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
	)	

REPLY

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SUMMARY

From the time the proposed combination of Comcast and NBCU was announced some eight months ago, the ACA has sought to precisely assess the competitive harms and provide empirical evidence as to their nature and magnitude. The ACA appreciates that the Commission too is conducting a very serious, fact-driven review. After all, the proposed combination is a “big deal,” whose harmful effects will be widespread and extensive.

This Reply filing represents the final part of the ACA’s case that without sufficient relief, the Commission cannot find the proposed combination is in the public interest. In its initial comments, the ACA demonstrated that the proposed transaction, if consummated, would have significant deleterious horizontal and vertical competitive effects. In its July 21, 2010 filing responding to the initial comments, the ACA, using documents submitted by the Applicants pursuant to the Commission’s directive buttressed its arguments and the conclusion that, if the proposed combination were permitted, significant competitive harms would result and therefore the transaction should not be approved absent enforceable conditions sufficient to protect competition and consumer welfare. In this Reply, the ACA, relying on a new report from its economic expert, Professor William Rogerson, first addresses and rebuts arguments raised by the Applicants and their economists in their response to comments. Second, the ACA, again using the Rogerson Report, sets forth proposed conditions that the Applicants would need to adopt to ameliorate the harms caused by the proposed transaction, including by enabling smaller MVPDs to enforce any rights provided in the remedies either directly or through a bargaining agent.

At its core, the ACA’s remedies ensure that MVPDs – especially smaller MVPDs – can carry NBCU’s broadcast stations, its cable networks and Comcast’s RSNs at rates, terms, and conditions reflecting pre-combination conditions. To achieve this aim, the ACA first proposes general measures most of which were either used in or based upon previous Commission decisions. These measures, which apply generally to all MVPDs, include expanding the reach of the program access rules to cover all programming sold by Comcast-NBCU and all platforms by which MVPDs may distribute that programming, the stand-alone sale by Comcast-NBCU of

local broadcast stations and RSNs, and commercial arbitration for all programming. The ACA then proposes three critical measures to ensure that smaller MVPDs can effectively employ these remedies. The following summarizes the key features of these two integrated proposals:

1. General Remedies to Address Increases in Programming Prices

- The program access rules shall be applied to Comcast-NBCU's sale of its broadcast stations and its other programming regardless of the means by which any of the programming is delivered to subscribers (e.g. online and mobile).

- Comcast-NBCU must sell each NBC O&O and each Comcast RSN on a stand-alone basis to all MVPDs. This remedy will significantly decrease the complexity and cost of commercial arbitration, including the proposed special commercial arbitration process for smaller operators.

- Comcast-NBCU is subject to a commercial arbitration process to ensure that it does not sell programming – broadcast stations, RSNs, and national cable networks – at a price that exceeds fair market value.

2. Special Provisions to Ensure Remedies are Useful for Smaller MVPDs

- MVPDs with fewer than 125,000 MVPD subscribers in the relevant market cannot be charged more than 5% higher than the lowest Net Effective Rate charged to other MVPDs for NBC O&Os and Comcast RSNs. To ensure transparency and assist in enforcing this right, Comcast-NBCU and Comcast must file annual certifications.

- To enable smaller MVPDs to enforce their ability to access NBC O&Os and Comcast RSNs at competitive rates, a new, lower-cost arbitration process with an automatic right of continued carriage is established.

- Comcast-NBCU must negotiate in good faith with Bargaining Agents, and these agents shall have comparable rights to MVPDs to obtain programming from Comcast-NBCU.

Finally, to ensure the remedies adequately address the harms and reflect the dynamic of the programming market and other carriage agreements entered into by the Applicants with other parties to the FCC's proceeding, they should remain in effect for 9 years.

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REPLY

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 Reply to responses on the applications by Comcast Corporation ("Comcast"), General Electric Company ("GE") and NBC Universal ("NBCU") (hereinafter referred to jointly as the "Applicants") for consent to assign and transfer control of certain

[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, DA 10-457, MB Docket No. 10-56 (rel. Mar. 18, 2010) ("Public Notice").

[2] The ACA represents approximately 900 small and medium-sized cable companies serving mostly 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 7.6 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.

spectrum licenses to a new limited liability company that would constitute a joint venture of GE and Comcast ("Joint Venture").[3] The ACA explained in its initial comments that the proposed transaction, if consummated, would have significant deleterious horizontal and vertical competitive effects.[4] In its July 21, 2010 filing responding to the initial comments,[5] the ACA demonstrated that documents submitted by the Applicants pursuant to the Commission's directive[6] buttressed its arguments and the conclusion that, if the proposed combination were permitted, significant competitive harms would result and therefore the transaction should not be approved absent enforceable conditions sufficient to protect competition and consumer welfare. In this Reply, the ACA, relying on a new report from its economic expert, Professor William Rogerson,[7] first addresses and rebuts arguments raised by

[3] *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 (filed Jan. 28, 2010) ("Application").

[4] *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 of the American Cable Association (filed June 21, 2010) ("ACA Initial Comments"). ACA's initial comments included a report from its economist, Professor William Rogerson, analyzing the nature and extent of horizontal and vertical harm that would result from the proposed combination. William P. Rogerson, "Economic Analysis of the Competitive Harms of the Proposed Comcast-NBCU Transaction," June 21, 2010 ("Rogerson I").

[5] *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, Response to Comments of the American Cable Association (filed July 21, 2010) ("ACA Response Comments").

[6] Letter from William T. Lake, Chief, Media Bureau, to Michael H. Hammer, Esquire, James H. Casserly, Esquire, Michael D. Hurwitz, Esquire, Brien C. Bell, Esquire, Willkie Farr & Gallagher LLP, Counsel for Comcast Corporation, MB Docket 10-56, May 21, 2010; Letter from William T. Lake, Media Bureau, to Bryan N. Tramont, Esquire, Kenneth E. Satten, Esquire, David H. Solomon, Esquire, Natalie G. Roisman, Esquire, Wilkinson Barker Knauer, LLP, Counsel for NBC Universal, Inc., MB Docket No. 10-56, May 21, 2010.

[7] William P. Rogerson, "A Further Economic Analysis of the Proposed Comcast-NBCU Transaction," Aug. 19, 2010, attached hereto as Attachment A ("Rogerson II).

the Applicants and their economists in their response to comments.[8] Second, the ACA, again using Rogerson II, sets forth proposed conditions that the Applicants would need to adopt to ameliorate the harms caused by the proposed transaction. These conditions, which operate as an integrated package, will protect consumers from higher prices and the loss of programming that otherwise would result from the transaction.

I. A BRIEF REVIEW OF THE COMPETITIVE HARMS CAUSED BY THE PROPOSED COMBINATION.

Horizontal Harm:[9] The proposed combination creates horizontal competitive concerns because key programming assets now separately owned by NBCU and Comcast -- NBCU's 10 Owned & Operated ("O&O") and affiliated broadcast television stations, its block of national cable programming and Comcast's 9 Regional Sports Networks ("RSNs") -- will be joined post-transaction. Moreover, these assets, which are "must have" programming, are substitutes in the sense that the value of one network to a multichannel video programming distributor ("MVPD") is lower conditional on already carrying the other network. 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

[8] *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, Opposition to Petitions to Deny and Response to Comments, Comcast Corporation, General Electric Company, NBC Universal, Inc. (filed July 21, 2010) ("Applicants' Opposition"). The Applicants' Opposition includes two exhibits: Exhibit 1, Gregory L. Rosston, Ph.D. and Michael D. Topper, Ph.D, "The Proposed Comcast-NBCU Transaction: Response to Comments and Petitions Regarding Competitive Benefits and Advertising Competition" (July 21, 2010); and, Exhibit 2, Mark Israel and Michael L. Katz, "Economic Analysis of the Proposed Comcast-NBCU-GE Transaction" (July 20, 2010) ("Israel/Katz Report").

[9] *See* ACA Initial Comments at 18-25.

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 its prior comments, the ACA offered evidence in support of this claim and the magnitude of the harm.[10]

The greatest threat of horizontal harm from this proposed combination occurs in regions of the country served by an NBC O&O[11] and a Comcast RSN. In such regions, NBCU's control over retransmission consent for the NBC broadcast signal and control over its popular national cable networks will be combined with Comcast's control over its RSN. Approximately 12.1% of all TV households in the United States,

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[10] 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 Department of Justice and the Federal Trade Commission.

The ACA's concern about the effects of Big 4 collusion leading to increased retransmission fees was recently echoed by the National Cable Telecommunications Association: "Permitting a broadcaster to negotiate retransmission consent on behalf of two stations in a market …is likely to result in consumer harm rather than the pro-competitive efficiencies envisioned when LMAs were created. As Time Warner Cable explains, "[b]y aggregating their market power and negotiating in tandem instead of in competition with one another, broadcasters can more easily raise the price of retransmission consent and more effectively threaten to withhold their signals during negotiations." (Comments of the National Cable Telecommunications Association, MB Docket No. 09-182, July 26, 2010, at 4.)

[11] For purposes of assessing the extent of harm and discussing remedies in these comments, the term "NBC O&O" shall include NBC Owned and Operated broadcast television stations currently or in the future owned or controlled by Comcast-NBCU and any other NBC local television affiliate on whose behalf Comcast-NBCU negotiates retransmission consent agreements.

spread over six different metropolitan areas, are located in DMAs with these characteristics.[12]

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. Approximately 28% of TV households are located in designated market areas ("DMAs") with these characteristics. Therefore, regions containing at least 40% of all TV households are threatened with the horizontal harm from this transaction. The harm in fact may be even more widespread if the Applicants swap assets to aggregate programming in markets or if the Applicants are able to negotiate on behalf of NBCU affiliates for retransmission fees.[13]

Vertical Harm:[14] 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 MVPD. 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.

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[12] These are Chicago, IL, Philadelphia, PA, San Francisco-Oakland-San Jose, CA, Washington, DC, Miami-Fort Lauderdale, FL, and Hartford and New Haven, CT.

[13] *See* ACA Response to Comments at 13-18 (a "review of the documents produced by Applicants demonstrates that in fact they recognize there is substantial overlap in the programming assets of Comcast and NBCU, that they intend to sell these assets in combination to MVPDs and that they are likely to add to them to increase the number of programming overlaps. In other words, Professor Rogerson's analysis *should be viewed as a conservative assessment of the post-transaction behavior in which the Applicants plan to engage and the impact such behavior is likely to have on MVPDs and subscribers.*") (emphasis added).

[14] *See* ACA Initial Comments at 25-37.

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 cost. 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 multichannel video programming distributor ("MVPD"). Approximately 12% of all TV households in the United States, spread over six metropolitan areas, are located in such DMAs, 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

MVPDs who compete against Comcast, such as DirecTV, DISH Network, Verizon's FiOS service and AT&T's U-verse offering.

Cable overbuilders will experience higher programming fee increases to the extent that Comcast passes a high percentage of their subscribers. Under plausible parameter values, if Comcast passes almost all of an overbuilder's customers, its 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 members who are Comcast rivals in all or some of their service areas.

II. THE APPLICANTS' AND THEIR ECONOMISTS DO NOT PROVIDE COGENT ARGUMENTS TO COUNTER THE CONCLUSION THAT THE PROPOSED COMBINATION WILL CAUSE SIGNIFICANT HORIZONTAL AND VERTICAL HARMS.

A. Horizontal Harm.

1. Introduction.

In Rogerson I, Professor Rogerson described how the horizontal combination of NBCU and Comcast programming networks would result in MVPDs paying higher prices "so long as the networks are substitutes for one another in the weak sense that the value of one network to an MVPD is lower conditional on already carrying the other network."[15] The economic rationale for this conclusion is that when negotiations for NBCU and Comcast networks occur separately, each can only

[15] *See* Rogerson I at 4-5 for a summary of the horizontal harms. The NBCU and Comcast programming networks can be substitutes even if subscribers have a strong preference to subscribe to a MVPD that carries both networks.

extract a limited share of the joint profit from adding the last network. However, when NBCU and Comcast combine networks, they will be able to extract the full share of the profit from adding the entire bundle, which will be greater than twice the surplus from adding just the last network. This result holds even if the NBCU and Comcast programming networks are not perfect or even relatively close to perfect substitutes and are merely partial substitutes.

Applicants' economists, Drs. Israel and Katz, attempt to rebut Professor Rogerson's analysis by making a series of claims that the NBCU and Comcast programming are not close substitutes and that empirical evidence shows that combining such networks does not raise prices. In the next section, the ACA, using the attached report by Professor Rogerson, responds to each of these arguments.

2. The arguments of the Applicants do not undermine the conclusion demonstrated by the ACA in its initial comments that horizontal harms will result from the proposed combination.

The Applicants' make five different arguments in attempting to counter the ACA's conclusion that the combination of NBCU and Comcast programming networks will lead to significantly increased prices for consumers. In each instance, these shots fired by the Applicants either fall wide or short of their mark. Below the ACA, relying on Rogerson II, discusses each of the Applicants' arguments and shows that they do not undermine the conclusion that the proposed combination will result in substantial horizontal harms to MVPDs and their subscribers.

> **1. Applicants' Contention:** "A basic review of the content carried suggests that Comcast's RSN's and NBC broadcast stations are not likely to be close substitutes."[16]

ACA Response: Drs. Israel and Katz present a much too narrow view of what constitutes substitutability. As Professor Rogerson states, "To the extent that substitutability between networks is caused simply by the fact that subscribers value increases in variety at a decreasing rate, it is perfectly possible and reasonable that two very different types of networks could be partial substitutes for one another in the sense that the value of adding one of the two networks decreases conditional on the other network already being carried." [17] In other words, subscribers may pay $1 extra to add either a sports or general entertainment network but, once one of those were added – and overall variety increased -- subscribers would only be willing to pay a significant amount less than $1 to add the other network. Thus, contrary to the Applicants' claim, content alone is not sufficient to determine substitutability.

> **2. Applicants' Contention**: "The Commission has previously found that RSNs, broadcast networks, and national cable networks 'differ significantly in their characteristics, focus, and subject matter,' and are imperfect substitutes that should be analyzed in separate 'categories.'"[18]

ACA Response: Drs. Israel and Katz seem to be asking the Commission to conclude that because it has stated that RSN programming differs significantly from programming on other networks, these other networks and the RSNs cannot be close substitutes. If that is the case, the ACA believes they are overstating the effect of the

[16] Israel/Katz Report, ¶ 111.

[17] Rogerson II at 27-28.

[18] Israel/Katz Report, ¶ 104.

Commission's finding as it applies to Professor Rogerson's analysis. As stated above, for Professor Rogerson's results to hold, the networks do not have to be perfect or near-perfect substitutes. Rather, it is sufficient that the networks be partial substitutes, and the Commission's previous statements do not foreclose such a finding.

> **3. Applicants' Contention:** "The demographic profiles of the NBC broadcast network and the Comcast RSNs look nothing like each other."[19]

ACA Response: Just because demographic profiles of viewers on different types of networks may differ does not necessarily mean that the networks are not substitutes. First, even assuming the demographic profiles of two types of networks differ, a substantial number of viewers may still watch both networks – and thus view the networks as partial substitutes. Second, most households (the decision making entity for procuring programming from a MVPD) have multiple viewers with different demographic profiles – and thus even if individual viewers may only watch one type of network, the overall household watches both types of networks, viewing them as substitutes.

> **4. Applicants' Contention:** "The transaction involves a relatively small share of television viewing and will not substantially increase the concentration of broadcast and cable networks combined, or cable networks on their own."[20]

ACA Response: Drs. Israel and Katz base their examination of concentration in the programming market on the share of total viewing hours that households devote –

[19] Israel/Katz Report, ¶ 113.

[20] Israel/Katz Report, ¶ 109.

before and after the proposed combination -- to watching all the networks produced by a programmer. Using their approach, the shares are relatively low pre-combination and do not rise substantially post-combination, especially to the levels that normally concern antitrust authorities. While superficially plausible, this approach, as Professor Rogerson states, "completely ignores the Commission's own determination that calculating concentration ratios in this manner is not the correct way to assess the extent of market power in programming markets."[21] For example, their approach runs counter to the Commission's conclusion that programmers with RSNs or local broadcast networks have significant market power.

> **5. Applicants' Contention**: An empirical analysis of the combination of Fox's O&Os and its RSNs indicates that "on average, joint ownership by New Corporation had no significant effect on the level of RSN affiliate fees."[22]

ACA Response: The ACA does not disagree that the effects of the combination of Fox's O&Os and RSNs would provide a good indication of the potential harms that would result from the combination proposed by the Applicants. However, because no such evidence was available, the ACA presented the next best evidence -- the effects of combining multiple Big 4 local broadcast stations – to make the general point that combined control of multiple networks (especially "must have" networks) can lead to higher programming fees. Using this evidence, the ACA showed that prices from the proposed combination would increase by 20% if not more.

[21] Rogerson II at 30.

[22] Israel/Katz Report, ¶ 124.

To date, no one has attempted to analyze the pricing effects of combining Fox O&Os and RSNs. Professor Rogerson notes this is because there are "limitations in the amount and type of data available and the inherent impossibility of controlling for other factors that might affect RSN fees."[23] For example, it is well-known that the attractiveness of a RSN can change dramatically if a sports team enters into or walks away from a carriage agreement with the network. In addition, the ownership of a RSN may play a large role in determining prices, terms, and conditions and the type of programming carried. These and other variables may be viewed as not that significant – that is, important to control – if there are a very large number of events. However, if the data set is limited, controlling for these unusual events so that the results are credible becomes essential.

In their filing, Drs. Israel and Katz take on this daunting challenge. They gathered data and then analyzed the pricing effects of the Fox's O&O and RSN combinations. From this work, they concluded there is no substantial effect, that is, where combinations existed, prices did not rise significantly.

The flaws in the empirical analysis conducted by Drs. Israel and Katz are numerous and serious, and the Commission should not rely on its conclusion. To begin with, Drs. Israel and Katz have a limited data set – "eleven transactions" that occurred between 2000 and 2008. Professor Rogerson, in the attached report, reviews each of these transactions.[24] First he finds that six of these transactions are

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[23] Rogerson II at 32.

[24] Rogerson II at 33-37.

not suitable for analysis because they are based on a single post-transaction year of data, an especially troubling problem where most agreements between programmers and MVPDs are multi-year deals:

> The first thing to notice about this list of transactions is that six of the listed eleven transactions all occurred in 2008 when News Corp. sold a number of Fox O&Os. Since Drs. Israel and Katz have annual fee data from 1999-2009, this means that they only have one post-transaction year of data for RSN fees for these six transactions. Furthermore, it is typically the case that programmers and MVPDs sign multi-year agreements. Therefore it may well be the case that many of the RSN fees paid in 2009 were determined by contracts signed prior to News Corp.'s sale of the Fox affiliates. Therefore, in my judgment, these six transactions should not be included in the study.[25]

The remaining five transactions involve Fox purchasing a RSN. As discussed above, a change in ownership by itself can have dramatic effects on the objectives, operations, and content of – and, of course, carriage fees charged by -- a RSN. One of these five transactions involved the purchase of Turner South, which aired both regional sports and non-sports programming. After Fox's purchase, the RSN changed programming line-ups and carried only regional sports programming. Another transaction involved Fox Sports Ohio, which just after its purchase by Fox in 2005 lost the rights to carry its anchor-tenant, the Cleveland Indians baseball games. It is likely that this occurrence led Fox to drop its prices, or, at the very least, refrain from any increases. This in turn would greatly affect the overall results of the analysis by Drs. Israel and Katz; yet, they did not control for it. As for the other three events, there may well have been uncontrolled-for events as well. In sum, their empirical study has far too many problems for it to be considered reliable by the Commission,

[25] Rogerson II at 35.

and the best available evidence continues to be the ACA's submission of price increases resulting from the combination of Big 4 local television stations.

B. Vertical Harm.

1. Introduction.

Professor Rogerson's first report set forth the theory of vertical harm that arises from the proposed combination of Comcast and NBCU and then calculated the extent of this harm. In essence, because the Joint Venture will take account of the fact that selling programming to MVPDs that compete with Comcast will reduce Comcast's profits, the combination of Comcast's ownership share of the Joint Venture and its ownership of its MVPDs assets would cause the Joint Venture to bargain for higher programming fees from MVPDs that compete with Comcast and these higher fees would be substantially passed through to subscribers, increasing their fees (The "Raising Rival's Costs" effect). Professor Rogerson then calculated that in regions with an NBCO O&O, the expected increase in fees charged to competing MVPDs (DBS and telephone providers) for both retransmission and for carriage of cable networks would be approximately $.95 per subscriber per month.[26]

The Applicants' Opposition, relying on the Israel/Katz Report, seeks to refute Professor Rogerson's analysis by contending:

1. "[I]t would be inappropriate to consider the potential programming-cost increases that may arise because NBCU may internalize Comcast's profits…without also accounting for programming cost decreases flowing from

[26] For a cable overbuilder where Comcast passed 80% of the same homes, the price increase would be larger, $1.06 per subscriber per month.

efficiencies – notably the reduction in double marginalization – that will arise because Comcast, while paying the same price to NBCU for programming as determined in arm's-length negotiations, will internalize NBC profits…Once these efficiencies are incorporated, the net effect of the transaction on average MVPD programming costs is negative."[27]

2. The "Raising Rival's Costs" approach used by Professor Rogerson "does not predict how players will allocate the surplus generated by their agreement" and, in any event, his calculation overstates the likely effect.[28]

3. The Commission should not be concerned if post-combination the Joint Venture raises programming fees for cable overbuilders since these providers have an insignificant number of subscribers.[29]

In the following sections, the ACA uses Rogerson II to demonstrate the fundamental flaws in the arguments propounded in the Applicants' Opposition and the Israel/Katz Report.

2. Contrary to the Applicants' claim, the reduction in Comcast's costs post-combination because of double marginalization is relatively insignificant.

The Applicants contend that double marginalization exists pre-combination because "although the marginal cost of NBCU when MVPDs distribute programming to an additional subscriber is typically near zero, NBCU charges Comcast (and other

[27] Applicants' Opposition at 149-150.

[28] Applicants' Opposition at 143-144.

[29] Israel/Katz Report, n.100.

MVPDs) a pre-subscriber price that is above zero for most of its content."[30] They then argue that double marginalization will be reduced post-combination because "for every dollar that Comcast pays to NBCU, it will retain ownership of 51 cents through its interest in NBCU" and that "these double marginalization savings represent a true reduction in the average cost (across MVPDs) for NBCU programming."[31] Finally, they maintain that the reduction in costs as the result of double marginalization is so great that the price increases calculated by Professor Rogerson are "swamped by the price effects of transaction-related efficiencies."[32]

While the Applicants' double marginalization analysis may at first seem appealing, Professor Rogerson demonstrates in Rogerson II that Drs. Israel and Katz "make a grave error in economic reasoning that results in a completely false conclusion."[33] Professor Rogerson does not disagree that post-combination Comcast will operate as if its marginal cost of providing NBCU programming to its cable subscribers is zero. He, however, finds that Drs. Israel and Katz ignore in their analysis the new opportunity cost that arises because the Joint Venture charges a programming fee not only to Comcast but to all competing MVPDs and that this entire programming fee charged to competing MVPDs represents profit to the Joint Venture. As a result, should Comcast lower its subscription price slightly to attract more customers, the Joint Venture will lose these fees paid by other MVPDs and the

[30] Israel/Katz Report at 150.

[31] Israel/Katz Report at 151.

[32] Israel/Katz Report at 152.

[33] Rogerson II at 8.

attending profit.[34] Professor Rogerson shows (using $1.56 as a reasonably plausible value for the cost of NBCU programming) that when the new opportunity cost is taken into account the effect of reduced double marginalization is minimal:[35]

> [I]f θ is the switcher share for Comcast, then this means that θ of the customers that it would attract by lowering its price slightly would be customers that switch from some other MVPD. This means that the opportunity cost of attracting a new customer is θ x $1.56, because this is the amount of profit that the vertically integrated firm will lose when it attracts new customers. Therefore a complete accounting of the effects of vertical integration on the marginal cost to the combined entity of serving new MVPD customers is as follows. First, because the payment of Comcast to the joint venture of $1.56 is now simply a transfer payment, the marginal cost goes down by $1.56. However, second, because θ of the customers that Comcast attracts will be from other MVPDs, there is a new opportunity cost of θ x $1.56 per subscriber per month. A decrease in cost of $1.56 combined with an increase in cost of θ x $1.56 yields a net decrease in cost of (1-θ) x $1.56. In particular, if θ is close to 1 [which should be expected since most new customers will be existing MVPD customers], then the net decrease in cost due to the double marginalization effect will be close to 0.[36]

Even if the share of new customers that are "switchers" from competing MVPDs is somewhat lower – that is, the value of θ is not 1 but .9 – the cost reduction from double marginalization would only be $.16 per subscriber per month. To provide context for this reduction, Rogerson I found that post-combination, competing MVPDs would see an increase of $.95 in their cost to carry NBCU programming. Thus,

[34] This is based on the perfectly reasonable assumption that, given the large percentage of MVPD subscribers, almost all of the new customers switch from other MVPDs.

[35] For purposes of reading the following passage, Professor Rogerson defines the "switcher share," denoted by the parameter θ, as follows. Suppose that an MPVD lowers its price slightly in an attempt to attract new customers. Some of the new customers will be people who switch from some other MVPD (the "switchers") and some will be people who previously subscribed to no MVPD. The switcher share, θ, is defined to be the share of new customers that are "switchers." Professor Rogerson argues that the switcher share is likely very close to 1.

[36] Rogerson II at 10.

contrary to the claim of the Applicants, the harm from the proposed combination dwarfs the putative benefits.[37]

3. Applicants' arguments do not lessen concerns that Comcast-NBCU will raise programming prices to rival MVPDs post-combination.

The Applicants present a series of arguments in their attempt to undermine the validity of the Raising Rivals' Costs approach used by Professor Rogerson to demonstrate that post-combination Comcast would raise the prices competing MVPDs would pay for NBCU programming. The ACA responds to each:

> **1. Applicants' Contention**: The benefits of double marginalization can be achieved without close coordination and redistribution of profits and thus could occur with Comcast only holding 51% of the Joint Venture. In contrast, the Raising Rivals' Costs approach requires close coordination and redistribution of profits which will not occur because of General Electric's interest in the Joint Venture.[38]

ACA Response: First, as discussed above, the efficiencies gained by double marginalization are minimal. Thus, even if Comcast fully internalized all of the upstream profits, the effects of double marginalization would not give it sufficient incentive to make significantly different pricing decisions at the downstream level.

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[37] The ACA also notes that Professor Rogerson highlights another concern the Commission should consider in addressing the issue of double marginalization. In n.17 in Rogerson II, he states: "I would also like to raise the more minor point that even if the reduced double marginalization effect was of the same order of magnitude as raising rivals' costs effect, this would still potentially create an issue of concern for the Commission. In the markets that Comcast serves, it is generally the dominant provider. Any transaction that had the effect of giving Comcast a significant cost advantage over its competitors might threaten to drive Comcast's competitors out of the market entirely or at least weaken them considerably, and thus damage competition. Thus, even if the effect of the transaction was to lower Comcast's own costs and raise its rivals' costs by approximately the same amount, it is not at all clear that the net effect on subscribers would be minor. If the result of this was to drive Comcast's competitors from the market or at least considerably weaken them, the reduction in competition might ultimately make it profitable for Comcast to raise its own subscription prices."

[38] Israel/Katz Report, ¶ 26.

Second, there are important classes of efficiencies that can only be achieved by close coordination and profit redistribution. Thus, the Applicants' cannot contend the proposed combination will produce meaningful efficiencies if they do not also believe they can and will act in concert.

> **2. Applicants' Contention**: The bargaining model used by Professor Rogerson is too stylized and "cannot generate reliable predictions about the pricing effects of the proposed transaction."[39]

ACA Response: While Drs. Israel and Katz criticize the bargaining model, they also admit that it "commonly is used in academic settings to derive basic insights about various types of negotiations." Moreover, Dr. Katz found the bargaining model sufficiently valuable to use as the basis of a paper he submitted to the Commission late last year to justify a client's policy position.[40] As Professor Rogerson notes, "Almost all economic models are highly stylized, including most of the game theoretic models that provide the foundation for modern industrial organization theory and that play a key role in providing guidance for antitrust policy…[and in deriving] basic insights useful for policy analysis."[41] Finally, in its most recent review of a significant vertical integration, the Adelphia-Time Warner-Comcast transaction, the Commission relied on a type of bargaining model to analyze the vertical effects.[42]

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[39] Israel/Katz Report, ¶ 35. *See* also Israel/Katz Report, ¶¶ 43-48.

[40] 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, Submission of Michael Katz, Jonathan Orszag, and Theresa Sullivan, "An Economic Analysis of Consumer Harm From the Current Retransmission Consent Regime," Nov. 12, 2009 (filed Nov. 25, 2009).

[41] Rogerson II at 14.

[42] *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,*

> **3. Applicants' Contention**: Professor Rogerson used the wrong parameter value for the share of subscribers leaving a competing MVPD and switching to Comcast as opposed to some other MVPD.

ACA Response: The Initial Rogerson Report used the formula $\Delta P = \alpha\ d\ \pi / 2$ to calculate the fee increase that a MPVD competing with Comcast would face due to the transaction. ΔP denotes the per subscriber fee increase due to the transaction; d the share of the customers that would leave the rival MVPD if it were unable to offer the NBCU programming, α the share of these customers that would switch to Comcast, and π the per subscriber profit margin of Comcast. Professor Rogerson inserted into the formula plausible values which yielded a fee increase of $.95 per subscriber per month.[43]

The primary issue Drs. Israel and Katz have with Professor Rogerson's calculation is the value he used for the parameter α, the share of the customers that would switch to Comcast.[44] In his initial report, Professor Rogerson used the same procedure to calculate the parameter α that Drs. Israel and Katz used in their initial report accompanying the Application: customers leaving an MVPD will be distributed to other MVPDs according to their relative market shares.[45] In the Israel/Katz Report, while they maintain this approach is correct as it applies to cable overbuilders and telephone companies, they argue, based on two pieces of evidence involving the

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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, (2006) ("*Adelphia Order*").

[43] Rogerson I at 26-40.

[44] Drs. Israel and Katz recommend slightly higher values for π and d than those used by Professor Rogerson, which would lead to a greater degree of harm.

[45] Rogerson I at 34.

DBS provider DISH, that customers subscribing to a satellite providers tend to switch in large numbers only to another satellite provider and, therefore, for DBS providers α should be one-third of the "market share" value.[46]

The ACA raises several concerns with the Applicants' new value for α for DBS providers:[47]

1. The evidence provided by the Applicants is limited and relies heavily on the Applicants' own reported analysis of its own private data. Thus, the Commission should not rely on it if (1) it does not have a larger set of data and (2) it does not obtain independent verification of the proposed effect, such as from data from another major cable operator.

2. If customers who subscribe to one DBS provider tend to switch to another DBS provider, then it is equally plausible that the same occurs among wireline MVPDs. Thus, if Comcast withheld programming from a cable overbuilder or a telephone company, it would receive a larger share of switchers than the relative market share method would suggest.

3. Even if Drs. Israel and Katz are correct, the predicted level of harm from the Raising Rivals' Costs effect would still dwarf any possible projected benefits from the reduced double marginalization effect. In other word, reducing the estimate of a $.95 per subscriber per month increase in programming fees by two-thirds yields a projected increase in programming fees of $.32 per subscriber per month. This is approximately ten times greater than the

[46] Drs. Israel and Katz provide no data to justify for the use of one-third of the "market share" value.

[47] *See* Rogerson II at 17-18.

reduction in cost by the double marginalization effect (assuming the switching rate for Comcast is 98%).

4. Applicants' Contention: Empirical analysis does not show that previous vertical mergers have resulted in price increases for programming to competing MVPDs.

ACA Response: In their report, Drs. Israel and Katz seek to analyze the impact on programming prices in four instances of vertical integration and disintegration: Cablevision/Bravo (2002); Cox/Travel Channel (2007); News Corp./DirecTV integration (2004); and, News Corp./DirecTV disintegration (2008). They conclude that "these data provide no support for the hypothesis that vertical integration leads to higher equilibrium affiliate fees."[48] The ACA disagrees. As Professor Rogerson discusses in the attached report, the empirical analysis of Drs. Israel and Katz suffers from a series of problems that undermine their ability to draw any conclusions, much less the bold conclusion that experience does not indicate that vertical integration leads to higher prices for rival MVPDs:

(1) <u>Results from Cablevision and Cox Instances are Inapt</u>.

> "The instances involving Cablevision and Cox are completely inappropriate to use for this study…because the networks involved are national networks and Cablevision and Cox both have extremely small subscriber shares on a national level…Therefore, the raising rivals cost theory would suggest that vertical integration of a national cable network with Cox or Cablevision would have absolutely no effect on the fees it would charge to the other major incumbent cable operators such as Comcast and Time Warner and would also have an extremely modest effect on the fees it would charge the two DBS providers."[49]

[48] Israel/Katz Report, ¶ 80.

[49] Rogerson II at 20.

(2) The Data Set used in the News Corp.-DirecTV Disintegration Instance is Too Limited.

"Although Drs. Israel and Katz do not explicitly state the source of their pricing data, they do explicitly state that the most recent year for which they have pricing data is 2009 and that their data is annual. This means that they have only one year of data for post-transaction pricing - 2009. Furthermore, it is typically the case that programmers and MVPDs sign multi-year contracts. Therefore it may well be the case that many of the prices paid in 2009 were determined by contracts signed prior to News Corp.'s spin off of DirecTV."[50]

(3) The Data used in the News Corp.-DirecTV Integration is Unclear and Potentially Flawed.

"Even for the one event that in principal might be able to provide useful information, Drs. Israel and Katz are not clear how they deal with the issue of long term contracts that extend over the transaction date. Given that they must have interpreted 2009 data as being post transaction data to be able to include News Corp.'s 2008 sale of DirecTV in their study, it seems likely that they interpreted data in 2005 and later as being post transaction data for News Corp.'s 2004 purchase of DirecTV. Once again, to the extent that program fees were determined by longer term contracts that spanned the transaction date, we would not necessarily expect there to be much of an immediate impact."[51]

(4) The Controls used in News Corp.-DirecTV Integration Analysis are Unknown and Potentially Flawed.

"Although I am confident that Drs. Israel and Katz were likely able to control effectively for any general trends in network prices over the period, I am much less confident that they were able to control properly for issues such as age of the network, quality changes to the network, entry or exit of networks that compete with the networks being studied, and how the networks were bundled together. In a study with a large amount of data this may not be as important, since one might hope that some of randomness associated with uncontrolled-for events may simply wash out. However, given that Drs. Israel and Katz actually have only one data point that appears to be a reasonable candidate for them to study, the inability to properly control for other factors is an extremely serious issue."[52]

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[50] Rogerson II at 21.

[51] Rogerson II at 21.

[52] Rogerson II at 21-22.

4. Cable overbuilders provide significant competition, and the Commission needs to account for harm to them caused by the proposed combination.

Professor Rogerson in Rogerson I demonstrated that cable overbuilders suffered the greatest harm caused by vertical integration from the proposed combination.[53] Drs. Israel and Katz, however, believe because these overbuilders do not have a large number of subscribers, concerns about harm to them should be dismissed.[54] The ACA strongly disagrees.

Forty ACA members are cable overbuilders that compete directly with Comcast's cable systems, and their presence in many of these local markets is significant. If they were no longer in business, customers would experience higher prices, lower quality customer service, and fewer innovative products. Moreover, even if the market share held by these overbuilders may be small, because they have already invested to construct extensive networks, they remain a constant threat to enter (provide service) throughout a large area. In other words, their "competitive punch" is much greater their weight (current subscribership) may indicate.

WOW! provides an example of valuable overbuilder competition to Comcast. It provides residential services to over 460,000 customers in five Midwest markets, including 22 communities in the Chicago metro area, and 66 percent of its video customers today are passed by Comcast, who it competes against in Illinois and Michigan. To compete, it must provide exceptional service, and MVPD customers

[53] Rogerson I at 40.

[54] Israel/Katz Report, n.100.

have rated WOW! the #1 Cable, Internet and Phone provider in Consumer Reports and have recognized it with 10 JD Powers awards in 7 years. [55]

In sum, while the Applicants' may dismiss the importance of WOW! and other cable overbuilders, the harm both the cable overbuilders and their subscribers will experience because of the proposed combination is no less real than that experienced by larger competing MVPDs. Further, the Commission has long recognized the value of competition in the multichannel video distribution market and encouraged entry by competing MVPDs. The proposed combination, if approved without appropriate conditions, will set back this objective.

III. THE COMMISSION SHOULD NOT APPROVE THE TRANSACTION WITHOUT FIRST ENSURING THAT THE APPLICANTS ADOPT THE FOLLOWING TARGETED, ROBUST, AND DURABLE CONDITIONS, WHICH WILL AMELIORATE THE COMPETITIVE HARMS THAT WOULD RESULT FROM THE PROPOSED COMBINATION.

A. The Commission's standard of review and authority to adopt conditions.

Under Section 310(d) of the Communications Act,[56] the Commission must find that, on balance, the proposed transfer of control of certain FCC licenses and authorizations held by NBCU and Comcast as part of the proposed transaction will

[55] *See, e.g.,* "J.D. Power and Associates Reports: Overall Satisfaction with Television Service Providers Rebounds Due to Improvements in Product Performance and Customer Service," Press Release, Oct. 7, 2009, *available at* http://businesscenter.jdpower.com/news/PressRelease.aspx?ID=2009219 (last visited Aug. 19, 2010); "J.D. Power and Associates Reports: Improvements in Performance and Reliability Drive Increase in Overall Customer Satisfaction with Residential Internet Service Providers," Press Release, Oct. 28, 2009, *available at* http://businesscenter.jdpower.com/news/PressRelease.aspx?ID=2009238 (last visited Aug. 19, 2010); and "J.D. Power and Associates Reports: Customers Respond Positively as Cable and Voice Providers Leverage Web Sites to More Effectively Address Customer Service Issues," Press Release, Sept. 10, 2008, available at http://businesscenter.jdpower.com/news/PressRelease.aspx?ID=2008180 (last visited Aug. 19, 2010).

[56] 47 U.S.C. § 310(d).

serve the public interest, convenience, and necessity.[57] As the ACA stated in its Comments, the Commission then employs a balancing test weighing any potential public interest harms of the proposed transaction against any potential public interest benefits.[58] In this case, the Applicants have failed to carry their burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, will serve the public interest.[59] As detailed in ACA's initial comments and response to comments, the record in this proceeding discloses substantial public interest harms for which there are no off-setting public interest benefits.[60]

In such cases, the Commission's public interest authority enables it to impose and enforce narrowly tailored, transaction-specific conditions that ensure that the

[57] 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*"); *Adelphia Order*, ¶ 23; *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) .

[58] ACA Initial Comments at 5-6. *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.

[59] *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 , 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*").

[60] ACA Initial Comments at 9-37; ACA Response Comments at 2-23.

public interest is served by the transaction.[61] In contrast, to the analysis undertaken by the antitrust enforcement agencies, the Commission's public interest authority enables it to rely upon its extensive regulatory and enforcement experience in crafting and enforcing conditions to ensure that the transaction will yield overall public interest benefits.[62] In the past, the Commission has imposed conditions to remedy harms that arise from transactions involving license transfers that are related to the Commission's responsibilities under the Act and related statutes.[63]

For the reasons explained above, the proposed Comcast/NBCU transaction threatens significant public interest harms that are not outweighed by the projected public interest benefits of the combination. Accordingly, unless the Applicants sufficiently 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. Unfortunately, as the ACA demonstrates in the following section, the conditions proposed so far by the Applicants fall far short of this standard.

B. <u>A review of the flaws with the Applicants' proposed conditions.</u>

The Applicants effectively admit that the proposed combination raises anticompetitive concerns, but they contend that the existing program access

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

[62] *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).

[63] *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.

regulations are a sufficient remedy.[64] The ACA disagrees. In its initial comments, the ACA provided a lengthy discussion on the many flaws with the conditions proposed by the Applicants.[65] First, the Applicants propose no conditions whatsoever to address the horizontal harms demonstrated by the ACA in its filings. In addition, neither the Applicants' proposed voluntary conditions nor the process of resolving 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 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 operators.

Because the conditions proposed by the Applicants are so patently inadequate, the task now falls to the Commission. As discussed above, the Commission has both the authority and obligation to not approve the transaction without first adopting conditions sufficient to protect the public interest. In the next section, the ACA discusses the strengths and weaknesses in conditions adopted as part of two previous Commission license transfer approvals. The ACA then builds

[64] Application at 116-117.

[65] ACA Initial Comments at 37-47.

upon this analysis and proposes conditions that are sufficient to address the harms that would ensue if the Comcast-NBCU transaction is approved.

C. <u>Conditions imposed by the Commission in the past are insufficient, standing alone, to remedy the likely horizontal and vertical harms of this transaction.</u>

Comcast and NBCU come before the Commission seeking approval of license transfers necessary to effectuate an unprecedented combination of programming and distribution assets. The ACA has demonstrated that the transaction will create both horizontal and vertical competitive harms. Below, ACA demonstrates the need for the Commission to improve and go beyond remedies previously utilized to combat the deleterious effects of enhanced post-transaction market power.

1. News Corp.-Hughes and Adelphia-Time Warner-Comcast conditions targeted only vertical harms.

Previous transactions reviewed by the Commission involving MVPDs have not included the horizontal combination of programming assets, with the result that there is no Commission precedent on how to condition such license transfers to avoid or lessen such harms. To the extent the Commission has addressed harms arising from the horizontal combination of telecommunications companies, it has employed structural remedies, such as divestiture of assets, to ensure that the transaction minimizes the possibility of harm while preserving the overall benefits, if any, to the public.[66]

[66] *See, e.g., In the Matter of Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements, Memorandum Opinion and Order and Declaratory Ruling*,

In cases where the Commission has previously addressed vertical harms arising from the combination of video programming assets with video distribution systems, it has relied principally on a combination of extending the reach of the program access rules to cover non-satellite cable programming networks and providing an option to take carriage disputes involving "must have" programming to commercial arbitration to establish fair market value for carriage when market negotiations fail to produce an acceptable agreement between the parties.[67]

In the *News Corp.-Hughes Order*, the Commission found that both the program access rules and the applicant's proposed program access commitment were insufficient, standing alone, to protect against harms arising from News Corp.'s enhanced incentive and ability post-transaction to use its market power in the market for RSNs and local broadcast stations (both O&Os and any local affiliate on whose behalf the broadcaster negotiates retransmission consent) to raise prices charged to competing MVPDs for programming. The Commission therefore conditioned its approval of the transaction on compliance with a series of safeguards, including mandatory arbitration of carriage disputes.

The Commission found substantial evidence that competitive and consumer harms would likely result from the increase in News Corp's ability to leverage its market power with respect to both regional sports networks and local broadcast television stations once it acquired DirecTV.[68]

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23 FCC Rcd 17,444 (2008) (requiring that Verizon Wireless divest business units and associated licenses and authorizations in 105 markets).

[67] *See News Corp.-Hughes Order*, ¶¶ 175-76, 218-21; *see also Adelphia Order*, ¶¶ 159-63.

[68] *News Corp.-Hughes Order*, ¶ 366.

Specifically, with respect to RSNs, the Commission found that the primary public interest harm likely to follow the combination of News Corp's RSN programming assets and DirecTV's nationwide distribution platform "is the competitive harm of an across-the-board MVPD price increase resulting from News Corp.'s ability to extract rents or other unfair carriage concessions from MVPDs for carriage of RSN programming."[69] Neither the existing program access rules nor the applicants' proposed safeguards, according to the Commission, would be sufficient to protect against these harms "because they were not intended to regulate or address the level of rates *per se*."[70]

Similarly, with respect to broadcast television, the Commission found that substantial public interest harms would flow from News Corp.'s enhanced post-transaction market power to "extract more compensation for its broadcast station signals from competing MVPDs than it could reasonably expect to achieve absent the transaction."[71] Absent remedial action, the Commission found that ". . . News Corp.'s use of market power to extract artificially high levels of compensation from MVPD rivals, or other carriage concessions, could make rival MVPDs less viable options for consumers, thus limiting consumer choice."[72]

To remedy these harms, the Commission created a mechanism, available at the option of any aggrieved MVPD, to demand neutral resolution of carriage disputes through commercial arbitration. The Commission postulated that the availability of

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[69] *News Corp.-Hughes Order*, ¶ 172.

[70] *News Corp.-Hughes Order*, ¶ 162.

[71] *News Corp.-Hughes Order*, ¶ 209.

[72] *News Corp.-Hughes Order*, ¶ 209.

commercial arbitration would provide a "useful backstop" mechanism to prevent New Corp. from exercising its increased market power to force rival MVPDs to either adopt inordinate affiliate fee increases for access to RSN programming, broadcast station signals, and/or other unwanted programming concessions or potentially cede critical content to their most powerful MVPD competitor, DirecTV.[73] The commercial arbitration remedy was intended to restore, to the degree possible, the pre-transaction "balance of terror" between upstream programming suppliers and their downstream distributors by providing a "fair and neutral" mechanism by which disputants could quickly resolve carriage disputes that had reached an impasse.[74]

In addition, the Commission extended coverage of the non-discriminatory access provisions of the program access rules to any broadcast station that News Corp. owns and operates, or on whose behalf it negotiates retransmission consent. To further temper increases in News Corp.'s market power arising from the transaction and protect the public interest in continued access to local broadcast stations carried by their MVPD as part of their package of video programming services, the Commission extended the good faith and exclusivity requirements of the Satellite Home Viewer Improvement Act of 1999 for as long as its program access rules are in effect.[75]

In theory, the arbitration remedy would permit MVPDs to demand commercial arbitration when they are unable to come to a negotiated "fair" price for the

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[73] *News Corp.-Hughes Order*, ¶¶ 173, 180.

[74] *News Corp.-Hughes Order*, ¶ 220.

[75] Pub. L 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 (Nov. 29, 1999) ("SHVIA").

programming.[76] The goal, as stated by the Commission, was "to push the parties toward agreement prior to a complete breakdown in negotiations. Final offer arbitration has the attractive 'ability to induce two sides to reach their own agreement, lest they risk the possibility that a relatively extreme offer of the other side may be selected by the arbitrator.'"[77]

To help achieve this goal, the Commission specified that the final offers for RSNs be submitted to the arbitrator in the form of a contract for carriage of the programming that may not include any provision to carry any video programming networks or any other service.[78] For agreements involving retransmission of the broadcast signal, the final offers may not include any provision to carry any video programming networks or any other service other than the broadcast signal.[79]

To further temper increased market power post-transaction, the Commission imposed a pair of standstill carriage requirements. That is, News Corp. was prohibited from "deauthorizing" carriage of an RSN after an MVPD has chosen to avail itself of the arbitration condition,[80] and required to allow continued retransmission of the broadcast station signal under the same terms and conditions of the expired contract upon receiving notice of intention to submit a dispute to arbitration.[81]

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[76] *News Corp.-Hughes Order*, ¶ 175.

[77] *News Corp.-Hughes Order*, ¶ 174.

[78] *News Corp.-Hughes Order*, ¶ 177.

[79] *News Corp.-Hughes Order*, ¶ 222.

[80] *News Corp.-Hughes Order* at ¶ 175

[81] *News Corp.-Hughes Order* at ¶ 221.

The Commission later employed a similar set of remedies extending program access rules and imposing a commercial arbitration remedy for RSNs in its approvals of the license transfers incident to the Adelphia-Time Warner-Comcast transaction.[82] The Commission found that the transaction was likely to result in a public interest harm based on the ability of the applicants to impose uniform price increases on carriage of RSN programming; that these price increases would harm consumers of existing MVPDs and deter competitive entry by new MVPD competitors; and that the program access rules do not afford a remedy for allegations of competitive harm due to uniform price increases.[83]

Accordingly, the Commission imposed a condition based on a combination of the requirements of the program access rule and commercial arbitration, modeled on the News Corp.-Hughes remedy, primarily to "constrain Comcast's and Time Warner's ability to increase rates for RSN programming uniformly or otherwise disadvantage rival MVPDs via anticompetitive strategies."[84] The Commission also found that, in addition to tempering across-the-board price increases through enhanced bargaining power, the conditions would "provide protection, if necessary, against "'stealth discrimination,' permanent foreclosure, and temporary foreclosure.[85]

Comcast and Time Warner were prohibited, *inter alia*, from offering any RSN on an exclusive basis to any MVPD, regardless of means of delivery, and that carriage be offered on a non-exclusive basis and on nondiscriminatory terms and

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[82] *Adelphia Order* at 159-63, Appendix B.

[83] *Adelphia Order*, ¶ 155.

[84] *Adelphia Order*, ¶ 156.

[85] *Adelphia Order*, ¶ 160.

conditions under the requirements of the program access rules, regardless of the means of program delivery.[86] Aggrieved MVPDs were given the right to bring program access complaints against Comcast and Time Warner or their covered RSNs using the procedures set forth in the Commission's program access rules.[87] Similar to the News Corp.-Hughes arbitration remedy, carriage of RSN programming was to continue on the terms and conditions of the expired affiliation agreement during the pendency of the arbitration proceeding and the final offer made to the arbitrator must be for standalone carriage of the RSN and no other programming or service.[88]

In summary, to temper the ability of vertically-integrated programming providers post-transaction to raise rates above the level they would have been able to command pre-transaction, the Commission has conditioned its license transfer approvals by extending the reach of its program access rules; created a commercial arbitration remedy; imposed standstill provisions ensuring carriage during the pendency of the dispute resolution mechanism; and required that final offers presented to the arbitrator in "baseball arbitration" be in the form of contracts for stand-alone carriage of the affected programming – RSNs and local broadcast station signals. In addition, as discussed below, certain provisions were made for small cable systems.

[86] *Adelphia Order*, ¶ 156, Appendix B.

[87] *Adelphia Order*, ¶ 156.

[88] *Adelphia Order*, Appendix B.

While these remedies were clearly necessary in order for the Commission to find, on balance, that it was in the "public interest" to approve the license transfers attendant upon these transactions, the remedies themselves have proven insufficient *in practice* to cure the harms for small and mid-sized MVPDs.

2. ACA has demonstrated that neither the program access rules nor arbitration, standing alone, provide adequate remedies for the harm of this transaction.

While the Commission's goals in extending the program access rules to cover broadcast programming and establishing a commercial arbitration remedy to address transaction-specific competitive and consumer harms resulting from increased vertical market power were well-intended, for small and mid-sized MVPDs they have fallen far short of a cure.

First, because, as discussed above, the News Corp.-Hughes and Adelphia-Time Warner-Comcast transactions did not involve significant horizontal effects, the remedies discussed above do not address the substantial horizontal harms the combination of Comcast and NBCU programming assets will visit upon MVPDs in affected markets. That said, the Commission has extensive experience in addressing horizontal harms arising from mergers and acquisitions and either rejecting proposed transactions or imposing stringent conditions, usually structural remedies. For example, in the proposed combination of Dish and DirecTV, the Commission effectively rejected (by setting the petition for hearing) the horizontal combination of multichannel video programming distribution assets finding:

> Based on the record before us, we find that Applicants have not met their burden of demonstrating that approval of the Application is in the public interest. As discussed more fully below, we are concerned that ownership of

> all satellites in the full-CONUS orbital locations by one entity, New EchoStar, could likely undermine our goals of increased and fair competition in the provision of DBS service...Accordingly, pursuant to Section 309(e) of the Communications Act of 1934, as amended (the "Communications Act" or the "Act"), we hereby designate the Application for hearing.[89]

Several years later, in reviewing the proposed acquisition of BellSouth by AT&T, the Commission found that the horizontal overlap in the local private line market was of sufficient concern – "likely to have an anticompetitive effect" – that it approved the transaction only after accepting AT&T's commitment to divest assets.[90] The Commission also has employed the divestiture remedy on numerous occasions to address horizontal harms arising from mergers in the mobile radio (cellular) industry.[91] Thus, the Commission has demonstrated its understanding that transactions producing serious horizontal harms warrant the imposition of robust relief.

Second, as ACA has demonstrated, the program access rules are inadequate to deal with discrimination since it permits price differentials based on more than the

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[89] *EchoStar-DirecTV Order,* ¶ 3.

[90] *In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5664, ¶ 3 (2007) ("The record indicates that, in a small number of buildings in the BellSouth in-region territory where AT&T and BellSouth are the only carriers with direct connections, and where other competitive entry is unlikely, the merger is likely to have an anticompetitive effect on the market for Type I wholesale special access services. We further find, however, AT&T's voluntary commitment to divest at least eight fiber strands in the form of ten-year IRUs for these two-to-one buildings where entry is unlikely [to] adequately remedies [sic] these potential harms.").

[91] *In the Matter of Applications of AT&T Inc. and Centennial Communications Corp. For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Leasing Arrangements*, Memorandum Opinion and Order, 24 FCC Rcd 13,915, ¶ 2 (2009) ("[T]he proposed transaction raises competition issues because it would result in the combination of overlapping AT&T and Centennial mobile communications coverage and services in various local areas…Accordingly, we require divestiture of Centennial's wireless operations in these areas….").

cost of delivery.[92] The problem is compounded, as ACA wrote in its comments, by the lack of "publicly available systematic data about the degree of volume discounts in the marketplace," rendering the program access rules difficult to enforce.[93] As ACA explained:

> 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. 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, and in 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.[94]

Moreover, as ACA and its economic expert Professor Rogerson have also found, even if the program access rules are extended to retransmission consent negotiations, "'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

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[92] ACA Initial Comments at 38-40; Rogerson I at 41-44. Professor Rogerson also describes this as the "quantity discounts problem" in Rogerson II. *See* also Rogerson II at 38.

[93] ACA Initial Comments at 39.

[94] ACA Initial Comments at 39-40 (footnotes omitted).

charge its rivals' in the six DMAs where there is both an NBC O&O and where Comcast is the most significant cable operator."[95]

In addition, ACA has demonstrated that the program access rules will fail to prevent Comcast-NBCU from raising its rival MVPDs' rates by simply charging itself supra-competitive prices.[96]

> 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.[97]

Thus, while the rules serve the admirable function of prohibiting exclusive program access agreements and preventing vertically integrated cable programming networks from discriminating against unaffiliated MVPDs in the prices, terms and conditions of program access, they do not, as the Commission itself has recognized, address the question of price level.[98] As ACA has concluded, unless these well-known shortcomings of the program access are adequately addressed, they cannot provide redress for the harms of the Comcast-NBCU combination.

Third, arbitration has proven too costly for small MVPDs (even with a bargaining agent provision). The Commission recognized the particular risk of supra-

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[95] ACA Initial Comments at 40 (*quoting* Rogerson I at 44).

[96] ACA Initial Comments at 42-43.

[97] ACA Initial Comments at 42 (*quoting* Rogerson I at 46).

[98] *See* ACA Initial Comments at 42-43 (*citing News Corp.-Hughes Order*, ¶¶ 170, 211; *Adelphia Order*, ¶ 119).

competitive RSN and retransmission consent prices being extracted from small and medium-sized MVPDs, and the relative inability of such MVPDs to bear the costs of commercial arbitration due to smaller subscriber base and financial resources in the News Corp.-Hughes Order.[99] In the hope of ensuring that it provided all MVPDs a useful procedure, the Commission specified that an MVPD meeting the definition of "small cable company" could choose to appoint a bargaining agent to bargain collectively on its behalf in negotiating carriage of RSNs; the designated collective bargaining agent was give all the rights and responsibilities granted an MVPD in the arbitration conditions.

Additionally, the Commission recognized that the "costs of arbitration may overwhelm MVPDs with fewer than 5000 subscribers, thereby providing them with little relief from the harms associated with this transaction. For such systems, News Corp. was required to either elect "must carry" status or negotiate retransmission consent for its owned and operated stations without any requirements for cash compensation or carriage of programming other than the broadcast signal.[100]

Unfortunately, in ACA's experience, the costs of arbitration not only overwhelm small MVPDs with 5000 or fewer subscribers, as the Commission accurately predicted, they have in fact overwhelmed the utility of this remedy for MVPDs even with far greater subscriber levels. Colleen Abdoulah, President and Chief Executive Officer of WOW!, emphasized this point in her February 4, 2010

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[99] *News Corp.-Hughes Order*, ¶¶ 176, 220, 223.

[100] *News Corp.-Hughes Order*, ¶ 224.

testimony before the Senate Committee on Antitrust, Competition Policy and Consumer Rights:

> WOW! considered using the arbitration process imposed on Comcast in the Adelphia decision but 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. In other words, 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. Instead, we had no choice but to "eat" an enormous rate increase to carry Comcast's RSN. In effect, the program access process has essentially given us a right without a remedy.[101]

In the attached declaration, Robert Gessner, President of Massillon Cable TV,[102] buttresses this conclusion in his discussion of the high cost of his company's arbitration with Fox over carriage of Fox Sports Ohio, which began in 2005 and is still not completely resolved:

> When all costs of the arbitration are considered, Massillon spent approximately $1,000,000 from the date of the arbitration request (October 2006) through the present day. This amount does not include the consideration out-of-pocket costs (including travel expenses) incurred by Massillon and substantial time and resources spent by Massillon management and employees to participate in the dispute and arbitration process.[103]

Mr. Gessner goes on to state that "Fox was intent on…using its 'deep pockets' to make a small cable operator 'cry uncle.'"[104]

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[101] 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 8, *available at* http://judiciary.senate.gov/pdf/10-02-04%20Abdoulah%20Testimony.pdf (last visited Aug. 19, 2010).

[102] Massillon Cable TV has approximately 40,000 subscribers.

[103] Declaration of Robert Gessner, ¶ 15, attached hereto as Attachment B ("Gessner Declaration").

[104] Gessner Declaration, ¶ 18.

Nor has the arbitration process been quick and efficient, as hoped by the Commission. In fact, the opposite is the case. Mr. Gessner vividly concludes about Massillon's arbitration experience:

> "In the final analysis, the arbitration process was far different than any expectations. It was not a relatively straightforward process. It did not live up to its potential as an expeditious and low-cost dispute resolution mechanism. Rather, it proved that one party can frustrate the process to the point where it is not feasible for a smaller entity to remain engaged either for lack of financial resources or personal time. Large program entities may say Massillon has 'learned its lesson' because it would not be inclined to commit to binding arbitration again."[105]

Moreover, arbitration has been of extremely limited value even for bargaining agents chosen by smaller MVPDs seeking to avail themselves of the collective bargaining option the Commission has used in the past. In the News Corp.-Hughes Order, the Commission specified (i) that an MVPD meeting the definition of "small cable company" under its rules "may choose to appoint a bargaining agent to bargain collectively on its behalf in negotiating for carriage" of both RSN and broadcast station programming and (ii) that the programmer may not refuse to negotiate carriage of the covered programming such entity.[106] The designated collective bargaining entity was also granted "all the rights and responsibilities granted" by the arbitration conditions.[107] In theory, permitting collective bargaining on behalf of the small operators would "counter-balance the increase in News Corp. market power" with respect to the covered programming.[108]

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[105] Gessner Declaration, ¶ 20.

[106] *News Corp.-Hughes Order*, ¶¶ 176, 223.

[107] *News Corp.-Hughes Order*, ¶¶ 176, 223.

[108] *News Corp.-Hughes Order*, ¶ 176.

These bargaining agent provisions proved to be of extremely limited value for the small MVPDs' chosen bargaining representative, the National Cable Television Cooperative ("NCTC"). NCTC is a buying cooperative that primarily negotiates program carriage agreements for national satellite cable programming networks on behalf of 950 member companies. NCTC is not formally designated as an agent for its members. Nonetheless, NCTC effectively operates as a "non-binding agent" for them. That is, NCTC negotiates the rates, terms, and conditions of carriage agreements with programmers, and its individual members may then opt into the agreement. In practice, structural limitations prevented NCTC from representing a meaningful class of its members in arbitration for several reasons.

First, "collective bargaining" for carriage agreements does not work for non-binding agents like NCTC, because it only extends protection to the MVPDs that are bound by the terms of the agreement while it is being negotiated, and, in the case of a non-binding agent, that number will be zero. Because the prices for programming are based on the number of subscribers the MVPD brings to the table, NCTC cannot get the best terms for its members unless all are considered "represented" even though NCTC is not in a binding agent-principal relationship with them for purposes of the negotiation. Therefore, even if NCTC is bargaining on behalf of, for example, 80 MVPDs with 100,000 or more subscribers for carriage of a particular programming network, the programmer is not obligated to make an offer based on the largest number of subscribers who may benefit from the deal but is free to offer the relatively higher rates for a far lower number of subscribers.

Second, when NCTC sought to apply the Commission's collective bargaining provision to RSN negotiations, it found that the programming supplier limited any NCTC negotiation to a "sub-class" of its members with subscribers distributing that RSN. This effectively decreased NCTC's ability to negotiate a fair market rate for the programming.

Third, the "small cable company" restriction removed the larger NCTC members from potential representation in a class for collective bargaining purposes, with the effect of further limiting NCTC's representation to an even smaller sub-class of its "small cable company" members.

Fourth, those "small cable companies" typically had widely disparate contract expiration dates, whereas the bargaining agent provisions effectively required any small cable companies that wanted to be represented by a bargaining agent to have simultaneous contract expiration dates. This had two effects. First, this fact precluded all the small cable operators from being represented. Second, since any "small cable companies" whose contracts expired later could only join a separate class, which would have to negotiate its own agreement with its own three-year term, it effectively precluded those small cable companies from ever joining an earlier class. Thus, by negotiating staggered contract expiration dates, a programmer could easily, effectively, and permanently preclude a meaningful class from ever being formed.[109]

[109] NCTC's historic solution to this problem, which has been its uniform practice in all affiliation agreements with programmers throughout its 25-year history, is to provide in NCTC's agreements with programmers the right for NCTC's members to opt into NCTC's agreements and to simultaneously terminate any direct pre-existing contractual arrangements such members might have with the programmers.

In the one instance where NCTC invoked the arbitration procedures, it reversed its historic business practice and secured appointments of agency from a small number of its members. Without acknowledgement of the effect of its "opt-in" procedure on its ability to collectively bargain, however, NCTC was precluded from assembling for the arbitration (or for that matter, for any agreement resulting from the arbitration or for any subsequent arbitration), a meaningful class of members to conduct an effective collective bargaining.

In summary, because of the juxtaposition of collective bargaining with the opt-in nature of NCTC's actual bargaining position, where NCTC has acted as bargaining agent and invoked the Commission's arbitration remedy, it has been unable to secure the benefits of lower programming costs that true collective bargaining would provide, thus frustrating the goals of the Commission in establishing the arbitration remedy.

ACA's proposed conditions, described below, build upon the strengths and correct the weaknesses of the conditions imposed on the News Corp.-DirecTV and Adelphia-Comcast-Time Warner transactions to better target the transaction-specific horizontal and vertical harms posed by the combination of Comcast and NBCU programming and distribution assets.

D. The ACA's conditions are targeted to addressing the competitive harms of the proposed combination and are sufficiently robust and durable to ameliorate these effects.

1. Introduction and Summary of Remedies.

In these and earlier comments, the ACA has demonstrated that the proposed combination of NBCU's programming assets with Comcast's programming and distribution assets would generate diverse and significant harms that affect both traditional and new multichannel distribution platforms. While the MVPDs throughout the industry and their subscribers would incur these harms, smaller MVPDs – especially those that compete with Comcast's distribution assets – and their subscribers would suffer the greatest. The Commission thus faces real challenges in fashioning sufficient remedies that would ensure the proposed transaction is in the public interest. These challenges are magnified by the fact that remedies used in previous combinations have often proven insufficient.

It is from these perspectives that the ACA has fashioned its proposed remedies. In the proposals that follow the ACA provides an integrated series of remedies with two overarching objectives:

- Address the principal harms from the proposed combination, i.e. increases in the programming prices MVPDs and their subscribers will pay to Comcast-NBCU when the programming assets of NBCU and Comcast are combined; and increases in programming prices rival MVPDs and their subscribers will pay to Comcast-NBCU when the programming assets of NBCU are combined with the distribution assets of Comcast.

- Enable smaller MVPDs to enforce any rights provided in the remedies either directly or through a bargaining agent.

At its core, the ACA's remedies ensure that all MVPDs – and especially smaller MVPDs -- can carry NBCU's O&Os and its cable networks and Comcast's RSNs at rates, terms, and conditions reflecting pre-combination market conditions. To achieve this aim, the ACA proposes two sets of measures. The first are general measures, most of which were either used in or based upon previous Commission decisions. These general measures, which apply to all MVPDs, include extension of the program access rules to cover all programming sold by Comcast-NBCU and all platforms by which MVPDs may distribute that programming, the stand-alone sale by Comcast-NBCU of local broadcast stations and RSNs, and commercial arbitration for all programming. The ACA then proposes three critical special measures to ensure that smaller MVPDs can effectively utilize these remedies. The following summarizes the key features of these two integrated proposals:

1. General Remedies to Address Increases in Programming Prices

- The program access rules shall be expanded so that they apply to Comcast-NBCU's sale of its broadcast stations and its other programming regardless of the means by which any of the programming is delivered to consumers (*e.g.*, online and mobile).

- Comcast-NBCU must sell each NBC O&O and each Comcast RSN on a stand-alone basis to all MVPDs. This remedy will significantly decrease the complexity and cost of commercial arbitration, including the proposed special commercial arbitration process for smaller operators.

- Comcast-NBCU is subject to a commercial arbitration remedy to ensure that it does not sell programming – broadcast stations, RSNs, and national cable networks – at a price that exceeds fair market value.

2. Special Provisions to Ensure Remedies are Useful for Smaller MVPDs

- MVPDs with fewer than 125,000 MVPD subscribers in the relevant market cannot be charged more than 5% higher than the lowest Net Effective Rate charged to other MVPDs for NBC O&Os and Comcast RSNs. To ensure transparency and assist in enforcing this right, the Joint Venture and Comcast must file annual certifications.

- To enable smaller MVPDs to enforce their ability to access NBC O&Os and Comcast RSNs at competitive rates, a new, lower-cost arbitration process with an automatic right of continued carriage is established.

- Comcast-NBCU must negotiate in good faith with Bargaining Agents, and these agents shall have comparable rights to MVPDs to obtain programming from Comcast-NBCU.

Finally, to ensure the remedies adequately address the harms and reflect the dynamic of the programming market and other agreements entered into by the Applicants with other parties to the FCC's proceeding, the license conditions should remain in effect for 9 years. The sections that follow discuss the conditions and enforcement mechanisms in detail.

2. ACA Proposed Conditions.[110]

a. Definitions.

Proposal:[111] *For purposes of the conditions set forth below, the following definitions apply:*

- ***"Bargaining Agent"*** *means any entity that negotiates retransmission consent or carriage agreements on behalf of one or more of its principals or members, regardless of whether they are bound by the prices, terms and conditions entered into by the Bargaining Agent.*[112]

- ***"Comcast-NBCU"*** *shall include Comcast Corporation ("Comcast") and the joint venture, composed of assets of Comcast and NBC Universal, Inc., ("NBCU"), and each of the companies' subsidiaries, affiliates, parents, successors, and assigns.*

- ***"Covered NBC Stations"*** *means all NBC broadcast television stations currently or in the future owned, controlled or managed by Comcast-NBCU and all independent NBC affiliates on whose behalf Comcast-NBCU currently or in the future negotiates retransmission consent agreements.*

[110] ACA's Proposed Comcast-NBCU License Transfer Conditions are attached hereto as Attachment C.

[111] The ACA discusses these definitions further in the next sections.

[112] It is intended that the National Cable Television Cooperative (NCTC), as currently organized and as it operates, would be considered a Bargaining Agent for purposes of these conditions.

- ***"Covered RSNs"*** *means all regional sports networks ("RSNs") that are currently or in the future owned, controlled or managed by Comcast-NBCU.*[113]

- ***"Covered National Cable Networks"*** *means all national cable programming networks that are currently or in the future owned, controlled, or managed by Comcast-NBCU.*

- ***"Covered Programming"*** *means all Covered NBC Stations, Covered RSNs, and Covered National Cable Networks.*

- ***"Net Effective Rate"*** *means the net cash consideration charged under a retransmission consent agreement or an RSN carriage agreement, adjusted to reflect the value of: (1) all other economic consideration exchanged, including marketing or launch support, penetration or other discounts, advertising availabilities, channel positioning, and payment terms; and (2) any other rights or obligations related to such agreement, including the packaging of the Covered NBC Station or Covered RSN, and other distribution rights or obligations, which may include digitization, streaming, and/or dual feeds, and the distribution of the Covered NBC Station or Covered RSN on a video-on-demand basis or via a high-definition format or interactive version or broadband technology.*

- ***"Smaller MVPD"*** *means a multichannel video programming distributor ("MVPD") that serves 125,000 MVPD subscribers or less in either the DMA served by a Covered NBC Station, or the region commonly served by a Covered RSN.*

- ***"Stand-Alone Retransmission Consent Agreement"*** *means a retransmission consent agreement that does not include any provision to carry any video programming networks, other services, or other items unrelated to the carriage of a broadcast station signal, other than the primary and multicast streams of a single broadcast station, and any ancillary programming or service.*

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[113] "Regional Sports Network" shall have the same meaning as in the Adelphia-Time Warner-Comcast Order. *Adelphia Order*, ¶ 158 ("For purposes of the foregoing conditions the term 'RSN' means any non-broadcast video programming service that (1) provides live or same-day distribution within a limited geographic region of sporting events of a sports team that is a member of Major League Baseball, the National Basketball Association, the National Football League, the National Hockey League, NASCAR, NCAA Division I Football, NCAA Division I Basketball and (2) in any year, carries a minimum of either 100 hours of programming that meets the criteria of subheading 1, or 10% of the regular season games of at least one sports team that meets the criteria of subheading 1.").

- ***"Stand-Alone RSN Carriage Agreement"*** *means a carriage agreement that does not include any provision to carry any video programming networks, other services, or other items unrelated to the carriage of a RSN, other than a single RSN, and any ancillary programming or service.*

b. General Remedies Applicable to all MVPDs to Ameliorate Price Increases Caused by the Proposed Combination.

Proposal: Extended Applicability of Program Access Rules

1. *The program access rules will apply to Covered NBC stations and all other broadcast television stations currently or in the future owned, controlled or managed by Comcast-NBCU and all independent broadcast television station on whose behalf Comcast-NBCU currently or in the future negotiates retransmission consent agreements.*

2. *The program access rules will apply to Covered RSNs and Covered National Cable Networks, regardless of the means of delivery to MVPDs, including terrestrially delivered programming.*

3. *The program access rules will apply to all programming discussed in Conditions II.A.1 and II.A.2., which shall include all means by which such programming is offered, in whole or in part, to consumers by Comcast-NBCU through any platform, including online and mobile platforms.*

Discussion:

The ACA proposes that the Commission extend the applicability of the non-discrimination and non-exclusive requirements of the existing program access rules to retransmission consent agreements for NBCU broadcast stations and all terrestrially transmitted networks. Moreover, the ACA proposes that the program access rules apply to Comcast-NBCU's distribution of Covered Programming to consumers over any distribution platform (*e.g.* linear, online, or mobile). For example, to the extent that Comcast-NBCU distributes Covered Programming online either directly or through an unaffiliated entity to consumers, a MVPD shall have the right to access the Covered Programming for delivery online to its subscribers. As discussed earlier in this Reply and in Rogerson II,[114] the program access rules are somewhat beneficial to ensure rival MVPDs have recourse when Comcast-NBCU discriminate against them, although they are clearly not sufficient to address the vertical harms from the proposed combination. The ACA's proposal expands the existing rules to correct some of their flaws by:

- Extending the rules to retransmission consent agreements for all of Comcast-NBCU's broadcast television stations, including its NBC and Telemundo O&Os – a condition proffered by the Applicants;
- Applying the conditions to the carriage of all Comcast-NBCU programming regardless of the means of delivery, including terrestrial delivery – an issue addressed to some extent earlier this year by the Commission; and
- Providing MVPDs with the right to obtain carriage of all Comcast-NBCU programming delivered to consumers on any platform, including online distribution and distribution on mobile networks.

In regard to ensuring that program access requirements extend to additional consumer distribution platforms used by MVPDs, the Applicants recognize this trend and discuss in their Application the fact that high-quality video content is increasingly being distributed online by both traditional, new media, and user-generated sources,[115] and "[a]ny relevant market(s) for online video distribution would share many characteristics with the market(s) for traditional video programming."[116] The ACA agrees. "Must have" video programming will retain its "must have" nature regardless distribution platform. Further, Comcast and other MVPDs are developing

[114] Rogerson II at 38-39.

[115] Application at 4.

[116] Application at 88.

sophisticated business strategies to permit their existing video subscribers to have access to 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" local broadcast stations, RSNs, and national cable 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.[117] It is clear that by controlling such a significant amount of "must have" programming post-transaction, Comcast-NBCU would have the incentive and ability to use this newfound market power to either withhold consent from competitors or impose higher fees and discriminatory or other unreasonable conditions for carriage.

Proposal: Require Stand-Alone Agreements for Covered NBC Stations and Covered RSNs

1. *All retransmission consent agreements entered into by Comcast-NBCU for Covered NBC Stations must be Stand-Alone Retransmission Consent Agreements.*

2. *All RSN carriage agreements entered into by Comcast-NBCU for Covered RSNs must be Stand-Alone RSN Carriage Agreements.*

Discussion:

The ACA proposes that Comcast-NBCU sell Covered NBC Stations and Covered RSNs on a stand-alone basis. The term "stand-alone" means the economic value of carrying only the broadcast station or RSN, respectively, without any linkage to carriage of other programming or the exchange of any other items of value. This

[117] ACA Initial Comments at 41-42.

proposal will simplify contracts for must have programming, thereby facilitating compliance with the ACA's commercial arbitration and special arbitration proposals. Having a process that is more straightforward and has greater transparency is important for all MVPDs, but particularly important to smaller MVPDs which have limited resources to participate in arbitrations.

Proposal: Provide Rights to Binding Commercial Arbitration

> *When negotiations fail to produce a mutually acceptable set of prices, terms, and conditions for carriage of (i) Covered NBC Stations, (ii) Covered RSNs, or (iii) Covered National Cable Networks, an aggrieved MVPD may submit a dispute over the prices, terms, and conditions of retransmission consent or carriage agreements for Covered Programming to commercial arbitration, subject to the arbitration rules outlined in the Adelphia-Time Warner-Comcast Order.*[118]

Discussion:

The ACA proposed that the Commission again adopt as a condition a commercial dispute resolution process – baseball-style arbitration -- that can be used by MVPDs unable to achieve carriage at fair market rates for any Covered Programming from Comcast-NBCU. As discussed in the previous section, the Commission adopted this mechanism to address vertical harms in the News Corp.-Hughes transaction and again used it in the more recent Adelphia-Time Warner-Comcast transaction. The ACA agrees that, if properly structured, this process will create incentives for the parties to reach a negotiated solution, and the use of arbitration should be limited.

While the Commission has used commercial arbitration to address vertical

[118] The ACA would not object to the Commission enhancing the terms and conditions of this commercial arbitration remedy to make it more efficient and effective.

effects in recent mergers, ACA notes that it also may prove beneficial to remedying horizontal harms. As Professor Rogerson observes:

> "An important point to note about the regular arbitration process in the context of Comcast-NBCU transaction is that it can remedy both the vertical and horizontal harms of the transaction. That is, to the extent that the arbitration process allows MVPDs to obtain programming from Comcast-NBCU at fair market value, it will prevent Comcast-NBCU from charging fees higher than fair market value regardless of whether the problem originates with the horizontal or vertical aspect of the transaction. The fact that the condition remedies both vertical and horizontal competitive harms is one of the rationales for applying it to all types of Comcast-NBCU programming and not just to programming that was owned by NBCU prior to the transaction."[119]

The ACA proposes this remedy despite the fact that it is too expensive and resource intensive to be used by smaller MVPDs. The Commission should note that the ACA proposes two measures that can rectify some of the shortcomings in the current process. First, as discussed above, the ACA proposes a requirement that Comcast-NBCU sell carriage for its broadcast stations and RSNs on a stand-alone basis, which would simplify the process and significantly lower the cost of accurately valuing the carriage price. Second, as discussed in the next section, for smaller MVPDs, the ACA proposes the creation of a new special arbitration process, which is more streamlined and cost-efficient.

Finally, the ACA's commercial arbitration proposal applies to all Covered Programming, whereas the Commission previously used the arbitration process only to settle disputes for carriage of local broadcast stations and RSNs. The ACA submits that disputes over Comcast-NBCU national cable networks should be covered by the arbitration remedy because of the demonstrable harm to competition

[119] Rogerson II at 44-45.

that arises when NBCU's national cable networks are combined with Comcast's distribution assets. As argued by Professor Rogerson in his report accompanying the ACA's initial comments, the fact that the block of NBCU national cable networks has ratings similar to, if not greater than, Big 4 broadcast networks, provides evidence that withdrawal of this block would have a similar significant effect on rival MVPDs to withdrawal of an NBC O&O or Comcast RSN.[120]

c. Special Provisions to Ensure Remedies are Useful for Smaller MVPDs.

Proposal: Establish Special Requirements for Stand-Alone Agreements for Covered NBC Stations and Covered RSNs for Smaller MVPDs

1. *Upon entering into a Stand-Alone Retransmission Consent Agreement for a Covered NBC Station with an MVPD that serves 125,000 MVPD subscribers or less in the DMA served by the Covered NBC Station, and throughout the life of the agreement, Comcast-NBCU may neither require nor accept fees, terms, and conditions from the MVPD that result in a Net Effective Rate more than 5% higher than the lowest Net Effective Rate of any retransmission consent agreement for the Covered NBC Station with any MVPD including itself, that is currently in force. Moreover, Comcast-NBCU may neither withhold terms and conditions related to carriage of the Covered NBC Station that are made available to other MVPDs, including itself, nor require terms and conditions related to carriage of the Covered NBC Station that are technically infeasible or commercially prohibitive for the MVPD.*

2. *Upon entering into a Stand-Alone RSN Carriage Agreement for a Covered RSN with an MVPD that serves 125,000 MVPD subscribers or less in the region commonly served by the Covered RSN, and throughout the life of the agreement, Comcast-NBCU may neither require nor accept fees, terms, and conditions from the MVPD that result in a Net Effective Rate more than 5% higher than the lowest Net Effective Rate of any carriage agreement for the Covered RSN with any MVPD including itself, that is currently in force. Moreover, Comcast-NBCU may neither withhold terms and conditions related to*

[120] Rogerson I at 37-40. *See* also Rogerson II at 45.

carriage of the Covered RSN that are made available to other MVPDs, including itself, nor require terms and conditions related to carriage of the Covered RSN that are technically infeasible or commercially prohibitive for the MVPD.

3. *Each principal executive and financial officer of Comcast-NBCU will certify to the Commission on an annual basis that Comcast-NBCU, based on his or her knowledge, has calculated the Net Effective Rate for each retransmission consent agreement for Covered NBC Stations and for each carriage agreement for Covered RSNs currently in force, and is not in violation of III.A.1. or III.A.2. (1. or 2. above).*

Discussion:

The special requirement for stand-alone agreements for Covered NBC Stations and Covered RSNs for smaller MVPDs establishes the basic right enabling these MVPDs to obtain Comcast-NBCU programming at rates comparable to that of other MVPDs: Comcast-NBCU is required to make Covered NBC Stations and Covered RSNs available to smaller MVPDs at rates no more than 5% higher than the lowest "Net Effective Rate" of any retransmission consent agreement or carriage agreement, respectively; and, Comcast-NBCU cannot as part of these agreements withhold terms and conditions made available in other agreements or impose conditions that are technically infeasible or commercially prohibitive.

The ACA defines smaller MVPDs as those that serve fewer than 125,001 video subscribers in the relevant market served either by the Covered NBC Station or the Covered RSN. This is based on the discussion earlier in these comments regarding the excessive costs incurred by Massillon in its arbitration with Fox and confronted by WOW! as it was considering filing for arbitration against Comcast. In other words, because they have fewer subscribers, for smaller MVPDs the threshold at which the cost of arbitration, which is relatively fixed, exceeds the benefits of any price decrease is much lower. Professor Rogerson described this clearly in the attached report and provides the rationale for the "125,000 level":

> "Suppose that Comcast-NBCU is raising the fee for a particular network above its fair market value by $.50 per subscriber per month. Suppose that an MVPD believes that it has a 50% chance of winning an arbitration case on this issue, which would result in a fee decrease of $.50 per subscriber per month over the life of the contract. I will assume that the contract lasts 3 years (36 months) and that the MVPD uses a cost of capital of 10%. Straightforward calculation shows that the expected discounted gain to the MVPD from engaging in an arbitration is then equal to $7.80 per subscriber. If the MVPD has s subscribers, then its expected net benefit to participating in the arbitration is given by
>
> $$7.80\ s \quad - 1{,}000{,}000 \qquad \text{(IV.1)}$$
>
> The first term of Equation (V.1) is the expected benefit from winning the arbitration and the second term is the cost of the arbitration. Let s* denote the level of subscribership at which the MVPD would just break even from participating in the arbitration. It is given by
>
> $$s^* = 1{,}000{,}000/7.80 = 128{,}205. \qquad \text{(IV.2)}$$
>
> Based on this calculation, it therefore appears that an MVPD with fewer than approximately 125,000 subscribers for any particular piece of programming would not find it affordable to enter into arbitration even when it had a reasonably strong case."[121]

The 5% rate allowance reflects the fact that Comcast-NBCU may have cost savings when, for larger MVPDs, the fixed costs of contracting can be spread over a larger number of subscribers. Professor Rogerson notes that "5% is likely a very generous over-estimate of the extent to which programmers' per subscriber costs of dealing with smaller MVPDs are higher than their per subscriber costs of dealing with larger MVPDs. In the course of reviewing this transaction, the Commission may

[121] Rogerson II at 42-43 (citations omitted).

consider assessing for itself the magnitude of such cost differences and use this to determine the appropriate percentage."[122]

The term "Net Effective Rate" as used in the special commercial arbitration provision for smaller MVPDs is based upon standard industry Most Favored Nation ("MFN") provisions and practices, including the arbitrator's use of a benchmark value – the "Net Effective Rate" – upon which to base a decision. The definition proposed by the ACA for "Net Effective Rate" reflects current commercial agreements and seeks to account for all consideration, whether in cash or other value, received by the programmer and paid by the MVPD. The ACA recognizes that determination of the "Net Effective Rate" may seem difficult; however, it is important to note that parties regularly enforce MFN provisions in commercial agreements based on calculations of "Net Effective Rate," and the ACA conditions facilitate this by requiring that Comcast-NBCU provide broadcast stations and RSNs on a stand-alone basis.

Finally, due to the lack of transparency for smaller operators with respect to the prices, terms, and conditions paid by other MVPDs and to ensure compliance with ACA's proposed Special Requirements for Smaller MVPDs, the ACA proposes an annual certification from "each principal executive and financial officer of Comcast-NBC." This is similar to certifications used by the Commission to enforce other requirements.[123]

Proposal: Special Commercial Arbitration Remedy for Smaller MVPDs

[122] Rogerson II at 48.

[123] *See, e.g.,* the certification requirement used to ensure compliance with the Commission's Customer Proprietary Network Information ("CPNI") rules. 47 C.F.R. § 64.2009(e).

1. *An MVPD that serves 125,000 MVPD subscribers or less in either the DMA served by a Covered NBC Station, or the region commonly served by a Covered RSN, may submit a dispute over the terms and conditions of carriage of a Covered NBC Station or a Covered RSN subject to a special commercial arbitration remedy for smaller MVPDs designed to affordably resolve disputes related to Conditions III.A1. or III.A.2. (1. and 2. under the Special Requirements for Stand-Alone Agreements above).*

2. *The special commercial arbitration remedy for Smaller MVPDs shall be a traditional arbitration conducted in accordance with the Rules for Special Commercial Arbitration Remedy for Smaller MVPDs contained in Appendix A. (4. below), different from the "final offer" or "baseball" arbitration outlined in Condition II.C.1. (under the commercial arbitration condition above).*

3. *An aggrieved MVPD shall be granted an automatic right to continued carriage of the Covered NBC Station or Covered RSN until the resolution of the special commercial arbitration remedy for smaller MVPDs.*

4. *Rules for the Special Commercial Arbitration Remedy for Smaller MVPDs:*

    a. *Upon receiving timely notice of a Smaller MVPD's intent to arbitrate, Comcast-NBCU shall submit to the arbitrator in writing its last offer to the MVPD, and may include, at its discretion, an explanation of why its offer complies with Conditions III.A.1. or III.A.2. (1. or 2 under the Special Requirements for Stand-Alone Agreements above).*

    b. *Comcast-NBCU shall be obligated to make available to the arbitrator all relevant contracts and other data and information, including its calculations of the Net Effective Rate for each retransmission consent agreement for the Covered NBC Station or for each carriage agreement for the Covered RSNs currently in force, as the arbitrator deems necessary to resolve the dispute.*

    c. *The Smaller MVPD may submit to the arbitrator in writing an explanation for why it believes Comcast-NBCU's last offer does not comply with Conditions III.A.1. or III.A.2. (1. or 2. under the Special Requirements for Stand-Alone Agreements above).*

d. *Comcast-NBCU may respond in writing to the Smaller MVPD's filing.*

e. *After receiving the written briefs of both parties and all relevant contracts and other data and information, the arbitrator shall determine whether Comcast-NBCU's last offer complies with Conditions III.A.1. or III.A.2. (1. or .2. under the Special Requirements for Stand-Alone Agreements above). If the arbitrator finds that Comcast-NBCU's offer does not comply, then the arbitrator, after informal consultation with the parties, shall adjust the Comcast-NBCU offer to bring it into compliance. The MVPD and Comcast-NBCU shall be bound to accept the arbitrator's modified terms and conditions.*

Discussion:

A special arbitration process is established so that individual smaller MVPDs can benefit from the remedy. This process is a traditional arbitration process (not "baseball" style) and is based on standard commercial practices. This arbitration is less burdensome for smaller MVPDs because it will only focus on whether the "Net Effective Rate" for a programming network is within 5% of the lowest rate obtained by any other MVPD.[124] In addition, the arbitrator's task in making this determination will be facilitated because the Covered NBC Stations and Covered RSNs must be

[124] Professor Rogerson in the attached report discusses the nature and benefits of this arbitration process more fully: "[N]ote that the arbitration process is this case is not baseball-style arbitration where both parties make offers and the arbitrator selects the offer that most closely meets the condition specified in the arbitration rules. Instead, only Comcast-NBCU makes a final offer and then the arbitrator directly determines if this offer meets the 5% condition or not. The rationale for using this simpler type of arbitration is that, since Comcast-NBCU and the arbitrator will both have access to all of Comcast's contracts and the MVPD will not, Comcast-NBCU and the arbitrator will both have vastly superior information about the value of the correct rate than will the MVPD. Furthermore under the specified arbitration process Comcast-NBCU will know that it has to choose a rate that meets the 5% condition because the arbitrator will find it very easy to determine if the condition is met. Therefore there will be no need (or advantage) to try to involve the MVPD in a more active way. That is, the arbitrator is the appropriate actor to discipline Comcast-NBCU because it will have access to the same information that Comcast-NBCU has access to and it will be simple and inexpensive for the arbitrator to directly determine if the 5% condition is met." Rogerson II at 49.

offered on a stand-alone basis. This process thus stands in contrast to the Adephia-Time Warner-Comcast arbitration process where the arbitrator needs to determine the fair market value of programming by estimating the revenue stream of the programming and compare the fees charged for all types of related programming offered on the market. Finally, the ACA proposal includes a “standstill” provision, enabling the smaller MVPD to continue to carry the programming until the dispute is resolved.

Proposal: Enable Bargaining Agents to Represent Smaller MVPDs

1. *Comcast-NBCU shall negotiate in good faith with Bargaining Agents. The following actions by Comcast-NBCU would violate this duty to negotiate in good faith:*

   a. *Refusal to negotiate with a Bargaining Agent on behalf of all its principals or members.*

   b. *Refusal to enter into a retransmission consent or carriage agreement with an MVPD unless it contains a restriction on either being represented by a Bargaining Agent, or opting into an agreement subsequently reached by a Bargaining Agent.*

   c. *Refusal to put forth an offer to a Bargaining Agent with members who are not bound by the prices, terms, and conditions entered into by the Bargaining Agent, for any set of different subscriber levels specified by the Bargaining Agent so long as none of the subscriber levels are greater than the aggregate number of MVPD subscribers served by the entire membership of the Bargaining Agent.*

2. *When negotiations involving Bargaining Agents fail to produce a mutually acceptable set of prices, terms, and conditions for Covered Programming, an aggrieved Bargaining Agent shall have the same rights to submit a dispute over the prices, terms, and conditions of carriage for Covered Programming to commercial arbitration as an MVPD, pursuant to the rules outlined in Condition II.C.1 (under the commercial arbitration condition above), with the following additional rules:*

a. *An aggrieved Bargaining Agent with members who are not bound by the prices, terms and conditions entered into by the Bargaining Agent and Comcast-NBCU shall present final offers to the arbitrator based on each disputed set of subscriber levels specified by the Bargaining Agent so long as none of the subscriber levels are greater than the aggregate number of MVPD subscribers served by the entire membership of the Bargaining Agent. For each set of different subscriber levels, the arbitrator will choose the final offer of the party that most closely approximates the fair market value of the Covered Programming.*[125]

Discussion:

The previous proposal addressed concerns with smaller MVPDs obtaining carriage of Covered NBC Stations and Covered RSNs. The "Bargaining Agent" proposals address Comcast-NBCU's post-combination ability to increase prices for carriage of Covered National Cable Networks by smaller MVPDs. It is important to note that the term "Bargaining Agent" includes the National Cable Television Cooperative (NCTC), as currently organized and as it operates. Because NCTC already bargains on behalf of smaller MVPDs to access national cable networks, the implementation of the ACA's proposal is relatively straightforward. In addition, it permits MVPDs to join together in other ways, including for the purpose of negotiating single or multiple agreements for all or any programming, and employing an individual or entity as an agent to bargain on its behalf with Comcast-NBCU, and such individual or agent also would be considered a Bargaining Agent.

The ACA proposal strengthens the ability of Bargaining Agents (and thus smaller MVPDs) to negotiate programming fees on behalf of its members in two

[125] The actual prices, terms, and conditions of the agreement entered into by the Bargaining Agent's members will then be determined by the aggregate number of MVPD subscribers of the Bargaining Agent's members that subsequently opt into the agreement.

important ways. First, the ACA's proposal requires Comcast-NBCU to negotiate in good faith with a Bargaining Agent. This means that Comcast-NBCU cannot refuse to negotiate with a Bargaining Agent. In addition, it must make an offer to a Bargaining Agent even if the agent's members are not bound by the agreement, and such offer must be for "any set of different subscriber levels specified by the Bargaining agent."

Second, the ACA's proposal gives a Bargaining Agent the ability, just like any MVPD, to request binding commercial arbitration to resolve disputes over programming fees for Covered Programming. This means that the agent can ask for arbitration for any individual covered network (*e.g.,* a NBCU O&O or a RSN) or a group of covered networks (*e.g.,* the block of NBCU cable networks) which it seeks to negotiate with Comcast-NBCU on behalf of a group of smaller MVPDs. In addition, in an arbitration proceeding, the Bargaining Agent and Comcast-NBCU shall provide final offers on "each disputed set of subscriber levels that could opt into the agreement, as specified by the Bargaining Agent." The arbitrator will then select the final offer for each subscriber level that is closest to the fair market value for the programming. Finally, the actual prices, terms, and conditions of the agreement entered into by the Bargaining Agent's members will be determined by the aggregate number of subscribers of the MVPDs (members) that subsequently opt into the agreement.

d. Conditions Should Remain in Effect While Harms are Likely to Occur.

Proposal: *These conditions shall apply to Comcast-NBCU for nine years, regardless of whether, during this period, any statute or regulation referenced in any condition, including the program access rules, are not extended by the Commission or are overturned by the Courts.*

Discussion:

The ACA proposes that its conditions remain in effect for nine years.[126] This is based on several factors. First, the competitive harms from the proposed combination are significant and extensive, and there is little likelihood that market events by themselves will soon diminish the increased market power Comcast-NBCU will obtain by the proposed combination. Second, current program carriage agreements may not be negotiated for some time, and rates tend to ratchet-up as subsequent agreements are negotiated. Thus, conditions need to remain in effect through a series of renegotiation cycles. Finally, the Applicants have already entered into privately negotiated agreements with other parties to the proceeding that have a duration of 7 years.[127]

IV. CONCLUSION.

This Reply is the third set of lengthy and well-documented comments the ACA has filed in this proceeding. In its initial comments, the ACA presented the significant horizontal and vertical harms that would ensue from the proposed combination of

[126] The ACA notes that the conditions adopted in the Adephia-Time Warner-Comcast proceeding remain in effect for 6 years. (*See Adelphia Order*, Appendix B.)

[127] *See Ex Parte* Letter of Michael H. Hammer, Counsel for Comcast Corporation, and David H. Solomon, Counsel for NBC Universal, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 10-56 (filed Aug. 6, 2010), and attached Agreements with NBC Television Affiliates, ABC Television Associates Association, CBS Television Network Affiliates Association, and FBC Television Affiliates Association).

Comcast and NBCU. This was supported by a detailed report from Professor Rogerson on the economic rationale underlying such harms and with empirical evidence of the nature and magnitude of the harms. In ACA's Response to Comments, it presented and analyzed documents submitted to the Commission by the Applicants to demonstrate that Comcast and NBCU recognized and understood the proposed combination would enable them to obtain additional market power. This Reply completes the ACA's presentation of its case: the Commission cannot approve the proposed transaction without adopting sufficiently robust and durable conditions. In this Reply, the ACA and its economic expert, Professor Rogerson, first have rebutted the arguments presented by the Applicants' economists, which sought to demonstrate the proposed combination raised little or no competitive concerns. It is clear the horizontal and vertical harms are real and significant. Second, the ACA set forth a series of conditions – both general for all MVPDs and specific for smaller MVPDs – all of which are necessary to ameliorate these harms.

The proposed combination of Comcast and NBCU is a "big deal," and a wide swath of the industry and a great many consumers will suffer grave harm if it is approved without sufficient relief. Consequently, the ACA intends to continue to advocate vigorously and persistently for the Commission to adopt such relief. The ACA recognizes and appreciates that the Commission too has taken a very serious and rigorous approach to reviewing the proposed combination. It stands ready to assist the Commission in further analyzing the transaction and drafting appropriate conditions.

Respectfully submitted,

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