D.C., Miami, and Hartford and New Haven – that are served by both an NBCU O&O station and a Comcast RSN and that these DMAs contain 13.8 million television households or 12.1% of all TV households.[96] Professor Rogerson adds that "[t]he horizontal harm may potentially [also] be significant in areas of the country served by a Comcast RSN but not served by an NBC O&O to the extent that the combined entity is able to raise programming fees by bundling the Comcast RSN along with the NBCU national cable networks."[97] Insofar that Comcast may someday negotiate retransmission consent on behalf of its NBC affiliates, the number of regions of the country where the NBCU/Comcast combination will result in significant horizontal harm will likely expand.

2. Discussion of Vertical Effects.

The proposed transaction further combines NBCU's programming assets with Comcast's cable systems. As such, it creates enhanced vertical integration which raises competitive concerns because Comcast can use these additional programming assets to raise fees (and harm) competing MVPDs. This concern is heightened because of the additional market power obtained by joining NBCU's programming assets with Comcast's RSNs.

The Commission has extensive experience in analyzing somewhat similar vertical combinations in recent media mergers. For instance, in the Comcast/Time

[95] *Rogerson* at 18.

[96] *Rogerson* at 18.

[97] *Rogerson* at 18.

Warner/Adelphia transaction, the Commission, in setting forth the economic theory of harm from the increased vertical integration, stated:

> [W]here a firm that has market power in an input market acquires a firm in the downstream output market, the acquisition may increase the incentive and ability of the integrated firm to raise rivals' costs either by raising the price at which it sells the input to downstream competitors or by withholding supply of the input from competitors.[98]

The Commission then concluded that these vertical effects were likely to result in public interest harm and adopted conditions to mitigate the harm.

The Commission also has been concerned with vertical effects in non-merger situations. In two program access proceedings, the Commission amassed empirical evidence to prove that withholding certain satellite-delivered programming from competitors "had a material adverse impact on competition in the video distribution market."[99] These instances involved Comcast's withholding of access to a Philadelphia RSN from DirecTV and DISH Network, and Cox's withholding of access to a San Diego RSN from AT&T, DirecTV, and DISH Network.[100] The Commission concluded that withholding access to the respective cable-affiliated RSN resulted in a 40 percent (Philadelphia) and 33 percent (San Diego) reduction in the anticipated percentage of television households that subscribed to DBS service.[101] These examples are not atypical. The ACA can point to other instances of vertically integrated programmers withholding access to certain content, including Cablevision's withholding of the HD feeds for the MSG and MSG+ New York RSNs from

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[98] *Adelphia Order*, 21 FCC Rcd at 8256, ¶ 117.

[99] *2007 Program Access Order*, 22 FCC Rcd at 17817, ¶ 39.

[100] *See Adelphia Order*, 21 FCC Rcd at 8270-72, ¶¶ 146-151 (evaluating the impact of lack of access to certain RSNs in Philadelphia, Pennsylvania and San Diego, California).

[101] *See Adelphia Order*, 21 FCC Rcd at 8270-72, ¶¶ 146-151.

Verizon in New York and AT&T in Connecticut.[102] As the Commission has recognized, "[V]ertically integrated cable programmers retain the incentive to withhold programming from their competitors."[103]

The Applicants are well aware of the competitive concerns caused by vertical effects. They have placed in the record a declaration from Drs. Israel and Katz in which these two economists use the methodology employed by the Commission in the News Corp./DirecTV Order to analyze the vertical effects in the proposed Comcast/NBCU combination. They conclude that "examination of available evidence supports the conclusion that the proposed Comcast/NBC/GE joint venture does not pose a significant threat of foreclosure."[104] The crucial problem with their declaration and this conclusion is that Drs. Israel and Katz did not analyze the transaction using the more practical methodology of competitive harms used by the Commission in the Comcast/Time Warner/Adelphia Order. Consequently, their conclusion concerning competitive harm, which is not without significant flaws, cannot be considered by the Commission as conclusive evidence that no harm will arise from the enhanced vertical integration that will result from the proposed combination. In the following sections, the ACA (and its economic expert, Professor Rogerson) instead applies the methodology used by the Commission in the more recent Comcast/Time Warner/Adelphia transaction to analyze the vertical effects, and demonstrates that, in fact, the proposed transaction results in vertical harms in the form of significant price increases. The consequences of increasing rivals' cost are well established – either competing MVPDs

[102] *See 2010 Program Access Order*, 25 FCC Rcd at 756-57, ¶ 17, n.57, n.58.

[103] *2007 Program Access Order*, 22 FCC Rcd at 17826-27, ¶¶ 50, 51.

[104] Mark Israel and Michael L. Katz, *Application of the Commission Staff Model of Vertical Foreclosure to the Proposed Comcast-NBCU Transaction*, Feb. 26,2010, at ¶ 4 (filed Mar. 5, 2010) (attached to Mar. 5, 2010 Letter from Michael H. Hammer to Marlene H. Dortch, MB Docket No. 10-56), *available at* http://fjallfoss.fcc.gov/ecfs/document/view?id=7020396280 (last visited June 21, 2010).

"eat" the additional costs or they pass them along to consumers.[105] In either event, competition suffers.

a. Economic theory shows how the proposed combination of "must have" programming and distribution, absent constraints, necessarily leads to higher prices and less competition.

Building upon the Commission's analysis of vertical effects in the News Corp./DirecTV merger and applying the methodology used in the Comcast/Time Warner/Adelphia transaction, Professor Rogerson describes the economic theory underlying the potential vertical harm:

> The vertical harm is that Comcast's ownership share in the joint venture combined with its ownership of its MVPD business will increase the joint venture's ability to bargain for higher programming fees for NBCU programming from MVPD rivals of Comcast. These fee increases will be substantially passed through to subscribers in the form of higher subscription fees.[106]

Professor Rogerson then goes on to explain the economic rationale in depth in a two step process:

> **Step #1: Comcast and the joint venture will coordinate their actions after the transaction to maximize their combined profit.**
>
> Standard economic theories that explain why a transaction that results in combined ownership of two vertically related firms will cause competitive harm rely on the prediction that, after the transaction, the two vertically related firms will choose actions that maximize their joint profits. If the transaction is a simple transaction, the transaction produces a single common owner of both firms, and it will obviously be in the direct interest of the single common owner to maximize combined profit. However, if the transaction results in partially overlapping ownership shares, as is the case in this transaction, the two firms will need to be able to redistribute profits between themselves in order for it to always be in their direct interests to maximize combined profits. Thus, in principle, one defense that the entities participating in such a transaction could offer is that the overlapping ownership shares will not be significant enough to

[105] *See Friedman Declaration*, ¶¶ 14-15; *Gessner Declaration*, ¶ 13.

[106] *Rogerson* at 19.

allow the parties to cooperatively coordinate their actions to maximize their combined profits.

I believe that this is a specious argument that the Commission should reject. The reason for this is that, in general, the type of close coordination that would be required to achieve any of the claimed efficiencies that a transaction would produce is exactly the same type of coordination that would be required for the firms to successfully engage in the anticompetitive actions that would produce vertical harms. That is, the proponents of a vertical transaction cannot have it both ways with respect to the issue of whether or not the transaction will allow the two entities to closely coordinate their actions to take advantage of profit maximizing opportunities. If the transaction will not allow close coordination, then the transaction will not produce any efficiencies and should not be approved. If the transaction will allow close coordination, then the transaction may potentially result in efficiencies but it must also necessarily result in the parties to the transaction taking advantage of opportunities to engage in coordinated anticompetitive behavior.[107]

Step #2: If the joint venture and Comcast take actions to maximize their combined profits, program fees that the joint venture charges to rivals of Comcast will increase.

The economic reason for this increase in programming fees is that the joint venture will take account of the fact that some of the customers of MVPDs that compete with Comcast would leave their current MVPD and switch to Comcast if NBCU programming were no longer available on their current MVPD. From an economic perspective, this means that the cost to the joint venture of providing NBCU programming to rivals of Comcast will be higher after the transaction because the joint venture will take account of the opportunity cost of Comcast's forgone profits from switching customers. Increases in opportunity cost have the same impact on programming fees as increases in direct cost. That is, if the transaction increases the opportunity cost to the joint venture of providing NBCU programming to rivals of Comcast by $x per subscriber per month, this will have the same impact on programming fees as would occur if NBCU was required to pay a tax of $x per subscriber per month when it sold programming to rivals of Comcast, or if the cost of

[107] *Rogerson* at 19-20. As Professor Rogerson notes, "The Commission has previously acknowledged this point in its analysis of the DirecTV- News Corp. transaction, which involved News Corp. purchasing a 34% interest in DirecTV which could be increased to 50%. One of the scenarios which the Commission considered in evaluating foreclosure incentives was the scenario where News Corp. made decisions to maximize the combined profits of both firms. It described one of the rationales for this decision as follows. 'The proposed joint endeavors between News Corp. and DirecTV that are a basis for many of the Applicants' claimed benefits provide ample opportunities to compensate News Corp. for the losses in programming revenue associated with foreclosure and make the strategy profitable to both firms and their stockholders.'" *Rogerson* at 20-21 (*citing News Corp.-Hughes Order*, 19 FCC Rcd at 633, *Appendix D, Staff Technical Analysis of the Likelihood of Foreclosure in the Broadcast Television Programming Market*, ¶ 7).

delivering programming to rivals of Comcast increased by $x dollars per subscriber per month. Standard economic theory predicts that an increase in cost will result in an increase in price.

> **Using standard economic theory to develop a formula to estimate the magnitude of harm.**
>
> In the absence of other information, a standard and well-accepted practice in economic theory is to predict that the negotiated price between a buyer and seller will rise by half the amount of any cost increase. This predicted outcome is usually referred to as the Nash bargaining solution. Therefore the most direct and natural method of estimating the likely effect of the transaction on programming fees is to begin by estimating the magnitude of the opportunity cost that will be created by the transaction. It is reasonable to project that programming fees will then rise by half this amount. [108]

As noted above, this methodology stands in contrast to that employed by the Applicants' economists, who take the approach that a merger should only be viewed as creating a significant vertical harm if the stand alone profit from withholding of programming would be positive after the merger. Such a condition is a sufficient condition for prices to rise, but it is clearly not necessary. As Professor Rogerson concludes:

> So long as a transaction increases the opportunity cost of providing programming to rivals, there will generally be an increase in programming fees regardless of whether or not the stand-alone profit from permanent or temporary withholding becomes positive. Therefore a finding that the stand-alone profit from permanent or temporary withholding of programming after the transaction would be negative does not provide any direct evidence on the likely magnitude of the programming fee increase that will be caused by the transaction. The only way to investigate this issue is to directly calculate the opportunity cost of providing programming to rivals that is created by the transaction.[109]

Professor Rogerson's calculations of the opportunity cost and magnitude of vertical harms are discussed in the next section.

b. Economic analysis shows that the proposed combination would result in significant vertical harms, which would be most

[108] *Rogerson* at 21-22.

[109] *Rogerson* at 23.

concentrated in markets where Comcast has a significant MVPD presence and would control an NBCU O&O.

In his analysis, Professor Rogerson estimates the effect of the enhanced vertical integration from the proposed transaction on the price that the new joint venture will charge for NBCU programming to three types of unaffiliated MVPDs: (i) DBS providers and the two largest local telephone providers of video programming (AT&T and Verizon); (ii) other incumbent cable operators; , and (iii) cable overbuilders, which include broadband service providers and local exchange carriers (LECs), who distribute video programming and compete with incumbent operators.[110] The basis of Professor Rogerson's calculation of this effect is that the per subscriber opportunity cost of selling programming to subscribers of a MVPD competing with a Comcast cable system is equal to the share of customers that would switch to the competitor multiplied by the profit per subscriber that the Comcast cable system would earn on every customer who switches.[111] As indicated above, the estimated price increase to the competing MVPD is equal to half the value of the increased opportunity cost created by the merger. Professor Rogerson uses publicly available data to determine reasonably plausible parameter values and then calculates a "reasonably plausible initial estimate of the likely effect of the vertical transaction on programming fees."[112]

Of the 10 DMAs with NBC O&Os, Comcast cable systems are a significant presence in six of those markets – markets that make up 13.8 million TV households, or 12.1% of all TV households in the country.[113] Using these figures and data from industry analysts and other public sources regarding video direct gross profit for Comcast and the effects of

[110] *Rogerson* at 35.

[111] When it makes its own calculations of the effects, the Commission should include as Comcast cable systems all systems in which it has an attributable interest. *See supra* note 52.

[112] *Rogerson* at 30.

[113] *Rogerson* at 37.

withdrawal of programming,[114] Professor Rogerson calculates that, as a result of the proposed transaction, the following harms (price increases) will occur:

Acquisition of NBC O&O Programming (Retransmission Consent) by DBS and the Largest Telephone Providers. The opportunity costs to NBC of providing these rival MVPDs with retransmission consent in those six DMAs will increase by between $.92 and $1.50 per subscriber per month,[115] resulting in an increase in retransmission consent fees for NBC O&O broadcast stations of between $.46 and $.75 per subscriber per month.[116] With many analysts already predicting retransmission consent fees for the Big 4 broadcast stations to rise to between $.50 and $.75 per subscriber per month over the next few years, the vertical effect of the proposed transaction in the six DMAs served by an NBC O&O where Comcast has a significant presence will essentially be a doubling of retransmission consent fees that the NBC O&O broadcast station can command through retransmission consent negotiations.[117]

Acquisition of NBCU Networks by DBS and the Largest Telephone Providers. For the provision of NBCU networks, Professor Rogerson calculates that fees to satellite TV providers and the two largest telcos would increase post-transaction by $.28 per subscriber per month – or 18%.[118] The reason these increases are smaller than the retransmission consent fee increases is that the DBS

[114] *Rogerson* at 30-32. Comcast's video direct gross profit was taken from Bernstein Research and for 2009 was $42.98 per subscriber per month. The program withdrawal parameter was calculated by Professor Rogerson using evidence gathered by the United States General Accounting Office.

[115] *Rogerson* at 37.

[116] *Rogerson* at 37.

[117] *Rogerson* at 37.

[118] *Rogerson* at 38.

providers and the largest telephone providers offer service to a significant number of households in all or many markets across the country, including some areas where Comcast is not located.

Acquisition of NBC O&O and NBCU Programming by Cable Overbuilders. For these broadband service providers and smaller local exchange carriers (LECs), Professor Rogerson calculates, "If 100% of a cable overbuilders' customers were passed by Comcast, this would produce a fee increase of $.66 per subscriber per month. An increase of this magnitude would represent more than a 100% increase over a retransmission consent fee of $.50 and a 42% increase over a program fee of $1.56 per subscriber per month for a bundle of NBCU national cable networks."[119] However, the fee increases would still be significant even in instances where the share of a cable overbuilder's customers that are passed by Comcast is less than 100%. For instance, 44% of RCN's subscribers are passed by Comcast, which would results in a 58% increase over the $.50 retransmission consent charge and a 19% increase over the $1.56 NBCU national cable networks bundle.[120] As noted earlier, the federal antitrust agencies generally consider that a proposed merger results in significant competitive harm when there is more than a 5% increase in price.

In their Application and Public Interest Statements, the Applicants aver that a "vertical combination cannot have anticompetitive effects unless the combined company has substantial market power" in the programming or distribution markets.[121] The ACA does not disagree. However, it is evident that in fact substantial market power attaches to programming assets of both NBCU and Comcast and that in at least six DMAs Comcast's

[119] *Rogerson* at 40.

[120] *Rogerson* at 40.

[121] *Application* at iv.

cable systems are the dominant MVPD. Consequently, the proposed combination produces vertical harms of sufficient significance that the Commission should not approve the application without adopting measures to offset these harms.[122]

c. Vertical harms to competing MVPDs extend to Online Distribution.

Today, more than 26 percent of U.S. households subscribe to a broadband Internet service.[123] The Commission recognized in its Thirteenth Annual Video Competition Report that the amount of video programming provided over the Internet continues to increase significantly each year.[124] More recent studies confirm this trend.[125] Recent measurements by comScore Media Metrix indicate record levels of Internet video viewing: nearly 178 million U.S. Internet users viewed a total of 33.2 billion videos online (averaging 187 videos per viewer) during the month of December 2009.[126] According to comScore, the average

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[122] The ACA notes that as part of the proposed transaction the new Joint Venture will acquire NBCU's expansive 4000-film library, as well as its major motion picture studio that annually produces and/or distributes about 20 films a year. *See Application* at 31. Just as it is concerned about other vertical effects, the ACA is concerned that if the proposed transaction is consummated, the Joint Venture will have an increased incentive and ability to discriminate against competing MVPDs in making NBCU's film library and upcoming releases available, particularly as a video-on-demand (VOD) product. Moreover, this discrimination could extend to prices, terms, and conditions, including "windows" – the time frames during which new releases are made available to MVPD subscribers on the VOD platform.

[123] *See* Organisation for Economic Co-Operation and Development (OECD), Information and Communications Technologies, *Total Broadband Subscribers by Country* (Dec. 2009), *available at* http://www.oecd.org/dataoecd/22/15/39574806.xls (last visited June 21, 2010).

[124] *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542, 549, 613-19, ¶¶ 17, 150-161 (2009) ("*Thirteenth Annual Video Competition Report*").

[125] Charles B. Goldfarb, Congressional Research Service, "The Proposed Comcast-NBC Universal Combination: How it Might Affect the Video Market," CRS Report for Congress R41063 (Feb. 2, 2010) at 5 ("*CRS Comcast-NBCU Report*").

[126] comScore Video Metrix, Press Release, US Online Video Market Continues Ascent as Americans Watch 33 Billion Videos in December, (Feb. 5, 2010), *available at* http://www.comscore.com/Press_Events/Press_Releases/2010/2/U.S._Online_Video_Market_Continues_Ascent_as_Americans_Watch_33_Billion_Videos_in_December (last visited June 21, 2010) ("*Video Metrix Press Release*").

Hulu viewer watched 22.9 videos during the month, totaling 2.2 hours of video per viewer, "representing another all-time high for the property."[127]

The Applicants recognize this trend and discuss in their filing the fact that high-quality video content is increasingly being distributed online by traditional, new media and user-generated sources,[128] and "[a]ny relevant market(s) for online video distribution would share many characteristics with the market(s) for traditional video programming."[129] The ACA agrees. "Must have" video programming will retain its "must have" nature regardless of the distribution platform. Further, MVPDs are developing sophisticated business strategies to permit their existing video subscribers to access the same content online. Thus, the rapidly accelerating movement of video programming online as a complement to existing offerings will make online access to "must have" broadcast and cable video programming essential for competing MVPDs. As a result, the concerns about the vertical harms of the transaction discussed above with respect to MVPD distribution networks extend to the evolving online marketplace. It is clear that by controlling such a significant amount of "must have" programming post-transaction, the combined entity would have the incentive and ability to use this newfound market power to either withhold content from competitors or impose higher fees or other unreasonable conditions for carriage.

A recent experience of the mid-sized MVPD, WOW!, which competes with Comcast cable systems, illustrates the potential online vertical harms to competition and consumers posed by the combination of the key programming assets of Comcast and NBCU. WOW! would like to initiate its own version of Comcast's "Fancast Xfinity TV" to expand online

[127] *Video Metrix Press Release*.

[128] *Application* at 4.

[129] *Application* at 88.

access to programming available to current subscribers of its MVPD service at no additional charge.[130] However, WOW!'s ability to initiate this online offering had been hampered, according to its President and CEO, Colleen Abdoulah, by its inability to obtain content from Comcast and other content providers with whom Comcast has struck online distribution deals.[131]

The Applicants' economists submitted an analysis of the effect of the proposed transaction on online video distribution. They conclude that "the majority of online video distribution today is complementary to the services offered by traditional" video distributors and that "application of the Commission staff's foreclosure methodology indicates that online foreclosure would be unprofitable."[132] The ACA does not disagree with the conclusion concerning the complementary nature of today's online video offerings. The ACA, however, disagrees that the proposed transaction would not generate harms connected to online distribution. First, as noted above, the Applicants' economists rely on the far too stringent test of vertical effects employed by the Commission in the News Corp./DirecTV proceeding.

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[130] According to the Applicants, the "TV Everywhere model was 'designed to be simple and attractive for any programmer and any video distributors to elect to adopt.'" *Application* at 59, n.100.

[131] *See* Testimony of Colleen Abdoulah, President and Chief Executive Office, WOW!, Board Member, American Cable Association, Before the Senate Committee on Commerce, Science & Transportation, *Consumers, Competition and Consolidation in the Video and Broadband Market*, March 11, 2010, at 9 ("*Abdoulah March 11th Senate Testimony*"), *available at* http://commerce.senate.gov/public/?a=Files.Serve&File_id=f210b5aa-bd46-48e5-a175-86e2acef32c0 (last visited June 21, 2010); Testimony of Colleen Abdoulah, President and Chief Executive Office, WOW!, Board Member, American Cable Association, Before the Senate Committee on Antitrust, Competition Policy and Consumer Rights, *The Comcast/NBC Universal Merger: What does the Future Hold for Competition and Consumers?*, February 4, 2010, at 5 ("*Abdoulah February 4th Testimony*"), *available at* http://judiciary.senate.gov/pdf/10-02-04%20Abdoulah%20Testimony.pdf (last visited June 21, 2010). In her Senate Testimony, Ms. Abdoulah noted that following her February 4th testimony before the Senate Committee on Antitrust, Competition Policy and Consumer Rights, Comcast had been willing to engage in talks for the online rights to their content, but that consummation of a deal remains uncertain. *Abdoulah March 11th Senate Testimony* at 9.

[132] Mark Israel and Michael L. Katz, *The Comcast/NBCU Transaction and Online Video Distribution*, MB Docket No. 10-56, at 2-4 (attached to May. 4, 2010 Letter from Michael H. Hammer to Marlene H. Dortch, MB Docket No. 10-56), *available at* http://www.comcast.com/nbcutransaction/pdfs/ISRAEL%20KATZ%20-%20Public%20Version%20Stamp%20In.pdf (last visited June 21, 2010).

The more appropriate test is the opportunity cost approach discussed above and in Professor Rogerson's declaration. Second, the Applicants' economists' analysis does not address the circumstance of a competing MVPD seeking to obtain access to content for the additional purpose of distribution online – as was discussed in the instance of WOW! Here the analysis used by Professor Rogerson for access to content for traditional video distribution would hold. In fact, the concerns are almost certain to be greater since Comcast's profits from video distribution would increase and competing DBS MVPDs are unlikely to offer a sufficient broadband service, which would mean that subscribers lost by a competing MVPD like WOW! would migrate to Comcast in much greater numbers.

In sum, as a result of the transaction, Comcast/NBCU will have both the incentive and ability to demand supra-competitive prices from competing MVPDs for access to Comcast/NBCU "must have" content online. If providers such as WOW! must pay the combined Comcast-NBCU supra-competitive prices for content or must accept anti-competitive terms and conditions, they will have little choice but to either raise prices for customers far above what would occur in competitive markets or limit the content they acquire from other suppliers, including smaller independent programming providers.

IV. EXISTING PROGRAM ACCESS RULES AND PREVIOUS MERGER CONDITIONS ARE INADEQUATE TO ADDRESS THE RISKS OF HARM IN THE PROPOSED TRANSACTION.

A. Existing Program Access Rules Provide Insufficient Protection.

The Applicants argue that the existing program access regulations will protect against any harms of transaction-specific programming cost increases.[133] Even with Comcast and NBC volunteering to make the retransmission consent arrangements subject

[133] *Application* at 116-17. It should be noted that the Applicants propose no conditions to ameliorate the horizontal harms described in these Comments.

to the rules as well, the ACA disagrees. The ACA's members have extensive experience negotiating program access arrangements with suppliers and with seeking to use the program access rules to ensure small cable operators are able to receive a fair bargain. In brief, the rules and implementing regulations are flawed, leaving small operators with few, if any remedy when dealing with vertically integrated suppliers of programming who demand discriminatory prices, terms, and conditions, and engage in other types of behavior barred by the rules.[134] Given that this proposed transaction creates substantial horizontal and vertical harms related to program access, the Commission cannot simply fall back on the current program access rules or even the conditions adopted as part of earlier media mergers that involved vertical integration. Rather, the Commission should conclude that the program access rules and regulations are inadequate for the following four reasons, especially for smaller MVPDs.

1. The "quantity discount" loophole eliminates any protection from unreasonable rates, terms and conditions for smaller competitors.

The program access regulations generally prohibit discrimination in prices, terms, and conditions of access to vertically-integrated programming.[135] However, the lack of publicly available systematic information regarding the magnitude of volume discounts in the programming market creates a significant enforcement problem for program access rules, leaving smaller MVPDs particularly vulnerable to abuse.

Despite the universal use of non-disclosure clauses in programming deals, it is generally undisputed by industry participants that carriage agreements exhibit relatively significant quantity discounts. ACA members report that smaller cable operators pay

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[134] *See Abdoulah March 11th Senate Testimony* at 10 ("WOW! is particularly concerned that the processes associated with pursuing a program access complaint (or any similar matter before the FCC or an arbitrator) are so burdensome and resource-intensive that any rights we might have are effectively nullified.").

[135] 47 C.F.R. § 76.1002(a), (b).

approximately 30% more for national cable programming than the largest MVPDs, a conclusion that Professor Rogerson affirms using industry sources.[136] While a small fraction of this differential may be explained by a difference in the cost of delivery, Professor Rogerson states that the chief reason is that smaller MVPDs simply have "considerably less bargaining strength."[137] This, of course, places these smaller MVPDs at an extreme disadvantage in the distribution market.

Without publicly available systematic data about the degree of volume discounts in the marketplace, the program access rules are difficult to enforce. A vertically-integrated programmer will always have a "volume-related" justification to charge smaller competitors discriminatory prices by claiming benefits attributable to differences in the number of subscribers served.[138] In practice, the Commission has rarely reached a finding that anticompetitive price discrimination has occurred in instances when a larger vertically integrated programmer charges its affiliated MVPD lower prices than a smaller rival MVPD. The ACA is aware of only two such decisions, one in 1997 and one in 1998,[139] and in

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[136] *Rogerson* at 42, n. 50.

[137] *Rogerson* at 42.

[138] The prohibition against discrimination remains subject to the following exception:

> Vendors may use volume-related justifications to establish price differentials to the extent that such justifications are made available to similarly situated distributors on a technology-neutral basis. When relying upon standardized volume-related factors that are made available to all multichannel video programming distributors using all technologies, the vendor may be required to demonstrate that such volume discounts are reasonably related to direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor if questions arise about the application of that discount. In such demonstrations, vendors will not be required to provide a strict cost justification for the structure of such standard volume-related factors, but may also identify non-cost economic benefits related to increased viewership.

Note to 47 C.F.R. § 76.1002(b)(3).

[139] *See In the Matter of Corporate Media Partners d/b/a Americast and Ameritech New Media, Inc. v. Rainbow Programming Holdings, Inc.*, CSR-4873-P, DA 97-2040, 12 FCC Rcd 15209 (1997); *In the Matter of Turner Vision, Inc., Satellite Receivers, Ltd, Consumer Satellite Systems, Inc., and Programmers Clearing House, Inc.,*

neither case nor in other orders has the Commission explicitly described the approach that it would take to dealing with this problem.

Since Comcast is the largest MVPD in the nation, and vastly larger than any ACA member, the program access rules will be particularly ineffective in preventing the combined entity from charging high discriminatory prices to its MVPD competitors. More specifically, Professor Rogerson concludes that "to the extent that program access rules allow Comcast to charge higher prices to MVPDs smaller than itself, program access rules will place no restriction at all on the retransmission consent prices that Comcast will be able to charge its rivals" in the six DMAs where there is both an NBC O&O and where Comcast is the most significant cable operator. Similarly, program access rules will place no constraint on the fees that Comcast charges other MVPDs for national cable networks.[140]

2. Because complainants are not assured carriage while disputes are heard, the program access complaint process offers no practical remedy for aggrieved MVPDs.

The program access rules do not provide automatic access to programming while a program access complaint is pending, which is typically for a period of 6 months or more. For a rival MVPD seeking access to new programming, this structure creates the incentive for a vertically integrated programmer to drag out the proceedings. For a rival MVPD seeking to renew an existing agreement, this structure exposes the complainant to the risks of temporary withdrawal. Professor Rogerson states, relying on previous Commission decisions, that "temporary withdrawals of programming lasting much shorter periods than six months can cause significant long-term harm to an MVPD because dissatisfied customers

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v. Cable News Network, Inc., CSR-4676-P. DSR-4677-P, CSR-4678-P, CSR-4706, DA 98-1295, 13 FCC Rcd 12610 (1998).

[140] *Rogerson* at 44.

leave during the temporary withdrawal and, once they have signed up with a new MVPD, are highly unlikely to return when carriage is restored."[141] Thus, even if an MVPD has a "winning" program access complaint, it will likely agree to accept the vertically-integrated programmer's unfair price, to avoid the even higher cost of losing access to the programming during the pendency of the proceedings. In the end, this flaw in the process effectively results in higher programming prices. The Commission must resolve it for any remedies to be effective in addressing the harms to competition caused by the proposed combination.

3. It is uncertain whether the program access rules apply to vertically-integrated online programming.

As discussed above, the ability to offer vertically integrated programming online is becoming an increasingly important component of MVPD offerings, with Comcast leading the industry with its Fancast Xfinity TV product. Many ACA members believe these complementary online offerings will become a standard part of their bundled offerings, without which they will be unable to compete. Yet, as demonstrated above in the discussion on vertical harms and as discussed by Professor Rogerson, the Comcast/NBCU entity "will have the same incentives to disadvantage rival MVPDs when providing them with rights to use their programming for TV Everywhere-type online distribution services as when providing them with rights to use their programming for traditional MVPD service."[142] The problem is that it is not clear that the program access rules apply to such online transactions. The Commission recently suggested that the program access regulations could apply to

[141] *Rogerson* at 45.

[142] *Rogerson* at 46.

different types of programming offerings,[143] but the question remains unsettled, and is unlikely to be settled at the time the Commission acts on the proposed transaction. Even if the Commission extended the program access rules to online programming distributors, however, the substantive and procedural problems discussed above, if not addressed as well, eliminate any utility of the regulations in protecting smaller MVPDs who wish to develop their own "TV Everywhere" offerings.

4. The program access rules do not prevent Comcast/NBCU from raising its rival MVPDs' rates by simply charging itself supra-competitive fees for the same programming.

A final problem with the program access rules is that they cannot prevent the joint venture from circumventing the ban on charging its rivals discriminatory programming fees by simply charging itself supra-competitive prices. Professor Rogerson finds that "vertically integrated firms who wish to charge high discriminatory prices to rival MVPDs may be able to do so without violating program access rules simply by raising the internal transfer price they charge themselves to the same high level, and then instructing their downstream divisions to continue to purchase the integrated programming at the artificially high internal transfer price."[144] The Commission is familiar with this issue, expressing the concern about transfer pricing in both the News Corp.-DirecTV Order[145] and in the Comcast/Time Warner/Adelphia Order. In the latter decision, the Commission concluded:

> [A] vertically integrated firm could disadvantage its downstream competitors by raising the price of an input to all downstream firms (including itself) to a level greater than that which would be charged by a non-vertically integrated supplier of the input. Such non-discriminatory pricing is not prohibited by the

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[143] *2010 Program Access Order*, 25 FCC Rcd at 785, ¶ 55, n.219 ("we will treat other terrestrially delivered formats of programming, such as VOD, 3D, and other new formats, as distinct services subject to the rules established in this *Order.*").

[144] *Rogerson* at 46.

[145] *News Corp.-Hughes Order*, 19 FCC Rcd at 551, 569, ¶¶ 170, 211.

> Commission's program access rules . . . The vertically integrated MVPD could then enjoy a competitive advantage, because the higher price for the programming that it would pay would be an internal transfer that it could disregard when it sets its own prices.[146]

Unless this well-known shortcoming of the program access rules is adequately addressed, these rules cannot remedy the harms of the Comcast/NBCU joint venture.

B. Conditions Like Those Imposed In Previous Transactions Provide Insufficient Protection.

In two transactions combining distribution and content assets, News Corp./DirecTV and Comcast/Adelphia/Time Warner, the Commission imposed additional conditions to buttress program access regulations. Key conditions included:

- Baseball-style arbitration for deadlocked retransmission consent and RSN negotiations.[147]
- A stand-still provision, *i.e.*, continued carriage pending resolution of arbitration.[148]
- Retransmission consent for affiliated stations with no additional consideration for cable companies serving less than 5,000 subscribers.[149]
- For small cable companies, a bargaining agent, like the National Cable Television Cooperative, had the right to negotiate and arbitrate on behalf of the companies.[150]

In adopting these conditions, the FCC expressly acknowledged that the program access rules imposed insufficient constraints to adequately protect against the harms to competition

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[146] *Adelphia Order*, 21 FCC Rcd at 8257, ¶ 119 (citations omitted).

[147] *News Corp.-Hughes Order*, 19 FCC Rcd at 677-83, *Appendix F, Conditions*; *Adelphia Order*, *Appendix B, Remedies and* Conditions, 21 FCC Rcd at 8337-39.

[148] *News Corp.-Hughes Order*, 19 FCC Rcd at 677, *Appendix F, Conditions*; *Adelphia Order*, *Appendix B, Remedies and Conditions,* 21 FCC Rcd at 8337.

[149] *News Corp.-Hughes Order*, 19 FCC Rcd at 682, *Appendix F, Conditions.*

[150] *News Corp.-Hughes Order*, *Appendix F, Conditions*, 19 FCC Rcd at 682; *Adelphia Order*, *Appendix B, Remedies and Conditions,* 21 FCC Rcd at 8339.

and consumers of combining significant distribution assets with "must have" content,[151] particularly recognizing that smaller MVPDs are especially vulnerable to abuse.[152]

While these conditions were important steps, the industry and the Commission have now had six years experience from which to evaluate their utility in a proposed combination like Comcast/NBCU. Careful evaluation of the conditions must lead the Commission to conclude that simply applying them as is to the Comcast/NBCU transaction would be insufficient, especially for small and medium-sized MVPDs.

In attempting to address the vertical harms of previous transactions, the Commission was not illogical in availing rival MVPDs that purchase certain classes of programming from a vertically-integrated entity the right to request binding arbitration with mandatory interim carriage.[153] In fact, Professor Rogerson says with regard to the Comcast/NBCU transaction, "This would be a reasonable condition for the Commission to consider adopting in this transaction as well. An additional advantage of this type of condition for this particular transaction is that it might also help address the horizontal harm. That is, such a condition might counteract to some extent the increase in horizontal market power created by the transaction."[154]

However, as ACA members have discovered and Professor Rogerson observes, binding arbitration as it has been previously implemented has not proven to be a cost effective remedy for small and medium-sized MVPDs. The cost of AAA arbitration, which involves participating in multiple hearings and producing evidence of market rates and

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[151] *News Corp.-Hughes Order*, 19 FCC Rcd at 551, ¶ 169; *Adelphia Order*, 21 FCC Rcd at 8257, ¶ 119.

[152] *News Corp.-Hughes Order*, 19 FCC Rcd at 552-53, ¶ 176; *Adelphia Order*, 21 FCC Rcd at 8257, ¶ 119.

[153] *See, e.g., News Corp.-Hughes Order*, 19 FCC Rcd at 552-55, ¶¶ 172-177; *Adelphia Order*, 21 FCC Rcd at 8284, 8287-88, ¶¶ 181, 189-191, *Appendix B, Remedies and Conditions*, 21 FCC Rcd at 8337-39.

[154] *Rogerson* at 50.

typically requires assistance from attorneys and economists, is substantial. Colleen Abdoulah, the CEO of the cable system operator WOW!, which serves 465,000 customers, recently testified before Congress that her company considered arbitration as an option to resolving a pricing dispute with Comcast for one of their RSNs and "determined the cost of the process was likely to exceed $1 million, take one year or longer, and require key personnel to take large amounts of time from their regular jobs."[155] Because the costs of undertaking an arbitration are relatively fixed regardless of the MVPD's size, and the potential benefits of arbitration – lower per subscriber programming rates– are directly related to the number of subscribers served by an MVPD, the appeal of engaging in a full-scale arbitration proceeding becomes gradually less attractive to an MVPD as its subscribership decreases. Even for WOW!, a mid-sized operator, after analyzing the potential costs and benefits, the company concluded, "the costs of using arbitration were going to be close enough to the extra price Comcast was going to charge us in the first place… we had no choice but to "eat" an enormous rate increase to carry Comcast's RSN."[156] For most small and medium-sized MVPDs or even groups of MVPDs, engaging in an arbitration is simply not a cost effective remedy because the fixed costs are often the same or greater than the potential benefits.

The Commission is familiar with this issue, and it has recognized that as a result special relief needs to be awarded smaller MVPDs. For instance, in the News Corp.-DirecTV Order, the Commission decided that "cable operators with fewer than 5,000 subscribers, for whom arbitration would be unreasonably expensive, are given special relief with respect to retransmission consent, and those with fewer than 400,000 subscribers are

[155] *See Abdoulah February 4th Testimony* at 8.

[156] *See Abdoulah February 4th Testimony* at 8.

permitted to bargain collectively and collectively avail themselves of the arbitration remedy for both RSN and broadcast programming."[157] For cable operators with fewer than 5,000 subscribers, this special relief with respect to retransmission consent effectively addressed the harms of that deal. However, except for the largest MVPDs, such as DirecTV and DISH that each serve millions of subscribers nationwide, arbitration was not a cost-effective remedy, particularly for small and medium-sized MVPDs serving more than 5,000 subscribers. Mid-sized operators, ranging in size from 44,000 to 200,000 video subscribers, have similarly highlighted this problem.[158]

Another problem with arbitration is that arbitrators of programming carriage disputes are neither required to publicly issue written opinions stating their rulings nor explain their decisions. Like judicial decisions, these arbitration decisions not only impact the MPVD and programmer at issue but also could prove useful to other MVPDs and programmers who will undertake arbitration in the future. These parties would use arbitration decisions as comparables and try to draw analogies to them. For smaller operators, having access to written opinions on previous arbitrations will lower the costs of engaging in the process. While certainly no panacea, arbitration would be substantially improved if arbitrators' decisions were required to be accompanied by written opinions.

The right to market rates for broadcast signals and RSNs backed up by the remedy of commercial arbitration seemed like a good idea in 2004. In the intervening years, smaller

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[157] *News Corp.-Hughes Order*, 19 FCC Rcd at 627, ¶ 368.

[158] *See, e.g., In the Matter of Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, Petition for Rulemaking, MB Docket No. 10-71, Comments of Massillon Cable TV, WaveDivision Holdings, LLC, NPG Cable Inc., Comporium Group, and Harron Communications, LP, at 2-3 (filed May 18, 2010).

and medium-sized MVPDs have learned that arbitration does not provide a realistic remedy. And, as is axiomatic under our law, there is no right without a remedy.

V. THE APPLICANTS SHOULD PROPOSE ADDITIONAL UNDERTAKINGS TO ADDRESS THE RISKS OF HARM TO SMALLER MVPDS AND THEIR CUSTOMERS.

The Applicants have proffered several undertakings aimed at addressing competitive concerns about the proposed transaction. As the ACA demonstrates above, those undertakings would not remedy the horizontal and vertical harms that would result from the proposed transaction, especially for smaller MVPDs. The ACA thus calls on the Applicants to return to the drawing board and develop meaningful enforceable commitments that address the risks of harms set forth in these Comments.

Without these commitments from the Applicants, the Commission must itself fashion appropriate constraints to ameliorate the public interest harms that would result from the proposed transaction.

VI. CONCLUSION.

The Applicants propose an unprecedented consolidation of content, distribution and control of licensed spectrum. The proposed combination would create significant horizontal and vertical harms, resulting in higher costs to consumers, reduced competition, and, in the smaller markets served by ACA members, diminished broadband deployment. The program access undertakings offered by the Applicants are insufficient to protect against these harms.

The Applicants should develop and propose enforceable commitments to address the harms identified by ACA. Unless they do so, the Commission must impose conditions sufficient to protect competition and consumers.

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