An Economic Analysis of Competitive Benefits from the Comcast-NBCU Transaction

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I. Introduction

A. Qualifications

1. I am Deputy Director of the Stanford Institute for Economic Policy Research ("SIEPR") and Deputy Director of the Public Policy program at Stanford University. I am also a Lecturer in the Public Policy program and have taught in the Economics department at Stanford University. I received my Ph.D. and my M.A. in economics from Stanford University and my A.B. with Honors in economics from the University of California, Berkeley. My specialties include industrial organization, antitrust, and regulation with an emphasis on telecommunications. I served at the Federal Communications Commission ("FCC") for three and one-half years as Deputy Chief Economist, as Acting Chief Economist of the Common Carrier Bureau, and as a Senior Economist in the Office of Plans and Policy. In these positions, I had significant involvement with, among other things, the FCC's implementation of areas of competition and Internet policy.

2. My research focuses on telecommunications and competition policy. I have been the author or co-author of a number of articles relating to Internet and telecommunications competition policy. I have also co-edited two books on telecommunications, have helped organize several telecommunications conferences, serve as an associate editor of Information Economics and Policy, a leading field journal in the economics of communication, and serve on the Board of the Telecommunications Policy Research Conference.

3. Since returning to Stanford from the FCC, I have regularly taught courses that involve telecommunications and competition policy. Several times I have taught a course entitled "Antitrust and Regulation," and I have also taught "Economics of the Internet" and "Economic Policy Analysis" that have focused on telecommunications, regulation, and antitrust issues.

4. I have testified as an independent academic expert on competition and telecommunications matters in hearings at the FCC, the United States Senate Commerce Committee, the House Commerce Committee, the California State Senate Committee on Banking, Commerce and International Trade, and the National Telecommunications and Information Administration of the Department of Commerce. I have also advised companies and organizations on antitrust matters and served as an expert witness on competition issues,

including testifying before the Copyright Arbitration Review Panel with regard to the allocation of cable distant signal copyright royalties. My curriculum vitae is included as Appendix 1.

B. Assignment

5. Comcast Corporation ("Comcast") and General Electric Company ("GE") propose to create a joint venture that combines the broadcast, cable programming, movie studio, theme park, and online content businesses of NBC Universal ("NBCU") with the cable programming and certain online content businesses of Comcast.[1] Initially, the joint venture will be majority-owned (51 percent) and managed by Comcast while will GE remain a minority partner (49 percent) in the joint venture. Over a period of three and a half to seven years, Comcast has the option to acquire GE's 49 percent ownership interest.[2] As described in the Public Interest Statement, GE will have consent rights with respect to certain non-ordinary course matters, and the joint venture agreement provides that Comcast executives serving as directors or officers of the joint venture owe fiduciary duties to the joint venture and its members, including GE.[3] As explained below, the joint venture will enable Comcast to obtain greater and more efficient access to NBCU content at arm's length terms for uses Comcast decides are appropriate without protracted delays or failures to reach agreements.[4]

6. I have been asked by counsel for Comcast and GE to analyze, from an economics perspective, the procompetitive effects that are likely to result from the Comcast-NBCU

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[1] See *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*, MB Docket No. 10-56, Applications and Public Interest Statement, Lead Application File Nos. BTCCDT-20100128AAG (MB), SES-ASG-20100201-00148 (IB), and 0004101576 (WTB) (filed Jan. 28, 2010) ("Public Interest Statement").

[2] See Public Interest Statement, pp. 12, 15.

[3] See Public Interest Statement, p. 14 and App. 4, § 6.01.

[4] Pricing for transactions between Comcast and the new entity are defined in the agreement as "terms that are no less favorable to the Company [the joint venture] . . . than those that would have been obtained in a comparable transaction by the Company . . . with an unrelated Person." See Public Interest Statement, App. 4, p. 93 (LLC Agreement Section 10.02(a)). As discussed extensively below in Section V, it is important to note that unrelated firms may not come to agreements because of differing views about uncertain future outcomes and fear of ex post opportunism. Because Comcast's distribution assets and NBCU will share common ownership, they are less likely to suffer from these concerns and more likely to come to an agreement quickly and efficiently whereas unrelated parties may delay substantially, agree to a sub-optimal contract, or even fail to come to an agreement and not realize the efficient gains from trade. As a result, "arm's length" terms and conditions has a slightly different interpretation here (and in the remainder of the paper) than simply assuming that all trades that Comcast and the new entity make would also be made by unrelated parties. For the purposes of this paper, I use the term "NBCU content" to refer to content for which NBCU has broad rights to control the distribution.

transaction. In particular, I examine the ways in which the transaction will facilitate increases in output through simplified negotiations, aligned incentives, and reduced costs.

II. Summary of Opinions

7. In this paper, I provide an economic analysis of the likely procompetitive efficiencies from the proposed transaction. The proposed transaction is primarily a vertical combination of NBCU's content with Comcast's distribution platforms, although there are some minor horizontal aspects as well. The transaction is likely to result in synergies and changes in incentives that will stimulate increased investment by Comcast in programming and distribution, and this, in turn, will broaden and accelerate innovation in video distribution platforms, expand the range of video programming services, and increase the quantity, quality, and convenience of video viewing by consumers. I address the likely effects of the transaction on Comcast's development of innovative distribution channels (including on cable and online) and the quantity and quality of content created by the joint venture. Beyond the benefits described in this paper, Applicants offered several voluntary commitments to provide additional consumer benefits.[5] Quantification of the costs and benefits of these commitments is beyond the scope of this paper, which focuses on the economic benefits inherent in the proposed new business structure. However, the tangible benefits of the voluntary commitments in terms of diversity, localism, and competition are discussed in the Public Interest Statement.[6]

8. My principal findings are:

- Comcast plans to make substantial investments in NBCU's programming. Comcast's past investments in its networks demonstrate its ability and willingness to invest in programming. Although Comcast has a limited array of programming, it has made substantial investments in launching networks,

[5] For example, among other things, Applicants made commitments regarding local programming, public, educational, and governmental ("PEG") programming, children's programming (including increased offerings and on-screen program ratings and parental controls), Spanish language programming, and adding at least two independent channels to Comcast's digital cable lineup each year for three years. They also committed to continue NBCU's policy of journalistic independence. See Public Interest Statement, pp. 10, 36-69, 112-113, and App. 8.

[6] See Public Interest Statement, Executive Summary ("Not only will the transaction yield the public interest benefits of diversity, localism, competition, and innovation, but the Applicants also propose to enhance those benefits by offering an unprecedented array of public interest commitments."); see also Public Interest Statement, App. 8; Public Interest Statement, App. 9 (Expert Declaration of Matthew L. Spitzer Concerning Diversity and Localism Issues Associated with the Proposed Comcast-NBCU Transaction, Jan. 26, 2010).

acquiring networks, and increasing the programming budgets of its networks. Comcast executives expect to have a similar approach to investment in the NBCU programming that will be part of the joint venture. Comcast's investments in programming will benefit consumers.

- Protracted negotiations and failures to reach agreements between content companies and distribution companies, such as Comcast, have delayed and hindered the development of innovative distribution platforms and the distribution of content through these platforms, to the detriment of consumers.

- Comcast's acquisition of a 51% ownership in, and control of, NBCU will facilitate and accelerate negotiations between NBCU (content) and Comcast (distribution). Consumers will benefit because Comcast management will have the ability and incentive to invest to increase content availability through a variety of different platforms, services, and business models.

- The quantity and variety of NBCU programming will help to facilitate experimentation by Comcast for its future investments in program delivery platforms, which will lead to the development of successful new business models.

- The likely changes by the new entity will expand output and increase incentives to develop and distribute quality content in a variety of ways to make consumers better off than they would be without the transaction.

- In response to changes and increased output by the new entity, competitive forces will likely encourage content and distribution competitors to increase the quantity and quality of their services, enhancing competition and further increasing the benefits to consumers.

- The proposed transaction will result in additional efficiencies from sharing of resources, cross-promotions, and elimination of double marginalization that will expand the quantity and quality of output to the benefit of consumers.

9. The remainder of my declaration proceeds as follows. Section III discusses Comcast's willingness and incentive to increase investment in programming. Section IV describes the challenges Comcast has faced in developing new platforms and services because of difficulties in reaching agreements with content providers. Section V discusses how – from an economic perspective – the proposed transaction is likely to help overcome these challenges and lead to more rapid adoption of new platforms for content delivery. Section VI discusses additional

anticipated efficiencies from the combination of NBCU and Comcast. Section VII provides conclusions.

III. Increased Investment in Programming

10. After the proposed transaction, Comcast will have the ability and incentive to increase investment in and expand NBCU's programming. Comcast's leadership has stated its willingness to invest in NBCU's programming to "enable the new NBCU to better serve consumers and advance the Commission's policy goals of diversity, localism, competition, and innovation."[7] Although Comcast has a limited array of programming, it has made substantial investments in acquiring networks and increasing the programming budgets of the networks it controls.

11. Comcast's ability and willingness to invest in programming is exemplified by its investments in the networks it controls. For example, Comcast has had a good track record of investing to expand and increase the attractiveness of programming on E! and Style.[8] Since the launch of the Style network in 2001, Comcast has made significant investments to develop the channel and make it viable; Style's programming expense was {{ }} million in 2004 and increased to {{ }} million in 2009. This increased investment in Style contributed to the network's substantial increase in ratings between 2005 and 2009.[9] During the same time period, Comcast increased E!'s annual programming expense from {{ }} million in 2004 to {{ }}

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[7] See Public Interest Statement, Executive Summary ("This transfer of control [of NBCU from GE to Comcast], along with the contribution of Comcast's complementary content assets, will enable the new NBCU to better serve consumers and advance the Commission's policy goals of diversity, localism, competition, and innovation."); see also Testimony of Brian L. Roberts, "Consumers, Competition, and Consolidation in the Video and Broadband Market," Subcommittee on Communications, Technology, and the Internet, Committee on Commerce, Science and Transportation, United States Senate, Mar. 11, 2010, pp. 63-67 (Appendix #3); Meg James, "Comcast Gets Its Wings: Deal to Take Over NBC Universal Affirms Cable TV's Ascendant Role," Los Angeles Times, Dec. 4, 2009 ("One question is whether Comcast would be willing to make the big investments in programming, where there are more misses than hits. On Thursday, Comcast executives said they would spend more, including for the NBC network, which has languished in fourth place for several seasons . . . . 'One of the things that we are most committed to, both GE and Comcast, is trying to return [NBC] to the No. 1 position,' Roberts told reporters in a conference call. 'There is a desire to invest and grow and compete well.'").

[8] See Comcast Corp., {{ }} (Comcast Attachment #1).

[9] Style's household total day ratings increased [[ ]] from 2005 to 2009, and the average number of households viewing the network [[ ]] in that period. (2005 is the first full year in which ratings for the network were available.) See [[ ]] (Comcast Attachment #2).

million in 2009, and E!'s ratings have likewise increased over this period.[10] Comcast has launched several other national video services – Sprout in 2005, Exercise TV in 2006, and FEARnet in 2006. Sprout was launched as a video-on-demand ("VOD") service to feature PBS, Sesame Street, and other programming for children, and has become a linear network. Exercise TV and FEARnet launched as VOD-only services and currently remain VOD only. Comcast has also invested substantially in securing programming rights for the Golf Channel and Versus since their launches in the 1990s.[11] Golf Channel's programming budget increased from approximately {{ }} million in 2000 to {{ }} million in 2009. Versus' programming budget grew from {{ }} million to {{ }} million over the same period. Comcast's investment in these networks is reflected in their ratings performance during this period.[12] During this same period, Comcast also launched four new sports networks and purchased two others.[13] In addition, in 2004 Comcast partnered with Radio One to launch TV One, a channel targeted to African-Americans.[14] Comcast executives expect to have a similar approach to investment in the NBCU programming that will be part of the new entity.[15]

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[10] E!'s household total day ratings increased [[ ]] from 2004 to 2009, and the average number of households viewing the network increased more than [[ ]] in that period. The equivalent primetime figures grew even more. See [[ ]] (Comcast Attachment #2). E! recently experienced its best-rated telecast ever, attracting 4.8 million viewers. See Josef Adalian, "Kardashians Scores Monster Ratings for E!," TheWrap, Feb. 22, 2010, available at http://www.thewrap.com/ind-column/kardashians-scores-monster-ratings-e-14483, accessed on Apr. 30, 2010.

[11] See Comcast Corp., {{ }} (Comcast Attachment #1).

[12] Golf Channel's household total day ratings increased approximately [[ ]] from 2005 to 2009, and the average number of households viewing the network increased just under [[ ]] in that period. (2005 is the first full year in which ratings for the network were available.) Likewise, Versus' household total day ratings increased [[ ]] from 2004 to 2009, and the average number of households viewing the network increased [[ ]] in that period (with even faster growth in primetime ratings and viewing households). See [[ ]] (Comcast Attachment #2).

[13] Comcast launched CSN Chicago in 2004 (30% interest), CSN California in 2004 (100% interest), CSN Northwest in 2007 (100% interest), and The Mtn. in 2007 (50% interest), and in 2007 purchased from Rainbow Media the regional sports networks ("RSNs") now known as CSN Bay Area (67% interest) and CSN New England (100% interest). Comcast also owns a non-controlling interest in SportsNet New York (8.2 percent), launched in 2006.

[14] See "Comcast to Launch TV One," Multichannel News, Nov. 23, 2003, available at http://www.multichannel.com/article/51720-Comcast_to_Launch_TV_One.php ("'Comcast is pleased to debut TV One, one of the most anticipated, innovative and exciting new networks in a long time, to our subscribers in some of the country's top urban markets,' Comcast Cable president Steve Burke said in a statement. 'TV One is representative of our efforts to provide viewers with the widest possible array of programming choices.'"); see also R. Thomas Umstead, "Will Good Times Roll for TV One?" Multichannel News, Jan. 19, 2004, available at http://www.multichannel.com/article/74645-Will_Good_Times_Roll_for_TV_One_.php ("'I'm so happy that our friends at Comcast saw the real value in this channel and gave us the initial analog carriage,' TV One president

12. For example, the new entity could increase programming by competing more effectively in purchasing rights for additional sports programming. The new entity will have national sports networks, regional sports networks, and local over-the-air broadcast stations. The proposed transaction will enable the joint venture to make more attractive bids to distribute sports content on a multitude of platforms, including broadcast networks, national cable sports networks, regional sports networks, and digital and mobile platforms, thus expanding the availability of sports programming to consumers.[16] Having more cable and over-the-air networks available to carry sports programming will also enable the joint venture to make real-time programming changes more easily such as carrying sports content that has been bumped from one network on another network (e.g., a golf tournament that runs over into primetime). Similar real-time synergies likely could not easily be achieved between unaffiliated companies on a contractual basis.

13. Similarly, Comcast has expressed its intent to improve and expand the joint venture's women's/lifestyle programming.[17] The joint venture will combine NBCU's assets in Oxygen

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Johnathan Rodgers said. 'Rarely do you get big companies to understand how important [distribution] is and to understand how African-Americans deserve this channel.'").

[15] Per David L. Cohen, Executive Vice President, Comcast Corp., Nov. 19, 2009, Mar. 27, 2010, Apr. 09, 2010, Apr. 28, 2010. See also Tom Shales, "A Deal for NBC Could Be Comcastic," Washington Post, Oct. 16, 2009 available at http://www.washingtonpost.com/wp-dyn/content/article/2009/10/15/AR2009101502354.html ("Comcast is expected to put money into NBC to develop programming, not just ask for more cost-cutting as the current owner reportedly does. Comcast will likely explore innovations rather than just trying to survive, since Comcast has been in the television business since it began. Its executives know more about the changing terrain of American telecommunications."); see also Testimony of Brian L. Roberts, "Consumers, Competition, and Consolidation in the Video and Broadband Market," Subcommittee on Communications, Technology, and the Internet, Committee on Commerce, Science and Transportation, United States Senate, Mar. 11, 2010, pp. 93, 118 (Appendix #3) ("What is our motivation is to try to make these channels better, more relevant. Invest in them, be more focused on them than their current situation, and that we think they are good businesses, as you describe, as the next generation wants them on more platforms.").

[16] Comcast is hampered in its competition with Disney/ESPN for sports rights, which can make high bids because it can distribute sports programming on ABC and a variety of widely-carried cable sports networks (e.g., ESPN2, ESPNU). Moreover, many sports leagues consider it important to have the exposure that results from having their games carried on both national networks and local over-the-air broadcast networks. Comcast has no over-the-air broadcast stations. NBCU does not have a widely distributed cable sports network, such as ESPN, but its acquisition in 2008 of a minority interest in what is now known as Universal Sports demonstrates its interest in expanding its provision of sports programming. Comcast's sports channels include its multiple RSNs, Versus, and Golf Channel. NBCU provides sports programming on the NBC network and local broadcast stations as well as Universal Sports, a multicast channel carried by some MVPDs. See John Eggerton, "NBCU, WCSN Create Universal Sports," Broadcasting & Cable, Jun. 16, 2008, available at http://www.broadcastingcable.com/article/114179-NBCU_WCSN_Create_Universal_Sports.php.

[17] See Public Interest Statement, p. 52.

and Bravo with Comcast's assets in E! and Style. Comcast has invested in acquiring and expanding a variety of networks and making the content from those networks available for distribution.

14. With this transaction, Comcast will have more efficient access to NBCU's programming and will have the ability and incentive to invest in the NBCU programming and ensure that it is available on new distribution platforms. Increasing investment in programming makes economic sense for the more vertically integrated entity, as discussed more fully below. Because the new entity will enter into distribution contracts more efficiently, the returns to content will be higher and therefore Comcast will have a stronger incentive to invest in content.

IV. Challenges Facing Comcast Regarding the Development of New Products and Services

15. Another key public interest benefit of the proposed transaction is the acceleration of the anytime/anywhere future of video viewing by overcoming the transactional friction that has made it difficult for Comcast to reach agreements (or to reach them quickly) with content owners and programmers to create and deliver more content to consumers on new platforms. There are a number of reasons for such difficulties, including different expectations about costs, demand, and profits, different perceptions of and attitudes toward risk, different business models, and the complexity of the markets (e.g., multiple windows for content with multiple sources of revenue).[18] There are many issues to resolve and agree upon, including the ability of the content provider to determine the amount and type of content that will be made available under certain conditions, the level of restrictions on licensing content to other distributors and for other services, most favored nation ("MFN") clauses, required marketing efforts by the parties, rights over the sale of advertising, release timing for programming, quality of programming, and many other factors. The challenges stemming from different perspectives and interests on these issues between Comcast and content providers have been difficult to surmount and have delayed the expansion of Comcast video products, platforms, and services that would increase the amount, quality, and accessibility of content for consumers. Greater access to NBCU's content at arm's

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[18] See Public Interest Statement, App. 7, ¶ 4 (Declaration of Robert Pick, Senior Vice President, Corporate Development, Comcast Corporation, Jan. 27, 2010) ("Pick Declaration").

length terms will help Comcast accelerate the transition to the anytime/anywhere world of video viewing its customers increasingly desire.[19]

16. This section describes the challenges facing Comcast and content owners in coming to agreements about the rights to distribute content. I use four examples to illustrate some of those tensions: VOD, DVD day-and-date release, Fancast Xfinity TV, and interactive advertising. Then, in Section V, I explain, from an economic perspective, why the transaction will help to alleviate some of the difficulties.

17. In this paper, I use "VOD" to refer to all video-on-demand. I use "pay VOD" when there is an additional charge for subscribers and "free VOD" when there is not an additional charge for subscribers. DVD day-and-date release refers to the practice of releasing movies on pay VOD the same day they are released on DVD.

18. As a content distributor, Comcast has been a pioneer in developing new, innovative ways of delivering content and services to consumers at times and places of their choosing. For instance, Comcast invested significant resources in developing and promoting VOD starting in 2001.[20] Comcast continues to be a leader in developing new ways of delivering content to consumers. In December 2009, Comcast launched a new service, Fancast Xfinity TV, which allows Comcast subscribers to obtain, at no additional cost, online access to content from their cable subscription packages via the Internet, in addition to ad-supported content available via the

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[19] See Public Interest Statement, p. 37 ("Similarly, the proposed transaction, by linking NBCU's content with Comcast's multiple distribution platforms, will give the combined entity greater incentive and ability to deliver more content choices to consumers sooner than either company could do alone. Moreover, Comcast's creative vision and willingness to invest in its vision will enable the new NBCU to more efficiently respond to consumers' desire for 'anytime, anywhere' access in the rapidly evolving 'new media' landscape."). See also "Multi-Platform TV Viewership," Converging Insights LLC, Mar. 2009, p. 3 (Third Party Attachment #1) ("In addition to watching TV programs as they are regularly scheduled, respondents have used their DVR's (36% overall and 64% among DVR owners) and online websites (20%) to watch as well . . . . TV network websites (31%) and VOD (23%) will become more important viewing platforms during the next six months. Making available more content to these platforms should be ramped up.").

[20] See "Concurrent's MediaHawk Powers VOD Deployments at Multiple Comcast Systems; Concurrent Now Delivering Video-On-Demand to Over 1.47 Million North American Customers," Business Wire, Nov. 20, 2001, available at http://www.allbusiness.com/company-activities-management/operations-customer/6148033-1.html ("Jack Bryant, president and chief executive officer, Concurrent, said, 'As the digital broadband market continues to excel, we are pleased to support Comcast's industry-leading rollout of Video-On-Demand in several Comcast systems in 2001 and 2002.'").

Internet to Comcast subscribers and non-subscribers alike.[21] In 2009, Comcast upgraded set-top boxes and launched Enhanced TV Binary Interchange Format ("EBIF") technology in select markets to allow for interactive TV advertising.[22] In April of this year, Comcast delivered the 2010 Masters Tournament in 3D across multiple platforms, the first live nationwide 3D telecast of a national sporting event.[23]

19. Developing such new platforms requires risky, business-specific investment. For example, as Exhibit 1 shows, Comcast has incurred significant upfront and ongoing expenditures for its new distribution platforms.[24]

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[21] See Comcast Corp., Press Release, Comcast Makes On Demand Online Video Entertainment Experience Available Nationally, Dec. 15, 2009, available at http://www.comcast.com/About/PressRelease/Press ReleaseDetail.ashx?prid=946 ("The innovative new service, now called Fancast XFINITY TV, gives customers an 'anytime anywhere' entertainment experience – at home and on-the-go – and expands the video content customers can watch online by giving them quick and easy access to thousands of hours of cable TV shows, movies and independently produced content . . . . Both Comcast customers and non-Comcast customers across the nation currently have access to over 12,000 hours of great online content through Fancast.com – the company's online TV site and a top TV destination on the web – for free. Now, as a benefit of their cable subscription, Comcast customers will enjoy even more access to thousands of titles from the cable channels in their subscription packages at no additional cost through Fancast XFINITY TV.").

[22] See Todd Spangler, "Comcast Hits 8 Million EBIF-Enabled Homes," Multichannel News, Dec. 2, 2009, available at http://www.multichannel.com/article/397739-Comcast_Hits_8_Million_EBIF_Enabled_Homes.php ("Comcast has upgraded set-tops for 8 million digital cable subscribers to support the cable industry's Enhanced TV Binary Interchange Format (EBIF) technology, which the operator has used to launch an interactive TV advertising service and HSN's Shop by Remote application.").

[23] See Comcast Corp., Press Release, Comcast Partners with the Masters Tournament to Deliver the First National Sporting Event in Next-Generation 3D, Apr. 5, 2010, available at http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=983.

[24] See Pick Declaration, ¶ 18.

Exhibit 1: Comcast Expenditures and Costs Regarding Select Products, Platforms, and Services

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20. However, expenditures such as these may be profitable only if sufficient content is available now and in the future at arm's length terms without protracted delays. While Comcast has made significant investments in developing new delivery platforms, it will have a greater incentive to make these investments (and make them sooner) when it expects to have more efficient access to sufficient quality and variety of content so that it can experiment and demonstrate the effectiveness of new platforms and thereby attract even more content.[25]

21. Although Comcast has invested directly in producing a limited amount of its own content, it must obtain rights to distribute programs from other networks and studios to have a sufficient quality and variety of content to launch new distribution platforms. Comcast has tried

[25] See Pick Declaration, ¶ 18.

to obtain rights to distribute the content that it needs to justify investments in innovative programming delivery platforms, but, as I describe below, it has in some cases been unsuccessful and in other cases experienced lengthy delays. Initially, customer usage of these platforms was limited because significant quality content was not available.[26] This transaction will ensure more certain, rapid, and efficient access to the quality and variety of NBCU programming on arm's length terms, which will facilitate investments by enabling experimentation to develop successful new programming delivery platforms.

22. Content providers such as NBCU recognize that consumers value content more highly when they can access it on more platforms and that increased consumer value creates incentives to generate more content.[27] Content providers, however, also need to ensure that new revenue streams will provide the financial support necessary to justify the large investments that are required to create high-quality, professionally produced programming before they risk undercutting established revenue streams by allowing their content to be delivered over new distribution platforms.[28]

23. These concerns have delayed the benefits consumers receive from new initiatives not only by delaying the availability of content directly, but also by reducing the incentive for rapid and extensive investment on the platform side. For example, as I discuss below, Comcast was not able to launch VOD, DVD day-and-date release, Fancast Xfinity TV, and interactive advertising services as quickly or extensively as Comcast wanted because it did not have sufficient content. NBCU's and Comcast' incentives will be better aligned after the transaction, which will make it easier to take risks and will encourage experimentation, innovation, and investment.

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[26] See Pick Declaration, ¶ 13.

[27] See "Internet Video: Field of Dreams or Nightmare on Elm Street," PiperJaffray, Nov. 2009, p. 12 (Third Party Attachment #2) ("Offering the ability to easily access an unlimited library of content online with limited restrictions would only serve to increase consumption of content. We believe users would be willing to pay as much, if not more, for content that is made available to watch on their schedule and through virtually any device.").

[28] See Public Interest Statement, p. 62 ("Technology, costs, and demand for video products and services change rapidly. As a result, there is a high degree of uncertainty about what content, which delivery platforms, and which revenue models (e.g., subscription and/or advertising) will work or work best."); see also Pick Declaration, ¶¶ 5, 8.

A. Video-on-Demand (VOD)

24. Comcast's experience in trying to create an innovative VOD service for its cable subscribers illustrates its difficulties in obtaining content from independent companies for new platforms. Comcast's vision in the early 2000s was to become a leader in providing popular content, including movies, to its subscribers "on demand" for viewing on their television sets. It invested considerable resources in the technology to provide VOD services. See Exhibit 1 above. While Comcast was able to obtain limited content for its VOD service, it was unsuccessful initially in convincing studios and other content owners to make available a sufficient amount of their popular content to make this new service as attractive as it could be. In its negotiations with content owners, Comcast sought the rights to provide movies and other content both on pay VOD and free VOD.[29] Content providers were uncertain regarding the degree to which offering content on demand to Comcast subscribers would cannibalize the content providers' existing revenue streams.[30]

25. While Comcast had developed VOD technology by 2001, it took several more years to begin to get sufficient quality and variety of content to achieve widespread adoption by consumers, notwithstanding the fact that it had the capacity to offer consumers much more.[31] See Exhibit 2.[32]

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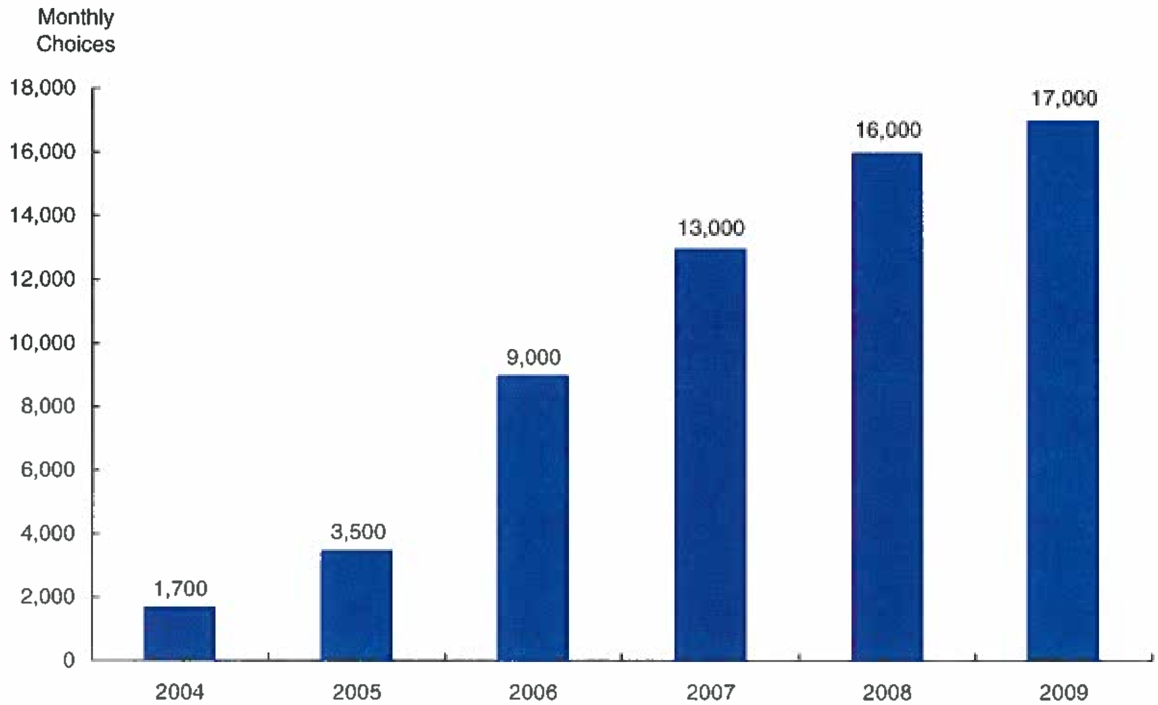
[29] See Mike Farrell, "Banking on a VOD Future," Multichannel News, Dec. 19, 2004, available at http://www.multichannel.com/article/82260-Banking_on_a_VOD_Future.php; see also "Comcast's VOD Guru; His Vision Broadened On-Demand Offerings," Television Week, Jul. 19, 2004 ("Comcast took a brave position nearly two years ago when it began to transition VOD away from just movies-on-demand, an expected moneymaker, to a broader service under the banner On Demand, starting with the Phillyvision concept in its flagship Philadelphia market. That's where Comcast incubated and successfully baked the idea of loads of free on-demand content to complement the movies that have price tags attached.").

[30] See Brooks Barnes, "Studios and Cable Unite in Support of Video on Demand," The New York Times, Mar. 18, 2010 ("[Movie studios] worried that creating too much noise would anger powerful retail partners like Wal-Mart and Best Buy, which had a stranglehold on DVD sales. Movie rental companies like Blockbuster had just enough life left in them to cause their own brand of trouble over video-on-demand cheerleading.").

[31] See Linda Moss, "Raging Debate on VOD Still Hasn't Delivered Hits," Multichannel News, Apr. 10, 2005, available at http://www.multichannel.com/article/118430-Raging_Debate_on_VOD_Still_Hasn_t_Delivered_the_Hits.php ("While major programmers continue to experiment with video on demand, they continue to hold back their most-prized content — marquee primetime programming — from the new platform . . . . Thus, programmers and cable operators (notably Comcast Corp.) are trying to figure out a business model for VOD that satisfies everyone: networks, distributors and advertisers.").

[32] Comcast personnel have provided estimates of VOD choices at different times using different assumptions and for different purposes. Based on interviews with Comcast personnel, the estimated figures for VOD choices and DVD day-and-date releases presented below are the most accurate for the purposes of my analysis.

Exhibit 2: Video On Demand Content Choices



Source: Comcast Corp., "All VOD - Views and Choices" (Appendix #2)

26. During this period, Comcast was negotiating with networks and studios for rights to distribute content on VOD. In late 2004, Comcast participated, along with Sony and others, in an acquisition of Metro-Goldwyn-Mayer ("MGM").[33] As part of the arrangement under which Comcast agreed to invest $250 million in MGM, Comcast was able to obtain expanded rights from Sony and MGM for 100 movies from Sony and an additional 100 movies from MGM for free VOD.[34] Comcast also gained access to more than 35,000 television episodes from Sony and

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[33] See Comcast Corp., Press Release, "Consortium Led by Sony Corporation of America, Providence Equity Partners, Texas Pacific Group, Comcast Corporation and DLJ Merchant Banking Partners Enters Into Definitive Agreement to Acquire Metro-Goldwyn-Mayer," Sept. 23, 2004, available at http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=193.

[34] See Martin Peers and Peter Grant, "Limited Viewing: Comcast, TV Program Owners Clash Over Video-on-Demand," The Wall Street Journal, Jan. 27, 2005 ("As a result of the deal, Sony Pictures agreed to license 100 of its older movies for use on the 'free' section of Comcast's on-demand service. Once the MGM purchase is completed, another 100 MGM films will be added, Mr. Burke says."); see also "About Comcast Cable," available at http://comcastcalifornia.mediaroom.com/index.php?s=18, accessed on Apr. 30, 2010 (noting Comcast's $250 million investment in MGM).

10,000 television episodes from MGM.[35] These deals allowed Comcast to create a "Free Movies" category on VOD; Comcast sought to expand that category over time.

27. As the quantity and quality of VOD content grew, many content owners began to recognize that the VOD model and its promotional aspects were beneficial. In several cases, audience ratings for the standard linear broadcasts of television shows were higher in the Comcast footprint when these shows' content was featured on free VOD.[36] As certain content providers observed that the VOD model could be a benefit, they gradually made more content available for VOD.[37] In 2004, Comcast offered about 1,700 VOD choices in a given month. By 2009, VOD choices increased tenfold to 17,000 choices in a month, including both free and paid selections. See Exhibit 2.

28. As additional content became available on demand, VOD consumption grew rapidly. In 2009, Comcast's digital customers averaged over 300 million VOD views per month. See Exhibit 3. There were about 17 VOD views per home per month.[38] Of the 17,000 available

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[35] See Mike Farrell, "Banking on a VOD Future," Multichannel News, Dec. 19, 2004, available at http://www.multichannel.com/article/82260-Banking_on_a_VOD_Future.php.

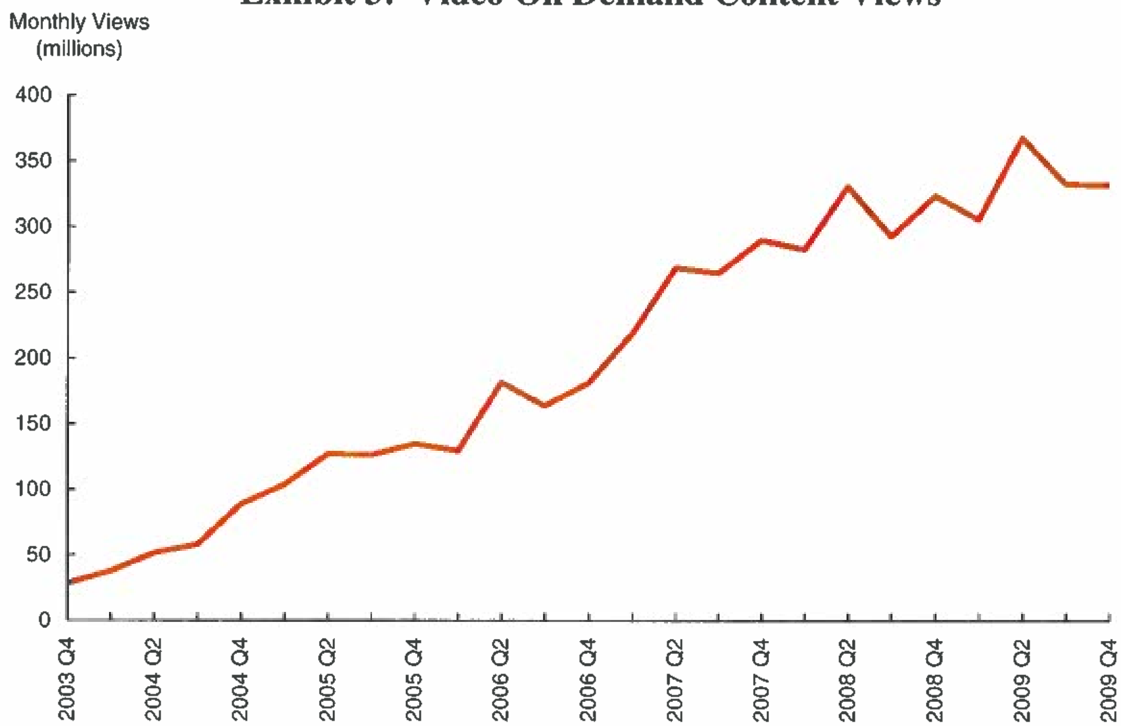
[36] See George Winslow, "Converging On The Future: Providers Try To Leave 2009 Woes Behind," Multichannel News, Jan. 4, 2010, available at http://www.multichannel.com/article/442198-Converging_On_The_Future.php ("'One of the big surprises has been how these new digital platforms have helped grow TV viewing,' said Nic Covey, Director of Cross-Platform Insight at The Nielsen Co."). AMC's Mad Men is one recent example of this. See Comcast Corp., {{ }} (Comcast Attachment #7); see also Comcast Corp., {{ }} (Comcast Attachment #8).

[37] See "Comcast's VOD Guru; His Vision Broadened On-Demand Offerings," Television Week, Jul. 19, 2004 ("'The Phillyvision model transformed the concept of what VOD could be for the whole industry from movies to everything on-demand,' said James Kelso, VP and general manager for broadband systems at SeaChange, a VOD services and equipment supplier that works with Comcast . . . . In fact, Comcast's VOD shift had a ripple effect with programming suppliers. '[Mr. Thompson] has worked across the industry and really stimulated the programming community to more carefully consider VOD,' said Clint Stinchcomb, senior VP and general manager for Discovery HD Theater and VOD. Discovery programming is slated to be added to Comcast's on-demand lineup this summer."). Recently, more content has been made available to consumers through the VOD services of other MVPDs. See Brooks Barnes, "Studios and Cable Unite in Support of Video on Demand," The New York Times, Mar. 18, 2010 ("'The Video Store Just Moved In,' a $30 million advertising campaign backed by eight motion picture companies and eight cable providers, began Tuesday night during 'American Idol' and will continue on television, print and online outlets for three months. The effort is the first time rival studios have come together to push consumers to rent more movies through their cable boxes.").

[38] Based on 18 million digital subscribers in 2009. Comcast's VOD-enabled footprint covers nearly all of its digital subscribers. Per Derek Harrar, Senior Vice President and General Manager of Video and Entertainment Services, Comcast Cable, Apr. 29, 2010. See also Public Interest Statement, p. 18.

titles, the vast majority of entertainment titles were viewed in a given month.[39] Overall, Comcast customers viewed more than 14 billion VOD videos from 2003 to 2009.[40]

Exhibit 3: Video On Demand Content Views



Source: Comcast Corp., "All VOD - Views and Choices" (Appendix #2)

29. Despite growing consumer demand for VOD, Comcast has often not been able to obtain all of the rights it wants from content providers, particularly with respect to programming from broadcast networks or ad-supported cable networks. Even as recently as the second half of 2009, Comcast did not obtain the amount and quality of VOD content it requested from large media companies with which it was negotiating. For example, Comcast has limited amounts of current season primetime broadcast series from ABC and NBC and nothing from Fox and CW.[41] Even

[39] Per Derek Harrar, Senior Vice President and General Manager of Video and Entertainment Services, Comcast Cable, Apr. 29, 2010.

[40] See Comcast Corp., "All VOD - Views and Choices" (Appendix 2); see also David Watson, "Comcast Launches XFINITY," Feb. 3, 2010, available at http://blog.comcast.com/2010/02/comcast-launches-xfinity.html, accessed on Apr. 30, 2010.

[41] Per Matthew Strauss, Senior Vice President, New Media, Content Acquisition, Comcast Cable, Mar. 24, 2010, Apr. 27, 2010.

for available series, only a limited number of episodes, typically four, are available at a time.[42] Similarly, top series and programming from many cable networks still are not available on Comcast VOD. In addition, Comcast has experienced significant delays in obtaining rights regarding the distribution of high-definition content on Comcast's VOD platform from many programmers, including premium programmers.[43] For example, {{ }}, NBCU and Comcast had different positions on a variety of issues, including the amount and type of content that should be released on Comcast's on demand platforms.[44]

30. There are several lessons from Comcast's experience with VOD. First, widespread consumer viewing of Comcast's VOD service would have occurred sooner had Comcast been able to reach agreements for distribution rights to more content during VOD's initial years. Second, absent having sufficient VOD content, it was difficult for Comcast to demonstrate that free and/or pay VOD could benefit content owners by direct payments, increasing audience, and providing promotion, ultimately increasing the content owners' revenues and profits. Thus, content owners were unwilling to make more content available for VOD until carriage agreements were negotiated and renewed, at which point Comcast was able to secure rights for some VOD content.[45] Third, once Comcast acquired VOD rights to greater content, it was able to demonstrate that VOD was a viable business and promotional model for both content providers and multichannel video programming distributors ("MVPDs"). The viability of VOD increased the willingness of content owners to make their content available for VOD services and increased the willingness of other MVPDs to also make the investments necessary to provide VOD services to their subscribers. Many MVPDs now offer VOD services based on content from numerous sources. Fourth, while VOD has become more widespread, it took substantial risky upfront investment and was much slower to develop than it could have been given the capacity of Comcast's distribution technology and consumer demand. As discussed below, these lessons apply directly to the current transaction; with a more certain supply of content, Comcast

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[42] Id.

[43] Id.

[44] Id.

[45] See Comcast Corp., Press Release, Comcast and Home Box Office Extend HBO and Cinemax Distribution Agreement, Aug. 19, 2003, available at http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=293.

will be more willing to invest more aggressively in new delivery platforms and in turn content providers will be more willing to invest in content and to make that content available to the new platforms.

B. DVD Day-and-Date Releases

31. Under DVD day-and-date release, movies become available to cable subscribers for pay VOD on the same day they become available on DVD. Comcast has been technically capable of providing DVD day-and-date release of movies since it first implemented VOD in the early 2000s, and Comcast has been trying for several years to convince content owners – with limited success – to provide movies for DVD day-and-date release. Warner Brothers, at a time when it was part of the same company as Time Warner Cable, was the first major studio to test DVD day-and-date releases.[46] These releases, in 2007, were initially on Time Warner Cable followed a few months later on Comcast.[47] In describing these DVD day-and-date tests, Andrew Mellett, SVP of VOD, Warner Brothers Digital Distribution said, "We are very excited about working with our sister company on this next-generation business model."[48]

32. Comcast has not been able to provide as many DVD day-and-date release movies as it would like because of the concerns of studios and other movie rights holders that such release to cable subscribers on pay VOD would reduce revenues from existing distribution channels, primarily DVD and Blu-ray disc sales.[49] In 2006, Comcast convinced all the major motion

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[46] See Nat Worden, "Films Studios And Cable Providers Tout Video-On-Demand," Dow Jones Newswires, Mar. 17, 2010, available at http://online.wsj.com/article/BT-CO-20100317-709489.html; see also "WB Sets Day-and-Date," Multichannel News, Mar. 15, 2010, available at http://www.multichannel.com/article/450246-WB_Sets_Day_and_Date.php; Mike Farrell, "Time Warner Split 'Legal,'" Multichannel News, Mar. 12, 2009, available at http://www.multichannel.com/article/189874-Time_Warner_Split_Legal_.php.

[47] Warner Brothers began testing day-and-date releases on Time Warner Cable in March 2007. See Time Warner Cable, Press Release, Time Warner Cable Tests Day-and-Date Movies On Demand with Warner Bros. Home Entertainment Group, Mar. 28, 2007, available at http://www.timewarnercable.com/MidOhio/about/inthenewsdetails.ashx?PRID=1643&MarketID=124. The Comcast day-and-date trial began with the release of "The Astronaut Farmer" in July 2007; see Stuart Miller, "Forward Fast: Studios Speed Up Launch Dates for VOD," Multichannel News, May 18, 2009, available at http://www.multichannel.com/article/232702-Forward_Fast.php. "The Astronaut Farmer" was released in July 2007. See Video ETA, The Astronaut Farmer, available at http://videoeta.com/movie/86567, accessed on Apr. 30, 2010.

[48] See Alex Woodson, "TWC Pushes VOD Envelope," The Hollywood Reporter, Mar. 28, 2007, available at http://www.allbusiness.com/services/motion-pictures/4780925-1.html.

[49] See "Comcast Craves Content; Access to MGM's Film Library Would Bolster Video-On-Demand," Broadcasting & Cable, Sept. 20, 2004 ("For years, cable operators had sought to sell a movie on pay-per-view on the same 'day-

picture studios except Sony to participate in a limited test of DVD day-and-date release. The studios permitted Comcast to offer movies on pay VOD at the same time they were released on DVD for six months in two markets – Denver and Pittsburgh – to assess the extent to which these offerings would affect DVD sales.[50] A study conducted for the two test markets provided evidence that [[

]][51] However, except for Warner Brothers, movie studios did not agree to offer Comcast more day-and-date movie releases for pay VOD at that time. According to one analyst:

> While studio executives from several studios have indicated to us that DVD sales (in day and date VOD trial markets) have not been negatively impacted, we believe consumer behavior is far too hard to analyze until day and date VOD is being done nationwide.[52]

33. In 2007, due to a lack of rights, Comcast distributed only thirteen movies on a nationwide DVD day-and-date basis, a number that was insufficient to determine whether this innovation would have a negative impact on revenues generated by existing distribution channels. In 2008,

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and-date' that the title hits the shelves of Blockbuster Video or Wal-Mart. But studios are too skittish about cannibalizing the home-video gold mine and delayed the PPV and VOD window by 45-60 days."); see also Mike Farrell, "Cleaning Up on Closing DVD Window," Multichannel News, Jan. 28, 2007, available at http://www.multichannel.com/article/127642-Cleaning_Up_on_Closing_DVD_Window.php ("Studios have resisted day-and-date releases via on-demand because of fears of cutting into lucrative retail DVD sales.").

[50] See "Six Studios in Comcast VOD Trial," Multichannel News, Dec. 18, 2006, available at http://www.multichannel.com/article/127188-Six_Studios_in_Comcast_VOD_Trial.php ("Comcast's day-and-date video-on-demand market test in Denver and Pittsburgh includes six studios . . . . The test is expected to run about six months, and then parties will evaluate the results. Actually, it could take longer to evaluate the impact on DVD sales or video-store rentals because the studios will want to see how much better sales were in Denver and Pittsburgh than in markets where the titles hit VOD with the usual 30- to 45-day lag."). The trials were eventually extended to two years and included Atlanta, GA as the third test market. See Stuart Miller, "Forward Fast: Studios Speed Up Launch Dates for VOD," Multichannel News, May 18, 2009, available at http://www.multichannel.com/article/232702-Forward_Fast.php ("In 2006, Comcast developed a two-year trial, working with eight movie studios. Denver, Atlanta and Pittsburgh were used as test markets (against three control markets) to measure VOD use, DVD sales and DVD rentals (which are more difficult to measure.)").

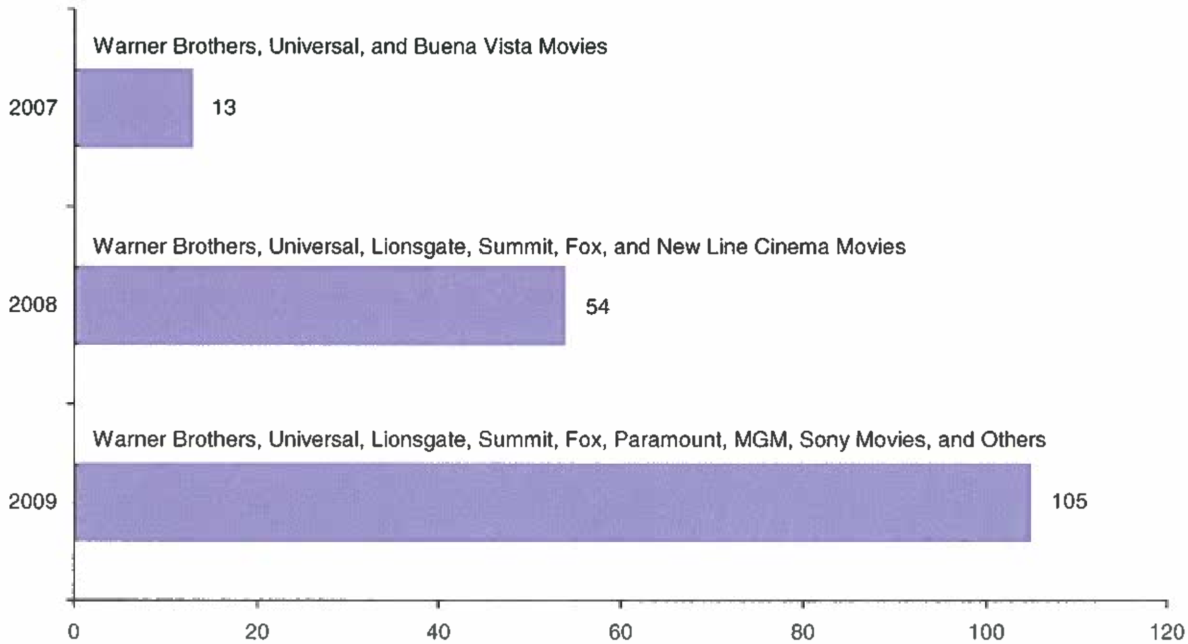
[51] {{

}} (Comcast Attachment #9).

[52] Richard Greenfield and Mark Smaldon, "Media & Cable Industry: Why We Believe Enabling VOD Day & Date with DVD is a Major Mistake for Movie Studios," Pali Research, Apr. 23, 2007, p. 3 (Third Party Attachment #3).

Comcast was able to distribute 54 DVD day-and-date movies, and increased that to 105 in 2009.[53] See Exhibit 4.

Exhibit 4: Number of Comcast Day-and-Date Movie Releases by Year 2007 – 2009



Source: Comcast Corp., [[ ]] (Comcast Attachment #10)

Note: Includes pre-DVD releases.

34. In Exhibit 5 below, the pie chart shows that the 105 DVD day-and-date releases Comcast obtained in 2009 were only about 19% of the 558 theatrically-released movies in 2009.[54] Comcast still faces difficulties obtaining day-and-date release commitments from major studios.[55] For example, in 2010, only 50% of VOD titles are expected to be released at the same time as the DVDs.[56] Furthermore, even successful negotiations have taken a long time.[57]

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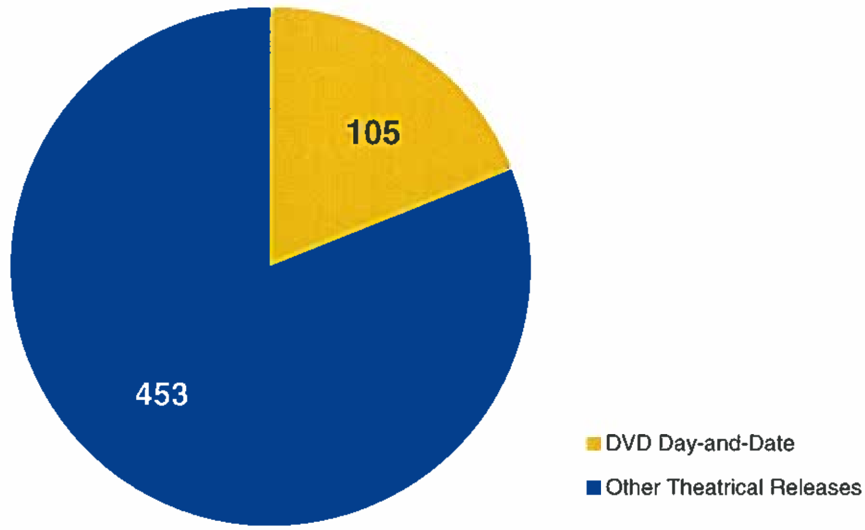
[53] These figures correspond to DVD day-and-date movies that were previously released in the theaters. They do not include "direct to video" movies that were not released in theaters.

[54] See Comcast Corp., [[ ]] (Comcast Attachment #10); see also "Theatrical Market Statistics," Motion Picture Association of America, 2009, p. 11, available at http://www.mpaa.org/Resources/091af5d6-faf7-4f58-9a8e-405466c1c5e5.pdf. Theatrical releases include all major and minor studio releases in theaters but are a small fraction of the thousands of movies released on DVD each year.

[55] Per Matthew Strauss, Senior Vice President, New Media, Content Acquisition, Comcast Cable, Mar. 24, 2010, Apr. 27, 2010.

[56] See R. Thomas Umstead, "Big Month for VOD Pix," Multichannel News, Nov. 7, 2009, available at http://www.multichannel.com/article/383336-Big_Month_for_VOD_Pix.php ("In Demand interim CEO Bob Benya

Exhibit 5: Comcast DVD Day-and-Date vs. Other Theatrical Releases 2009



Total 2009 New Theatrical Releases = 558

Source: Comcast Corp., [[ ]] (Comcast Attachment #10); "2009 Theatrical Market Statistics," Motion Picture Association of America.

Note: Includes pre-DVD releases.

35. In 2009, 8 of the top 10 most popular movies on Comcast's VOD platform were DVD day-and-date movies even though they accounted for a small minority of all VOD movies.[58] The popularity of DVD day-and-date demonstrates that consumers value this new distribution method.[59]

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said that he expects nearly half of all VOD titles offered in 2010 to be released on par with DVD — a major accomplishment, considering most titles carried a 45-to-90-day DVD window just five years ago. Still, the industry needs to figure out how to convert the remaining 50% of non-day-and-date titles, because many of them are among the biggest movies in Hollywood. While studios will continue to experiment with day-and-date titles on some big hit films, they understandably remain squeamish about potentially reducing huge DVD sell-through and rental revenue for top box-office titles. Operators will have to prove to them, without a shadow of a doubt, that premiering such titles on VOD is a revenue no-brainer and that the industry will aggressively promote and market day-and-date titles so that cable subscribers instinctively turn to VOD first to gain access to their favorite movies.").

[57] Per Matthew Strauss, Senior Vice President, New Media, Content Acquisition, Comcast Cable, Mar. 24, 2010, Apr. 27, 2010.

[58] See Public Interest Statement, p. 58.

[59] See Comcast Corp., Press Release, Comcast Announces 100th Movie Available On Demand Same Day as DVD Release, Dec. 17, 2009, available at http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=948 ("Movies available same day as DVD releases continue to rise in popularity and are consistently among the top-performing content On Demand.").

36. Comcast's experience with DVD day-and-date releases illustrates that, although there has been some progress, the available content is still limited despite the fact that Comcast has had the capacity to deliver more DVD day-and-date movies and consumers want this service. For example, even in negotiations with a major studio in the second half of 2009, Comcast was not able to get access to all of its recent theatrical releases within 30 days of their DVD release dates.[60] In addition to the limitations on the number of DVD day-and-date movies that Comcast has been able to offer its subscribers, the delays in the negotiating process have deprived subscribers of the benefits they would have enjoyed had the deals been reached more expeditiously. With common ownership of Universal Studios, Comcast may be able to encourage Universal to offer more DVD day-and-date titles or potentially even test offering titles before day-and-date for a premium, which in turn might encourage other major studios to follow suit.[61]

37. Other new and innovative delivery platforms and services will also require access to quality content. For example, theatrical day-and-date releases where subscribers could watch movies from major studios at home the same day they are released to theaters could be a very attractive option for consumers.[62] However, the studios' sensitivity to their relationships with theater owners and other third parties, as well as their concerns regarding piracy, are delaying the introduction of this new service for consumers.[63] Comcast's efforts to get DVD day-and-date

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[60] Per Matthew Strauss, Senior Vice President, New Media, Content Acquisition, Comcast Cable, Mar. 24, 2010, Apr. 27, 2010.

[61] Per Matthew Strauss, Senior Vice President, New Media, Content Acquisition, Comcast Cable, Mar. 24, 2010, Apr. 27, 2010. NBCU personnel agree the new entity, for instance, may be more likely to push forward with putting additional film content on VOD. Per Jean-Briac Perrette, President of Digital & Affiliate Distribution/Content Distribution Strategy, NBCU, Apr. 29, 2010.

[62] Comcast has been able to obtain a limited amount of theatrical day-and-date releases from smaller studios and other rights holders. See Comcast Corp., Press Release, Comcast and IFC to Offer On-Demand Day and Date Premieres of Independent Theatrical Films, Feb. 28, 2006, available at http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=89.

[63] Part of the reason that studios are reluctant to try theatrical day-and-date releases is that the current business model values movies according to their box office results. "In Hollywood, there's an obsession with a film's theatrical release and its opening weekend box-office performance. This box-office period is critical because the numbers from that three-day period establish most subsequent deals for DVD, international distribution, cable and satellite television, and free television." Mark Young, James Gong, Wim Van der Stede, Tatiana Sandino, and Fei Du, "The Business of Selling Movies," Strategic Finance, Mar. 2008, pp. 35-41 at p. 39.

movie releases illustrates that getting access to content is a critical factor in the speed at which new platforms can be rolled out.

C. Fancast Xfinity TV

38. Fancast Xfinity TV is a recent initiative by Comcast that lets consumers browse, manage, and watch video content on multiple platforms, such as TV, online, and mobile devices.[64] Fancast Xfinity TV's online video service is multilevel. Anyone (including consumers who are not Comcast cable subscribers) can access on an ad-supported basis at no additional charge approximately [[ ]] of all movies and [[ ]] of all television show episodes available on Fancast.com.[65] In addition, Comcast video customers (once authenticated) are entitled to online access at no additional charge to content associated with their individual Comcast Cable subscription level. For example, an eligible Comcast Cable customer who subscribes to HBO has online access to the HBO programming that HBO has made available for the platform. Of course, Comcast must obtain the appropriate licenses from content owners to distribute their content online.

39. Comcast would make much more content available online if it could obtain the rights at arm's length terms that would allow it to do so profitably over the long term. As Comcast set about obtaining rights to distribute authenticated content for Fancast Xfinity TV, it ran into and continues to experience contracting difficulties similar to those it faced with VOD and day-and-date releases. Most cable network owners have been reluctant to make all of their content available to Fancast Xfinity TV, and they generally have refrained from making long-term commitments. As of late 2009, 30 cable networks (out of the hundreds of networks from which Comcast has obtained cable distribution rights) provided some authenticated content to Fancast

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[64] Comcast and Time Warner, Inc. developed the TV Everywhere principles. The TV Everywhere model was "designed to be simple and attractive for any programmer and any video distributor to elect to adopt." See Comcast Corp., Press Release, Time Warner Inc. Announces Widespread Distribution of Cable TV Content Online, Jun. 24, 2009, available at http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=883. TV Everywhere is open and non-exclusive; cable, satellite or telco video distributors can enter into similar agreements with other programmers.

[65] These percentages exclude the Fancast Store which operates similar to iTunes in enabling customers to purchase video content. Including the Fancast Store, approximately [[ ]] of episodes and [[ ]] of movies are available on an ad-supported basis. See Comcast Corp., [[ ]] Apr. 1, 2010 (Comcast Attachment #11).

Xfinity TV and many of the most popular networks had not agreed to provide any content for Xfinity TV.[66]

40. There are three main reasons for the challenges that Comcast has faced in getting more content for Fancast Xfinity TV: content providers' fear of the risks to their content's value if the programming were made available online; uncertainty about future online business models; and cable network owners' lack of certain online rights in some programs.

41. Content owners are uncertain about the impact of online distribution on their traditional revenue streams and cautious about agreeing to permit online distribution of their programming.[67] For example, online advertising models are still evolving, and existing affiliate fees from traditional MVPDs are currently the largest source of revenue for most cable networks.

42. Moreover, a cable network generally buys rights for linear exhibition of the programming on its network and for certain related uses such as rights for limited free VOD viewing. Obtaining rights to content for a particular platform does not necessarily allow distribution of the content on other platforms, such as the Internet, or for all business models (such as free VOD). In addition, content providers may have entered into agreements for their owned/controlled product that contain exclusivity or other restrictions on certain types of VOD or online use.[68] This complex rights structure makes it more difficult for Comcast to obtain sufficient content as quickly as it would like for new platforms. Ultimately, it is the content owner's decision to make content available in a limited fashion (e.g., on the content owner's proprietary website), or to

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[66] See Public Interest Statement, p. 60.

[67] See "Internet Video: Field of Dreams or Nightmare on Elm Street," PiperJaffray, Nov. 2009, p. 10 (Third Party Attachment #2) ("When looking at studio revenue sources it is perfectly clear why content owners are nervous about abandoning existing business models in favor of unknown future revenue streams. From an advertising revenue standpoint, ad revenue from online video is still a drop in the bucket vs. overall TV broadcast ad revenue. In the 1H09, online video ad revenue was $477 million, according to IAB (Internet Advertising Bureau), so it is safe to assume 2009 internet video advertising revenue will be approximately $1 billion. This compares to TV broadcast advertising, which totaled $20.1 billion in 1H09 (source: TVB – Television Bureau of Advertising) and will, therefore, likely be greater than $40 billion in 2009. With regards to the movie rental market, according to Adams Media Research, Internet delivery will account for less than 1% of 2009 U.S. movie rental revenue.").

[68] Most third-party studios retain digital rights to their content and therefore limit the ability of NBCU's broadcast and cable networks to distribute such content on certain other platforms. Per Ron Lamprecht, Senior Vice President, Business Development & Sales, NBCU, and Jean-Briac Perrette, President, Digital & Affiliate Distribution/Content Distribution Strategy, NBCU, Mar. 23, 2010, Apr. 27, 2010.

make content widely available online (on Fancast Xfinity TV and/or through various third-party websites and aggregators).[69] As discussed below, the transaction will provide greater incentive for the new entity to align all of the rights to minimize this problem and increase consumer choice; it will do so because it will be able to come to an efficient agreement with Comcast for distribution that will increase the returns to the new entity for acquiring upstream rights.

43. Fancast Xfinity TV has launched, but its future is unclear: Comcast needs to negotiate with many different rights holders on a variety of complex issues about the ultimate product, and the new service is likely to evolve substantially over time, which will require additional negotiations and experimentations. Ultimately, viewer acceptance and the success of Fancast Xfinity TV will depend on having attractive content. Comcast's challenges in obtaining content for Fancast Xfinity TV have limited the scope of the service and slowed its rollout. Once again, Comcast has the capacity to deliver an innovative new service that consumers want but it cannot do so, or cannot do so as fully and quickly as it would like, because of negotiating friction with content owners. As I discuss in Section V, this transaction should help ensure that Comcast can break through that friction and obtain more efficient access to distribute more of NBCU's content through contracts on arm's length terms, and provide greater incentive for NBCU to secure rights for content owned by third parties.[70]

D. Advanced Advertising Services

44. Because of improved targeting and interactivity, advanced advertising has the potential to provide greater value – to consumers and advertisers – than traditional cable and broadcast advertising.[71] Implementing advanced advertising requires investment by MVPDs, by networks,

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[69] See "Internet Video: Field of Dreams or Nightmare on Elm Street," PiperJaffray, Nov. 2009, p. 10 (Third Party Attachment #2) ("In other words, while each individual internet video service will customize its offering to maximize consumer satisfaction, the content owners hold the key to making it easier for consumers to use and enjoy a service, through broader access to content and usage of that content. Content owners are conflicted about what strategy will optimize profitability today while positioning them well for tomorrow.").

[70] While NBCU does not have the complete set of rights for all of the television programs and movies on its broadcast and cable networks, NBCU has the complete set of rights for about {{ }} of the shows, although it can vary from season to season. The remaining shows are controlled by third parties. Per Ron Lamprecht, Senior Vice President, Business Development & Sales, NBCU, and Jean-Briac Perrette, President, Digital & Affiliate Distribution/Content Distribution Strategy, NBCU, Mar. 23, 2010, Apr. 27, 2010.

[71] See Adam Swanson and Derek Baine, "Interactive Advertising: Appearing Soon on a Screen Near You," SNL Kagan, Nov. 18, 2008 (Third Party Attachment #4) ("The potential for advertisers is that they can purchase a single

and by advertisers. Comcast has invested significant resources to develop advanced advertising services[72] and has been an active participant in Project Canoe, a cable industry advanced advertising effort.[73] One aspect of Comcast's investment has been to configure appropriate technology, for example, set-top boxes that can be used for advanced advertising and to develop the "front end" technology using the remote control as the device to offer coupons and "Requests for Information" or "RFI."[74]

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ad spot and store variations of ads on a database, and based on information from the set-top box, a specific ad will be addressed to a specific viewer. Therefore, advertisers can get the right message to the right consumer at the right time. With the present state of the economy, this could also reduce the amount of 'wasted' ad dollars spent on reaching uninterested audiences."); see also Todd Spangler, "Chasing the Interactive Ad(vantage)," Multichannel News, May 26, 2008, available at http://www.multichannel.com/article/133381-Chasing_the_Interactive_Ad_vantage_.php (noting that advanced advertising "serv[es] up more relevant, interactive and measurable ads" and that "[m]ajor advertisers and agencies are hungry for marketing techniques that reach would-be customers as precisely as the Internet, coupled with the power of the highly engaging and visual TV medium").

[72] For example, between 2007 and March 2010, Comcast spent approximately {{ }} million on advanced advertising. See Exhibit 1; see also "Comcast-NBCU: Madison Ave.'s Wish List – Speed Up Addressable Advertising, Fix the Network," Broadcasting & Cable, available at http://www.broadcastingcable.com/article/423422-Comcast_NBCU_Madison_Ave_s_Wish_List.php ("Starcom MediaVest Group has been intimately involved in addressable advertising trials with Comcast in Huntsville, Ala. and in Baltimore, Md. 'We have seen very positive business results from that,' said Desmond. Addressable advertising is the ability to tailor more suitable ad messaging to the consumer. 'The idea of taking some of Comcast's trials in the area of interactivity and bringing that expertise to broadcast television is a very powerful thing.' Desmond said addressable advertising had been held back by cable operators' inability to deliver scale. The addition of mass via the broadcast network, 'is the very intriguing development.' Comcast is also developing interactive applications such as requests for information services. 'The ability to have those interactive applications and gain more content and more channels could be great for advertisers,' said Comcast COO Steve Burke on a call with press today . . . '").

[73] See Tim Arango, "Cable Firms Join Forces to Attract Focused Ads," The New York Times, Mar. 10, 2008 ("In an effort to slow Google's siphoning of advertising dollars away from television, the nation's six largest cable companies are making plans for a jointly owned company that would allow national advertisers to buy customized ads and interactive ads across the companies' systems. . . . Getting the right advertisement to the right person, based on that individual's own tastes and lifestyle, has been the promise of cable television for years and the reality of the Internet. . . . Collectively, the cable companies will initially put about $150 million behind the effort in order to build a national service that can sell targeted advertising across all six cable systems. . . . Another component of Project Canoe is interactive advertising, which allows television viewers to use remote controls to, say, request a brochure or call up more information about a product.").

[74] See, e.g., Todd Spangler, "Canoe In Discussions on Providing Set-Top Data," Multichannel News, Jun. 2, 2009, available at http://www.multichannel.com/article/277916-Canoe_In_Discussions_On_Providing_Set_Top_Data.php ("Comcast, for its part, is reportedly working on a database project dubbed 'TV Warehouse' that would allow the MSO to store a full year of statistics gathered from digital set-tops in more than 16 million households nationwide. . . . For 2009, Canoe's focus with regard to set-top data will be collecting and harmonizing the information, as well as supporting the RFI application."); Todd Spangler, "Comcast 'TV Warehouse' To Track Clicks," Multichannel News, Jan. 1, 2009, available at http://www.multichannel.com/article/161894-Comcast_TV_Warehouse_To_Collect_STB_Clicks.php.

45. However, successful implementation requires that networks and advertisers also make investment in technology and programming for interactive and targeted advertising. For example, networks would have to embed RFI enabled spots in their network programming, adding costs that are not incurred for traditional, linear spots. For targeted advertising, advertisers would have to provide multiple commercials for different audience segments and invest in technology to make use of the information from interactive advertising. Because networks and advertisers have not made the necessary investments, the pace of development and adoption of advanced advertising capabilities has been slow. In turn, Comcast and other MVPDs have not invested as rapidly as they could in part due to their realization that they would lack suitable programming that could support interactivity and targeted advertising. In part, the slower pace of investment can be attributed to complexity and uncertainty surrounding the feasibility of advanced advertising on multiple platforms, including how advanced advertising will impact profits.[75]

46. Comcast Spotlight, thc local advertising sales division of Comcast Cable, would like to move forward to experiment with advanced advertising.[76] However, Comcast has been unable to get a sufficient number of programming networks to move forward with these advanced advertising endeavors as rapidly as it would like. {{

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47. As I discuss below, this transaction will bring NBCU's networks under Comcast's control and likely increase their participation with Comcast directly and in Project Canoe, leading to more experimentation and deployment of advanced advertising services. Increased

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[75] See David Tanklefsky, "Advanced Advertising: Ready to Turn the Corner," Multichannel News, Feb. 23, 2010, available at http://www.multichannel.com/article/449280-Advanced_Advertising_Ready_to_Turn_the_Corner.php ("Addressable advertising has picked up steam recently thanks to test results, like the recently concluding findings from a Comcast trial in Baltimore, that showed targeted ads improve viewer tune-in and buyer efficiency. But [Leap Media Group Principal, Courtenay] Harry said [advertisers] still express a lot of confusion about addressable advertising and need to be convinced of its efficacy before moving money from one part of their ad budget to the addressable space. 'It's as if we're re-teaching them how to buy television,' she said.").

[76] Per Robert Klippel, Vice President, New Products and Operations, Comcast Spotlight, Apr. 27, 2010.

[77] Id.

deployment, in turn, should bring more networks on board and also create incentives for other MVPDs to implement advanced advertising services.

V. How the Transaction Can Help Accelerate the Development of New Ways of Delivering Content

48. In Comcast's experience, content owners have been cautious, relying more heavily on traditional distribution channels for revenue, and reluctant to license content for new and/or uncertain ventures. Comcast and most content owners have different expectations about the profitability of new content distribution platforms, the impact of new distribution platforms on revenue from existing platforms, how profits should be divided, and how risks should be shared. As a result, agreements between distributors and owners of content for distribution on emerging platforms have been delayed or have not been reached.

49. There are two main economic reasons why the proposed transaction can change the outcome of negotiations over rights to distribute content on emerging platforms: vertical integration and a change in corporate control. Vertical integration can remove some of the barriers to efficient contracts when there is uncertainty, relationship-specific investment, and/or moral hazard.[78] A change in corporate control can lead to a different strategy toward how to maximize profits from content. This section will provide the economic underpinnings for those two reasons, discuss how they interact, and explain why they apply here.

50. Comcast wants to move quickly toward making content more widely available on multiple platforms. This strategy differs from that of most traditional content owners and emanates from Comcast's considerable experience as a distributor. Comcast's distribution strategy has been frustrated by not being able to get rights to distribute as much content as it wants on terms it regards as efficient, not having the flexibility to experiment with a variety of business models, and not having the ability to make adjustments when necessary. From an

[78] Moral hazard can arise when upstream and downstream firms face conflicting incentives and fail to internalize incremental profits. See Jean Tirole (1988), "The Theory of Industrial Organization," The MIT Press, Ch. 4, pp. 177-179. Specifically, moral hazard arises when it is difficult to contract for the appropriate level of effort and one of the firms does not have sufficient incentives to exert the appropriate level of effort, which prevents firms from producing the optimal quantity of output. The moral hazard framework is relevant to the current transaction because it is very difficult to contract in advance on the right mix and quality of content necessary for new platforms in an evolving marketplace.

economic perspective, because the NBCU transaction gives Comcast assured access to content on arm's length terms but with less contractual friction, it can increase Comcast's multiplatform distribution while assuring that producers/content owners receive appropriate compensation. While NBCU content is only a small fraction of overall or even professionally produced content, the transaction will increase the amount of programming that would be controlled by Comcast. The certainty of future access to NBCU content at arm's length terms will provide a baseline level for Comcast that will allow for experimentation and justify long-lived distribution investments.

A. Vertical Integration and Corporate Control Theory

51. Theoretical analysis and empirical economic research underscore the challenges that companies at different levels in a distribution chain face in using contracts with affiliated parties to develop and expand products, platforms, and services and thereby allocate resources efficiently.[79] The economic literature identifies conditions under which vertical integration can overcome some of these challenges and yield significant efficiency and consumer benefits that are not readily realized by unaffiliated parties. According to this literature, vertical integration generally leads to more efficient production and pricing:

> Because many vertical mergers create vertical integration efficiencies between purchasers and sellers, many if not most vertical mergers are either procompetitive or competitively neutral. Potential efficiency benefits involve coordination in pricing, production, and design that can reduce costs and improve product quality. They also involve more efficient input usage and promotion.[80]

52. Economic literature shows that as complexity and uncertainty increase, the advantages of vertical integration over reliance on contracts between independent parties also increase.[81]

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[79] See Oliver Williamson (1979), "Transaction-Cost Economics: The Governance of Contractual Relations," Journal of Law and Economics, Vol. 22, No. 2, pp. 233-261; see also Oliver Williamson (1971) "The Vertical Integration of Production: Market Failure Considerations," The American Economic Review, Vol. 61, No. 2, pp. 112-123; Francine Lafontaine and Margaret Slade (2007), "Vertical Integration and Firm Boundaries: The Evidence," Journal of Economic Literature, Vol. 45, No. 3, pp. 629-685.

[80] See Michael Riordan and Steven Salop (1995), "Evaluating Vertical Mergers: A Post-Chicago Approach," Antitrust Law Journal, Vol. 63, pp. 513-568 at p. 519; see also Dennis Carlton and Jeffrey Perloff (2005), Modern Industrial Organization, Addison Wesley, 4th ed., Ch. 12.

[81] See Lafontaine and Slade (2007), Tables 13, 14.

Transaction cost economics and moral hazard frameworks demonstrate that the benefits of vertical integration increase when there is a greater potential for hold-up due to *ex post* opportunism, when parties differ more widely in their assessments of the value of trade and when it is more difficult to achieve breakthrough solutions with unaffiliated parties.[82] *Ex post* opportunism arises when one party makes a sunk investment and then its trading partner demands better terms than the first party would have agreed to prior to making the investment. For example, suppose that a railroad built a spur to a coal mine without an enforceable contract that required the mine to use the spur. If the mine had an alternative mode of transport available, the railroad could be exposed to *ex post* opportunism.

53. The potential for opportunistic behavior can also be greater when the parties have divergent incentives. Long-term contracts might help alleviate the potential for opportunistic behavior, but such contracts can lead to other issues such as changed incentives to put forth effort and maintain quality.

54. Vertical integration in such settings reduces or eliminates the transactional frictions that can hinder efficient contracts between unaffiliated parties. Vertical integration can help the two sides in a negotiation have assurances they will be able to make adjustments necessary to come to an agreement. Professor Oliver Williamson discusses the relative merits of organizing activities within a firm versus trading in a market:

> The properties of the firm that commend internal organization as a market substitute would appear to fall into three categories: incentives, controls, and what may be referred to broadly as "inherent structural advantages." In an incentive sense, internal organization attenuates the aggressive advocacy that epitomizes arms-length bargaining… In circumstances, therefore, where

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[82] One aspect of transaction cost economics states that vertical integration is better than contracts with unaffiliated parties when there is a potential for hold-up due to ex post opportunism and contractual incompleteness due to complexity and uncertainty in the marketplace. Specifically, transaction cost economics focuses on the hold-up issues in contractual relationships posed by "quasi-rents" and incomplete contracts. Quasi-rent is the additional value generated by relationship-specific assets when they are deployed within a relationship as compared to other outside uses. Quasi-rents can create lock-in since the assets are less valuable outside the relationship. If, in addition, contracts are incomplete, any party to the contract can engage in hold up through ex post haggling, renegotiation, and opportunistic behavior to expropriate a larger share of the quasi-rent. If these types of hold-up issues cannot be fully anticipated or detected and accounted for in the contract, it creates ex post inefficiency and becomes a motivation for vertical integration (especially when the ex post inefficiencies are large). See Lafontaine and Slade (2007); see also Benjamin Klein, Robert Crawford, and Armen Alchian (1978), "Vertical Integration, Appropriable Rents, and the Competitive Contracting Process," Journal of Law and Economics, Vol. 21, No. 2, pp. 297-326.

> protracted bargaining between independent parties to a transaction can reasonably be anticipated, internalization becomes attractive... Especially relevant in this connection is that, when conflicts develop, the firm possesses a comparatively efficient conflict resolution mechanism. To illustrate, fiat is frequently a more efficient way to settle minor conflicts (say differences of interpretation) than is haggling or litigation... The firm may also resort to internalization on account of the economies of information exchange... It is widely accepted, for example, that communication with respect to complex matters is facilitated by common training and experiences and if a compact code is developed in the process. Repeated interpersonal interactions may permit even further economies of communication; subtle nuances may come through in familiar circumstances which in an unfamiliar relationship could be achieved only with great effort.[83]

55. In addition to the economic literature on the benefits of vertical integration, there is also a large body of economic literature that describes corporate control as a valuable asset in its own right and important in facilitating change in an organization.[84] A change in corporate control can enhance vertical integration efficiencies by providing a different vision based on the new management's experience and viewpoint about how to maximize profits and minimize transactional frictions. As a result, changes in control can have a large effect on the direction and strategy of a firm.

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[83] See Williamson (1971) pp. 113-114.

[84] See Henry Manne (1965), "Mergers and the Market for Corporate Control," Journal of Political Economy, Vol. 73, No. 2, pp. 110-120 at p. 112 ("The basic proposition advanced in this paper is that the control of corporations constitute a valuable asset; that this asset exists independent of any interest in either economies of scale or monopoly profits; that an active market for corporate control exists; and that a great many mergers are probably the result of the successful workings of this special market"); see also Michael Jensen (1988), "Takeovers: Their Causes and Consequences," Journal of Economic Perspectives, Vol. 2, No. 1, pp. 21-48 at p. 23 ("Takeovers generally occur because changing technology or market conditions require a major restructuring of corporate assets, and it is easier for new top-level managers with a fresh view of the business and no ties with current employees or communities to make such changes"); see also Jeffrey Allen and Gordon Phillips (2000), "Corporate Equity Ownership, Strategic Alliances, and Product Market Relationships," The Journal of Finance, Vol. 55, No. 6, pp. 2791-2815 at p. 2792 ("There are several possible reasons why target and purchasing firms might benefit from establishing long-term partial ownership positions. First, block ownership might be useful in aligning the incentives of the firms involved in alliances or joint ventures. Contracting or monitoring costs between firms may be reduced if a significant ownership stake increases the incentives of firms to invest in product market relationships or other relationship-specific assets . . . . Second, block equity purchases by corporations could mitigate information problems regarding the investment opportunities of target firms. For example, if asymmetric information has an adverse impact on the cost and availability of external capital, it may be less costly to sell equity to an informed party such as an outside corporation. . . . Third, as with other large blockholders, purchasing corporations may also be able to effectively monitor or influence management.").

B. Application to Comcast–NBCU

56. The economic literature on the benefits of vertical integration and changes in corporate control is directly relevant to the Comcast–NBCU transaction. Comcast must incur significant upfront and ongoing investments to develop new media platforms.[85] There is a greater incentive for it to make these investments when it has secure access to sufficient content at arm's length terms so that it can offer, and demonstrate the success of, efficient new services on innovative platforms.[86] Absent assurances that sufficient content would be available to demonstrate the viability of its new platforms for a reasonable amount of time, Comcast would be wary of the potential for opportunistic behavior on the part of content companies that could demand high prices for content after Comcast has sunk investment in the distribution platform. As is described in the vertical integration literature, concern about high prices after a firm has made a sunk investment will lead a firm to try to protect itself in advance of sinking the investment. However, because of the complexity of video distribution contracts and the changing nature of business models for video distribution, this is not simple and therefore efficient contracts between unaffiliated parties can be delayed or never agreed upon. Comcast's experiences with VOD, DVD day-and-date release, and Fancast Xfinity TV show that it failed to get such *ex ante* guarantees, which delayed the roll-out of these platforms to consumers.

57. In the dynamic video programming marketplace, technology, costs, and demand for products, platforms, and services change quickly. Content providers and distributors are uncertain about the emerging revenue models – what type of content works on what types of platforms and the best mix of subscription, transactional, and advertising revenues. This concern is particularly relevant for online video distribution, where there is considerable uncertainty about which business models will survive, what consumers will demand, and the evolution of technologies.

58. As discussed above, it is difficult to anticipate and account for in a contract all the potential issues that may emerge in the development of new video products, platforms, and services. Given the significant uncertainties inherent in a new video distribution service, it is

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[85] See Exhibit 1; see also Pick Declaration, ¶ 18.

[86] See Pick Declaration, ¶ 18.

difficult to write and agree on complete incentive-compatible contingent contracts. As a result, contracts will be incomplete, which can lead to greater potential for *ex post* opportunistic behavior and a resulting increase in the difficulty of reaching any agreement. Vertical integration can help overcome these obstacles because the parties do not have to specify every clause and contingency, and can experiment and make adjustments to the contracts more easily.

59. Comcast, with its considerable experience as a distributor, has a different vision of how to maximize the returns to content than do many content owners.[87] Because there is significant uncertainty, companies differ in how to maximize the returns from content. Many content owners believe that the use of limited outlets is the best way to maximize returns, whereas others (including Comcast) believe that greater exposure through the use of more outlets will increase returns. Comcast and content providers likely need to experiment with variety of business models on different platforms to determine which platforms turn out to be successful, and Comcast needs assurances that the content will not be withdrawn or its quality reduced after the risky testing and upfront investment is sunk. The new entity's content business is likely to reflect Comcast's management strategy of increasing experimentation and content availability once Comcast takes control of NBCU.[88]

60. While the transaction is not initially a complete vertical integration, the structure of the transaction will allow the companies to overcome some of the contracting difficulties because Comcast's control will ensure that deals (by written contract at arm's length terms) between NBCU and Comcast affiliates can move forward.[89] The acquisition of a 51% ownership in, and control of, NBCU will substantially facilitate and accelerate negotiations because Comcast management, as it has in the past with VOD, DVD day-and-date release, and Fancast Xfinity

[87] Per David L. Cohen, Executive Vice President, Comcast Corp., Nov. 19, 2009, Mar. 27, 2010, Apr. 09, 2010, Apr. 28, 2010, and Robert Pick, Senior Vice President, Corporate Development, Comcast Corp., Apr. 2, 2010, Apr. 22, 2010, Apr. 27, 2010.

[88] See "TWX – Comcast and Time Warner Partner to Advance TV Everywhere Initiative Conference Call," Thomson StreetEvents, Jun. 24, 2009, pp. 3-4 (Third Party Attachment #5). Comcast Chairman and CEO Brian Roberts stated, "At Comcast, some of you remember at the beginning of last year we laid out a multi-year strategy called Project Infinity. And our view as technologists was that we were going to be able to use our platform to offer a consumer whatever they want, in theory, [infinity] of choices; that's our goal, to figure out architecturally how to offer whatever they might want, whether it's new shows, historical shows, on whatever device they want and when they want it." Id.

[89] See Allen and Phillips (2000), p. 2792.

TV, plans to push for increased content availability, distribution, and experimentation with content.

61. The NBCU limited liability company Agreement provides that the new entity will be managed by or under the direction of a board whose majority will be appointed by Comcast.[90] Comcast can enter into agreements with the new entity for distribution of NBCU content. The agreement provides that such related-party transactions must be on arm's length terms.[91] It is my understanding that the terms of the agreement state that, while GE has the right to withhold consent to deals between the new entity and Comcast that are outside the ordinary course,[92] GE cannot block or "veto" ordinary-course deals between the new NBCU and Comcast; it can only challenge whether the terms of such ordinary-course deals are in fact arm's length.[93] Thus, the structure of the transaction will reduce the concern over *ex post* opportunism between the content and distribution businesses of the commonly controlled companies.[94]

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[90] See Public Interest Statement, App. 4, pp. 40-42, § 5.01(a)-(f).

[91] The Agreement states that agreements between NBCU and Comcast must be entered into on "arm's length terms" defined as "terms that are no less favorable to the Company [the joint venture] or such Subsidiary than those that would have been obtained in a comparable transaction by the Company or such Subsidiary with an unrelated Person." See Public Interest Statement, App. 4, p. 93, § 10.02(a).

[92] An ordinary course related party transaction "means a Related Party Transaction that is within the ordinary course of business of the Company and its Subsidiaries. Examples of Ordinary Course Related Party Transactions include the entering into by the Company or any of its Subsidiaries with Comcast or any of its Affiliates of programming agreements, affiliation agreements, agreements with respect to corporate overhead and support services (other than the Comcast Services Agreement (as defined in the Master Agreement)) and other commercial agreements of a type that are entered into between content producers and distributors in the ordinary course of business. It is understood that entering into agreements of this type will be considered Ordinary Course Related Party Transactions even if they relate to new technologies or new types of arrangements that have not previously been in place between the Company and its Subsidiaries and Comcast and its Subsidiaries." See Public Interest Statement, App. 4, p. 19, § 1.01, and pp. 94-95, § 10.02(d-i).

[93] GE has the right to dispute whether a given ordinary course related party transaction is in fact on arm's length terms through a dispute resolution process that could culminate in binding arbitration. Once the arbitrator issues a decision, Comcast has the option to cause NBCU or the relevant NBCU subsidiary to enter into the proposed related party transaction on the terms specified by the arbitrator, or not to enter into the transaction. Id., p. 94-95, § 10.02(d-i).

[94] While vertical integration will help Comcast overcome the transactional frictions described earlier, News Corp/DirecTV and Time Warner/Time Warner Cable have recently separated their content and distribution businesses, presumably because their circumstances were different from the Comcast–NBCU joint venture. News Corp., however, remains vertically integrated throughout the world, and Liberty Media, with the acquisition of DirecTV, became more vertically integrated. See "News, Liberty Poised to Deal," Multichannel News, Dec. 11, 2006, available at http://findarticles.com/p/news-articles/executive-quote-and-information-service-equis/mi_8119/is_20061211/news-liberty-poised-multichannel-news/ai_n50628983/.

62. The proposed transaction will enable Comcast to obtain access to NBCU content on arm's length terms for use in launching new initiatives without the delays that it has encountered in the past in attempting to obtain such rights through negotiations with third parties.[95] Vertical integration will allow Comcast to invest in new distribution platforms with the assurance that it will have access to content and a reduced fear of opportunistic behavior on the part of NBCU, helping it to establish the new platform.

63. Thus, by gaining control of NBCU, Comcast will be able to decide whether to use NBCU content in various new initiatives and platforms (subject to the condition that it contract with NBCU on arm's length terms). In other words, Comcast will have the assurance that it can get content on arm's length terms from NBCU now and in the future. Such an assurance previously was missing in Comcast's efforts to get sufficient content from unaffiliated entities. Comcast views NBCU's broad array of content, including feature films, television series, and older "library" content (including both television series and feature films) as providing an attractive base for potential use in its current and future distribution endeavors. Importantly, the NBCU content is not merely a substitute for current Comcast content. Comcast only has limited programming and does not have the variety of attractive programming that NBCU can provide. NBCU content, while still small relative to the overall video marketplace, is of sufficient quality, quantity, and variety to help Comcast to introduce new distribution businesses and experiment with distribution methods.

64. After this transaction, Comcast will also be NBCU's partner in negotiating to obtain content rights from third parties. The new entity would be more likely to acquire broader rights to content because it would have more confidence it would come to an agreement with distributors for its content on multiple platforms, raising the profitability from acquiring additional upstream rights. Without vertical integration, it would be difficult for a distributor, such as Comcast, and a significant content provider, such as NBCU, to align incentives to negotiate jointly with third parties for broader rights to distribute content. Increased confidence about distribution agreements and subsequent higher value of distribution would make NBCU

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[95] See Pick Declaration, ¶¶ 4-5.

more likely to strike deals with its upstream suppliers and partners for extensive distribution rights to minimize transaction costs and increase the returns to content.

65. The better alignment of incentives made possible by this transaction will also encourage NBCU to invest in new and innovative programming suited to these multiple platforms. Professor Christopher Yoo's point about historical investment examples is instructive:

> Guaranteed distribution allows new networks to invest in their programs with greater confidence. Indeed, industry participants confirm that vertical integration was essential in getting programming stars such as CNN, C-Span, the Discovery Channel, BET, and TNT off the ground.[96]

66. One of the important outcomes from the change in control of NBCU is that Comcast's vision of maximizing the return to content through deployment on a wide array of platforms will lead to increased content availability from other content providers and availability on other platforms. If a firm increases the availability of its content through one distribution mechanism or provider, competitive forces will encourage other content companies to make their content more available as well. At the same time, competitive forces will encourage other distributors to make deals for additional content to compete with the new distribution methods of the first distributor.[97] These reactions by other companies will increase content availability to the benefit of consumers.[98] The vertical relationship and new ownership of NBCU is likely to create some of this competitive dynamic.

67. In addition to this transaction providing incentives for investing in programming and expanding the range of platforms on which this content is available, more efficient access to NBCU's content should provide Comcast with the ability and incentive to accelerate

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[96] See Christopher Yoo (2002), "Vertical Integration and Media Regulation in the New Economy," Yale Journal on Regulation, Vol. 19, pp. 171-300 at p. 233.

[97] See "Comcast's VOD Guru; His Vision Broadened On-Demand Offerings," Television Week, Jul. 19, 2004.

[98] For a general description of this competitive process, see Marvin Lieberman and Shigeru Asaba (2006), "Why Do Firms Imitate Each Other?" Academy of Management Review, Vol. 31, No. 2, pp. 366-385 at pp. 2-3 ("Firms may imitate to avoid falling behind their rivals, or because they believe that others' actions convey information . . . Imitation of superior products, processes and managerial systems is widely recognized as a fundamental part of the competitive process.").

development of advanced interactive advertising services.[99] The assurance of an agreement with NBCU will provide a base for experimenting with and implementing advanced advertising, learning from that experience and modifying technology and business models to create better, consumer-friendly services. If NBCU – in light of the breadth and quality of its cable properties – were to demonstrate that advanced advertising capabilities (such as interactivity, addressability and new metrics) are effective, other national TV networks may be more likely to adopt them as well. NBCU's extensive advertising relationships, research expertise, and industry-leading content also position it well to potentially accelerate for Comcast the design and implementation of these new advertising capabilities.[100] If advanced advertising proves to be successful, then MVPDs, content owners, advertisers, and viewers will all benefit. According to *The Wall Street Journal*:

> As Comcast gets close to a deal for control of General Electric's NBC Universal, the big cable operator and Madison Avenue think the merger could lead to some major changes in the $65 billion U.S. television advertising market. The potential new company could speed the development of interactive TV ads and "addressable advertising."[101]

C. Future Platforms and Services

68. The economic literature on vertical integration and changes in corporate control and Comcast's experience with attempting to develop and expand new services while relying on content obtained from unaffiliated parties indicates that the present transaction is likely to accelerate development of new distribution outlets that will benefit consumers. For example, NBCU has current production of feature film and television programming, a library of approximately [[ ]] episodes of TV shows and made-for-television movies, and

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[99] See "Comcast-NBCU: Madison Ave.'s Wish List – Speed Up Addressable Advertising, Fix the Network," Broadcasting & Cable, available at http://www.broadcastingcable.com/article/423422-Comcast_NBCU_Madison_Ave_s_Wish_List.php ("Madison Avenue is busy weighing the implications of Comcast's acquisition of a majority stake in NBC Universal . . . . CEO of Starcom MediaVest Group Laura Desmond said: 'We think this is a seminal deal and signals a change in the media landscape because putting together a distributor with a mass broadcaster unleashes all sorts of advances in TV measurement from the set top box. There are also national and local synergies.'").

[100] Per Edward Swindler, Executive Vice President and COO, Ad Sales, NBCU, Apr. 28, 2010.

[101] See Suzanne Vranica and Sam Schechner, "Two-Way Communications: NBC could push Comcast towards Interactive Ads," The Wall Street Journal, Nov. 16, 2009, available at http://online.wsj.com/article/SB10001424052748703811604574534272928283340.html.

approximately [[ ]] motion pictures.[102] Easier access to this content on arm's length terms will enable Comcast to accelerate the rollout of content across multiple platforms and invest to introduce new platforms and business models that will allow consumers to watch video programs via the Internet.

69. Furthermore, the successful rollout of new platforms and services will encourage other content suppliers and distributors to emulate Comcast and the joint venture. Successes by the combined entity will provide valuable information to competitors and will give competitors an incentive to develop and provide innovative new video options of their own. For example, because data on DVD sales and show ratings are available to them, other content suppliers and distributors will be able to analyze the impact of Comcast's day-and-date release of movies on DVD sales even if they do not participate themselves.[103] Other MVPDs would likely reap the benefit from Comcast's efforts to achieve more favorable film VOD release windows since studios frequently adopt a "one size fits all" model when distributing their titles.[104]

70. Thus, as the proposed transaction increases the success of Comcast's new video ventures, not only Comcast subscribers but viewers across the nation and across MVPDs will directly benefit from new and expanded video options.

VI. Additional Efficiencies from the Transaction

A. Sharing of Resources

71. The transaction will lead to synergies from the sharing of resources in sports, local news, and entertainment programming. While there is a limited amount of sharing of resources between unaffiliated media companies by contract, the ability to share resources is greater with commonly controlled companies. Sharing of resources would enable the combined company to reduce costs, expand output, and improve the quality of programming and promotion.

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[102] Per Gavin Imai, Vice President, Financial Planning & Analysis, TV Production, NBCU, Apr. 30, 2010 and Jason Beesley, Senior Vice President, Financial Planning & Analysis, Universal Pictures & Studios, Apr. 30, 2010.

[103] For example, show ratings are available through Nielsen while DVD revenues and units shipped for most theatrical and many direct-to-video movies are available through Baseline Research.

[104] Per Matthew Strauss, Senior Vice President, New Media, Content Acquisition, Comcast Cable, Apr. 27, 2010 and Michael Bonner, Senior Vice President, Digital Distribution, NBCU, Apr. 29, 2010.

72. The proposed transaction will facilitate the sharing of news and sports-related assets and other resources by Comcast and NBCU including on-air talent and studio capabilities. Comcast's RSNs could take advantage of the sports production capabilities, local sports reporters, and on-air sports talent of NBC's owned-and-operated stations ("O&Os") in areas where both operate.[105] Similarly, NBCU and its local O&Os could take advantage of Comcast's sports resources to upgrade their sports programming and news.

73. In addition, the transaction will enable the two companies to engage in talent exchanges (e.g., a host from a program on one network appearing on a program on another network). Such arrangements are much less common for nonaffiliated networks. NBCU already uses talent exchanges among its programming assets. For example, Al Roker has appeared on multiple NBCU outlets – NBC News' "Today Show," WNBC-TV's "Live at 5" evening newscast, and The Weather Channel's "Wake Up With Al."[106] Similarly, hosts of NBCU's shows, such as Brian Williams of "Nightly News" and David Gregory of "Meet the Press," routinely appear on related MSNBC shows "Hardball" and "The Rachel Maddow Show."

74. In terms of sharing of content and on-air talent, potential synergies exist between Comcast's Golf Channel and golf events on the NBC broadcast network and between sporting events such as NHL games on Versus and on the NBC broadcast network. Comcast's recent experience in sharing programming and talent is instructive. In 2009 it acquired a controlling interest in New England Cable News ("NECN"), a regional channel providing news, weather, sports, and other information of interest to viewers in the New England area where Comcast also owns an RSN, Comcast SportsNet New England ("CSN-NE").[107] After gaining control of NECN, Comcast was able to arrange for CSN-NE to use the news facilities and personnel of NECN to launch new morning and evening local sports news programs without hiring a whole new crew of sports news workers. Simultaneously NECN has drawn on CSN-NE's strengths to

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[105] Comcast has ownership interest in an RSN and NBC has an O&O in Boston, Chicago, Hartford, New York, Philadelphia, San Francisco, and Washington, D.C.

[106] See msnbc.com, "Al Roker: Weather and feature reporter, TODAY," available at http://today.msnbc.msn.com/id/4515729, accessed on Apr. 30, 2010.

[107] See Johnny Diaz, "Comcast assumes full ownership of NECN," The Boston Globe, Jun. 18, 2009, available at http://www.boston.com/business/ticker/2009/06/comcast_assumes.html.

add more local sports content to its news programming.[108] This could serve as a template for achieving similar synergies between Comcast's RSNs and NBC's O&O stations. Essentially these synergies arise from increasing the scale and scope of the programming organization. It is difficult to do that absent a merger or acquisition of another programmer because starting new networks takes significant time and expense and is risky. Even if successful, such an effort would delay the benefits by many years until the new networks reached sufficient scale.

75. Similar synergies are likely to arise with the entertainment programming that will be part of the content joint venture. For example, in women's/lifestyle programming, the joint venture will combine NBCU's assets in Oxygen and Bravo with Comcast's assets in E! and Style. While each network is differentiated from the others in various ways, the majority of viewers for these networks are adult women.[109] The joint venture could share programming, production facilities, reporting, and on-air talent among multiple platforms.[110] For example, Access Hollywood and E! News brands and resources could be optimized, or the E! News brand could be extended into non-English programming by airing Spanish-language E! News updates on Telemundo.[111] This type of sharing is extremely unlikely to occur by contract between unaffiliated entities for branding and other reasons. My understanding is that sharing of on-air talent across networks also makes it easier to retain top talent by increasing their exposure, value, and ultimately compensation. Combining Comcast's cable networks with NBCU would significantly increase the opportunity for talent sharing.

76. The transaction is also likely to lead to sharing of advertising resources to realize economies of scale and scope and provide more attractive advertising services to advertisers and consumers. In a number of local markets, the parties have between two and four advertising sales forces from among: (1) Comcast Spotlight, the local advertising division of Comcast

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[108] See Johnny Diaz, "NECN, SportsNet Find Way to Share Strengths," The Boston Globe, Oct. 31, 2009, available at http://www.boston.com/business/articles/2009/10/31/necn_beefs_up_sports_programming_as_sportsnet_makes_more_hires/ ("The news cable channel [NECN] is getting more sports programming and a $1 million-plus upgrade to high-definition broadcasting, while the sports outlet is hiring more journalists.").

[109] See Public Interest Statement, p. 52.

[110] Id. pp. 51-52.

[111] Per John Miller, Chief Marketing Officer, NBCU Television Group, Apr. 29, 2010.

Cable;[112] (2) Comcast RSN; (3) an NBC O&O; and (4) a Telemundo O&O. By combining resources among these entities,[113] the joint venture should be able to offer improved advertising services.

77. For example, Spanish-language advertisers are likely to benefit by the joint venture combining its Spanish-language advertising sales, using Telemundo sales teams, which have close relationships with Spanish-language advertisers, to sell advertising time supplied by Comcast Spotlight.[114] Currently, Comcast's Spanish-language advertising sales are extremely small, and the company is not a significant factor in the Spanish-language advertising business. Telemundo's existing relationships with Spanish-language advertisers could help Comcast increase its sales of Spanish-language advertisements. These improved Spanish-language advertising services would be difficult to achieve between unaffiliated parties and it would be difficult for either party to increase its scale internally to achieve the same efficiencies.

B. Cross-Promotions

78. The transaction will also allow Comcast and NBCU to overcome difficulties associated with cross-promotions – the promotions of networks and shows on other networks either in the form of short advertisements or within programming itself. Cross-promotions are recognized in the media industry and academic literature as important for targeting consumers, expanding audiences and ratings of shows and networks, and building brand identities.[115] Media companies,

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[112] Spotlight has a presence in {{ }} DMAs and generates approximately {{ }} billion of gross advertising revenue annually from the sale of spot television advertising on more than {{ }} ad-inserted cable networks. Per Robert Klippel, Vice President, New Products and Operations, Comcast Spotlight, Apr. 30, 2010.

[113] At the local level, NBCU O&O stations and Spotlight could realize cost synergies including market research and back-office support. Per Robert Klippel, Vice President, New Products and Operations, Comcast Spotlight, Apr. 29, 2010. As a result of having additional breadth and reach, the combined entity may have more flexibility in designing attractive packages of advertising inventory to reach audiences attractive to advertisers. Per Muriel Malka, Senior Vice President, Corporate Strategy & Development, NBCU, Mar. 24, 2010, Apr. 28, 2010.

[114] Per Muriel Malka, Senior Vice President, Corporate Strategy & Development, NBCU, Mar. 24, 2010, Apr. 28, 2010.

[115] Given that the majority of U.S. households receive over 100 channels, it is difficult for consumers to be informed about all of their viewing options. See, e.g., Robert Bellamy and Paul Traudt (2000), "Television Branding as Promotion," S.T. Eastman (ed.), Research in Media Promotion, p. 130 ("Of critical importance in the cluttered television environment is getting television users to sample programs and channels – the traditional function of promotion. . . . [T]he network brand name can be easily applied to new channels, outdoor advertising, cooperative promotion/advertising and spin-off products and services . . ."); Maria Norback (2005), "Cross-Promotion and Branding of Media Product Portfolios," Media Product Portfolios: Issues in Management of Multiple Products and Services, pp. 139, 153 ("Cross-promotion and branding are critical for the creation and use of media product

such as NBCU, already engage in frequent internal cross-promotion within their existing families of broadcast and cable networks. For example, NBCU used cross-promotions to grow Bravo's ratings after it acquired Bravo in 2002.[116] Similarly, Oxygen's ratings increased once it had the Bravo platform for cross-promotion.[117] Cross-promotion between NBC and Universal properties increased after NBC acquired Universal.[118]

79. Currently, cross-promotion between Comcast and NBCU is limited.[119] Once Comcast's and NBCU's networks are in the same family, the frequency and scale of the cross-promotions will likely increase.[120] For example, the new NBCU could cross-promote among four women-oriented cable networks (Bravo, Oxygen, E!, and Style) and among NBC's O&O's and Comcast's RSNs. NBC's O&O's and Comcast's RSNs have not engaged in cross-promotion

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portfolios. . . Cross-product promotion could also be a way to strengthen a brand. . . . Products within the same brand also allow for logical cross-product promotion. . . . Portfolio owners will, furthermore, achieve a promotional effect just by owning different product types within the same brand. . . . Cross-product promotion can also be used for the creation of customer loyalty – when a customer is a consumer of one product, the promotion of other products is a way to strengthen this loyalty by getting the consumer interested in other products within the portfolio.").

[116] See Wayne Friedman, "NBCU to Acquire Oxygen, Extend Reach with Women Viewers," MediaDailyNews, Oct. 10, 2007, available at http://www.mediapost.com/publications/index.cfm?fa=Articles.showArticle&art_aid=68902.

[117] See Anne Becker, "NBCU Names Zalaznick to Head Oxygen, Closes Deal," Broadcasting & Cable, Nov. 20, 2007, available at http://www.broadcastingcable.com/article/92064-NBCU_Names_Zalaznick_to_Head_Oxygen_Closes_Deal.php ("Oxygen gains the cross-promotional power that it could never leverage as an independent."); see also Nellie Andreeva and Andrew Wallenstein, "Zalaznick adds Oxygen to portfolio," The Hollywood Reporter, Nov. 21, 2007, available at, http://www.hollywoodreporter.com/hr/content_display/television/news/e3i8795cac930e98bab43213801fb98af57 ("Cross-promotion will undoubtedly be a priority with Oxygen likely to benefit from marketing exposure on other NBC Uni series."). Following its purchase by NBCU, Oxygen had its "best-ever year" in 2008, followed by a "best and most watched year ever in 2009." See "USA Network Tops Cable (and the CW) for 2008," The Hollywood Reporter, Dec. 17, 2008, available at http://livefeed.hollywoodreporter.com/2008/12/usa-network-top.html; see also Oxygen Press Release, Oxygen Celebrates Best and Most-Watched Year Ever in 2009, Dec. 28, 2009, available at http://tvbythenumbers.com/2009/12/28/oxygen-celebrates-best-and-most-watched-year-ever-in-2009/37214.

[118] After NBC acquired Universal it formed the NBC Universal Marketing Council to create a mechanism for company cross promotion and marketing and to share best practices. Per John Miller, Chief Marketing Officer, NBCU Television Group, Apr. 29, 2010.

[119] Per Edward Harbert, President, Comcast Entertainment Group, Apr. 27, 2010.

[120] The new entity will allow Comcast and NBCU to cross promote across an expanded array of assets, including broadcast networks, cable networks, English and Hispanic local media, websites, and theme parks and across multiple platforms (linear, VOD, online, mobile). Per Edward Harbert, President, Comcast Entertainment Group, Apr. 29, 2010; per John Miller, Chief Marketing Officer, NBCU Television Group, Apr. 29, 2010. See also Pick Declaration, ¶ 19.

while under separate ownership. After the transaction, they would have a greater incentive to cross-promote.[121]

C. Reduction of Double Marginalization

80. One significant procompetitive effect of vertical integration that has long been recognized by economists is the "elimination of double marginalization."[122] The application to this transaction is straightforward. Despite the fact that the marginal cost to NBCU when MVPDs distribute NBCU programming to an additional subscriber is typically near zero, NBCU charges Comcast (and other MVPDs) a per-subscriber price that is above zero for most of its content.[123] As a separate firm, Comcast then uses the price it pays to NBCU for content (rather than the true, near-zero marginal cost of that content) as a component of its marginal cost per subscriber, to determine the packages that it offers consumers.[124] In contrast, following (full) vertical integration with NBCU, Comcast would use the true, near-zero marginal cost of NBCU content to calculate its marginal cost for use in determining its packages. When faced with lower marginal costs after the transaction, Comcast may choose to attract additional subscribers through greater investments in service, expanded program offerings, or other non-price alternatives. As explained by Church and Ware, the effect is to increase consumer welfare:

> Instead of paying a wholesale price that includes a markup over marginal cost, the integrated firm will transfer the input internally post merger at only marginal cost.

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[121] A simple, passive form of on-air cross-promotion would be adoption of a single on-screen logo, or "bug," that would be displayed on both NBCU and Comcast's sports programming.

[122] See Tirole (1988), p. 175 ("The objective of vertical integration is to avoid the double price distortion that occurs when each firm adds to its own price-cost margin at each stage of production.").

[123] Note that this does not imply that NBCU has monopoly power (or even market power in the antitrust sense). For example, in a competitive industry with fixed costs, prices will be above marginal cost. The price content providers charge for the rights to distribute their content is above marginal cost because once the content has been created, the marginal cost is very low. If the price were set equal to cost, content creators would not be able to recover their fixed costs.

[124] See Reply to Comments and Petitions to Deny Applications for Consent to Transfer Control of AT&T Corp. and Comcast Corp., *In the Matter of Applications for Consent to the Transfer of Control of Licenses, Comcast Corporation and AT&T Corp., Transferors, To AT&T Comcast Corporation, Transferee*, MB Docket No. 02-70 (May 21, 2002), App. 4 (Declaration of Howard Shelanski), pp. 21-22 ("Video programming is a good for which marginal costs of distribution are negligible but the fixed costs of distribution are very high."). Again, the fact that Comcast sets a price above marginal cost does not imply that Comcast has monopoly power or market power in the antitrust sense. Similar to content providers, distributors make significant investments in their networks and systems so that distribution should be expected to be priced above marginal cost even when there is competition, as is required to recoup the upfront investment costs.

This gives it an incentive to increase output downstream, to the benefit of consumers.[125]

81. Vertical integration, by eliminating double marginalization, allows a firm to internalize the cost of the upstream input rather than treating the cost equal to the price paid for the upstream product and thus creates an incentive to provide a more attractive package for consumers. As such, following vertical integration, economics predicts not only that consumers will get more attractive packages, but also that the resultant increase in output will be sufficient to increase total profits accruing to the integrated firm. Hence, by eliminating double marginalization, vertical integration leads (all else equal) to increased consumer welfare.[126]

82. Despite the fact that Comcast is obtaining only a 51% interest in NBCU (at the time the transaction closes), the theory of double marginalization is relevant to the proposed transaction. Post-transaction, for every dollar that Comcast pays to NBCU, it retains ownership of 51 cents through its interest in NBCU. As a result, even though the amount paid by Comcast to license the NBCU cable networks will continue to be governed by the terms of their pre-transaction contract, as a simple matter of economics, post-transaction (for purposes of determining the packages it offers) Comcast will behave as though 51% of its per-subscriber payments to NBCU are no longer marginal costs, thus generating more attractive packages and effective output expansion.

83. To illustrate the impact of these double marginalization savings, Exhibit 6 lists the top four NBCU-owned cable networks according to SNL Kagan subscriber data.[127] It is important to note that the actual form of the consumer benefit will not necessarily be a reduction in Comcast's prices relative to current prices or prices that would otherwise be charged, but consumer benefit could also come from increased investment by Comcast in programming and distribution leading

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[125] See Jeffrey Church (2008), "Vertical Mergers," Issues in Competition Law and Policy, Vol. 2, pp. 1455-1501 at p. 1461.

[126] It is possible to avoid double marginalization without vertical integration – for example, with contracts that set lump-sum fees and marginal cost pricing. However, there may be market and regulatory reasons why such contracts do not occur frequently. Whatever the reason, MVPDs (including Comcast) usually pay content producers (including NBCU) on a per-subscriber basis despite the fact that per-subscriber marginal costs are near zero, indicating that double marginalization exists in this industry.

[127] The values in Exhibit 6 are based on SNL Kagan and Media Business Corp. data. According to SNL Kagan, affiliate fees and subscribers per network are estimates.

to higher quality and more consumer choice. In addition, Comcast may choose to attract additional subscribers through greater investments in service, expanded program offerings as part of less-expensive tiers, or other non-price alternatives. The key point is that, because Comcast will internalize a portion of the payments it makes to NBCU, it will view the margin earned per subscriber as larger and thus have an incentive to increase output and provide a more attractive package to consumers in any or all of these ways.

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84. Based on Exhibit 6, Comcast's payments for the top four NBCU cable networks generate marginal costs equal to approximately [[ ]] per subscriber per month.[128] Across all Comcast customers receiving these [[ ]], the marginal costs add up to approximately [[ ]] per month or [[ ]] per year. As a result, the transaction will lead to an approximate annual aggregate implicit marginal cost reduction of 51% of [[ ]] per year, which is equal to [[ ]] per year.

[128] For households with subscription packages that include [[ ]]. For households with more networks with per-subscriber charges, the savings would be greater.

85. To illustrate the consumer benefits of reducing double marginalization, I rely on an estimate of the pass-through rate. Calculating the price reduction implied by the pass-through of marginal costs simply provides a straightforward way to quantify the magnitude of the associated consumer benefits, but as discussed above, these consumer benefits could be in the form of higher-quality packages because of increased Comcast investment.

86. Previous economic literature has found changes in programming costs are passed through to MVPD subscribers at a rate of about 50 percent.[129] According to Professor Shelanski:

> The case for pass-through of efficiencies is compelling for a firm that faces competition, particularly competition as vigorous as that in the MVPD market. . . . Reductions in the direct costs of procuring programs will result in both a lower cost per-program for subscribers and in an increased number of programs being made available to subscribers. . . . Efficiency gains from the merger may also be passed through to consumers in a less direct way through increased investment in network upgrades and the development and deployment of innovative services.[130]

87. Using an assumed pass through rate of 50 percent, a simple illustration of the benefits to Comcast subscribers from the elimination of double marginalization is given by 50 percent of the [[ ]] in effective marginal cost reduction, or [[ ]] per year.

88. Two points are important to keep in mind regarding this simple estimate. First, it is likely to underestimate the effect of the reduction in double marginalization on a number of dimensions. For one, it only calculates the benefits to existing Comcast subscribers for these four networks. As described above, one effect of Comcast's more attractive packages will be to attract more subscribers, thus increasing welfare for those consumers who find the post-transaction Comcast offering attractive enough to switch away from their pre-transaction MVPD choice. In addition, basic economics suggests that other MVPDs – particularly the Direct

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[129] See George Ford and John Jackson (1997), "Horizontal Concentration and Vertical Integration in the Cable Television Industry," Review of Industrial Organization, Vol. 12, No. 4, pp. 501-518 at pp. 513-514. Note that 50% is also the value of the pass-through rate for a monopolist facing linear demand curve. For many models that are commonly used in merger simulations – in which competitors react to one another's price cuts by lowering their own prices and in which demand takes alternative functional forms such as logit or AIDS – pass-through rates are substantially higher than 50%, so this may be a conservative estimate of the actual benefits from eliminating double marginalization.

[130] See Reply to Comments and Petitions to Deny Applications for Consent to Transfer Control of AT&T Corp. and Comcast Corp., *In the Matter of Applications for Consent to the Transfer of Control of Licenses, Comcast Corporation and AT&T Corp., Transferors, To AT&T Comcast Corporation, Transferee*, MB Docket No. 02-70 (May 21, 2002), App. 4 (Declaration of Howard Shelanski), pp. 21-22.

Broadcast Satellite ("DBS") and telco providers who compete directly with Comcast – are likely to react to Comcast's improved service or lower prices with service enhancements or price reductions of their own.

89. Second, my calculation was simplified by assuming that the estimated affiliate fees charged by NBCU (to Comcast and other MVPDs) would not change due to the transaction. This simplification is supported by the terms of the proposed transaction and by the fact that there is a long-term agreement in place governing the terms on which NBCU provides its networks to Comcast. In particular, as described in the declaration by Dr. Mark Israel and Professor Michael Katz,[131] under the terms of the joint venture agreement, the officers and directors of the joint venture have a fiduciary duty to run NBCU to maximize its own profits (not the combined profits of Comcast and NBCU). Hence, while it is possible that some pricing incentives could change due to the combination of content created by the proposed transaction, current NBCU prices should provide a reasonable approximation of post-transaction prices. More generally, while there are certainly complications that one could add to the model (including adjustments for the ways in which the model is an underestimate, described above), my calculation provides a simple, useful summary measure of the magnitude of consumer benefits that should be expected to result from the elimination of double marginalization following the proposed transaction.

90. In connection with the 2003 DirecTV–News Corp. transaction, Professors Salop and Shapiro, and their co-authors, developed a model to show the magnitude of the effects of the reduction in double marginalization.[132] The economic logic of their model, which is also relevant

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[131] See Mark Israel and Michael L. Katz, "Application of the Commission Staff Model of Vertical Foreclosure to the Proposed Comcast-NBCU Transaction," *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*, MB Docket No. 10-56 (Mar. 5, 2010), ¶ 16.

[132] See Opposition to Petition to Deny and Reply Comments of News Corp., General Motors Corp., and Hughes Electronics Corp., *Application of General Motors Corporation and Hughes Electronics Corporation, Transferors, And The News Corporation Limited, Transferee, For Authority to Transfer Control*, MB Docket No. 03-124 (July 1, 2003), Exhibit B (CRA Expert Report); Ex Parte of News Corp., General Motors Corp., and Hughes Electronics Corp., *Application of General Motors Corporation and Hughes Electronics Corporation, Transferors, And The News Corporation Limited, Transferee, For Authority to Transfer Control*, MB Docket No. 03-124 (Sept. 8, 2003) (CRA Second Expert Report).

to the proposed transaction, shows that vertical integration of content and distribution can benefit consumers by reducing double marginalization.

VII. Conclusions

91. Economic analysis shows that the proposed transaction between Comcast and NBCU is likely to lead to a substantial investment in programming and an increase in the quantity, quality, and viewing convenience of video programming. The major benefits to consumers and the companies come from vertical efficiencies that lead to increased investment in distribution and programming and the expansion of output. In particular, the transaction will increase the ability of Comcast and NBCU as commonly controlled companies to enter into contracts that will increase the supply of content to Comcast so that it can accelerate the provision of innovative video programming services on new distribution platforms.

92. The efficiencies from this transaction are likely to result in benefits that go beyond expansions of output and reductions in effective prices. Consumer welfare depends on innovation and the introduction of new products and services.[133] This transaction is likely to lead to greater investments in new platforms and services. Comcast is ready to make those investments because the transaction will reduce contracting frictions between Comcast and NBCU and bring their incentives into closer alignment. The transaction will enable Comcast to speed up the introduction of new distribution platforms that will enable it to provide video services to consumers whenever, wherever, and however consumers want them. While it is unclear what the next innovative platform or distribution mechanism will be, it will surely involve coordination between distribution and content. Minimizing contracting difficulties and aligning incentives between providers of content and distribution can lead to greater

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[133] See Antitrust Modernization Commission, Report and Recommendation, Apr. 2007, pp. 39-40. ("Innovation provides a significant share of the consumer benefits associated with competition, particularly in the most dynamic industries. New and improved products and services, as well as new business methods and production processes, are created through innovation. To improve the application of antitrust in new economy industries, antitrust enforcers should give further consideration to efficiencies that lead to more rapid or enhanced innovation. The potential benefits to consumer welfare from such efficiencies are great, thus warranting careful assessments of the potential for certain business conduct to create more rapid or enhanced innovation."); see also Testimony of Carl Shapiro, "New Economy" Antitrust Modernization Commission, Nov. 8, 2005, p. 2 ("[A]t least over the medium to long term, the lion's share of consumer benefits associated with competition in our most dynamic industries results from innovation. Here I use the term 'innovation' broadly, including the introduction of new and improved products as well as the adoption of new business methods and production processes. Put simply: 'Innovation is King.'").

experimentation with different models and provide better information about what new methods will be successful at serving consumer demand. Because of its ability to increase consumer welfare directly through increased output and innovation, and indirectly through other efficiencies, this transaction will benefit consumers.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed on this 4th day of May, 2010.

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Appendix 1

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Federal Communications Commission, Washington, DC
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Other Activities

Editorial/Committees

Co-chair, Obama for President, Economy Globalization and Trade Committee, 2008
Member, Obama Presidential Transition Team, 2008
Associate Editor, *Information, Economics and Policy*, 2008-
Referee for *American Economic Review, Rand Journal of Economics, Industrial and Corporate Change, Journal of Industrial Economics, Information, Economics and Policy, Telecommunications Policy, Telecommunication Systems, Journal of Economics and Management Science, Antitrust Law Journal.*
Telecommunications Policy Research Conference, Program Committee 2002-2004.
Bay Area Economic Profile Academic Review Panel, 2003-2004.
National Research Council Committee on *Wireless Technology Prospects and Policy*, 2003-

Testimony and Submissions

FCC Economist Panel on the Economics of Interconnection, May, 1996.
FCC Economist Panel on the Economics of RBOC Entry under §271, July, 1996.
FCC Economist Panel on Competitive Bidding for USF, March, 1997.
Consultant for the World Bank on Telecommunications Policy in Hungary, 1998.
FCC Academic Expert Panel on "A New FCC for the 21st Century," June 1999.
FCC Academic Expert Panel on AT&T—MediaOne Merger, February, 2000.

Principal co-author of 37 Concerned Economists submission on "Promoting Efficient use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets," February 2001
FCC Panel on Wireless Competition, February 2002.
FCC Workshop on Spectrum Policy, July 2002.
San Francisco Telecom Commission on Cable Competition, January 2003.
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San Francisco City Board of Supervisors Land Use Committee on Cable Competition, July 2004.
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FTC Panel on Network Neutrality, February 2007.
FCC *En Banc* Hearing on Network Management, April 2008.
Principal co-author of 71 Concerned Economists submission on "Using Procurement Auctions to Allocate Broadband Stimulus Grants" Submitted to the National Telecommunications Information Agency (NTIA) and Rural Utilities Service (RUS), April, 2009
FCC Broadband Task Force, Workshop on "Benchmarks" September 2009
U.S. House Commerce Subcommittee on Communications, Technology and the Internet, Universal Service hearings, November 2009
FCC Video Relay Service Reform Workshop, December, 2009

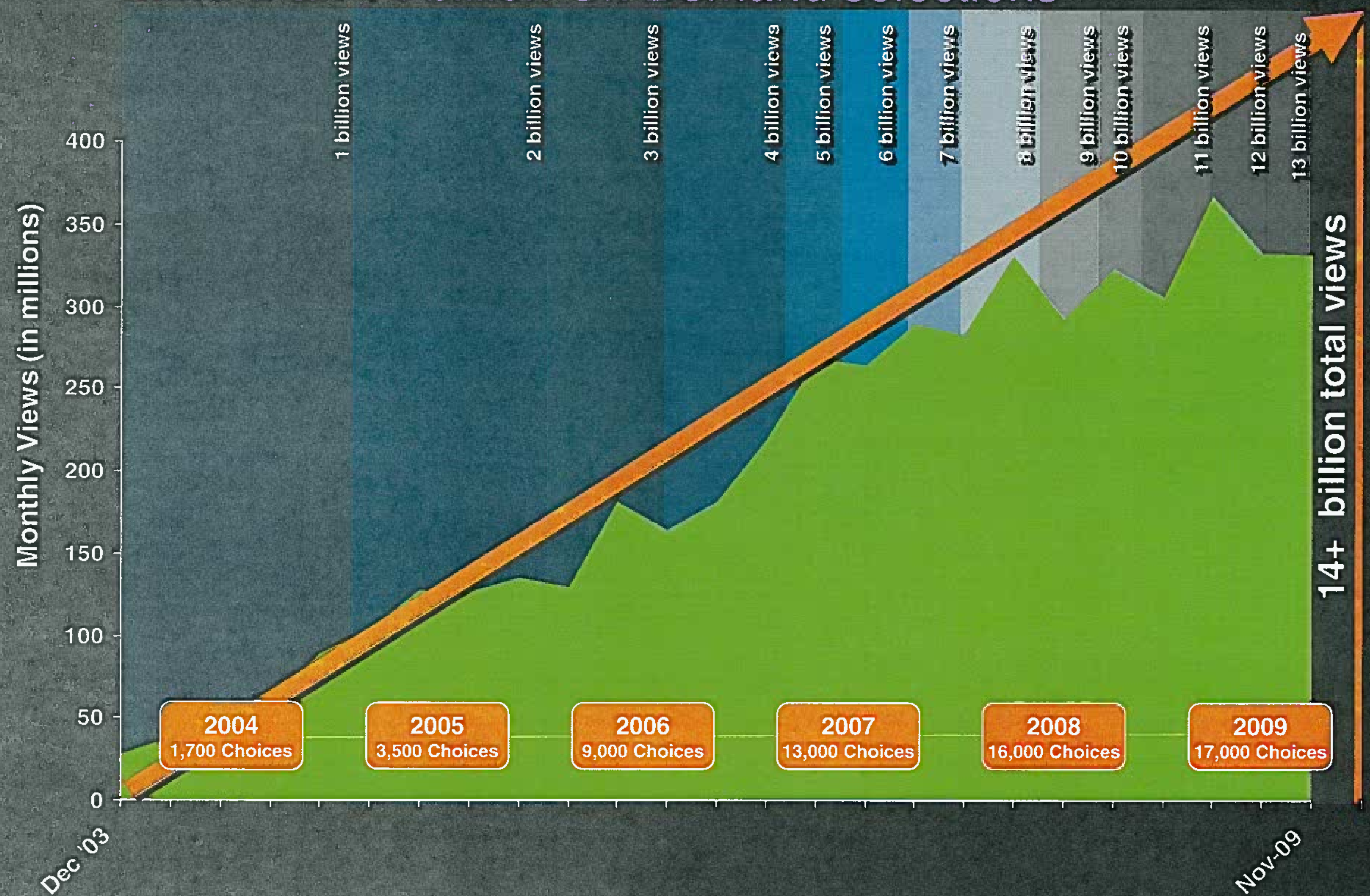
Other
Sustainable Conservation, Advisory Board, 2007-
Nepalese Youth Opportunity Fund, Advisory Board, 2007-
Telecommunications Policy Research Conference Board, 2009-
Boards and Advisory Boards for private companies

Awards
Chairman's Distinguished Service Award, FCC, 1997.
University of California, Brad King Award for Young Alumni Service, 1994.
National Performance Review Hammer Award for Reinventing Government, 1994.

Appendix 2

Total On Demand Views

Since 2003, Comcast customers have viewed more than 14 billion On Demand selections



Appendix 3

Stenographic Transcript
Before the

SUBCOMMITTEE ON
COMMUNICATIONS, TECHNOLOGY,
AND THE INTERNET

COMMITTEE ON COMMERCE,
SCIENCE, AND TRANSPORTATION

UNITED STATES SENATE

CONSUMERS, COMPETITION, AND CONSOLIDATION IN THE VIDEO AND BROADBAND MARKET

THURSDAY, MARCH 11, 2010

WASHINGTON, D.C.

ALDERSON REPORTING COMPANY
1155 CONNECTICUT AVE, N.W.
SUITE 200
WASHINGTON, D.C. 20036
(202) 289-2260

STATEMENT OF BRIAN L. ROBERTS, CHAIRMAN AND CEO, COMCAST CORPORATION

Mr. Roberts: Thank you, Mr. Chairman.

It is a privilege to come here today and talk about Comcast's planned joint venture with GE regarding NBC Universal. My father, Ralph, seated behind me, started Comcast, as we heard, almost half a century ago with a single small cable system in Tupelo, Mississippi. And together, we have been able to build a national cable broadband and communications company, employing nearly 100,000 people.

So in proposing to combine with NBC Universal, we are taking the next step in our improbable journey. I am proud of what we have been able to accomplish and especially pleased that my father is here with me today to share this important moment in Comcast history.

Let me first briefly summarize the transaction. Under our agreement, Comcast will become the 51 percent owner and manager of NBC Universal. GE will still own 49 percent. We will create a new venture that combines NBCU's broadcast TV, cable programming, movie studio, and theme park businesses with Comcast limited video programming channels.

The transaction puts two great American media and entertainment companies under one roof. It will help to deliver more diverse programming to millions of households, and it will also help to accelerate a truly amazing digital future for consumers.

Together, Comcast and NBCU can help accelerate the delivery of anytime, anywhere multiplatform video experience Americans want. In combination, we will be a more creative and innovative company, and our success will stimulate our competitors to be more innovative, too. So this joint venture will be good for consumers, innovation, and competition.

To leave no doubt about the benefits of the new NBCU, we have made a series of public interest commitments in writing, detailing how we will bring more local programming, more children's programming, and more diverse programming on more platforms. We have also made commitments to reassure our competitors that we will compete fairly in the marketplace. Let me offer two quick examples.

First, we volunteer to have the key components of the program access rules apply to our retransmission negotiations for NBC stations, even though those rules have never applied to retransmission consent negotiations.

Second, we want independent programmers with quality and diverse content to know we are committed to help them reach an audience. So we have committed to add at least two new independently owned cable channels to our system every year beginning in 2011.

Bringing NBCU and Comcast together is primarily a vertical combination. There is no significant overlap between the assets of the two companies. A vertical combination generally poses fewer competitive concerns. That also means no massive layoffs, no closure of facilities, nothing to produce hundreds of millions of dollars of "synergies."

This is why some on Wall Street did not fall in love with this deal right away, but it is also why we believe Washington can. Because we will grow these great American businesses over the long term and make them more successful, not cut them.

Congress has recognized the benefits of vertical integration before and adopted rules in 1992 to address potential risks. At that time, there was almost no competition to cable. More than half the channels were owned by cable companies. So Congress created program access and program carriage rules to ensure that a company which owns both cable content and distribution cannot treat competitors unfairly.

Those rules have worked in the past and will work in the future, and we are willing to discuss with the FCC having the program access rules bind us even if they were to be overturned by the courts.

In the past decade, Comcast has come to Washington twice to seek merger approvals, when we acquired cable systems from AT&T and Adelphia. Each time, we explained how consumers would benefit, and in each case, I believe we have delivered.

We have spent billions of dollars upgrading cable systems to make them state-of-the-art. We created On Demand, which our customers have used 14 billion times. And from a standing start 4 years ago, we now give millions of Americans their first real phone choice. We have created thousands of jobs and promoted diversity in our workforce. Once again, we have described how consumers will benefit, and I want to assure you that we will deliver.

Mr. Chairman, we are asking for the opportunity to make one of the great icons of American broadcasting and communications part of the Comcast family. We promise to be reliable stewards for the national treasures of NBC and NBC News. It is a breathtaking and humbling moment in our history, and we hope to have your support.

Thank you very much.

[The prepared statement of Mr. Roberts follows:]

Senator Dorgan: Mr. Roberts, thank you very much. Mr. Wells, nice to see you. You may proceed.

And so, many have said, as we heard in Professor Yoo's testimony and as I have pointed out before, Time Warner and Time Warner Cable have separated, News Corp. and DirecTV, both deals that were approved through a similar process. But it didn't prove to be right for them as they wanted to operate their businesses.

So I think I began by saying it is not a sure thing, and you start with what is your principal motivation? My opinion, principal motivation is an opportunity, at a time when our economy has really suffered in the last year or so, to make a bet that we are going to see a rebound and that this is a good time to bet on America, on advertising coming back, and on consumers wanting more and more content.

And one of my answers to Mr. Wells is you don't buy the fourth-place network that was once, for my formative years, the number-one network and want to do harm, but rather, you want to invest and grow it and restore it to its grandeur.

One of the reasons General Electric has chosen us to pick us to partner with in a 51/49 transaction is that they think we will be more focused and more committed to wanting to see innovation and investment. We know -- as was discussed with the Internet, we know consumers are looking for more ways to get content on more devices. This is a industry, and there are these program access opportunities at the FCC if that were one's behavior.

What is our motivation is to try to make these channels better, more relevant. Invest in them, be more focused on them than their current situation, and that we think they are good businesses, as you describe, as the next generation wants them on more platforms.

And I don't know how more that we can state it that that is really what our goal is. And I think if we do all that, we will have a successful deal here.

Senator LeMieux: Can you speak to what is going to happen to employees of NBC, and specifically, as you may expect, being a Senator from Florida, I am concerned about NBC Universal. They are headquartered -- the theme park operation, I guess, is headquartered there. I expect that you are going to commit that there are no plans to move that to Philadelphia?

[Laughter.]

Mr. Roberts: People would love to be in the snow that we have had in Philadelphia all winter long and here in Washington.

Yes, we are excited about other businesses that we haven't talked about at all today, NBC Universal and what have you, and the investment that is being made in Universal theme parks with the Harry Potter. That is, in my opinion, under talked about is GE decided to sell. And in all likelihood, it was going to sell to somebody, and most of those somebodies that I can see would have had duplicative businesses, and there would have been real job reductions.

The fact is Comcast doesn't own a theme park, doesn't own a news channel, doesn't own a broadcast, doesn't own a film studio, and doesn't own many of those cable type of news channels. So we don't anticipate any reductions and movements and all the disruption to people's lives at this really sensitive time in the economy.

And I think that is maybe not the sole determinant factor, but a reality that GE had chosen to sell. And if they sold to somebody with more "synergy," Wall Street would have liked it. Washington perhaps would have had more dislike.

Senator LeMieux: And if you would like to move the general headquarters down to Florida, we would welcome that.

Thank you, Mr. Chairman.

Senator Dorgan: Senator Wicker?

Senator Wicker: Well, speaking of headquarters, I think members of the panel might be interested to know that this giant of Comcast actually had its beginnings in my hometown of Tupelo, Mississippi. And Mr. Roberts's father,