Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

OPPOSITION TO PETITIONS TO DENY AND RESPONSE TO COMMENTS

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July 21, 2010

EXECUTIVE SUMMARY

Applicants seek Commission approval to transfer a majority ownership interest in NBC Universal from General Electric, a large and diversified enterprise that has made a business decision to deploy its resources elsewhere, to Comcast, a company focused on communications, information, and entertainment. The combined entity will have a strong incentive to invest in and improve NBCU's assets and to pursue innovations that will deliver to consumers a wealth of high-quality content where they want it and when they want it.

Significant and Substantial Public Interest Benefits. The voluminous record in this proceeding demonstrates that the proposed transaction will yield significant and substantial public interest benefits. Some flow from the increased investment, accelerated innovation, and stimulated competition that will come with the marrying of content and distribution; others flow from the tangible and verifiable voluntary commitments that Applicants have made to diversity, localism, and other public interest goals. Specifically, Commission approval of the joint venture will lead to: (1) an expansion in the amount, quality, and diversity of programming available to consumers; (2) an acceleration of investment in and deployment of innovative products and services that consumers demand; (3) a stronger system of free over-the-air broadcasting; and (4) the realization of efficiencies that will benefit consumers.

Applicants have described and explained the benefits of the transaction at length in their Public Interest Statement, responses to Congressional questions in this proceeding, and responses to the Commission's information requests. These benefits are confirmed by the comprehensive expert report previously submitted by Dr. Greg Rosston. Applicants now provide additional evidence that the asserted benefits will be realized, including a further economic analysis by Dr. Rosston and Dr. Michael Topper reinforcing that the public interest benefits of this transaction

are real and substantial. Applicants also provide additional details regarding the expansion of certain voluntary commitments that enhance the benefits of the transaction.

Many parties recognize these benefits. In an outpouring that has no precedent in any prior transaction review, literally hundreds of businesses and business associations, elected officials and elected official associations, community organizations, and private individuals have expressed their support for the transaction. Many of these commenters have longstanding first-hand knowledge of Applicants as business or community partners. Many offer concrete explanations of Comcast's and NBCU's sustained contributions to the growth of their businesses and communities, and attest to the character and commitment of both companies. These testaments clearly demonstrate that Applicants possess the necessary qualifications to hold broadcast licenses and that the transaction is in the public interest.

Applicants have had successful dialogues with the broadcast stations affiliated with the NBC Television Network and the broadcast stations affiliated with ABC, CBS, and Fox. Applicants have worked closely with the stations' respective affiliate organizations to strengthen Comcast's original voluntary commitment to preserve and enhance free over-the-air broadcasting in a challenging economic environment. These affiliate organizations, representing hundreds of TV stations across the country, now have entered into binding agreements with Comcast and NBCU which further ensure that the joint venture will improve local broadcasting and promote the public interest.

Applicants also have reached agreements with representatives of the Hispanic and African American communities to ensure the transaction will renew and materially bolster Comcast's and NBCU's longstanding commitments to diversity in programming, employment,

procurement, philanthropy, and governance. Applicants continue to work cooperatively and constructively with a range of other stakeholders.

No Significant Competitive Harms. The proposed transaction takes place against the backdrop of an extremely competitive and dynamic communications marketplace. Despite the self-serving claims of various competitors and the predictable responses from certain familiar critics, this transaction will not diminish competition in any relevant market. This is primarily a vertical transaction between parties who do not, and will not, possess market power in any relevant market. Competition will be advanced, not impaired.

In today's dynamic and highly-competitive marketplace, Comcast and NBCU have, and will continue to have, powerful incentives to deliver the services that consumers want – "anytime, anywhere." This transaction will encourage Comcast and NBCU to invest and innovate more rapidly, enhance localism and diversity, and serve consumers better across all of today's – and tomorrow's – media and communications platforms. This in turn will stimulate investment and innovation by others in the industry, ultimately benefiting all consumers.

The transaction presents no material horizontal effects and does not pose any of the harms that some associate with traditional "media consolidation." NBCU does not own cable systems or wired or wireless Internet distribution facilities, and Comcast owns no broadcast TV assets (and on the media consolidation point, owns no radio stations or newspapers either). Although both Comcast and NBCU own cable networks, when Comcast's modest programming assets are combined with those of NBCU, the new entity will have only about 12 percent of total advertising and affiliate revenues for national cable programming networks, ranking behind Disney/ABC, Time Warner, and Viacom (and only slightly ahead of News Corporation). As

economists and academic experts have already opined, a vertical transaction with market shares at such levels simply poses no cognizable risk to competition or consumers.

The combined entity cannot and will not pursue anti-competitive vertical foreclosure strategies, despite the contrived efforts of certain opponents to show otherwise. As explained herein and in the analyses submitted by Drs. Mark Israel and Michael Katz, the combined entity cannot plausibly profit from foreclosure strategies against competing MVPDs by withholding content or against unaffiliated content providers by withholding distribution. Intense competition among programming networks and among MVPDs ensures against misconduct at either level of the market, and existing program access and program carriage rules provide a further backstop. Nor, as explained at length, does the proposed transaction present any threat of vertical harm to competition in online video, a nascent marketplace that is dynamic, vibrant, and competitive – and will become even more so as a result of the transaction.

Extraneous Issues. The Commission's responsibility in this proceeding is to review the transaction-specific benefits and transaction-specific harms and, if the former outweigh the latter, to approve the transaction. A full and fair review of the record properly focused on transaction-specific issues demonstrates that Applicants have more than met their burden. Applicants' public interest commitments and agreements with interested stakeholders further strengthen the case for approval.

For decades, the Commission has stated that pre-existing disputes and issues of industry-wide significance should not be considered in license transfer proceedings. Indeed, the Commission "will not consider arguments in [license transfer] proceeding[s] that are better addressed in other Commission proceedings, or other legal fora, including the [courts] and the Congress." Despite this clear precedent, some opponents have succumbed to the temptation to

exploit this proceeding to address pre-existing, industry-wide, or other extraneous issues. For example, some parties raise so-called "net neutrality" issues. But these issues are already pending in at least two active rulemakings and should be addressed there. The same is true of concerns about the operation of the current program access or program carriage rules – each is already the subject of an open rulemaking. Still other parties complain about media consolidation and ownership diversity, but these issues too are already the subject of ongoing industry-wide proceedings precisely because they affect numerous stakeholders. To the extent commenters allege that Comcast or NBCU has violated any rule, the Commission's existing complaint processes are the proper place for such allegations to be considered. In any event, any allegations of rule violations in the instant record are without merit or immaterial.

Also off the mark are efforts to use this proceeding as a vehicle to air grievances that bear little, if any, relationship to the proposed transaction (and which are, in any event, unfounded), or for leverage in negotiating (or changing) contracts, or to air unrelated issues regarding the regulation of cable television generally or labor grievances. The Commission's precedents rightly require a focus on transaction-specific issues. From those who argue there are any such issues, the Commission should demand facts, logic, and rational argument, not the hyperbole, speculation, and even character assassination that several opponents employ. These tactics violate the spirit of an open, transparent, fact-based, and data-driven inquiry and should be disregarded.

Bringing together Comcast and NBCU will accelerate investment and innovation, promote competition, and benefit consumers. The transaction also will benefit diversity, localism, employment, and the nation's economy. Accordingly, the proposed transaction serves the public interest, convenience, and necessity, and should be approved expeditiously.

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I. INTRODUCTION AND OVERVIEW

Over the nearly six months since Comcast Corporation ("Comcast"), General Electric Company ("GE"), and NBC Universal, Inc. ("NBCU") (collectively, "Applicants") filed their Applications and Public Interest Statement,[1] the Commission has compiled a lengthy record. Applicants alone have already submitted three separate economic reports, produced hundreds of thousands of pages of documents, and answered over 150 specific interrogatories, and hundreds of leaders and organizations representing millions of Americans have filed in support of the transaction. The overwhelming weight of the factual, legal, and economic evidence shows that the transaction is pro-competitive, pro-consumer, and in the public interest. Accordingly, the Commission should approve it expeditiously.

This is primarily a vertical transaction between parties who do not, and will not, possess market power in any relevant market, so competition will be advanced, not impaired, by the transaction. In today's dynamic and highly competitive market, Comcast and NBCU have, and will continue to have, powerful incentives to deliver the services that consumers want, where and when they want them. This transaction will encourage Comcast and NBCU to invest and innovate more rapidly, enhance localism and diversity, and serve consumers better across all of today's – and tomorrow's – media and communications platforms. And this in turn will stimulate investment and innovation by others in the industry to the benefit of the nation's economy and all American consumers.

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[1] *See Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. For Consent to Assign Licenses or Transfer Control of Licensees*, Applications and Public Interest Statement, Lead Application File Nos. BTCCDT-20100128AAG (MB), SES-ASG-20100201-00148 (IB), and 0004101576 (WTB) (filed Jan. 28, 2010) ("Public Interest Statement").

Applicants seek the Commission's approval to transfer a majority ownership interest in NBCU and its corporate affiliates from GE, a large and diversified enterprise that has made the business decision to focus its resources elsewhere, to Comcast, a company focused on communications, information, and entertainment, that will invest in and operate NBCU's assets to accelerate the "anytime, anywhere" future that Americans want. Each of the businesses in which Comcast and NBCU operate today – broadcasting, multichannel video distribution, programming, online content, broadband Internet, and voice – is fiercely competitive. This transaction will not result in "media consolidation" or reduce competition in any meaningful respect – to the contrary, as demonstrated in great detail, the transaction will enhance competition.

The transaction presents no material horizontal effects. NBCU does not own cable systems, so Comcast's cable distribution platform will not grow. Comcast's cable systems will continue to serve fewer than one-quarter of multichannel video programming distributor ("MVPD") households, and Americans will continue to have a choice among three, four, or five MVPDs in every community that Comcast serves. NBCU owns no wired or wireless Internet distribution facilities, and Comcast's less-than-20-percent national share in the residential portion of this marketplace will therefore also remain unchanged. When Comcast's modest programming assets are combined with those of NBCU, the new entity will have about a 12 percent share of total advertising and affiliate revenues for national cable programming networks, ranking behind Disney/ABC, Time Warner, and Viacom (and only slightly ahead of News Corporation), leaving NBCU post-transaction in the same fourth-place position it occupies today. Comcast brings no broadcasting assets to the joint venture, but it does bring a long-term commitment to free over-the-air broadcasting and increased investment in broadcast

programming. As economists and academic experts have already opined, a vertical transaction with these types of market shares simply poses no cognizable risk to competition or consumers.

The Commission's responsibility in reviewing a transaction such as this is to assess the *transaction-specific* benefits and the *transaction-specific* harms and, if the former outweigh the latter, approve the transaction. As the Commission has said many times, the review of a proposed transaction is not the right context in which to address normal-course business disputes or industry-wide issues, and many of the opponents' concerns fall into one or both of those categories or have no relationship whatsoever to the proposed transaction. The Commission's precedents require that it dismiss a large number of issues raised by competitors and the usual naysayers and focus its analysis on transaction-specific issues. A full and fair review of the record so conducted will demonstrate that Applicants have more than met their burden of demonstrating that the public interest benefits of this transaction outweigh any potential harms. Applicants' substantial voluntary public interest commitments, in combination with stakeholder agreements, make the case for approval even stronger.

Literally hundreds of businesses and business associations, elected officials and associations of elected officials, community organizations, and private individuals have expressed their support for the transaction. Many of these commenters have longstanding first-hand knowledge of Applicants, and many offer concrete and personal explanations of Comcast's and NBCU's contributions to their communities, as well as their understanding of the character and commitment of each of the companies. The breadth and depth of this support is unprecedented in a transaction review proceeding. These testaments clearly demonstrate that Applicants possess the necessary qualifications to hold broadcast licenses and that the transaction is in the public interest.

Elected officials: Among the substantive comments that have been filed in support of the transaction are those of 83 United States Senators and Members of the House of Representatives, eight Governors (including those of California, New York, and Pennsylvania), over 40 Mayors (including the mayors of Baltimore, Chicago, Denver, Las Vegas, Los Angeles, Orlando, Philadelphia, Pittsburgh, and San Francisco), and over 115 other state and local elected officials. These officials represent communities across the country, from New York to California, urban and rural states and districts, and many diverse populations. Applicants are also pleased to have the support of diverse associations representing thousands of elected officials, including the National Conference of State Legislatures, the National Black Caucus of State Legislators, the National Conference of Hispanic Legislators, the National Hispanic Caucus of State Legislators, the National Conference of Black Mayors, the National Organization of Black Elected Legislative Women, and the National Association of Black County Officials, among others.

Diversity organizations: Applicants are proud to have the support of hundreds of established organizations representing diverse communities. Supporters include the National Urban League (and 14 local Urban League chapters from Portland, Oregon to Springfield, Massachusetts), the National Action Network and its founder, Reverend Al Sharpton, the United States Hispanic Chamber of Commerce, the Asian Pacific American Leadership Institute, the Asian American Journalists Association, and the Latin American Economic Development Association, among many others.

Community organizations: National community organizations that have filed letters in support include One Economy Corporation, Common Sense Media ("Common Sense"), Big Brothers Big Sisters, City Year, Boys & Girls Clubs of America, and the Partnership for a Drug Free America. Numerous local chapters of these and other charitable, educational, and

community service organizations also expressed their support, as have almost 40 local Chambers of Commerce, all attesting to the meaningful contributions of time, talent, and other resources that Comcast and NBCU make in their communities. These organizations, and others like local libraries and public television stations, have seen first-hand the sustained commitment Applicants have to the local communities they serve.

Content creators and suppliers: Independent networks and programmers like BlueHighways, CatholicTV, CoLours TV, Crossings TV, GolTV, Hip Hop On Demand, Inspiration Networks, Jewish Life TV, Outdoor Channel, Reelz Channel, RHI Entertainment, Somos TV, Sportsman Channel, and Tribeca Films are among those who have offered their support. So too have the National Hockey League ("NHL") and the National Football League ("NFL"). Applicants are proud to have support from the Hollywood creative community through the Directors Guild of America. Applicants have also reached an agreement with the Independent Film & Television Alliance ("IFTA") that will create new opportunities for independent content creators to work with the broadcast, cable programming, and On Demand divisions of NBCU and Comcast.

Labor: The transaction has received support from organized labor including Joint Council 42 of the International Brotherhood of Teamsters and International Brotherhood of Teamsters, Studio Transportation Drivers Local #399, as well as the Directors Guild of America.

Advertisers/Others: In addition to the groups listed above, multiple advertising firms supported the transaction, including VivaKi, Naked Communications, Mindshare, TargetCast tcm, and Starcom MediaVest. Similarly, a number of prominent high-tech companies, such as Motorola, Inc. and Cisco Systems, Inc. ("Cisco"), expressed their support. Other categories of supporters include local franchising authorities and local PEG organizations.

Applicants are especially pleased by the successful dialogues that have occurred with the broadcast stations affiliated with the NBC Television Network and the broadcast stations affiliated with the ABC, CBS, and Fox Television Networks. In the months since Applicants filed their Public Interest Statement, they have worked closely with the affiliate organizations of NBC as well as the other major broadcast networks, listening to their concerns and working together to flesh out Comcast's original voluntary commitment to preserve and enhance free over-the-air broadcasting in a challenging economic environment. These affiliate organizations represent hundreds of TV stations across the country, and binding agreements have been reached that address their concerns and promote the public interest. Applicants view the conditions requested by these organizations as consistent with that goal.

Applicants have also reached agreements with representatives of the Hispanic and African American communities to ensure that the transaction will renew and materially bolster Comcast's and NBCU's long-standing commitment to diversity in programming, employment, procurement, philanthropy, and governance. Applicants continue to work cooperatively and constructively with a range of other stakeholders.

Inevitably, however, there are critics whose complaints cannot (and should not) be addressed because they would not serve the public interest. A transaction review process inevitably draws a number of filings from entities that seek to leverage the approval process for their own unique benefit, airing grievances that they are unwilling to resolve at the bargaining table, or in some cases trying to reopen issues that were already settled in good faith in prior negotiations. Such filings should not be used as a basis to block, delay, or condition the transaction. In addition, the Applications have drawn predictable oppositions from an array of familiar critics who employ hyperbole, speculation, and even character assassination rather than

facts and logic. These tactics are not conducive to a reasoned decision-making process and should be disregarded.

Similarly, the Commission should reject arguments from competitors that attempt to use the transaction review process as an opportunity to seek advantages and concessions outside of marketplace negotiations, or to force Comcast and NBCU to adhere to rules and restrictions that do not apply to others in the marketplace. Robust competition in every corner of the marketplace is the primary safeguard against anti-competitive behavior. Commission policies that have been designed to promote facilities-based competition have worked. Existing Commission rules further ensure that competing programmers' and distributors' interests are protected, and Applicants have even voluntarily committed to extend the program access rules to retransmission consent negotiations for the NBCU broadcast stations.

Several commenters expressed concerns about how effectively the program access and program carriage rules work. If those concerns can be substantiated, the appropriate place to address them is in FCC rulemaking proceedings that apply to all companies, *not* to impose unique restrictions that do not apply to Comcast's and NBCU's competitors. The same is true for those who perceive a need to regulate broadband Internet services; the Commission already has opened proceedings to consider the adoption of such rules, and Comcast has affirmed its unwavering commitment to operate its broadband Internet service in accordance with "open Internet" principles. As for those who want to impose requirements regarding online video, this nascent marketplace is dynamic, vibrant, and competitive – and is particularly ill-suited for government regulation or transaction conditions.

Many of the objections articulated by opponents of the transaction already have been addressed in the Public Interest Statement and the three economic reports Applicants

subsequently submitted at the request of Commission staff. In the sections that follow, Applicants answer them at greater length. But one thing that should be noted at the outset is how many of Applicants' key points are not even disputed by the transaction's critics:

- Broadcasters currently face severe challenges. The fourth-ranked NBC Television Network is especially challenged, and, while GE now has other priorities for its investment capital, Comcast has stepped up with meaningful commitments to preserve and enhance free over-the-air broadcasting.

- Cable in general, and Comcast in particular, has made enormous strides in improving the quality, variety, and ease-of-use of its services. No one disputes that Comcast has constantly increased cable choices (from three dozen, to 60, to 200+ channels, with multiple packaging options); no one denies that Comcast has progressed from one-way analog to two-way digital networks; no one criticizes Comcast's leading role in making video-on-demand ("VOD") a successful platform, with an abundance of choices available anytime, day or night, and generally for no additional charge; no one faults Comcast for bringing the Internet from the modem closet across town right into the home, or for increasing speeds again and again (from 1.5 to 3 to 4 to 6 to 12 to 50 Mbps and now even over 100 Mbps); and no one plausibly refutes Comcast's role in increasing the number of movies made available on VOD the same day they became available on DVD.

- No one makes a credible argument that cable has anything remotely approaching the power it had in 1992, when DBS had not yet launched and the telcos were statutorily prohibited from offering cable service. As the D.C. Circuit recently ruled, cable operators in general – and Comcast in particular – cannot exercise "bottleneck" power over programming in today's highly competitive MVPD marketplace.

- No one disputes that consumers have benefited substantially from the FCC's approval of the AT&T/Comcast transaction in 2002 and the Adelphia/Time Warner/Comcast transactions in 2006. Millions of consumers formerly served by antiquated and ill-maintained cable systems are now at the forefront of the Information Age. Yet some of the same opponents of those transactions have returned in this proceeding and have raised many of the same tired arguments. The Commission correctly found them to be unpersuasive before and should do so again.

This transaction, like the AT&T/Comcast and Adelphia/Time Warner/Comcast transactions before it, will accelerate investment and innovation, promote competition, and benefit consumers. The joint venture also will benefit diversity, localism, employment, and the economy.

Section II shows that the Commission, consistent with its well-settled precedent, must reject the wide variety of issues raised by commenting parties that are unrelated to the proposed transaction. In Section III, Applicants discuss the public interest benefits this transaction will generate and, buttressed by an accompanying economic report from Drs. Gregory Rosston and Michael Topper, rebut assertions to the contrary. Section IV answers in detail the various allegations of competitive and consumer harm that have been presented, and both this section and an accompanying economic report from Drs. Mark Israel and Michael Katz demonstrate the fallacies of the economic analyses that purport to show problems with the transaction. Section V demonstrates that Applicants will comply with all applicable laws and rules and are fully qualified to hold broadcast licenses. Section VI responds to various other (and largely extraneous) issues that have been raised. In sum, as demonstrated in detail below, the proposed transaction serves the public interest, convenience, and necessity and should be approved expeditiously.

II. THE COMMISSION SHOULD NOT CONSIDER INDUSTRY-WIDE OR NON-TRANSACTION-SPECIFIC ISSUES IN THIS TRANSACTION REVIEW.

For decades, the Commission has stated that non-transaction-specific matters and issues of industry-wide applicability should not be considered in transfer-of-control proceedings.[2] Indeed, the Commission has stated that it "will not consider arguments in [license transfer]

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[2] *In the Matter of Applications for Consent to the Assignment and/or Transfer of Control of Licenses; Adelphia Communications Corporation, Time Warner Cable Inc., and Comcast Corporation*, Memorandum Opinion and Order, 21 FCC Rcd 8203 ¶ 26 (2006) ("*Adelphia Order*") ("Despite its broad authority, the Commission has held that it will impose conditions only to remedy harms that arise from the transaction (*i.e.*, transaction-specific harms) and that are reasonably related to the Commission's responsibilities under the Communications Act and related statutes."); *see also In the Matter of Applications of Nextel Communications, Inc. and Sprint Corporation for Consent to Transfer Control*, Memorandum Opinion and Order, 20 FCC Rcd 13967 ¶ 43 (2005); *In the Matter of Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation for Consent to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd 21522 ¶ 43 (2004).

proceeding[s] that are better addressed in other Commission proceedings, or other legal fora, including the [courts] and the Congress."[3]

This well-established precedent clearly applies to arguments involving rules or policies of general applicability, several of which are currently the subject of pending rulemaking proceedings.[4] The Commission also has excluded from consideration in transaction and similar review proceedings extraneous disputes regarding an applicant's compliance with particular Commission rules.[5] In addition, while the Commission recognizes "the temptation and tendency

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[3] *In the Matter of Applications of Craig O. McCaw and American Tel. & Tel. Co. for Consent to the Transfer of Control*, Memorandum Opinion and Order, 9 FCC Rcd 5836, ¶ 123 (1994), *aff'd sub nom. SBC Communications Inc. v. FCC*, 56 F.3d 1484 (D.C. Cir. 1995); *see also In the Matter of Applications of AT&T Inc. and Centennial Communications Corp. for Consent to Transfer Control*, Memorandum Opinion and Order, 24 FCC Rcd 13915 ¶¶ 133, 141, 150 (2009) (stating that various issues raised by parties related to roaming, exclusive handset arrangements, claims before other agencies, and private contractual disputes should be addressed in rulemaking proceedings or other fora) ("*AT&T-Centennial Order*").

[4] *See, e.g.*, *Applications of NYNEX Corp. and Bell Atlantic Corp. for Consent to Transfer Control*, Memorandum Opinion and Order, 12 FCC Rcd 19985 ¶¶ 210, 220-221 (1997) ("*Bell Atlantic-NYNEX Order*"); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Southern New England Telecommunications Corporation to SBC Communications, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 21292 ¶ 29 (1998).

[5] *See In the Matter of Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control*, Memorandum Opinion and Order, 13 FCC Rcd 18025 ¶ 215 (1998) ("*MCI-WorldCom Order*") ("[T]hese unadjudicated matters [regarding payphone providers' choice of long distance carrier] are not a sufficient basis to conclude that the merger is not in the public interest, and we decline to condition approval of the transfer of control applications on resolution of this dispute."); *id.* ¶ 215 n.628 (noting that commenters could seek recourse against alleged anti-competitive restrictions on payphone providers' choice of long distance carrier from the Commission under Section 208 of the Act); *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc. to AT&T Corp.*, Memorandum Opinion and Order, 15 FCC Rcd 9816 ¶ 81 n.255 (2000) (commenters could file a program access complaint under 47 C.F.R. § 76.1003); *In the Matter of Applications of Pacific Telesis Group and SBC Communications, Inc. for Consent to Transfer Control*, 12 FCC Rcd 2624 ¶ 38 (1997) (refusing to consider extraneous allegations of market power-preserving conduct in the license transfer proceeding, and instead relying on "the specific enforcement tools that Congress" had given the Commission and the tools available to state commissions); *In the Matter of News Corp. and the DirecTV Group, Inc. and Liberty Media Corp. for Authority to Transfer Control*, Memorandum Opinion and Order, 23 FCC Rcd 3265 ¶ 161 (2008) (dismissing argument concerning license transfer applicant's alleged violation of FCC rules governing over-the-air reception devices because it was not transaction specific); *see also In the Matter of Qwest Communications International, Inc. and U S WEST, Inc., Applications for Transfer of Control*, Memorandum Opinion and Order, 15 FCC Rcd 5376 ¶ 28 (2000); *Applications of In the Matter of Applications of Turner Broadcasting System, Inc. and Time Warner Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 19595 ¶ 33 (1996); *In the Matter of Bell Atlantic Mobile Systems, Inc. and NYNEX Mobile Communications Company, Application for Transfer of Control of Eighty-two Cellular Radio Licenses to Cellco Partnership*, Order, 10 FCC Rcd 13368 ¶ 37 (1995) ("*Cellco Partnership-Bell Atlantic/NYNEX Order*").

for parties to use the license transfer review proceeding as a forum," it has repeatedly emphasized that such proceedings should not address "disputes with one or the other of the applicants that have little if any relationship to the transaction or to the policies and objectives of the Communications Act."[6]

Notwithstanding the Commission's clear precedent, various parties have raised a number of issues that are already under consideration or could more appropriately be considered in industry-wide proceedings, rather than in the context of this proposed transaction.[7] For example, a number of parties, including Dish Network LLC/EchoStar Corporation ("Dish Network"), America Online ("AOL"), and Public Knowledge, seek to use this license transfer proceeding to impose "net neutrality" requirements on Comcast.[8] There is nothing about the facts of the proposed transaction, however, that could possibly justify the imposition of special "net neutrality" conditions on the parties.

NBCU is not an Internet service provider ("ISP") and has no ISP facilities; the joint venture consequently will not result in the expansion of Comcast's ISP facilities and provides no basis for considering "net neutrality" issues in the context of license transfer applications. The

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6 *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., to AOL Time Warner Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 6547 ¶ 6 (2001) ("*AOL-Time Warner Order*"); *see also In the Matter of Applications of AT&T Inc. and Cellco Partnership for Consent to Assign or Transfer Control of Licenses and Authorizations*, WT Docket No. 09-104, Memorandum Opinion and Order, FCC 10-116 ¶¶ 136-149 (rel. June 22, 2010); *AT&T-Centennial Order* ¶ 152.

7 *See, e.g., Bell Atlantic-NYNEX Order* ¶¶ 210, 220-221; *SBC-SNET Order* ¶ 29.

8 Dish Network Petition to Deny at 28 (requesting that the Commission "apply [its] proposed open Internet rules to Comcast-NBCU and prohibit all forms of discriminatory conduct on Comcast's broadband network"); AOL Comments at 9 (stating that the Commission should "require Comcast to abide by the network neutrality rules recently set forth in its *Notice of Proposed Rulemaking* on the topic, regardless of the outcome of that proceeding"); Public Knowledge Petition to Deny at 14 (asking that the Commission "impose strict non-discrimination rules that prevent the entity from interfering with the distribution of non-affiliated content through filtering, blocking, or degrading distribution"). Unless otherwise noted, all citations to comments or petitions herein are to those filed in MB Docket No. 10-56 on or about June 21, 2010.

Commission has dismissed similar claims in prior license transfer proceedings, finding that such issues are not transaction specific.[9] "Net neutrality" and "open Internet" issues plainly implicate all ISPs and, more properly, all participants in the Internet ecosystem.[10] Hence, such issues are most appropriately considered in a general rulemaking proceeding. In October 2009, the Commission launched a general rulemaking proceeding seeking comment on the need and rationale for rules to "preserve an open Internet."[11] More recently, the Commission sought comment on its legal framework for regulating broadband network management practices and other aspects of broadband Internet services.[12] The commenters' "net neutrality" arguments most appropriately belong in those proceedings, not in this review of license transfer applications.

Similarly, such parties as the Fair Access to Content & Telecommunications Coalition ("FACT Coalition"), the American Cable Association ("ACA"), and the Greenlining Institute

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[9] *In the Matter of Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee,* Memorandum Opinion and Order, 17 FCC Rcd 23246 ¶ 141 (2002) ("*AT&T-Comcast Order*") ("We find that the alleged potential harm to unaffiliated broadband content producers arising from the merged firm's potential foreclosure, degradation, or restriction of access to unaffiliated content is not a merger-specific issue."). Some applicants in prior merger proceedings involving the Bell Operating Companies offered certain "net neutrality" commitments, but these commitments were voluntary and were "not general statements of Commission policy and d[id] not alter Commission precedent or bind future Commission policy or rules." *In the Matter of AT&T Inc. and BellSouth Corporation, Application for Transfer of Control,* Memorandum Opinion and Order, 22 FCC Rcd 5662 ¶ 222 (2007) ("*AT&T-BellSouth Order*"). These unilateral, voluntary commitments, made in merger proceedings that involved different parties and completely different competitive issues, provide no precedent for injecting non-transaction specific issues into the instant proceeding.

[10] In fact, at least two parties advocating for net neutrality conditions, Dish Network and Public Knowledge, have explicitly called for such rules to be implemented on an industry-wide basis. *See generally* Comments of Dish Network L.L.C., GN Docket No. 09-191 (Jan. 14, 2010); Comments of Public Interest Advocates, GN Docket No. 09-191 (Jan. 14, 2010).

[11] *In the Matter of Preserving the Open Internet; Broadband Industry Practices,* Notice of Proposed Rulemaking, 24 FCC Rcd 13064 (2009).

[12] *In the Matter of Framework for Broadband Internet Service,* GN Docket No. 10-127, Notice of Inquiry, FCC 10-114 (rel. June 17, 2010).

complain about the Commission's existing program access rules,[13] while parties such as the Consumer Federation of America ("CFA") *et al.*, Bloomberg L.P. ("Bloomberg"), and Tennis Channel voice dissatisfaction with the Commission's program carriage rules.[14] Still other parties complain about media consolidation, minority ownership, and the Commission's media ownership rules.[15] All of these issues are already the subject of ongoing proceedings precisely because they implicate industry-wide questions that affect scores of parties, not only those involved in this transaction.[16] To the extent commenters allege – without substantiation – that Comcast or NBCU has violated any of these rules, the Commission has steadfastly held that its existing complaint processes are the proper place for such allegations to be considered.[17]

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[13] Fair Access to Content & Telecommunications Coalition Comments at 28; American Cable Association Comments at 38; Greenlining Institute Petition to Deny at 30.

[14] Consumer Federation of America, Consumers Union, Free Press, and MAP ("CFA et al.") Petition to Deny at 43-44; Bloomberg Petition to Deny at 39; Tennis Channel Comments at 8.

[15] *See, e.g.,* National Coalition of African American Owned Media Petition to Deny at 16, 21; Writers Guild of America, West Comments at 3-8; CFA *et al.* Petition to Deny at 14-17. Applicants believe the transaction will have positive effects on minority ownership opportunities, as detailed in the record.

[16] *See In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition; Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791 (2007); *In the Matter of Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage*, Notice of Proposed Rulemaking, 22 FCC Rcd 11222 (2007); *Cablevision Systems Corp. v. FCC*, No. 10-1062 (D.C. Cir. filed Mar. 15, 2010), and *Madison Square Garden v. FCC*, No. 10-1088 (D.C. Cir. filed Apr. 30, 2010) (consolidated appeals of *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746 (2010)); *In the Matter of 2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Notice of Inquiry, 25 FCC Rcd 6086 (2010); *In the Matter of Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order and Fourth Further Notice of Proposed Rulemaking, MB Docket No. 07-294, 24 FCC Rcd 5896 (2009).

[17] *See supra* note 5; *AT&T-Comcast Order* ¶¶ 212-14 (the allegations of rule violations did not provide a legitimate basis for denying the transfer application and were appropriately subject to the complaint process at the FCC or other fora). Tennis Channel provides a vivid example of an inappropriate attempt to challenge this transaction. At the same time that it recommends onerous program carriage conditions, claiming dissatisfaction with the Commission's program carriage rules, the Tennis Channel also is availing itself of the Commission's complaint process, alleging that Comcast has violated the very same rules. *See The Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, Program Carriage Complaint, File No. CSR-8258-P (filed Jan. 5, 2010). Tennis Channel's filing of this complaint shows that (i) its program carriage claims arise from preexisting circumstances that are

Commenters and petitioners raise a host of other issues clearly unrelated to the proposed transaction, such as the status of certain Comcast franchise obligations,[18] the legality of certain cable service subscriber fees,[19] the application of obscenity laws to cable television,[20] existing disputes over the distribution of certain sports programming,[21] a proposal by DirecTV and Dish Network for implementing a new program access regime for online video,[22] and even allegations of trespass and property damage.[23] The Commission should apply its longstanding policy and reject these efforts to inject extraneous issues and individual disputes into this proceeding.

Ironically, DirecTV, one of the parties seeking to raise extraneous matters in this proceeding, has previously and correctly emphasized the Commission's strong policy against entertaining such claims in license transfer proceedings. Specifically, DirecTV has pointed out that "[t]he Commission has repeatedly established that it will 'impose conditions only to remedy harms that arise *from the transaction* (*i.e.*, transaction-specific harms),' and 'will not impose conditions to remedy pre-existing harms or harms that are unrelated to the transaction.'"[24]

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completely unrelated to the proposed transaction, and (ii) beyond general rulemaking proceedings, the Commission has provided the Tennis Channel and other parties an appropriate legal mechanism for pursuing their individual claims. Accordingly, there is simply no basis for considering such individualized claims in the context of the instant proceeding. In any event, as the NFL stated in its comments, proposals to change the program carriage rules are "best addressed by broad-based Commission action" and should be addressed on an "industry-wide" basis. Letter from Gerard J. Waldron, Covington & Burling LLP, Counsel to the NFL, to Julius Genachowski, Chairman, FCC, at 2 (June 21, 2010).

18 City of Detroit Comments at 2.

19 City of Seattle, *et al.* Comments at 5-7.

20 Morality in Media Comments at 2.

21 Letter from Larry Miller, President, Portland Trail Blazers, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56 (June 21, 2010).

22 DirecTV Comments at 28-36; Dish Network Petition to Deny at 3-29.

23 Elan Feldman Petition to Deny at 3-4.

24 DirecTV Consolidated Opposition to Petitions to Deny and Response to Comments, MB Docket No. 07-18, at 3 (April 9, 2007) (emphasis in original; citations omitted). In that Opposition, DirecTV added that "[n]or, for that

By adhering to this well-established approach and imposing the appropriate discipline of its precedents, the Commission can streamline its review process and limit its analysis to issues that are germane to the proposed transaction. In contrast, if the Commission were to depart from this approach and ignore its well-settled precedent, the inevitable result would be to delay unreasonably the resolution of this proceeding and to encourage parties to introduce similarly irrelevant issues in future review proceedings.[25] The Commission should make it unequivocally clear that it will not permit such attempts to divert its focus from the central issues of its public interest review.[26]

Indeed, the Commission's standard of review in this public interest analysis is well settled. As described in the Applications and as the Commission has repeatedly reaffirmed, the Commission will approve a transfer of control of licenses if the proposed transaction does not violate a statute or rule, and if, after weighing "the potential public interest harms of the proposed transaction against the proposed public interest benefits," it concludes that, "on balance," the transfer will serve the public interest, convenience, and necessity.[27] That is the

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matter, will [the Commission] impose conditions to address issues more appropriately handled in an industry-wide rulemaking." *Id.*

[25] One filer appears to suggest that the Commission may consider non-transaction specific issues in a license transfer proceeding, provided it also initiates industry-wide rulemaking proceedings on these issues at the same time it approves the license transfer. *See* Letter from Susan Crawford to Marlene H. Dortch, Secretary, FCC, at 2 (June 11, 2010). This suggested approach, however, not only would inject irrelevant issues into license transfer proceedings contrary to Commission precedent, but it also would "put the cart before the horse." In effect, that approach would force the Commission to prejudge policies of general applicability in the context of individual licensing proceedings before it has had a chance to develop a full rulemaking record after giving proper notice as required by the Administrative Procedure Act. *See* 5 U.S.C. § 553(b). This proposed approach, thus, represents the antithesis of due process.

[26] Applicants nevertheless respond to certain of these extraneous issues in Section VI in an effort to correct baseless claims and ensure an accurate record.

[27] *In the Matter of Applications Filed by Frontier Communications Corporation and Verizon Communications Inc. for Assignment or Transfer of Control*, Memorandum Opinion and Order, 25 FCC Rcd 5972 ¶ 9 (2010) ("*Frontier-Verizon Order*").

relevant test. There is no basis for applying a different standard of review to the proposed transaction than the one the Commission has applied in dozens of other license transfer proceedings in recent years, including very recently.[28] Clearly, the extraneous and irrelevant arguments and facts put forward by numerous petitioners and commenters have no place in this public interest balance. In fact, to the contrary, as described in the Applications and this submission, the proposed transaction will generate substantial public interest benefits that overwhelm any potential public interest harms, and should be approved by the Commission expeditiously.[29]

III. PETITIONERS' AND COMMENTERS' CHALLENGES TO THE PUBLIC INTEREST BENEFITS OF THE TRANSACTION ARE MERITLESS.

The Public Interest Statement and the voluminous record in this proceeding demonstrate that significant and substantial public interest benefits will flow from the proposed transaction. Some of these benefits will be seen in the increased investment, accelerated innovation, and stimulated competition that will come with the marrying of content and distribution; others will be seen in the tangible and verifiable commitments that Applicants have made to diversity, localism, and programming availability. Specifically, Commission approval of the joint venture will lead to: (1) a stronger system of free over-the-air broadcasting; (2) an expansion in the amount, quality, and diversity of programming available to consumers; (3) an acceleration (both by the joint venture and others) in investment in and deployment of innovative products and

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[28] *Frontier-Verizon Order* ¶¶ 9-12.

[29] Since the transaction was announced last December, Applicants have reached out to a variety of individuals and organizations and entered into understandings that acknowledge and address issues raised by those individuals and organizations. Applicants do not concede that such issues are transaction-specific. Applicants' willingness to offer voluntary commitments or enter into agreements regarding these issues is based on a desire to expedite Commission approval and further strengthen the public interest benefits of the proposed transaction.

services that consumers demand; and (4) the realization of efficiencies that will benefit consumers. Accordingly, grant of the Applications will serve the public interest, convenience, and necessity as the Act requires.[30]

Many commenters who criticize the proposed transaction simply shut their eyes to these benefits. Others offer conclusory statements that the benefits are trivial, unsubstantiated, or amorphous.[31] These criticisms are wide of the mark. Applicants have described and explained the benefits of the transaction in their Public Interest Statement, in their responses to Congressional questions in this proceeding, and in their responses to the Commission's information requests. These benefits were confirmed by Dr. Rosston's report, titled *An Economic Analysis of Competitive Benefits from the Comcast-NBCU Transaction* ("Rosston Benefits Report" or "Benefits Report")[32] and are further substantiated by Drs. Rosston and Topper's *The Proposed Comcast–NBCU Transaction: Response to Comments and Petitions Regarding Competitive Benefits and Advertising Competition* ("Rosston/Topper Reply Report").[33] In this section, Applicants provide additional evidence that the asserted benefits will be realized, as well as ways in which they will enhance certain voluntary commitments they have made in this regard.

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30 47 U.S.C. § 309.

31 *See, e.g.*, CFA *et al.* Petition to Deny at 52-64; DirecTV Comments at 51-65. Because these commenters are the two most significant critics of the transaction's benefits in the record, the responsive points in this section necessarily focus on their arguments. DirecTV has not been remotely consistent on these issues. In 2003, DirecTV strenuously argued in favor of the type of vertical integration it is now criticizing. This seriously compromises the credibility of DirecTV's filing, and the Commission should approach it with the greatest skepticism. CFA *et al.*, by contrast, have been consistent in opposing nearly every major transaction to come before the Commission.

32 Gregory L. Rosston, An Economic Analysis of Competitive Benefits from the Comcast-NBCU Transaction, MB Docket No. 10-56 (May 4, 2010) ("Rosston Benefits Report" or "Benefits Report").

33 Gregory L. Rosston & Michael D. Topper, The Proposed Comcast–NBCU Transaction: Response to Comments and Petitions Regarding Competitive Benefits and Advertising Competition, MB Docket No. 10-56 (July 21, 2010) ("Rosston/Topper Reply Report") (Attached as Exhibit 1).

Applicants first detail how the proposed transaction will preserve and strengthen free over-the-air broadcasting. There can be no doubt as to the significance of this benefit, as Applicants have now formalized legally binding agreements not only with respect to the NBC and Telemundo Networks and owned-and-operated stations ("O&Os"), but also with respect to the associations representing the NBC affiliates and the affiliates of the other "Big Four" broadcast networks. Next, Applicants describe how the content-focused joint venture will expand the amount, quality, and diversity of national and local programming for consumers. Here, too, Applicants' voluntary public interest commitments and subsequent stakeholder agreements in the areas of promoting and increasing the carriage of diverse programming build on their strong records of diversity. Applicants then describe how the proposed transaction will accelerate investment, innovation, and the development of the "anytime, anywhere" future of video programming that consumers want. Finally, Applicants describe the efficiencies of the proposed transaction and how those efficiencies are likely to benefit consumers.

A. The Proposed Transaction Will Preserve and Strengthen Free Over-the-Air Broadcasting.

In the Public Interest Statement, Applicants described their commitment to continue to provide free over-the-air broadcasting and to preserve and enrich the valuable content that is currently broadcast on the NBC Television Network and the local NBC O&O broadcast stations.[34] Applicants backed up this important public interest benefit with specific voluntary commitments which they have offered to accept as binding conditions of any Commission order approving the transaction.[35]

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[34] NBCU's excellent record of serving the public interest and the local communities in which its O&O stations operate is discussed in Section V.B below.

[35] Public Interest Statement at 39-42 & App. 8.

Some parties have criticized or attempted to downplay the value of these benefits and of Applicants' voluntary commitment to preserve free over-the-air broadcast television and other related commitments. For example, CFA, *et al.* assert that the commitments are "somewhat token and hollow . . . given that Comcast has not made any meaningful [promise] to invest and expand free over-the-air programming."[36] These criticisms are not supported by the record.

As discussed in Section V.B below, Applicants' historic commitment to localism has been strong and specific. In particular, NBCU has an unparalleled tradition of independent local news and public affairs programming, with the average NBC O&O airing more than 30 hours per week of local news and public affairs programming. Moreover, the new NBCU will make focused investments to ensure that the NBC Television Network and NBC's O&Os will provide the highest quality programming to consumers. As Comcast CEO Brian Roberts has explained, Comcast's objective is to strengthen the NBC Television Network (currently rated fourth among broadcast networks) and restore its former glory: "Comcast is asking for the opportunity to make one of the great icons of American broadcasting and communications part of the Comcast family . . . [and to be] reliable stewards for the national treasures of NBC and NBC News."[37] As a focused communications, information, and entertainment company, Comcast will be in a better

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[36] CFA *et al.* Petition to Deny at 62.

[37] Testimony of Brian L. Roberts, Chairman and CEO, Comcast Corporation, *Consumers, Competition, and Consolidation in the Video Broadband Market*, Hearing Before the Subcomm. on Commc'ns, Tech., and the Internet, Senate Comm. on Commerce, Sci., and Transp., Transcript at 66 (Mar. 11, 2010) "[W]hatever NBC has done to be in fourth place, we hope we can do better in the future. So I come with an open mind on how to do better." *Id.* at 144. *See also* Testimony of Jeff Zucker, President and CEO, NBC Universal, Inc., *An Examination of the Proposed Combination of Comcast and NBC Universal*, Hearing Before the Subcomm. on Commc's, Tech., and the Internet, House Comm. on Energy and Commerce, Transcript at 22 (Feb. 4, 2010) ("I think what is terrific about this proposed joint venture is that Comcast is committing to free over-the-air television, and the future of broadcasting, and I have to say that, before this joint venture was proposed, I was concerned about the future of broadcasting. It has been under a tremendous amount of duress, especially with the economic woes that we have all suffered. I think Comcast's willingness to commit to the future of over-the-air broadcasting, to step up and say that they are willing and hope that they will be able to play a constructive role in retrans conversations; all of these give me greater comfort in thinking about the future of broadcasting.").

position than GE, a manufacturing conglomerate with wide-ranging holdings and business imperatives unrelated to media and communications,[38] to devote the attention and resources necessary to ensure that NBCU's broadcasting businesses remain vibrant sources of news and entertainment programming for consumers.[39] Given the importance the Commission has historically placed on broadcasters' service to their local communities,[40] Comcast's role in strengthening NBCU's broadcasting businesses will be a significant public interest benefit of the proposed transaction.

In addition, building on NBCU's past service as a trustee of the public airwaves, Applicants have made specific commitments to increase the amount of local news and information programming provided by the NBC O&Os and to make local news and other local programming available to consumers at more times and on more platforms (*e.g.*, on demand, online, and on Comcast's regional networks) than ever before.[41] All of these commitments will not only strengthen NBCU's local broadcasting businesses, but also bring to consumers the "anytime, anywhere" access to local news and entertainment programming that they desire.[42] It is difficult to fathom how any party reviewing the Public Interest Statement and accompanying

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38 In the words of GE Chairman and CEO Jeffrey Immelt, the proposed transaction "simplifies [GE's] portfolio for investors while allowing [GE] to have a major interest in a more valuable media business." General Electric Company, GE Reports, *What's On? A new Comcast/NBCU media venture.* (Dec. 3, 2009), *available at* http://www.gereports.com/new-comcast-nbcu-media-venture/.

39 *See* Testimony of Jeff Zucker, President and CEO, NBC Universal, Inc., *The Comcast/NBC Universal Merger: What Does the Future Hold for Competition and Consumers?*, Hearing Before the Subcomm. on Antitrust, Competition Policy, and Consumer Rights, Senate Comm. on the Judiciary, Transcript at 27 (Feb. 4, 2010) ("With this deal GE will have billions of dollars to invest in new technologies and jobs in its core businesses. . . . This deal will give [NBCU] the resources and the tools to innovate and adapt in an unpredictable media world and meet the needs of 21st century consumers.").

40 *See In the Matter of Broadcast Localism*, Notice of Inquiry, 19 FCC Rcd 12425 ¶¶ 1-2 (2004).

41 Public Interest Statement at 42.

42 For a further discussion of the "anytime, anywhere" benefits of the proposed transaction, see Section III.C below.

commitments regarding the strengthening of free, over-the-air broadcasting could credibly find no "meaningful [promise] to invest and expand free over-the-air programming."[43]

When Applicants made these important commitments, they also said that Comcast would "continue its cooperative dialogue with its affiliates toward a business model to sustain free over-the-air service that can be workable in the evolving economic and technological environment."[44] DirecTV denigrates this commitment as "amorphous."[45] In fact, since making this commitment, Comcast has engaged in constructive dialogue with the associations representing more than 750 local television stations affiliated not just with the NBC Television Network, but also with the three other major commercial television networks. As a result, two separate agreements have been reached: one among Comcast, NBCU, and the NBC Television Affiliates Association (the "NBC Affiliates Association Agreement"), and a second among Comcast, the ABC Television Affiliates Association, the CBS Television Network Affiliates Association, and the FBC ("Fox") Television Affiliates Association (the "ABC, CBS, and Fox Affiliates Associations," collectively, and the "Non-NBC Affiliates Associations Agreement"). These agreements, which provide significant additional detail regarding the ways in which Applicants will undertake to meet their commitment to the local broadcasting business, are binding and legally enforceable.[46]

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[43] CFA *et al.* Petition to Deny at 62.

[44] Public Interest Statement at 40.

[45] DirecTV Comments at 62.

[46] Letter from Michael H. Hammer, Willkie Farr & Gallagher LLP, Counsel for Comcast Corporation, and David H. Solomon, Counsel for NBC Universal, Inc. to Marlene H. Dortch, Secretary, FCC, MB Docket. No. 10-56 (June 23, 2010) ("Summary of NBC Affiliates Association Agreement"); Letter from Michael H. Hammer, Willkie Farr & Gallagher LLP, Counsel for Comcast Corporation, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56 (July 1, 2010).

In the agreement with the NBC Television Affiliates Association, Comcast has made clear its intention to preserve and strengthen the NBC Television Network, to maintain a vibrant affiliate distribution system, and to continue the partnership that exists today between the NBC Television Network and its many valued local affiliates.[47] Specifically, Comcast has agreed to:

- Maintain the NBC Television Network – as made available for over-the-air broadcast by the NBC Television Network's broadcast station affiliates – as a premier general entertainment programming service and devote sufficient resources to program development to ensure that the NBC Television Network's program schedule remains competitive;

- Continue to broadcast on the NBC Television Network, subject to certain conditions, major sporting events for which NBC holds broadcast rights as of the date of the agreement, and, with certain qualifications, refrain from migrating such events to any linear programming channel in which Comcast has an ownership interest;

- In negotiating to acquire rights for national distribution of major sporting events on Comcast's networks, use commercially reasonable efforts to negotiate for reasonable distribution of such events on the NBC Television Network in a manner that is available to the NBC local affiliates;

- Ensure that Comcast's cable systems remain solely responsible for negotiating retransmission consent agreements with individual NBC local affiliates. Such retransmission consent negotiations will be conducted separate from the NBC Television Network's affiliation negotiations with the NBC local affiliates;

- Ensure that certain provisions relating to programming (*e.g.*, the amount and type of programming to be supplied to local network affiliates by the NBC Television Network) will remain part of the standard terms and conditions of affiliation offered to local network affiliates;

- Ensure that the NBC Television Network will provide to local network affiliates primarily first-run programming on a primarily first-window basis;

- Honor NBC's agreements and side letters that preserve existing non-duplication protections against importation of another affiliate broadcast station signal into an NBC local affiliate's market;

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47 *See* Summary of NBC Affiliates Association Agreement, *supra* note 46.

- Ensure that decisions involving exclusivity issues will continue to be made by the Network and solely on the basis of Network considerations; and

- Refrain from using its control of the NBC Television Network to transmit a same-day linear feed of Network programming on a Comcast cable system in the television market of an NBC local affiliate in the event that the NBC local affiliate withdraws its consent in the course of a retransmission dispute with the Comcast cable system.

The NBC Television Affiliates Association filed comments in this proceeding stating that it supports the transaction, provided that the Commission adopts as conditions three of the key terms of the agreement with Comcast and NBCU. Those three terms relate to (1) migration of major sporting events, (2) negotiation of retransmission consent and affiliation agreements, and (3) non-duplication, exclusivity, and other "affiliate market integrity" issues.[48] With the three conditions in place, the NBC Television Affiliates Association concludes, the proposed transaction "has the potential to strengthen the NBC Television Network in ways that would further the distribution of quality content on free, over-the-air television and enhance the community service NBC and its affiliates bring to the public in markets across the country[.]"[49] The proposed conditions of the Commission's approval of the transaction are consistent with Comcast and NBCU's agreement with the NBC Television Affiliates Association.

Comcast's agreement with the ABC, CBS, and Fox Affiliates Associations also will strengthen local broadcasting. Specifically, the Non-NBCU Affiliates Associations Agreement obligates Comcast to:

- Engage in arm's-length, good-faith negotiations of retransmission consent agreements between Comcast and the affiliates of ABC, CBS, and Fox ("Non-NBCU Affiliates");

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[48] NBC Television Affiliates Association Comments at App. A.

[49] *Id.* at 3-4. The NBC Television Affiliates Association also opposes any effort to require Comcast to divest the NBCU O&Os as a condition of the transaction. *Id.* at 16 ("[d]ivestiture would be contrary to the goal of maintaining NBC as a strong and responsible network that is committed to free, over-the-air service to local communities").

- Not discriminate in its retransmission consent negotiations with the Non-NBCU Affiliates on the basis of affiliation (or lack thereof) with Comcast or the NBC or Telemundo Television Networks;

- Maintain Comcast's cable system affiliates' sole responsibility for negotiating retransmission consent agreements with the Non-NBCU Affiliates. Such negotiations will be separate from and not influenced by NBCU. NBCU will remain solely responsible for retransmission consent negotiations for NBCU-owned stations with non-Comcast MVPDs;

- In any retransmission consent complaint proceeding involving a Non-NBCU Affiliate, not rely on the terms of any retransmission consent agreement between Comcast and any television station wholly-owned, controlled, or under common control with Comcast or affiliated with the NBC or Telemundo Television Networks ("NBCU Stations") that is entered into following announcement of the Comcast-NBCU transaction in order to establish whether rates, terms, and other carriage and retransmission conditions are consistent with competitive marketplace conditions; and

- Refrain from attempting to gain a competitive advantage by discriminating against any local, in-market Non-NBCU Affiliate in favor of any NBCU Station licensed in the same market with respect to certain technical signal carriage matters.

The ABC, CBS, and Fox Affiliates Associations also filed comments in which they reiterate the key terms of the agreement reached with Comcast and state that they would not object to the Commission's approval of the proposed transaction provided that those terms are adopted as conditions.[50] These proposed conditions are also consistent with the Non-NBC Affiliates Associations Agreement.

The proposed transaction – on its own terms – provides a strong public interest benefit by infusing into NBCU new resources and leadership from Comcast, a company dedicated to communications, information, and entertainment. This alone will help preserve and enhance local broadcasting. When bolstered by Applicants' voluntary commitments and the agreements reached with the affiliate associations representing the entities most directly and immediately

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[50] ABC, CBS, and Fox Affiliates Associations Comments at 2-3.

affected by the issue – the local broadcasters affiliated with all four major broadcast networks – the proposed transaction's benefits in this regard should be given significant weight by the Commission.

B. The Proposed Transaction Will Expand the Amount, Quality, and Diversity of National and Local Programming for Consumers.

As discussed in greater detail in Section V.B below, Comcast and NBCU each currently offers a wide range of quality programming responsive to the diverse interests and needs of the public they serve. These efforts have been applauded by scores of commenters who praise both companies' efforts. The joint venture will build on Applicants' separate programming successes and expand the amount, quality, variety, and availability of content better than either company could on its own.

1. National Programming

a. Benefits of the Transaction

A central public interest benefit of the proposed transaction is that Comcast will have powerful incentives to invest in the programming assets of the joint venture, resulting in greater programming output and quality to the benefit of all consumers. As Dr. Rosston observed, "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."[51] This greater downstream flexibility, in turn, will make it more profitable for Comcast and NBCU to invest in more and higher value programming: "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

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[51] Rosston Benefits Report ¶ 59.

additional upstream rights."[52] As Dr. Rosston explained, "[t]he 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."[53]

The dynamic described by Dr. Rosston is not just theoretical but has been substantiated numerous times by Comcast's leadership since the announcement of the joint venture. For example, Comcast Chairman and CEO Brian Roberts stated in testimony before Congress: "Our goal and I believe our commitment and our actions are to restore NBC, to invest in NBC." Mr. Roberts further testified that, "from where I sit as a business person, our reason for wanting to buy NBC Universal is to invest in content, grow the business, preserve free broadcast television over the air, and to build a wonderful content company for the 21st century . . . ."[54] More recently, Mr. Roberts reiterated at the 2010 Cable Show that running NBCU is "going to require some risk, some investment and some patience. We signed up for that . . . . We are coming into the business with an expectation to invest."[55] These statements have substantial weight because, as noted above, the joint venture will be a content company, and Comcast is focused exclusively on entertainment, information, and communications. Comcast has delivered on its investment

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52 *Id.* ¶ 64; *see also id.* ¶ 14 ("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.").

53 *Id.* ¶ 65.

54 Testimony of Brian L. Roberts, Chairman and CEO, Comcast Corporation, *The Comcast/NBC Universal Merger: What Does the Future Hold for Competition and Consumers?*, Hearing Before the Subcomm. on Antitrust, Competition Policy, and Consumer Rights, Senate Comm. on the Judiciary, Transcript at 73, 78 (Feb. 4, 2010). Mr. Roberts also noted that this investment would allow Comcast to become a more diverse company. *Id.* at 78. *See also* Rosston Benefits Report ¶ 10 (recounting how "Comcast's leadership has stated its willingness to invest in NBCU's programming.").

55 Cynthia Littleton, *Comcast chief high on NBC U deal: Roberts, Chernin speak at Cable Show confab*, Variety, May 12, 2010 (reporting that "Comcast stands ready to invest big bucks in rehabilitating the mothership NBC broadcast network"), *available at* http://www.variety.com/index.asp?layout=print_story&articleid=VR1118019149&categoryid=14.

promises in past transactions, and there is every reason to believe it will do so here[56] – all the more because it is in Comcast's self-interest to do so.[57]

What is more, Dr. Rosston supported his finding about Comcast's likelihood of future investment in programming with empirical evidence of Comcast's strong track record of investment in programming. As Dr. Rosston observed: "Comcast's past investments in its networks demonstrate its ability and willingness to invest in programming. Although Comcast owns a limited array of programming networks, it has made substantial investments in launching networks, acquiring networks, and increasing the programming budgets of its networks."[58] This finding has now been further substantiated in the Rosston/Topper Reply Report which shows that the programming expenditures of the four Comcast networks that Dr. Rosston initially analyzed (E!, Style, Versus, and Golf Channel), as well as G4, have grown faster, on average, than the average growth in programming expenditures for all other "Sports," "Arts & Entertainment," and "Niche" national cable networks, as well as all other cable networks between 2005 and 2009.[59] These networks' ratings performance relative to all other national cable networks in those genres and all other cable networks tells a similar story.[60]

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[56] *See generally* Public Interest Statement at n.16 (detailing investment promises kept in connection with Comcast's acquisitions of AT&T Broadband systems in 2002 and Adelphia systems in 2006).

[57] As Mr. Roberts stated in Congressional testimony, "One of the reasons we want to get more invested in content is we see that value of that content growing." Testimony of Brian L. Roberts, Chairman and CEO, Comcast Corporation, *An Examination of the Proposed Combination of Comcast and NBC Universal, Hearing Before the Subcomm. on Commc'n, Tech., and the Internet, House Comm. on Energy and Commerce*, Transcript at 94 (Feb. 4, 2010).

[58] Rosston Benefits Report ¶ 8.

[59] Rosston/Topper Reply Report ¶ 14 & Ex. 1 (based on SNL Kagan estimates of networks for which data was available and using SNL Kagan's network genre categories).

[60] *Id.* ¶ 15 & Ex. 2.

Notably, the entertainment industry has recognized that Comcast's commitment to investment in programming will be beneficial both to consumers and the economy. As the Directors Guild of America told the Commission: "In a time when the industry is facing financial pressure from all sides, we expect that Comcast's commitment to grow the industry, infuse new capital into the entertainment business and invest additional resources into programming will represent a change from the uncertainty caused by many of the current owner's past decisions concerning commitment to our industry, programming and jobs."[61] One labor organization representing studio employees similarly told the Commission: "NBC Universal will be combined with a company that understands the entertainment industry, values the content we help produce, and respects the efforts that go into making that content possible. With this transaction, we feel will come a renewed focus on delivering exciting new content to viewers that is created and supported by American workers and members of Local 399."[62]

It is telling that the vast majority of the petitioners and commenters in this proceeding who have criticized the proposed transaction have not contested the validity of these points. DirecTV is virtually alone in criticizing Dr. Rosston's conclusions about the proposed

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[61] Letter from Jay D. Roth, National Executive Director, Directors Guild of America, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56, at 1 (June 21, 2010). NBCU CEO Jeff Zucker has similarly noted in Congressional testimony that "[t]he creative programming that lies at the heart of our business is neither easy nor inexpensive to produce . . . . In a highly competitive, unpredictable, and dynamic media marketplace, Comcast's desire to expand our business and invest in programming will benefit NBC Universal, the American consumer, and the U.S. economy." Testimony of Jeff Zucker, President and CEO, NBC Universal, Inc., *The Comcast/NBC Universal Merger: What Does the Future Hold for Competition and Consumers?*, Hearing Before the Subcomm. on Antitrust, Competition Policy, and Consumer Rights, Senate Comm. on the Judiciary, Transcript at 25 (Feb. 4, 2010).

[62] Letter from Leo T. Reed, Division Director, International Brotherhood of Teamsters, Studio Transportation Drivers Local #399, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 10, 2010). *See also* Letter from Randy Cammack, President, Joint Council 42 of the International Brotherhood of Teamsters, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 10, 2010) ("The Comcast-GE joint venture is very much in the interests of our members, including the nearly 5,000 Teamsters whose work is closely tied to the entertainment industry. We strongly believe that marrying two American entertainment companies – in this case Comcast and NBC Universal – will strengthen the economic future of our members.").

transaction's boon to investment, and its criticisms do not hold up. DirecTV contends that Comcast's record of investment in its own networks should be given no weight because Comcast's networks were "underperforming," and "Dr. Rosston provides no evidence that the NBCU networks . . . have similarly been underperforming for lack of investment."[63] Because Dr. Rosston "nowhere attempts to demonstrate that the NBCU networks are at all similarly situated to the Comcast networks," DirecTV contends that "Applicants provide no basis upon which to conclude that Comcast would make the additional investments in NBCU programming that Rosston postulates."[64]

As an initial matter, DirecTV completely ignores the fact that the most prominent NBCU network – the NBC Television Network – has been underperforming its peers for several years.[65] No party disputed that the NBC Television Network will benefit from increased focus and investment in content, or that Comcast is willing and able to bring that focus and investment. (Indeed, as discussed above, the transaction's benefits regarding the preservation and enhancement of free, over-the-air broadcasting begin with a commitment to maintain and increase quality programming on the NBC Television Network). As Comcast Chairman and CEO Brian Roberts told investors on the day the joint venture was announced, "One of the things that we are most committed to, both GE and Comcast, is trying to return [NBC] to the No. 1 position . . . . There is a desire to invest and grow and compete well."[66] Mr. Roberts and other

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63 DirecTV Comments at 58-59.

64 *Id.* at 59.

65 Rosston/Topper Reply Report ¶ 16 & Ex. 3.

66 Meg James, *Company Town, Comcast Gets Its Wings: Deal to Take Over NBC Universal Affirms Cable TV's Ascendant Role*, L.A. Times, Dec. 4, 2009.

Comcast executives have since emphatically reiterated this point on several occasions.[67] And the NBC Television Affiliates Association supports this transaction for this very reason.

Next, while DirecTV notes that NBCU's programming assets "include some of the most highly rated cable programming available,"[68] DirecTV does not even attempt to argue that other NBCU networks would not benefit from increased investment. Nor does DirecTV offer evidence that even highly-rated networks would not benefit from increased investment.[69] DirecTV simply ignores the fact that networks that are performing well will require sustained resources to continue to do so in the highly competitive and dynamic programming marketplace, especially at a time when every network's programming budget must be weighed against the prospect of diminished advertising dollars. In fact, it is unclear why Dr. Rosston would have to demonstrate that the NBCU networks are "similarly situated"[70] to Comcast's networks to support his point about what Comcast's record of programming investments portends for the joint venture. The fact, uncontested by DirecTV or any other party, that Comcast has substantially improved its existing portfolio of networks – and that Comcast significantly increased investments in these networks as it gained greater control of them[71] – is a strong indication that Comcast will increase programming investment in the joint venture's networks.[72]

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67 *See supra* note 37.

68 DirecTV Comments at 58.

69 Similarly, neither DirecTV nor any other commenter challenged Applicants' or Dr. Rosston's showing that the transaction will allow Comcast and NBCU to share resources and to increase the frequency and scale of the cross-promotions, which are important for expanding audiences and ratings of shows and networks, and for improving brand identities. *See* Public Interest Statement at 50-52, 66; Rosston Benefits Report ¶¶ 72-79; Rosston/Topper Reply Report ¶ 18.

70 DirecTV Comments at 58.

71 Rosston Benefits Report ¶ 20.

72 *See* Rosston/Topper Reply Report ¶¶ 14-19.

DirecTV's misplaced doubt about Comcast's intent to increase its programming investment is perhaps best allayed by the NHL, which has stated that, "in the last five years, Versus has been a tremendous business partner and has made considerable efforts and investments to improve the quality and quantity of its NHL coverage. That commitment is clearly reflected in Versus' increased carriage and the NHL's increased ratings."[73] In a different context, Comcast's investment efforts recently bore fruit with the first live national next-generation 3D telecast of a major sporting event – the 2010 Masters Golf Tournament.[74]

It is curious – especially given DirecTV's vested interest in high-priced sports programming[75] and its former vertical integration with the second-largest owner of sports programming rights[76] – that DirecTV should attempt to contest Dr. Rosston's claim that the joint venture will increase programming quality by competing more effectively in purchasing rights for sports programming. DirecTV argues that, absent the proposed joint venture, Comcast and NBCU could partner with each other or with other programmers or broadcasters to pursue sports programming. But, as Dr. Rosston explained (and, again, as DirecTV does not dispute), many sports leagues consider it important, as a threshold negotiation matter, to have their games

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[73] Letter from Gary B. Bettman, Commissioner, National Hockey League, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 at 2 (June 17, 2010).

[74] *See* Motorola Comments at 1 (observing that Comcast "fully demonstrated the potential of 3-D television with its recent telecast of the Masters golf tournament").

[75] DirecTV reportedly paid $4 billion to lock up the exclusive rights to the NFL Sunday Ticket through 2014, which it aggressively uses to gain a competitive advantage over rival MVPDs such as Comcast. DirecTV also recently acquired control of three regional sports networks.

[76] *See In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, For Authority to Transfer Control,* Memorandum Opinion and Order, 19 FCC Rcd 473 ¶¶ 49, 326 (2004) ("*News Corp.-Hughes Order*") (detailing News Corp.'s reach and indicating that Fox Sports Net "now challenges ESPN"); *see also* Andy Bernstein, *Sports Gives Murdoch Key to DirecTV Revamp*, Sports Bus. J., Dec. 22, 2003.

carried both on national cable networks and on over-the-air broadcast networks.[77] With the proposed transaction, the new NBCU will own national cable sports networks and a national television broadcast network, putting it in a much stronger position to compete with Disney's ESPN cable networks and its ABC Television Network. The proposed transaction will enable the joint venture to make competitive bids to distribute sports content on a greater number and variety of platforms, including broadcast networks, national cable sports networks, regional sports networks, and digital and mobile platforms.[78] This will significantly expand the availability of sports programming to consumers. To be sure, the joint venture will be an effective competitor to DirecTV and others in the purchase of sports programming, and while this may in part explain DirecTV's interest in this proceeding, it in no way explains how the proposed transaction poses any harm to the *public*, as DirecTV wrongly claims.

DirecTV points to a single example of an unaffiliated broadcast network and cable network jointly securing rights for discrete programming – namely, the current agreement for the NCAA men's basketball tournament – but that single example certainly does not prove that unaffiliated entities can pursue such rights as readily as the joint venture could. Securing the contractual rights from sports leagues for multiple or season-long events in a dynamic marketplace is particularly difficult because parties often diverge in their assessments of the value of discrete rights and events. Parties are more likely to be able to overcome such difficulties when one of them brings to bear multiple outlets on which these events can be shown.[79] Hence, contracts with unaffiliated partners cannot be nearly as efficient a way for

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77 Rosston Benefits Report ¶ 12.

78 Rosston/Topper Reply Report ¶¶ 20-24.

79 *Id.* ¶¶ 21-22.

Comcast to "devise and implement a long-term strategy for competing effectively" with Disney/ESPN (or News Corp.) for sports rights "across a range of sporting events."[80] Vertical integration also makes other sports programming synergies more likely than would occur merely by contractual means.[81]

Other programming-related benefits of the transaction include increased opportunities for independently-produced programming with respect to the Comcast and NBCU platforms, as well as increased programming diversity measured by a number of metrics. In particular, the transaction will result in more carriage of independent networks, including programming channels owned by Hispanics and African Americans. These benefits, which are the subject of commitments in the Public Interest Statement and/or agreements reached since the filing of the Public Interest Statement, are discussed in more detail below.

b. Voluntary Programming Commitments

Beyond the inherent programming benefits of the proposed transaction, discussed above, Applicants have made an unprecedented number of voluntary commitments relating to programming in the Public Interest Statement and have proposed that these commitments be made binding conditions of the Commission's order approving the transaction. DirecTV's claim

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80 *Id.* ¶ 22.

81 "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." Rosston Benefits Report ¶ 12. For example, during the time when News Corp. controlled DirecTV, Fox Entertainment Group and DirecTV announced an "industry first" initiative whereby DirecTV provided its subscribers (for a nominal fee) a "'first look' at prime time hits from FX a full 24-48 hours prior to their initial broadcasts" as well as "post-air access to Fox Broadcasting's hottest series . . . for six to seven days following their national broadcast." See Press Release, DirecTV, Fox Entertainment Group and DirecTV Launch Partnership to Offer Best of Fox and FX Network Programming On Demand; Groundbreaking Deal Includes Pre-Air Broadcasts of FX Series, Post-Air Broadcasts of FOX Programs Plus One Hour Weekly Showcase of Fox Entertainment Highlights, (Jan. 5, 2006), *available at* http://investor.directv.com/releasedetail.cfm?ReleaseID=286409.

is that these commitments (or at least those that it chose to highlight) are "not substantial";[82] CFA *et al.* simply assert: "to the extent any of these offerings provide any benefits at all, they are trivial and cannot be effectively monitored or enforced."[83] These conclusory assertions are incorrect. Many of these commitments in fact come at significant cost.[84] But even if a given commitment turns out to be not all that costly in monetary terms or does not meet DirecTV's or CFA's highly subjective standard of "substantiality," a commitment in furtherance of the public interest and offered to be made into a binding condition is still valuable in its own right. Indeed, there is value in a legally enforceable *guarantee* that something that is clearly in the public interest – such as increasing the amount of diverse programming, public affairs programming, and children's programming – will occur. Even assuming, *arguendo*, that a commitment costs little to nothing and even if it *could* be accomplished without the transaction, there is no assurance that it *would* actually occur in the absence of the transaction. Not only are all of the commitments in Applicants' Public Interest Statement concrete, but they are verifiable and – as transformed into binding conditions with the Commission's approval of the transaction – will be enforceable. The specific areas of national programming addressed by the voluntary commitments in Applicants' Public Interest Statement are discussed below.

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82 DirecTV Comments at 62. DirecTV makes similar conclusory assertions that the benefits of the proposed transaction are not of "sufficient magnitude" or are "not cognizable." *Id.* at 51-52. Of course, DirecTV never specifies what "magnitude" would be sufficient to satisfy its standard – and fails to note that the benefits it criticizes are far more significant and concrete than those recognized by the Commission in its approval of the News Corp./Hughes transaction. *See News Corp.-Hughes Order* ¶ 315 (recognizing that the transaction would result in two benefits – accelerating the introduction of new services, and increasing the number of DMAs that receive local-into-local broadcast television channels – as well as some additional benefits to which it "assign[ed] little weight").

83 CFA *et al.* Petition to Deny at 10.

84 *See, e.g., infra* note 84.

Children's Programming. No commenter has questioned the value of Comcast's commitment to increase the amount, quality, and availability of programming appealing to children and families.[85] This commitment is a clear public interest benefit, serving a public interest goal long recognized by the Commission.[86]

In addition, Comcast is now in the process of formalizing with Common Sense the additional efforts described in Commitment # 5 concerning the expanded availability and usability of Common Sense's parental tools and Comcast's substantial investment in Common Sense's digital literacy campaign that will provide Common Sense with expanded opportunities to disseminate important consumer information on several platforms. Comcast welcomes Common Sense's affirmation to the Commission that "Comcast is already a leader in bringing resources and information to parents, and Common Sense believes that, through this Joint Venture, the Applicants will have a unique opportunity to maximize their leadership position in the media industry by fulfilling [their] specific commitments[.]"[87]

Programming Diversity. Beyond Applicants' existing records of fostering programming diversity, Applicants have undertaken substantial commitments to invest in and increase the

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85 *See* Public Interest Statement at 43-44 (describing Applicants' Commitment # 3 regarding children's content).

86 *See In the Matter of Policies and Rules Concerning Children's Television Programming,* Report and Order, 11 FCC Rcd 10660 ¶ 14 (1996) ("For over 30 years, the Commission has recognized that, as part of their obligation as trustees of the public's airwaves, broadcasters must provide programming that serves the special needs of children. The Commission's efforts to promote programming for children began in 1960 with the statement that children were one of the several groups whose programming needs television licensees must meet to fulfill their community public interest responsibilities."); *In the Matter of Children's Television Obligations of Digital Television Broadcasters*, Second Order on Reconsideration and Second Report and Order, 21 FCC Rcd 11065 ¶¶ 4-5 (Sep. 26, 2006) ("Television plays a major role in the lives of American children. . . . Congress has recognized that television can benefit society by helping to educate and inform our children. As Congress has stated, '[i]t is difficult to think of an interest more substantial than the promotion of the welfare of children who watch so much television and rely upon it for so much of the information they receive.'").

87 Common Sense Media Comments at 3.

availability of diverse programming. As Applicants have recounted in the Public Interest Statement, in more recent submissions to the Commission,[88] and in Section V.B below, both Comcast and NBCU have very strong records of substantial investment in diverse programming, including independently-produced programming, women's/lifestyle programming, Hispanic programming, African American programming, and Asian American programming.

For example, TV One benefited from Comcast's early financial commitment to its programming. TV One's Chairman, Alfred C. Liggins, III, recently testified to Congress:

> Comcast understood the value and importance of their African-American customers and quickly agreed to become our major strategic partner . . . . They also negotiated a deal that helped finance the network, made a sizable cash investment while allowing my team to retain significant ownership, even in excess of Comcast's ownership stake, ceded management control and worked with me to allow a competitor, DirecTV, to acquire an interest in the network.[89]

Numerous other commenters have praised Comcast for its efforts to bring diverse programming to its customers. Marco Dominguez, President and CEO of IndyVision TV, related that, when Indianapolis lost its only local source of Spanish language TV news, Comcast entered the scene to support the start-up, IndyVision TV. According to Dominguez:

> Comcast's involvement isn't simply one of distribution. Comcast believed in the need of the Hispanic community . . . . Since inception, On Demand viewership has continued to grow and IndyVision TV programming is now among the top ten local programmers in the Indianapolis market. Our experience with Comcast has taught us that the company does so much more than simply 'talk the talk' when it comes to its role of promoting diverse programming or investing in locally

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[88] See Letter from Michael H. Hammer, Willkie Farr & Gallagher LLP, Counsel for Comcast Corp., A. Richard Metzger, Jr., Lawler, Metzger, Keeney & Logan, LLC, Counsel for General Electric Company, and David H. Solomon, Wilkinson Barker Knauer, LLP, Counsel for NBC Universal, Inc., to William T. Lake, Chief, Media Bureau, FCC, MB Docket No. 10-56 (June 2, 2010) (attaching Responses of Comcast Corporation and NBC Universal, Inc. to Questions Submitted by Several Members of the United States House of Representatives) ("Responses to Questions from Several Members of Congress").

[89] *Field Hearing on The Proposed Combination of Comcast and NBC Universal*, House Comm. on the Judiciary, Testimony of Alfred C. Liggins, III, Chairman, TV One (Los Angeles, CA, June 6, 2010).

> relevant content. Comcast actively seeks such opportunities. IndyVision TV is living proof.[90]

The President and CEO of CoLours TV, Tracy Jenkins Winchester, commended Comcast for providing "African Americans and Latinos an opportunity to create cable television networks" and for Comcast's "sense of responsibility . . . across the country to assist others in their efforts to succeed."[91]

Reverend Al Sharpton also praised Comcast as an "industry leader on diversity," noting that "Comcast has shown leadership in minority-owned and focused programming – starting with the carriage of BET in the 1980s and followed later by its investment in and carriage of TVOne, and continuing with its recent launch of Black Cinema on Demand and BET's Centric."[92] The CEO of Hip Hop on Demand, Will Griffin, commended Comcast for its work to reach out and educate members of the African American creative community on the opportunities on VOD.[93] Other commenters in the record also show overwhelming support for Comcast's diversity and niche programming efforts.[94]

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[90] Letter from Marco Dominguez, President and CEO, IndyVision, TV, to Julius Genachowski, Chairman, FCC, *et al.*, MB Docket No. 10-56, at 1-2 (Mar. 17, 2010).

[91] Letter from Tracy Jenkins Winchester, President & CEO, CoLours TV, to Hon. Rick Boucher, Chairman, Subcomm. on Commc'ns., Tech., and the Internet, House Comm. on Energy & Commerce (July 6, 2010).

[92] Letter from Al Sharpton, Reverend, National Action Network, Inc., to Julius Genachowski, Chairman, FCC, MB Docket 10-56, at 2 (May 24, 2010).

[93] Letter from Will Griffin, Chairman and CEO, Hip Hop On Demand, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56 (June 18, 2010) (attaching his testimony before the House Judiciary Committee in which he testified that "[w]hen we launched along with three other African-American channels, it was because a Comcast Corporate Vice President, Payne Brown, came to dozens of African-Americans in the creative community to educate us on the video on demand platform and the multi-billion-dollar investment that Comcast was making to become the industry leader in VOD") ("Will Griffin Testimony").

[94] *See, e.g.*, Letter from Luis Torres-Bohl, President, Castalia, to Julius Genachowski, Chairman, FCC, *et al.*, MB Docket No. 10-56 (Apr. 22, 2010) ("Castalia Communications Corporation is a small, minority-owned company based in Atlanta, Georgia . . . . For the past eight years, we have had a long and productive relationship with Comcast. Most recently, in association with Comcast, we launched several channels directed to the Mexican-American community, such as Mi Cine, Canal Once, Canal 22, and Mexicanal, both as linear and VOD channels . . .

No commenter has seriously contested the significance of the voluntary commitments that Applicants have made concerning additional investment of resources in the joint venture's diverse programming. Comcast first disclosed its robust array of voluntary commitments relating to programming on the day the proposed transaction was announced and provided specifics in Applicants' Public Interest Statement. As detailed in their Public Interest Statement, with respect to diverse programming, Applicants originally committed to (1) launch a new Spanish-language multicast channel, (2) feature Telemundo programming on Comcast's VOD and online platforms, and (3) continue expanding the availability of mun2 programming on the Comcast Cable, VOD, and online platforms.[95] DirecTV argues that this suite of commitments is

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. Comcast has been instrumental in the development of Hispanic television in the United States"); Letter from Burke Berendes, Partner, Condista, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (May 3, 2010) ("Since Comcast began operations in these [eight] key Hispanic markets, they have sought to be a leader in our industry: Spanish language pay-TV. Comcast has worked with our company to expand the number of independent, Spanish-language networks available to the market. Comcast has supported these networks and the drive to serve the US Hispanic population at all levels of their company."); Letter from David Casas, National Chairman, National Conference of Hispanic Legislators, to Julius Genachowski, Chairman, FCC, *et al.,* MB Dkt. No. 10-56 (June 2, 2010) ("Comcast has licensed more than 70 networks that serve Hispanic viewers and recently has begun to offer more than 50 Hispanic cable networks on the majority of its cable systems – by far the largest such offerings provided by any video provider in the country. Being able to work with a company that understands the needs of Hispanic Americans has been a pleasure and we believe that such engagement strengthens our uniquely American democracy by elevating the tenor of debates about the shape and nature of our society."); Letter from Diane Schwartz, President & CEO, American Conference on Diversity, to Julius Genachowski, Chairman, FCC, *et al.*, MB Docket No. 10-56, at 1 (June 17, 2010) ("Comcast's cable TV programming also mirrors the company's commitment to diversity, offering something for just about every culture – in particular programming in numerous foreign languages."); Letter from Phil Blazer, President& CEO, Jewish Life Television, to Julius Genachowski, Chairman, FCC, et al., MB Docket No. 10-56, at 2 (May 25, 2010) ("JLTV has recently entered into a carriage affiliation agreement with Comcast Cable . . . . JLTV is the only cable television network that provides programming for the Jewish community, and in fact, because of the cultural nature of JLTV, for all Americans."); Letter from Michael Warsaw, President and Chief Executive Officer, Eternal World Television Network, Inc., to Julius Genachowski, Chairman, FCC, *et al.,* MB Docket No. 10-56, at 1 (June 21, 2010) ("Comcast was one of the first major MSOs to distribute EWTN *Español,* subsequently developing that distribution to more than 250 cable systems in order to serve the Hispanic community nationwide, and it was the very first cable MSO to launch the EWTN HD service, showing its commitment to support independent programming on new technologies."); Letter from William Airy, Chief Strategy Officer, Inspiration Networks, to Julius Genachowski, Chairman, FCC, *et al.,* MB Docket No. 10-56, at 1 (June 18, 2010) ("Comcast's patronage… comes not as a result of contractual commitments or public mandate, but rather based on the recognition that values-based entertainment is an essential aspect of the American media landscape which helps to attract and retain subscribers in an increasingly competitive consumer marketplace.").

[95] Public Interest Statement at 48-50 (Commitments ## 6, 7, and 8).

"self-serving," because it "increases the amount of affiliated programming carried by Comcast systems," but DirecTV notably does not argue that there is not a significant public benefit to the increased availability of this programming.[96] (To the extent DirecTV suggests that Comcast would somehow be favoring its own then-affiliated programming to the exclusion or detriment of similar unaffiliated programming, the Commission need only review the list of the substantial number of unaffiliated Spanish networks that Comcast has launched since 2008 alone.[97] Several unaffiliated Spanish-language services are already available on Comcast's VOD platform. In any event, as discussed in more detail below, Comcast has now committed to significantly expand the carriage and availability of non-affiliated Spanish language programming as well.)

Applicants have continued to enhance and expand their initial commitments in the area of programming diversity.[98] Among other things, Comcast and NBCU have: (1) undertaken to invest substantial resources in independently produced programming; (2) expanded the independent network carriage commitment (Commitment # 13); (3) expanded the commitment to invest in and add more Hispanic programming (Commitments ## 6, 7, and 8); and (4) agreed to add more programming targeted to African Americans. Each of these additional commitments is described more fully in the subsections below.

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[96] DirecTV Comments at 64-65. In fact, DirecTV features programming in which it has an ownership interest on additional platforms, such as its tennis Grand Slam "Mix" channel, which offers a mosaic of programming from DirecTV's affiliated network, Tennis Channel. DirecTV no doubt believes that this type of offering – albeit "self-serving" in the narrow sense DirecTV asserts in its comments – is beneficial to its customers.

[97] *See* Letter from Michael H. Hammer, Willkie Farr & Gallagher LLP, Counsel for Comcast, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56, Response to Request No. 46 (June 29, 2010) (attaching Comcast's Response to the Commission's Information and Discovery) ("Comcast Information Request Response").

[98] Applicants' substantial additional diversity commitments beyond those related to programming are detailed in Section V.C. below.

Apart from these expanded commitments to enhance diverse programming, Comcast and NBCU have committed to increase the presence of minorities both in front of and behind the camera and throughout all the joint venture's programming, including entertainment, news, sports, and public affairs programming. Comcast will also establish a venture capital fund of at least $20 million intended to expand opportunities for minority entrepreneurs to develop new media content and applications. The fund, housed within Comcast Interactive Capital, will facilitate early stage financing of minority businesses.[99]

Independently-Produced Programming. Applicants recognize the importance of obtaining and providing outlets for programming from diverse sources. As discussed in Section V.B below, any concerns regarding the current amount of minority-owned or independently-produced programming on NBCU-owned channels are misplaced here. Looking to the future, Applicants fully expect the transaction's benefits to accrue to minority and independent programming producers, because the new combined entity will not only increase investment in and output of programming but also provide a greater number of outlets and platforms on which consumers may discover programming they like. Indeed, as a distributor of programming from myriad sources, Comcast has worked successfully with independent programmers to obtain content for its On Demand platform and will bring a fresh perspective about such programming to its management of NBCU.[100] As RHI Entertainment, an independent programming producer, informed the Commission in support of the transaction: "[o]ur experience with Comcast as a

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[99] *See* Letter from Michael H. Hammer, Willkie Farr & Gallagher LLP, Counsel for Comcast Corporation, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56 (July 12, 2010) (attaching letter from David L. Cohen, Executive Vice President, Comcast, to Hon. Bobby Rush, Congressman (D-IL)) ("Rush Letter")).

[100] For example, Comcast's On Demand lineup gives consumers access to content from IFC, Tribeca Enterprises, Concert TV, Havoc, Here Networks, RHI Entertainment, and Shalom TV, among others.

partner in its VOD services has been overwhelmingly positive"; "NBCU has also been an exemplary business partner" and has featured several RHI miniseries; and "we believe that the merger of these entities will serve only to strengthen our relationship with them and, at the same time, ensure the continued availability of a wide variety of television programming to the public."[101] Indeed, Comcast and NBCU together will be able to obtain higher quality programming from a greater diversity of sources than either company would be able to do on its own.

Notwithstanding a positive record of working with independent producers and the fact that this transaction will expand competitive outlets for independently-produced programming, Applicants have committed to invest substantial additional resources in independently produced programming and have now formalized this commitment. Specifically, since filing the Applications and Public Interest Statement, Applicants have concluded an agreement with IFTA whereby Applicants have committed, following the closing of the transaction, to devote substantial resources to enhance opportunities for independently-produced programming to be considered for NBCU and Comcast platforms.[102]

The key provisions of the IFTA agreement are as follows:

- *Development Meetings*. NBCU will schedule each year a presentation outlining for Independent Producers its upcoming scripted and reality programming needs.[103] IFTA

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101 Letter from Robert Halmi, Jr., Chief Executive Officer, RHI Entertainment, Inc., to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56, at 1-2 (June 21, 2010).

102 *See* Letter from Michael H. Hammer, Counsel for Comcast Corporation, Willkie Farr & Gallagher LLP and David H. Solomon, Counsel for NBC Universal, Inc., Wilkinson Barker Knauer, LLP to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56 (July 12, 2010) (summarizing the agreement among Comcast, NBCU, and IFTA) ("IFTA Agreement Summary Letter").

103 The term "Independent Producer" includes both IFTA and non-IFTA producers/production companies, and is generally defined as a producer/production company that: (i) is not part of a vertically-integrated company; (ii) is either an IFTA member, or is among those non- IFTA member companies that would not be considered a "major" independent supplier; (iii) is financially able to deficit finance network-quality scripted series or longform

will provide an invitation list of up to 200 Independent Producers, working with its members and with other independent producers and organizations;

- *Pitch Meetings*. NBCU will set up annual meetings with creative executives from NBCU's entertainment networks to take series pitches from Independent Producers. In the six-month period following each Development Meeting, NBCU's cable group will take at least 15 pitches and its broadcast group will take at least 20 pitches as part of this process. NBCU may also take pitches from Independent Producers in addition to those taken as part of this process. NBCU's Digital Studio executives may also participate in the pitch meetings in order to evaluate the presentations for potential digital platform opportunities;[104]
- *Allocated Development Funds*. Each year, the NBC Television Network will allocate $1 million in development funds and, separately, the NBCU cable entertainment networks will allocate $500,000 in development funds (collectively, the "Allocated Development Funds"). The Allocated Development Funds will be exclusively dedicated to supporting early development of new projects from Independent Producers as part of this process, and will be disbursed by NBCU directly to such Independent Producers in such amounts and allocations as NBCU determines is appropriate but seeking to provide funds to multiple projects/Independent Producers;[105]
- *Advertiser-Sponsored Movies of the Week ("MOWs")*. The NBC Television Network will facilitate formal introductions of Independent Producers of MOWs to advertisers looking to produce fully-sponsored MOWs that will be supplied to the NBC Network on a time-buy basis as the company's sales and programming needs dictate;
- *Acquisition of Feature Films and Other Programming*. To the extent the NBCU cable networks license MOWs or mini-series or seek to acquire feature films, their executives or employees will take submissions of professionally produced, completed MOWs, miniseries or films from Independent Producers at agreed upon times and locations including the American Film Market in a good faith effort to consider independent programming for such slots;[106] and

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programming or appropriately finance reality programming; and (iv) has had at least three projects in development at (or has produced at least one project that has been exhibited by) a broadcast network or a basic or pay cable entertainment network within five years preceding the date of the applicable Development Meeting.

[104] In addition, the Independent Producers will be referred by IFTA for pitch meetings based upon NBCU's stated needs with the goal of having presentations by a diverse group of producers. NBCU may submit Independent Producers to IFTA for inclusion in the process. Independent Producers who are not members of IFTA will not be unreasonably excluded from the process by IFTA, and Independent Producers may be selected for pitches even if they did not attend the Development Meeting.

[105] In addition, NBCU will provide IFTA an annual report setting forth the projects and Independent Producers to which the Allocated Development Funds were allocated.

[106] The definition of "Independent Producer" for purposes of this provision includes only parts (i) and (ii) of the general definition set forth in note 103, *supra*.

- *New Media Distribution*. Comcast commits to meet with IFTA to develop a plan to simplify the method by which Independent Producers license their content to Comcast for distribution on New Media platforms.[107] Comcast and IFTA will work toward the goal of developing a process within three (3) months of the Agreement for Comcast Cable to evaluate content for its New Media platforms from Independent Producers.

Independent Network Carriage. Comcast pursues carriage of programming that its subscribers will want, regardless of affiliation. Comcast has a strong record of carrying hundreds of non-affiliated channels and has been praised for its efforts by independent network owners in this proceeding.[108] The observations of GolTV, the bilingual US soccer network, illustrate Comcast's efforts to facilitate independent programming:

> Given our experience with Comcast, GolTV not only sees no cause for concern [regarding independent programmers' ability to gain carriage on Comcast], but believe[s] that the venture will promote the distribution of unaffiliated programming networks like ours . . . . GolTV's success is in part thanks to distribution partners like Comcast [that] understand that America is [a] melting pot of people, cultures, ideas, and languages and as a result they have invested in their network to bring consumers the programming that matters to them . . . Comcast has always been fair in its negotiations for carriage of our channel and in its ongoing dealings with us as an independent programmer.[109]

These sentiments were echoed by the Directors Guild of America, which noted that "Comcast has committed to support of independent programming, including adding new

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[107] The definition of "Independent Producer" for purposes of this provision includes only parts (i) and (ii) of the general definition set forth in note 103, *supra*.

[108] *See infra* Section V.B; *see also* Letter from Robert Halmi, Jr., *supra* note 101; Letter from Father Robert P. Reed, Director, The CatholicTV Network, to Julius Genachowski, Chairman, FCC, *et al.*, MB Docket No. 10-56 (Apr. 30, 2010) ("The FCC has asked questions about the ability of independent programmers, like us, to achieve carriage on Comcast should the deal become final. CatholicTV believes the ability of independent programmers to gain carriage on Comcast will not only remain unchanged, but has the potential to flourish."); Letter from Roger L. Werner, President & Chief Executive Officer, Outdoor Channel, to Julius Genachowski, MB Docket No. 10-56, at 3 (Apr. 19, 2010) ("With our long history working with Comcast, we have no doubts about its commitment to serving the public interest and working with independent programmers like Outdoor Channel. We've negotiated with Comcast for carriage in the past and expect that under this combined company, our carriage relationship will remain intact and unobstructed, and in no way impact any potential future negotiations.").

[109] Letter from Rodrigo Lombello, Chief Operating Officer, GolTV, to Julius Genachowski, Chairman, FCC, *et al.*, MB Docket No. 10-56, at 1 (May 3, 2010).

independently-owned and operated channels."[110] After the transaction, six out of every seven channels on Comcast's systems will remain unaffiliated with Comcast, even before these commitments to add new independently-owned and -operated channels.[111] Moreover, contrary to a handful of largely self-serving criticisms,[112] Comcast's commitment to add additional independent programmers is substantial.[113]

In Applicants' Public Interest Statement, Comcast detailed its commitment to carry six new independent networks beginning in 2011 (Commitment # 13).[114] A number of independent programmers praised this commitment.[115] However, as a result of further dialogue with leading diversity organizations, Comcast has enhanced this commitment – it will now add at least ten new independently-owned and -operated programming services over the next eight years

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110 Letter from Jay D. Roth, National Executive Director, Directors Guild of America, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56, at 1 (June 21, 2010).

111 *See* Comcast Information Request Response, *supra* note 97, Request No. 14.

112 *See, e.g.*, DirecTV Comments at 63-64; Writers Guild of America, West Comments at 8-9; WealthTV Petition to Deny at 6-7; Tennis Channel Comments at 10-14.

113 The costs of these commitments are also substantial. Adding these new channels may result in additional license fees, marketing costs, and equipment costs for Comcast. More importantly, the opportunity costs associated with the addition of these channels will be substantial. Even as Comcast expands the current capacity of its systems, the demands on that capacity are extensive and increasing. For example, Comcast will need that additional capacity to increase the speed of its High-Speed Internet ("HSI") service and to provide new and innovative programming consumers are demanding, including bandwidth-intensive HD and 3D networks. The new channels that Comcast has committed to add as part of this transaction will take up valuable capacity that Comcast will not have to provide these other services to consumers. This is a real and significant cost for Comcast, particularly in today's competitive environment where other distributors are aggressively attempting to improve their Internet services and add HD and 3D channels.

114 Public Interest Statement at 112-13 (Commitment # 13).

115 *See, e.g.*, Letter from Father Robert P. Reed, Director, The CatholicTV Network, to Julius Genachowski, Chairman, FCC, *et al.*, MB Docket No. 10-56 (Apr. 30, 2010) ("The key attributes of a successful programming venture will remain unchanged if Comcast and NBC proceed with their proposed arrangement. And yet, the companies have pledged to add even more independent programming as a condition of the deal. For these reasons, the venture has our unqualified support.").

following closing of the transaction.[116] Some of the specifics of the commitments regarding minority-owned and -operated programming are discussed further below.

Hispanic Programming. As recounted in Section V.B below, Comcast and NBCU both bring substantial experience with Hispanic programming to the joint venture. In combining this experience and these resources, Applicants firmly believe they will be able to increase the quality, quantity, and reach of programming targeting the Hispanic community. This vision was reflected in the substantial commitments to Hispanic programming that Applicants detailed in the Public Interest Statement.[117] Several commenters have ratified this vision. For example, the Latino Community Foundation, based in San Francisco, California, suggests that "[NBCU's] history of delivering quality Spanish language programming via its Telemundo network will only add to Comcast's already substantial and constructive impact on California's Latino communities."[118] Castalia Communications, a leading independent distributor of programming to

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116 Rush Letter at 2.

117 Public Interest Statement at 49-50 (Commitments ## 6, 7, 8).

118 Letter from Aida Alvarez, Chair, Latino Community Foundation, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (May 28, 2010); *see also* Letter from Oscar B. Goodman, Mayor, City of Las Vegas, to Julius Genachowski, Chairman, FCC, *et al.*, MB Docket No. 10-56 (May 27, 2010) ("I believe that Telemundo's and NBC's record of paying close attention to the changing needs of the Las Vegas community in recent years says volumes about their overall commitment to program localism and diversity and that this transaction with Comcast will only strengthen them in this regard."); Letter from Frank J. Aguilar, Chief Director Officer & President, Cicero Mexican Culture Committee, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 17, 2010) (supporting Comcast's acquisition of Telemundo and noting that it will expand the availability of over-the-air Spanish-language programming to the growing Hispanic community nationwide); Letter from Robert E. Walkup, Mayor, City of Tucson, to Julius Genachowski, Chairman, FCC, *et al.*, MB Docket No. 10-56 (May 12, 2010) ("Comcast has also honored its pledge to provide programming diversity on its ever expanding number of cable channels. . . . I'm confident that Comcast's focus on meeting new challenges will serve the company well throughout its new venture with NBC. In particular, Comcast will be able to work with our local Telemundo broadcast station, which is owned by NBC, further strengthening Comcast's leadership and promotion of minority initiatives."); Letter from Victor H. Diaz, CEO, Pittsburgh Metropolitan Area Hispanic Chamber of Commerce, to Julius Genachowski, Chairman, FCC, *et al.*, MB Docket No. 10-56 (June 18, 2010) ("Comcast has brought us exceptional Hispanic-oriented programming and content . . . . I believe that Comcast and NBC will be a great team, continuing to promote diversity in their companies and in American communities."); Letter from Gabriel Buelna, PhD, MSW, Executive Director, Plaza Community Services, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 18, 2010) ("Overall, the Comcast NBC merger should be beneficial for Telemundo, its employees

the Americas, stated: "We firmly believe that the proposed joint venture will produce even more opportunities for companies like ours and for multi-ethnic communities to receive better and richer services."[119]

In a wide-ranging agreement with a number of key Hispanic leadership organizations,[120] Applicants have detailed additional ways in which they will increase investment in and carriage of Hispanic programming. As its part of this agreement, NBCU will build on previous and current efforts to increase the presence of Latinos throughout all its programming, including entertainment, news, sports, and public affairs programming. NBCU will expand opportunities for Latinos both in front of and behind the camera. Examples of measurable outcomes will include increasing the number of Latino-show runners, producers, writers, and directors; and increasing the number of Latinos who appear on news and public affairs programs. Further, Applicants have agreed that the joint venture will not reduce the number of current local Telemundo newscasts even in this difficult time when the broadcast business faces challenges to its advertising revenue stream, and will consider expanding local Telemundo newscasts. NBCU will likewise increase news and information choices for Hispanic viewers, including a plan to produce with an independent producer a weekly business news program.

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and its Latino viewers. More investment in content, better distribution and enhanced marketing platforms can only help strengthen Telemundo's business.")

119 Letter from Luis Torres-Bohl, President, Castalia Communications Corporation, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Apr. 27, 2010).

120 The signatories are: National Hispanic Leadership Agenda ("NHLA"), the Hispanic Association on Corporate Responsibility ("HACR"), and the National Hispanic Media Coalition ("NHMC"). *See* Letter from Michael H. Hammer, Willkie Farr & Gallagher, LLP, Counsel for Comcast Corp., and David H. Solomon, Wilkinson Barker Knauer, LLP, Counsel for NBC Universal, Inc., to Marlene H. Dortch, FCC Secretary, MB Docket No. 10-56 (July 6, 2010) (attaching the Memorandum of Understanding Between Comcast Corporation, NBC Universal and The Hispanic Leadership Organizations) ("Hispanic MOU").

For its part, Comcast has agreed that it will add at least one American Latino-operated, English-language channel within 18 months of the closing of the transaction, and a second within 36 months, and will add at least two programming services in which American Latinos have a majority and/or substantial ownership interest within six years.[121] Comcast will work closely with its external Hispanic Advisory Council[122] to help identify qualified programming services.

Separate and apart from Applicants' independent carriage commitment (Commitment # 13), Comcast also has agreed to expand distribution of currently-carried networks that are American Latino-owned or -controlled or target the Latino community with English or Spanish language programming. Within six months of closing of the transaction, Comcast will extend digital distribution of at least three of such programming services (at least two of the three will be American Latino owned or controlled) by an aggregate of at least ten million subscribers collectively, subject to negotiating customary terms for extended distribution.[123]

African American Programming. With respect to Comcast's expanded Commitment #13 to carry independently-owned and -operated cable networks (as detailed above), Comcast has agreed that a minimum of four of the new linear programming services to be added will be services in which African American investors own the majority of the equity, with at least two such services to be added in the first two years following the closing of the transaction.[124]

As detailed in Section V below, Comcast currently carries African American-controlled and -operated programming networks as well as non-African American-owned networks that

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121 Hispanic MOU at 8.

122 Applicants' commitment to create this new body is discussed in further detail in the Hispanic MOU at 4.

123 Hispanic MOU at 8.

124 *See* Rush Letter at 2.

target the African American community. Comcast currently carries 11 such cable networks.[125] Working with programmers, Comcast will extend carriage of this type of programming in key market systems, including key African American market systems, within six months of closing of the transaction.[126] Comcast Cable is also committed to the expansion of VOD services featuring African American content, such as Hip Hop On Demand ("H2O"), co-created by Russell Simmons, Will Griffin, and their partners. Indeed, according to Mr. Griffin, "Comcast has the best Infrastructure of Inclusion to build upon in the media industry."[127] In addition, Comcast Cable recently launched Black Cinema On Demand, a VOD service.

Building on the success of these services, Comcast also intends to foster opportunities for owners of diverse content to utilize Comcast's dynamic VOD and online platforms. These platforms afford independent and minority owners of content with an opportunity to reach niche audiences in a direct way and with scheduling directed by the viewers' time preference. As Comcast expands On Demand and On Demand Online, it will focus on ways to ensure that

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125 Responses to Questions from Several Members of Congress, *supra* note 88, at 4.

126 *See* Rush Letter at 2.

127 Will Griffin Testimony, supra note 93; *see also* Letter from Calvin Smyre, President, National Black Caucus of State Legislators, to Julius Genachowski, Chairman, FCC, *et al.,* MB Docket No. 10-56, at 1 (June 2, 2010) ("We strongly believe that Comcast's commitment to promoting diversity in programming, as well as its support for the economic advancement of communities of color, provides ample evidence that the new Comcast-NBC Universal will promote the important value of diversity, a critical element of the FCC's review."); Letter from Harry C. Alford, President/CEO, National Black Chamber of Commerce, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56, at 2 (May 24, 2010) ("Comcast has helped significantly to improve the quality and amount of programming relevant to African American audiences . . . . It is our belief that Comcast's clear and unmatched record of promoting diversity in its own business practices and in the products and services it offers its customers illustrates how this company will move forward in its new business enterprise with NBC Universal."); Letter from Rev. Horace L. Sheffield, III, Detroit Association of Black Organizations, Inc. to Genachowski, Chairman, FCC, *et al.*, MB Docket No. 10-56 (Mar. 29, 2010) ("Comcast's investment in TV One added quality programming targeted towards African Americans . . . . I am confident that Comcast will continue to follow its own example in its new venture with NBC."); Letter from Esther L. Bush, President & CEO, Urban League of Greater Pittsburgh, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 17, 2010) ("Combining the assets of Comcast and NBCU should enable the new company to offer more choices to consumers and better serve the interests of many key segments of the American public, including African Americans, Hispanics, children and families. This partnership has the potential to be a major force in diverse programming[.]").

independent and minority owners of content, including African Americans, can take advantage of these platforms.[128]

Asian Pacific American Programming. This fall, Comcast Cable will launch Asian Cinema On Demand that will feature films from across the Asian Pacific Islander diaspora that highlight the experiences, accomplishments, and points-of-view of this community as expressed through the artistic medium of film. This permanent platform will allow Comcast Cable to work with Asian Pacific Islander English-language content developers and will be programmed by experts in the Asian Pacific Islander film space. This channel will contain 20 hours of content, refreshed by 50-100 percent each month, and it will include a specific marketing plan developed to promote the offering.[129]

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Applicants' commitments to increase the amount, quality, and diversity of national programming – and to enshrine key commitments in binding, enforceable transaction conditions – are unprecedented. No party in any previous transaction has voluntarily offered public interest benefits remotely comparable to what Applicants have promised here. No company in America, including competitors who criticize this transaction, has ever offered such guaranteed public interest benefits. These benefits are real and substantial. The best evidence of that fact is that parties directly affected by the commitments – leading diversity groups, independent programming producers, and Common Sense, among others – have engaged in productive negotiations with Comcast to add details to and expand the scope of the commitments and now stand together with Applicants in supporting the public interest benefits of these commitments.

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128 Rush Letter at 2.

129 *See* "Comcast's and NBCU's Summary of Diversity Commitments" (attached to Rush Letter).

2. Local Programming

As discussed in Section V below, both Comcast and NBCU are committed to local efforts in programming. Applicants have an unparalleled record of supporting the local communities they serve, as evidenced by numerous supportive filings by local officials and community organizations in this proceeding.[130] The proposed transaction will further strengthen the companies' local content businesses and promote localism by facilitating and encouraging the creation of new local programming and making it more widely available on more platforms. As discussed below, Applicants have made a number of commitments that guarantee that such benefits will flow from the proposed transaction. Indeed even before Applicants' most recent efforts to expand upon and back up these efforts, Dr. Matthew Spitzer concluded that these "additional efforts to promote localism . . . will further enhance the public interest benefits of the transaction."[131]

Local News and Public Interest Programming. As discussed in Sections III.A above and V.B below, Applicants remain committed to preserving and enriching local broadcasting. Beyond their existing local services, which are discussed extensively in Section V.B below, Applicants have undertaken specific obligations to increase and enrich the output of local news, local public affairs, and other public interest programming on NBC O&O stations. Applicants

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130 For example, numerous parties commented in support of NBCU's well-established commitment to local news, public affairs, and information programming. *See, e.g.*, Letter from Mayors Nutter, Becker, Lawrence, Marks, Rybak & Walker, National Conference of Democratic Mayors, to Julius Genachowski, Chairman, FCC, *et al.*, MB Docket No. 10-56 (June 21, 2010); Letter from Sonya Galvan, President & CEO, Child Advocates, Inc. to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 16, 2010); Letter from Monty Trainer, President, Coconut Grove Arts Festival, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 3, 2010); Letter from Jill Michal, President and CEO, United Way of Southeastern Pennsylvania, to Julius Genachowski, Chairman, FCC, MB Docket 10-56 (May 5, 2010).

131 Expert Declaration of Matthew L. Spitzer ¶ 24 (Jan. 26, 2010) (attached as Appendix 9 to Public Interest Statement).

have committed that the NBC O&Os will produce, in the aggregate, an additional 1,000 hours per year of local news and information programming, consisting of a range of local and regional content, including general interest news and public affairs programming, weather, traffic, and other informational programming focused on community events, local lifestyle, fashion, arts, and multicultural features.[132] Applicants will use a combination of distribution platforms to make this new local content available to consumers, including the NBC O&O stations, Comcast's local and regional networks, VOD, and online, as appropriate for each local market.[133]

DirecTV offers the Commission merely a back-of-the-envelope (and misleading[134]) calculation to attempt to diminish the magnitude of these commitments. DirecTV's choice to characterize Applicants' commitments to provide additional local news and other local programming as *de minimis* is ironic, given that in its nearly 20 years of operation, DirecTV has produced *no* local programming and has resisted public interest obligations on the local level.[135]

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132 Public Interest Statement at 42 (Commitment # 2).

133 *Id.*

134 DirecTV compares Applicants' commitment to produce 1,000 hours per year of local news programming on the NBC-affiliated O&O stations to the total hours of all news (national and local), public affairs, and informational programming aired on both the primary and multicast channels of the 26 NBCU O&O stations (NBC and Telemundo). *See* DirecTV Comments at 62-63. This apples-to-oranges comparison is misleading and irrelevant. A more meaningful comparison would consider the 1,000-hour commitment against the current 15,000-plus hours of local news per year on the 10 NBC-affiliated O&O stations, which yields an increase of nearly seven percent.

135 *See, e.g.*, Letter from Jim Wilcox, Vice President/General Manager, WALB-TV, to Sen. Saxby Chambliss, at 1 (Aug. 28, 2007) (attached to letter from Jim Wilcox, WALB-TV, to Commissioner Deborah Taylor Tate, MB Docket No. 04-233 (Mar. 17, 2008) ("DirecTV's refusal to honor the local-into-local commitment prevents its customers from receiving the important programming provided by their local broadcasters and deprives them of access to important public safety information broadcast locally."); Letter from Charles L. Spencer, General Counsel, Louisiana Association of Broadcasters, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 04-233, at 2 (Sept. 24, 2008) ("The public in small television markets are being put at risk of losing reception of their local TV service by the refusal of DirecTV and EchoStar/DISH to act on retransmission approval of local stations' signals. In markets such as Lake Charles, Louisiana, neither provider includes either analog or digital local television service on their satellite-fed lineup, but they mislead area satellite subscribers to believe that they will get local service. They also tell satellite subscribers there that they must disconnect their television antennas to receive satellite service."). *See also* Reply of the North Dakota Broadcasters, MB Docket No. 07-18, at 5-7 (Apr. 16, 2007) (noting

A better course for DirecTV would be to emulate the commitments made by Applicants, rather than denigrate them.

CFA *et al.*[136] and Greenlining Institute[137] simply dismiss these commitments out of hand. Yet at a time when local broadcasters are more often than not *cutting back* on public interest programming, these legally enforceable commitments to increase such programming constitute an undeniably significant public interest benefit.[138]

Beyond their investments in O&O stations, Applicants' commitments will also foster local programming in communities nationwide, even where there is no local Comcast cable system or NBCU O&O station. The agreements with the NBC Affiliates Association and the ABC, CBS, and Fox Affiliates Associations represent assurances to the local broadcasting business, which in turn will allow the stations represented by these associations to "enhance . . . community service . . . to the public in markets across the country[.]"[139]

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that DirecTV argues that its service offerings are guided by "market forces" but that, "[i]n this context, 'market forces' is a euphemism for 'we can make more money by concentrating on the big cities and avoiding service to the rural areas'"); Response of the Maine Association of Broadcasters, MB Docket No. 07-18, at 1-2 (Apr. 10, 2007) (asserting that DirecTV has engaged in a "willful denial of service…to small, rural television markets" by failing to extend local-into-local coverage "[d]espite the expanded capacity of DirecTV's satellite system"); Comments of the Mississippi Association of Broadcasters, MB Dkt. No. 07-18, at 4 (Apr. 9, 2007) (arguing that DirecTV did not fulfill its "promise[] to provide local-into-local service" and that "the lack of local-into-local service by DirecTV in four of five Mississippi markets is contrary to the public interest in localism and competition").

136 CFA *et. al.* Petition to Deny at 53.

137 Greenlining Institute Petition to Deny at 45.

138 "[T]he concept of localism has been a cornerstone of broadcast regulation for decades. The concept derives from Title III of the Communications Act of 1934, as amended (the "Communications Act"), and is reflected in and supported by a number of current Commission policies and rules . . . . The Commission has consistently held that, as temporary trustees of the public's airwaves, broadcasters are obligated to operate their stations to serve the public interest – specifically, to air programming responsive to the needs and issues of the people in their communities of license." *In the Matter of Broadcast Localism*, Report on Broadcast Localism and Notice of Proposed Rulemaking, 23 FCC Rcd 1324 ¶¶ 5-6 (2008).

139 NBC Television Affiliates Association Comments at 4.

Public, Educational, and Governmental ("PEG") Programming. Comcast takes seriously its responsibilities to the local communities it serves and has been praised by numerous commenters for being a valuable local partner and strong supporter of PEG programming.[140] As one local official stated: "Comcast has had a long and fruitful partnership with our channel and has provided significant financial and technical assistance aimed at meeting our goal of delivering the best possible experience for York [Pennsylvania] residents."[141]

Recognizing the important role that PEG can serve in local communities, and as a matter of good will, Comcast enhanced its localism commitments by making two voluntary public interest commitments relating to PEG programming.[142] These commitments build upon

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[140] *See, e.g.,* Letter from Barbara Pyle, Executive Director, MacMedia (Michigan), to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Apr. 16, 2010) (noting Comcast's support for PEG programming and its responsiveness regarding PEG programming concerns); Letter from James Krut, Board Member, Adams Community Television (Pennsylvania), to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Apr. 27, 2010) ("Comcast understands the importance of quality local programming that directly reaches out to Pennsylvanians."); Letter from Barry Krumstock, Assistant City Manager, Rolling Meadows, Illinois, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 18, 2010) ("Comcast is a supporter of PEG access for multiple users in the community."); Letter from Jeffrey W. Poehnert, Education/Government Television Manager, City of Nashua, New Hampshire, to Julius Genachowski, Chairman, FCC (June 14, 2010) ("During these past three years, as we have built our Community Television system in the City, Comcast has been a willing and valued partner each step of the way[.]"); Letter from Janet Taylor, Mayor, Salem, Oregon, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Apr. 20, 2010) ("Comcast makes positive contributions to the quality of life in Salem and we are very grateful for its commitments . . . . Our three public access channels – broadcasts made possible by Comcast – educate our citizens and enable our government to be transparent."); Letter from Stephen W. Mindera, Jr., President, Sky Cable XIII (Connecticut), to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Apr. 20, 2010) ("Our organization sees Comcast as a partner in achieving our goal of advancing public knowledge. Comcast has consistently demonstrated itself to be a national company with a local presence – and a responsible and committed one at that."); Letter from Jerry Franklin, President & CEO, Connecticut Public Broadcasting Network, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 17, 2010) ("Comcast has been a loyal friend to public television in Connecticut. The company shares CPTV's passion for excellence in local programming of interest to our 750,000 plus viewers."); Letter from Karen Hayden, Executive Director, Methuen Community Television (Massachusetts), to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 17, 2010) ("Comcast has been an outstanding partner and committed advocate for our public access programming.").

[141] Letter from Stephen W. Busch, Director of Regional Partnership, White Rose Community Television (York, Pennsylvania), to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Apr. 13, 2010).

[142] *See* Public Interest Statement at 68-69 (describing Commitment # 11 regarding analog carriage of PEG channels and Commitment # 12 regarding the development of a platform to host PEG programming on VOD and online).

Comcast's dedication to supporting the communities it serves and represent important steps toward improving access to PEG programming. No commenter disputes that these commitments are beneficial. Here, particularly with respect to developing VOD and online platforms to host PEG programming, Comcast's voluntary commitments go beyond what is required of any company by current law. Nonetheless, certain groups have filed comments asking the Commission to require Comcast to go further, even though there is no serious argument that their proposals address transaction-specific concerns. These proposals have no place in this transaction review,[143] and, as discussed in Section VI below, they are without merit.

Specifically, three commenters – the National Association of Telecommunications Officers and Advisors ("NATOA"), Greater Metro Telecommunications Consortium ("GMTC"), and Alliance for Communications Democracy ("ACD") (collectively, "PEG Commenters") – raise questions about Applicants' Commitment # 12, which states: "To enhance localism and strengthen educational and governmental access programming, Comcast will also develop a platform to host PEG content On Demand and On Demand Online within three years of closing."

The PEG Commenters first ask Comcast to confirm that the proposal to develop an alternative PEG platform is not intended to replace existing PEG channel carriage commitments. To avoid any confusion, Comcast confirms that Commitment # 12 is designed to enhance existing PEG channel carriage and will not affect Comcast's compliance with existing franchise agreement requirements for traditional linear PEG channel carriage.

The PEG Commenters next ask Comcast to confirm that its proposal is not in lieu of any other existing PEG commitments in franchises. Again, Comcast confirms that its proposal

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143 *See* Section II, *supra* (transaction-specific standard); *see also* note 930, *infra.*

regarding new PEG distribution platforms is intended as an enhancement and not a replacement for existing PEG franchise commitments.

It is important to recognize that Comcast does not currently provide PEG VOD programming on a community-by-community basis (most VOD content is delivered to multiple communities from a common system headend). Thus, as a result of Commitment # 12, Comcast will test potential solutions that could enable the cost-effective delivery of programming targeted to specific communities within a cable system. Such a delivery method also could be used to provide consumers with additional local non-PEG programming and information on a community-specific basis – a significant further consumer benefit.

As part of Commitment # 12, Comcast proposed to provide annual reports on its progress regarding the trials and implementation of its PEG VOD service.[144] NATOA and GMTC propose that Comcast be required to provide semi-annual reports.[145] While Comcast still believes that annual reports would be sufficient, Comcast is willing to provide semi-annual reports commencing six months from the closing of the transaction, should the Commission so desire.

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Applicants' substantial commitments with respect to local programming (combined with its wide-ranging commitments to preserve and enrich local broadcasting) are unprecedented. No competitor has ever committed to, or been required to, make such contributions to localism. These commitments will be binding and enforceable and fortify Applicants' dedication to serve their communities. Despite the efforts of some parties to find fault with specific details, it is indisputable that these commitments will increase the amount, quality, and diversity of local

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144 Public Interest Statement at 69.

145 *See* NATOA Comments at 11; GMTC Comments at 8.

news, public interest, and PEG programming – at a time when such programming faces significant economic pressures.

C. The Proposed Transaction Will Accelerate Investment in and Deployment of Innovative Products and Services That Consumers Increasingly Demand.

The marketplace for video services across multiple platforms is highly fragmented, dynamic, and intensely competitive.[146] Rapid advances in networks and technology have made video programming on multiple platforms a reality for millions of consumers, who can now watch video programming on computers, cell phones, iPads, and countless other devices.[147] Consumers are increasingly demanding innovative products and services to enhance the portability, flexibility, and availability of the content they want to watch, and there is every reason to believe that this trend will continue.[148]

Comcast has been a leader in developing technologies and business models that bring increased flexibility and choice to consumers, and this transaction is calculated to accelerate that

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146 *See generally* Comments of Comcast Corp., MB Docket No. 07-269 (May 20, 2009); Reply Comments of Comcast Corp., MB Docket No. 07-269 (Aug. 28, 2009).

147 *See, e.g.*, Comcast Voices, Xfinity Remote Prototype: iPad Demo at NCTA Show (May 12, 2010), *available at* http://blog.comcast.com/2010/05/xfinity-remote-prototype-ipad-demo-at-ncta-show.html (last visited July 20, 2010).

148 Consumption of content on multiple platforms shows signs of steady growth every quarter. According to Nielsen, the amount of time that viewers spend watching television is still rising. Viewers watched two more hours of television in the first quarter 2010 than they did in the first quarter 2009. The Nielsen Co., Three Screen Report, Vol. 8, at 1 (1st Quarter 2010) ("Nielsen Three Screen Report, 1st Quarter 2010"). Online video viewing continues to accelerate, with more people viewing more videos online for longer periods of time. *See* comScore, The 2009 U.S. Digital Year in Review (Feb. 8, 2010), *available at* http://www.comscore.com/digital09.

The Commission has also recognized that consumers are increasingly demanding higher quality video programming over a wide variety of platforms. *See In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542 (2009) (reporting that more video services are being provided over multiple delivery technologies, including cable television and other multichannel video programming distributors, home satellite dishes, broadband facilities, wireline facilities, open video systems, wireless systems, and the Internet).

progress. Applicants' confidence that the new joint venture will achieve this is shared by others. Cisco, one of the premier technology companies in the world, put it this way:

> Cisco firmly believes that bringing together Comcast's long history of developing high quality, innovative products and services with NBCU's media and entertainment resources will benefit the public interest by supporting the distribution of new and innovative products and services to consumers. The transaction also will drive future development of advanced technologies in the media and communications market in ways that the companies could not do independently, which will inure to the benefit of content developers and distributors, equipment manufacturers and other suppliers.[149]

Comcast's efforts to rapidly meet consumer demand for high-quality content across multiple platforms have been delayed by the understandable reluctance of content owners to risk their traditional revenue streams by permitting their content to be distributed on new and untested distribution platforms. Applicants have demonstrated, for example, that the development of VOD was delayed several years because of Comcast's inability to obtain content that was sufficiently compelling to make VOD attractive for consumers.[150] While Comcast ultimately obtained substantial content rights for VOD, and VOD ultimately became popular with consumers,[151] this does not undermine the fact that Comcast encountered serious hurdles in persuading content owners that this new platform would enhance, rather than diminish, the value of their content. Indeed, Comcast obtained access to movie content that was critical to offering a compelling VOD product only when it became a part owner of MGM along with Sony and made access to content a condition of its investment.[152]

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149 Cisco Comments at 1-2.

150 Public Interest Statement at 53.

151 No commenters dispute that Comcast has led the industry in developing and constantly improving the VOD platform.

152 Rosston/Topper Reply Report ¶ 9 ("The fact that some content providers now have an increased interest in earlier VOD release windows or multiplatform distribution after protracted negotiations and delays simply misses

Applicants have further demonstrated that this story repeats itself over and over again. The same dynamics have delayed the introduction of day-and-date movies on VOD and the online distribution of video content[153] – and they are likely to delay future innovation as new platforms are developed. The simple fact is that, without access to a sufficient amount and variety of high-quality content, Comcast does not have necessary flexibility to experiment with business models and make necessary adjustments to these models so that it can demonstrate to content owners the value of innovative platforms, without substantial delays.

Once other content owners and distributors observe Comcast's innovation using NBCU content, and recognize that innovative platforms are viable and profitable, they will be empowered to emulate such platforms. Content owners will be less hesitant to have their content distributed on new platforms once they perceive less risk.[154] And other distributors will have the example of successful revenue streams as an incentive to develop and provide new innovative video options of their own.[155] No party in this proceeding, or any of the economists who filed on their behalf, challenged Dr. Rosston's analysis of this point. In fact, as Cisco notes, the Commission has long recognized that advancements in products and services compel other service providers "to invest in new or improve existing technologies and services to remain

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the point that transactional frictions hindered and delayed the development and launch of those innovative distribution methods, and more importantly are likely to cause delays in the future as new products, services, and distribution methods are developed.").

153 Public Interest Statement at 57-61.

154 Rosston Benefits Report ¶ 69.

155 *Id.*

competitive"[156] and that this competition serves the public interest by leading to "additional product and service choices and better rates."[157]

Thus, the proposed transaction will enable Comcast to undertake future innovations faster than either company could do alone, which will, in turn, increase Comcast's incentives to invest in both content and distribution, and more rapidly meet consumers' increasing demand for "anytime, anywhere" access to video services and content. The incentive to create more content depends upon the availability of effective distribution outlets that reach viewers, and the incentive to invest in distribution depends upon the availability of content. The proposed transaction, which would vertically integrate a content owner and a distributor, aligns the incentives of each company and therefore supports efforts to expand the reach of programming.[158] As Dr. Rosston has explained – and no commenters have credibly challenged – the vertical integration of Comcast and NBCU will align these incentives in two complementary ways, by: (1) reducing the barriers to efficient contracting; and (2) changing corporate control.

1. By Eliminating or Reducing Transactional Friction, the Proposed Transaction Will Accelerate the Introduction of New and Innovative Services and Platforms.

Dr. Rosston concluded that vertical integration in the proposed transaction will eliminate or reduce some of the problems that Comcast has experienced in obtaining content for new

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156 Cisco Comments at 6 & n.18 (citing and quoting *AT&T-Comcast Order* ¶ 184 ("noting that the merged company should be able to better spread the costs of development and deployment of new technologies across a larger customer base, 'which should in turn foster incentives for investment by the merged entity, as well as other businesses that seek to sell equipment, technology, and service to the merged entity'")).

157 *Id.* at 6 & n.19 (citing and quoting *In the Matter of Application of EchoStar Communications Corp., General Motors Corp., and Hughes Electronics Corp.*, Hearing Designation Order, 17 FCC Rcd 20559 ¶ 188 (2002) ("noting that operational efficiencies resulting from a merger can enhance the merged company's 'ability and incentive to compete and therefore result in lower prices, improved quality, enhanced service, or new products'")).

158 Public Interest Statement at 54-55.

services and platforms via contract, often referred to as "transactional friction." "From an economic perspective, because the NBCU transaction gives Comcast assured access to content on arm's-length terms[159] but with less contractual friction, it can increase Comcast's multiplatform distribution while assuring that producers/content owners receive appropriate compensation."[160] Only two parties – DirecTV[161] and the American Antitrust Institute ("AAI")[162] – take issue with Dr. Rosston's conclusion that the elimination or reduction of transactional friction would produce significant public interest benefits. Yet, none of the economic reports submitted in the record, including the report filed by DirecTV's economists, challenges Dr. Rosston's findings. Thus, the only economic evidence regarding transactional friction in the entire record – Dr. Rosston's report – establishes that, as a result of this transaction, the combined company will be able to break through contractual issues that have delayed introduction of new services and platforms and accelerate consumers' access to the content they want, whenever and wherever they want it.

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159 One commenter incorrectly stated that Dr. Rosston's claim that Comcast will access content on arm's-length terms was not actually guaranteed by Comcast. *See* Writers Guild of America, West Comments at 13. But as Dr. Rosston detailed in his report, the LLC Agreement (Public Interest Statement, App. 4) between the Comcast, GE, and NBCU expressly 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." Rosston Benefits Report ¶ 61 n.91. This would apply to carriage and affiliation agreements. *See also* Rosston/Topper Reply Report ¶¶ 26-29 (refuting assertions in the Writers Guild, West Comments regarding the prices that Comcast will pay for NBCU's content and reiterating the effect of arm's length dealing between related parties as required by the LLC Agreement).

160 Rosston Benefits Report ¶ 50.

161 DirecTV Comments at 52-58.

162 AAI Comments at 21-24. AAI illogically claims that contracting difficulties that prevent parties from pursuing new services for consumers somehow promote competition. Further, as Drs. Rosston and Topper explain, there is no economic basis for AAI's claim; they show instead that the opposite is true. Rosston/Topper Reply Report ¶¶ 11-12.

DirecTV claims that the benefits from reducing transactional frictions are "speculative and/or not transaction specific, and therefore not cognizable" because Comcast has achieved some success with its existing distribution methods like VOD and DVD day-and-date releases.[163] Similarly, AAI claims that, because "Comcast launched these services before the [joint venture], the company presumably anticipated that they would be profitable" and that vertical integration is unnecessary to further develop these services.[164] Both DirecTV and AAI entirely miss the point.

In his report, Dr. Rosston used examples such as the rollout of VOD, DVD day-and-date releases, Fancast Xfinity, and advanced advertising[165] to illustrate both how Comcast has pioneered the development of these innovative services and how the launch of these services was neither as quick nor as extensive as Comcast – and its customers – wanted because Comcast did not have access to sufficient quantity and variety of content.[166] DirecTV's and AAI's assertions that these services have been, or eventually will be, offered to consumers do not undermine the fact that barriers to efficient contracting had prevented them from being offered to consumers

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163 DirecTV Comments at 53-58.

164 AAI Comments at 22.

165 DirecTV criticizes Dr. Rosston's conclusion that the proposed transaction will increase participation of NBCU's networks in advanced advertising initiatives, citing an article that indicates that Canoe recently signed up four programming partners, including NBCU, for the launch of its first interactive advertising application. DirecTV Comments at 57. DirecTV's criticism is unfounded. First, the article that DirecTV cites actually *supports* Dr. Rosston's point that the rollout of interactive advertising services has proceeded more slowly than Canoe would have liked. For example, the article notes that "Canoe has experienced a few setbacks" and that "an early test failed to spark interest among cable nets." Anthony Crupi, *Canoe Lands Four Network Partners With ITV in Sight*, Mediaweek (May, 17, 2010) (*available at* http://www.mediaweek.com/mw/content_display/news/cable-tv/e3i7278144fcfbad6f7a2ddff9c235faab7?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+Mediaweek-Cable-Television+(Mediaweek+News+-+Cable+Television)&imw=Y). Indeed, the rollout of Canoe's ITV application is still in preliminary stages and is limited to certain markets. Second, the same article notes that Comcast Networks were among the four programmers to sign up with Canoe – an indication that Comcast can encourage greater participation of its networks in advanced advertising initiatives.

166 Rosston/Topper Reply Report ¶ 8.

sooner and more fully than they could have been.[167] Neither Comcast nor Dr. Rosston has claimed that the launch and delivery of these services was impossible without vertical integration. Rather, the rollout of these services was – and even now remains[168] – much slower and more difficult than it should have been, in large part due to the transactional frictions that Dr. Rosston explained in his prior report.[169] As Drs. Rosston and Topper further show in their Reply Report, "vertical integration can accelerate the launch and expansion of new products, services and platforms and increase experimentation."[170] DirecTV and AAI appear to be saying that delaying for years the introduction of innovative services that consumers clearly desire does not cause harm, and the removal or reduction of such delays is not a benefit. Comcast and Drs. Rosston and Topper disagree.

The analyses provided by Drs. Rosston and Topper demonstrate, and DirecTV and AAI do not dispute, that in the future, these delays will be avoided because of the proposed transaction; vertical integration will enable Comcast to craft deals to obtain NBCU content on market-based financial terms and expand Comcast Cable's access to programming that it can use

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167 DirecTV asserts that Comcast obtained many more programs from MGM and Sony than it ultimately made available on its VOD service. However, while Comcast obtained access to an expanded number of movies and television episodes, there were {{ }} *See* Rosston/Topper Reply Report ¶ 9 n.8. DirecTV also denigrates the attractiveness and popularity of Comcast's On Demand platform. DirecTV Comments at 54-55. However, DirecTV does not – nor could it – contest that Comcast's customers have used it over 15 billion times – more than the total number of iTunes downloads. Further, as Drs. Rosston and Topper note, DirecTV's criticism is based on an inapt comparison that, when corrected, shows the overall increased usage of VOD. *Id.* ¶ 9 n.10.

168 While DirecTV suggests there has been no transactional friction in, for example, Comcast's desire to accelerate the amount of DVD day-and-date releases it offers to its customers, *see* DirecTV Comments at 55-56, DirecTV ignored the evidence Dr. Rosston presented that, in 2009, Comcast only obtained a fraction of theatrical releases for DVD day-and-date release. *See* Rosston Benefits Report ¶ 34 & Ex. 5.

169 Rosston Benefits Report ¶ 8.

170 Rosston/Topper Reply Report ¶ 8.

to develop novel video products and services for consumers across an array of platforms.[171] And of course, while DirecTV attacks the benefits of vertical integration here, it justified its own vertical integration with News Corp. by arguing – correctly – that vertical relationships "*often produce significant beneficial effects*."[172]

Significantly, DirecTV's economist in this proceeding, Dr. Kevin Murphy, has recognized that one of the benefits of vertical integration is the reduction of transactional friction. In an article unrelated to this transaction, Dr. Murphy (along with Dr. Benjamin Klein, whose past report on behalf of DirecTV was resubmitted in this docket) explained that "vertical integration can make it unnecessary to control either [of the merging parties'] behavior contractually."[173] Applicants agree with Drs. Murphy and Klein's point: "vertical integration may increase flexibility by reducing the degree of contractual specification."[174] Beyond that, once the companies are vertically integrated, the employees, especially those in decision-making positions, will be motivated to find business solutions that address uncertainty and risk in the context of reaching agreements rather than being satisfied with a bargaining impasse and doing

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171 Public Interest Statement at 57.

172 *In the Matter of Application of General Motors Corp. and Hughes Electronics Corp., Transferors, and The News Corporation Ltd., Transferee, For Authority to Transfer Control* News Corp., GM & Hughes Opposition to Petitions to Deny and Reply Comments, MB Docket No. 03-124, at 3 (July 1, 2003) ("DirecTV 2003 Reply Comments"). Similarly, while DirecTV argues here that Applicants' claims about the benefits of vertical integration are speculative, when its own vertical integration was at issue, it pointed out that the benefits from a vertical transaction are "much harder to quantify (but no less real) than consolidation of duplicative functions and reductions in overhead." *Id.* at 79-80. DirecTV's criticisms of the asserted benefits of the transaction ring hollow, because in its previous assertions before the Commission, DirecTV sought and obtained the Commission's approval to allow the owner of the very highly rated television network, 35 O&Os, a large stable of successful cable networks, major U.S. newspapers (and the world's largest owner of media properties) to buy control of the largest DBS provider with a nationwide footprint. *See News Corp.-Hughes Order* ¶ 3.

173 Benjamin Klein & Kevin M. Murphy, Vertical Integration as a Self-Enforcing Contractual Arrangement, 87 Am. Econ. Rev. 420 (May 1997) ("Klein & Murphy").

174 Klein & Murphy at 419.

nothing. Vertical integration may enable them to make investments and attempt innovations without fear of making the wrong decision for their standalone company.[175]

DirecTV also wrongly claims that Comcast contradicted itself by stating that: (1) the proposed transaction will overcome difficulties in obtaining content from unaffiliated parties for new platforms and innovative services; and (2) there is no reason to believe that new entrants in online video would be unable to negotiate effectively for content.[176] These are not contradictory statements. Comcast was claiming neither that it cannot now contract for online distribution rights, nor that negotiations for these rights are easy, whether from Comcast's or a new entrant's point of view.[177] The point, which Dr. Rosston confirms, is simply that negotiations with unaffiliated parties for rights to distribute content on new, untested platforms are often longer and more complicated, and result in a more restricted set of rights for that content. Because a distributor is typically unable to obtain the full set of rights it seeks, the introduction and development of new products and services in the market are delayed.[178] By vertically integrating,

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[175] As noted in the Public Interest Statement, Oliver Williamson has explained that vertically-integrated companies have improved "control instruments" including more refined reward and penalty systems. *See* Public Interest Statement at 62 n.105. Others have explained that integration can facilitate systemic innovation by facilitating communication – and reducing risk – between decision-makers. *See* David J. Teece, *Firm Organization, Industrial Structure and Technological Innovatio*n, 31 J. Econ. Behav. & Org. 193, 193-194, 205, 219 (1996).

[176] DirecTV Comments at 53.

[177] Indeed, while the barriers to entry in online video are low, not every market entrant will, or can, become the next YouTube. There is no guaranteed access to someone else's creative content – it should and will remain the decision of the content owner to choose whether and to whom it will license its content online. Viacom recently withdrew popular Comedy Central content like *The Daily Show* and *The Colbert Report* from Hulu because the parties could not reach a mutually satisfactory agreement. Importantly, consumers still can find Comedy Central content online, just through a different source.

[178] Other companies in the industry have also experienced the effects of transactional friction and similarly conclude that the elimination of that friction could bring innovative products and services to consumers faster. For example, Cisco said that:

> "It has been Cisco's experience that the need to separately negotiate [for] video products and services across multiple entities in the distribution chain can cause delays in deployment of new technologies that otherwise could be available to consumers. The proposed combination of

Comcast will have greater assurances and flexibility in its access to high-quality content, which will accelerate deployment of new services, as well as enable Comcast to experiment with and replace services more effectively and efficiently.[179] For example, once Comcast and NBCU are integrated, Comcast will not have to wait what could be several years for a renegotiation period to begin in order to bargain for new or expanded distribution rights.[180] As Dr. Rosston pointed out, "[v]ertical 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."[181] It does not follow, and neither Comcast nor Dr. Rosston claimed, that, absent vertical integration, other parties would be unable to enter the market, as several have done. Indeed, as Cisco explains, "[t]he additional avenues for distribution of Comcast and NBCU will create an environment that is *more* conducive for content creators and application developers to expand. Importantly, *more* shows, movies, local programming and other types of content will become available to consumers *more* quickly and through different mediums."[182]

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content and distribution platforms thus may allow for faster time to market, benefiting consumers and the marketplace generally."

Cisco Comments at 8.

179 *See* Rosston/Topper Reply Report ¶ 12.

180 Dr. Rosston's report noted that, with respect to Comcast's experience in developing its VOD platform, 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 carriage. However, even when renewal negotiations occur, there is no guarantee that Comcast will be able to obtain timely access to the quantity and quality of content necessary to demonstrate the effectiveness of new products, platforms, and services. *See* Rosston Benefits Report ¶ 30; *see also* Press Release, Comcast Corp., Comcast and Home Box Office Extend HBO and Cinemax Distribution Agreement (Aug. 20, 2003), available at http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=293.

181 Rosston Benefits Report ¶ 58.

182 Cisco Comments at 8 (emphasis added).

2. The Proposed Transaction's Change in Corporate Control Will Produce Consumer Benefits.

As Dr. Rosston explained in his report, there is a large body of economic literature that describes corporate control as a valuable asset in its own right and important in dictating the approach taken by an organization.[183] When the corporate control of an organization shifts, there is the opportunity for enhancements and improvements: "A change in corporate control can enhance vertical efficiencies by providing a different vision based on the new management's experience and viewpoint about how to maximize profits and minimize transactional friction. As a result, changes in control can have a large effect on the direction and strategy of a firm."[184] This is true here.

As applied to the combined entity, Comcast's focused strategic vision, technological leadership, demonstrated willingness to invest in programming, and proven ability to distribute content on multiple platforms will benefit NBCU networks and consumers. Unlike a widely-diversified company like GE, which now prefers to deploy its capital in its other core businesses,[185] Comcast has every incentive to devote whatever resources are necessary to ensure that NBCU develops high-quality programming and that such programming is made available to

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183 Rosston Benefits Report ¶ 55.

184 *Id.* ¶ 55.

185 When the proposed new joint venture was announced, it was reported that selling NBC Universal would allow GE Chairman Jeffrey Immelt to "shift resources to the company's main businesses and engines of future growth: power generation, aviation, rail and medical-imaging equipment, plus a finance arm – GE Capital – to serve them." Rachel Layne, *GE Exiting NBC Universal Brings Immelt Cash, Scrutiny*, Bloomberg News, *available at* http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aJicrCODVCv0. On a conference call with investors, Immelt reportedly said, "We believe there are going to be multiple investment opportunities with attractive returns. And we think we can put our capital into the businesses that most fully utilize GE's core strengths." *Id.*

consumers in as many ways and at as many times as possible.[186] Commenters critical of the transaction's benefits have ignored how the change in corporate control will better align incentives. Dr. Rosston concludes that one important outcome of shifting 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."[187] No party in this proceeding challenges this conclusion.

D. The Transaction Will Result in Further Efficiencies That Will Benefit Consumers.

1. The Transaction Will Result in a Reduction of Double Marginalization.

The transaction also will result in a reduction initially and elimination (once Comcast owns all of NBCU) of double marginalization, which has long been recognized by economists as a significant pro-competitive and pro-consumer effect of vertical integration.[188] The FCC stated in the *News Corp.-Hughes Order* that "[w]e recognize and agree with the theoretical argument

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186 *See* Rosston/Topper Reply Report ¶ 17 ("After the consummation of the proposed transaction, NBCU and Comcast will have greater certainty that they will be able to reach agreements for Comcast to distribute NBCU content and do so more efficiently, leading to higher returns to investing in content creation. The joint entity therefore will have a greater incentive to invest in content.").

187 Rosston Benefits Report ¶ 66

188 According to the Rosston Benefits Report, the analysis of double marginalization in 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. 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. In contrast, following the acquisition of NBCU, although Comcast would pay the same price to NBCU for its content, it would obtain 51% of the margin on NBCU's sale of that content to Comcast, changing the ultimate *effective* cost to Comcast of that content. After internalizing the NBCU margin, Comcast would use the lower marginal cost of NBCU content in determining its offerings to consumers. When presented with the ability to internalize the profits from a portion of the payments it makes to NBCU for content (and thus having a lower marginal cost for content), Comcast may choose to attract additional subscribers through greater investments in service, expanded program offerings, or other non-price alternatives. *Id.* ¶ 80 (internal citations omitted).

that vertical integration can reduce prices by reducing double marginalization."[189] Even DirecTV, which, alone among the petitioners and commenters, criticizes Applicants' double marginalization analysis in this transaction, trumpeted the benefits of reducing double marginalization in its own vertical transaction proceeding: "Even putting aside any other synergy or efficiency that may result from a transaction, the elimination of double markup [double marginalization] alone acts as a check on any incentive to raise prices as a result of vertical integration."[190]

In the *News Corp.-Hughes Order*, the Commission rejected DirecTV's claims regarding double marginalization, but only because DirecTV "neither attempted to quantify this benefit nor provided sufficient information for the Commission to quantify this benefit."[191] DirecTV urges the Commission to reach the same conclusion here, incorrectly arguing that Applicants have also failed to provide data that would allow the Commission to determine the size of the double marginalization benefit.[192] DirecTV is wrong. Applicants have quantified this benefit as it applies to the instant transaction. None of the commenters (including DirecTV) or their economists challenged Dr. Rosston's estimate of the magnitude of savings resulting from reduction of double marginalization.

It is important to understand that the quantification of the double marginalization savings set forth below does not involve a change in the price Comcast pays to NBCU for programming, which will continue to be determined on an arm's-length basis. Rather, even though Comcast

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189 *News Corp.-Hughes Order* ¶ 155.

190 DirecTV 2003 Reply Comments at 34.

191 *News Corp.-Hughes Order* ¶ 155.

192 DirecTV Comments at 60-61.

would pay the same price for content, 51 percent of that price would be an internal transfer in the vertically integrated company, while only 49 percent would reflect a marginal cost paid by Comcast for NBCU programming. Hence, even though the price paid to NBCU would not change, Comcast's marginal cost for NBCU programming would fall by 51 percent (and eventually 100 percent when Comcast obtains full ownership of NBCU). A substantial portion of this cost reduction would be passed on to consumers in the form of lower programming prices, investments in innovative services, network upgrades, expanded program offerings, or other benefits.

Dr. Rosston used SNL Kagan ("Kagan") and Media Business Corp. ("MBC") data to estimate the effect of double marginalization savings for the [[ ]] NBCU-owned cable networks.[193] Based on these sources' estimates, Comcast's payments for the [[ ]] NBCU cable networks generate marginal costs equal to approximately [[ ]] per subscriber per month, or approximately [[ ]] across all Comcast customers per year.[194] As a result, Dr. Rosston concluded that the transaction at the outset will lead to an approximate cost reduction of [[ ]] per year with respect to the [[ ]] NBCU cable networks alone because 51 percent of that [[ ]] per year will be returned to Comcast as the 51 percent owner of the joint venture.[195] Using a pass-through rate of 50 percent, the benefits to

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193 Rosston Benefits Report ¶¶ 80-90.

194 *Id.* ¶ 84.

195 *Id.* The cost reduction will be greater if additional NBCU cable networks are considered and if and as Comcast increases its ownership interest in NBCU as contemplated by the terms of the LLC Agreement.

Comcast subscribers from the reduction of double marginalization is [[ ]] per year (50 percent of [[ ]]) for the [[ ]] NBCU cable networks.[196]

Dr. Scott Wallsten, Vice President for Research and Senior Fellow at the Technology Policy Institute, reinforced Dr. Rosston's conclusions at the Commission's July 13, 2010 Public Forum. According to Dr. Wallsten, "The merger will also eliminate inefficient double-marginalization, which occurs because for each additional subscriber an independent NBC will charge a fee above marginal cost for each additional subscriber for the rights to carry its programming. As a merged entity, Comcast would internalize the extra fee and its marginal cost would become the true marginal cost of an additional subscriber to NBC. This effect is a standard benefit of vertical mergers, and economists generally recognize that it yields consumer benefits."[197]

Moreover, in the Rosston/Topper Reply Report, the authors replicate the prior analysis, this time using the actual affiliate fees (as opposed to Kagan or MBC estimates) that Comcast paid for the [[ ]] NBCU-owned networks along with actual counts of Comcast subscribers per NBCU network.[198] This analysis demonstrates that the marginal cost reductions and attendant consumer benefits from reducing double marginalization are [[ ]] than previously estimated. Specifically, Comcast's payments for the [[ ]] NBCU cable networks generate marginal costs of approximately {{ }} per subscriber per month compared

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196 *Id.* ¶ 87.

197 Scott J. Wallsten, Technology Policy Institute, *An Economic Overview of the Implications for Online Video of the Proposed Comcast-NBCU Transaction*, at 3 (July 2010), *available at* http://www.techpolicyinstitute.org/files/comcast-nbc%20fcc%20chicago%20hearing.pdf.

198 *See* Rosston/Topper Reply Report ¶ 39 & Ex. 4.

to [[ ]] as reported in the Rosston Benefits Report.[199] The marginal costs based on the actual data for these [[ ]] equal approximately {{ }} per month, or {{ }} per year.[200] Therefore, upon closing of the proposed transaction (when Comcast will hold 51 percent of the joint venture), the annual marginal cost reduction will be {{ }} per year (51 percent of {{ }} per year). With a pass through rate of 50 percent, the benefits to Comcast subscribers from the reduction of double marginalization would be {{ }} per year (50 percent of the {{ }}) for the [[ ]] NBCU cable networks, which is consistent with [[ ]] the [[ ]] per year using the Kagan and MBC estimated data.[201]

DirecTV challenges the pass-through or reinvestment of such cost savings as lacking real-world evidence.[202] This is incorrect, as the Rosston/Topper Reply Report explains. The Rosston Benefits Report illustrated the potential saving based on an assumed pass-through rate of 50 percent, which is supported by empirical research.[203] In addition, Dr. Howard Shelanski, former FCC Chief Economist and currently Deputy Director of the Bureau of Economics at the Federal Trade Commission, has underscored the analytical basis for such cost savings to be passed through to benefit consumers.[204] Finally, Drs. Rosston and Topper note that in the News Corp.-Hughes transaction Drs. Salop and Shapiro, *et al.* calculated consumer benefits from a

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199 *Id.* ¶ 39.

200 *Id.*

201 *See id.*

202 DirecTV Comments at 60.

203 *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.

204 *See* Rosston/Topper Reply Report ¶ 31.

reduction in double marginalization based on assumed pass-through rates as high as 90 percent.[205] Thus, Drs. Rosston and Topper conclude that "the 50 percent pass-through rate used for illustrative purposes in the Rosston Benefits Report is consistent with both empirical (*i.e.* 'real-world') and well-established economic theory from the academic literature *as well as the values relied on by DirecTV in that earlier Commission proceeding.*"[206] Moreover, these efficiencies may be passed through to Comcast subscribers in the form of "greater investments in service, expanded program offerings as part of less-expensive tiers, or other non-price alternatives"[207]

DirecTV also faults the Rosston Benefits Report as lacking evidence that Comcast invested to improve its services when it acquired programming services in the past.[208] DirecTV is wrong again. For example, Dr. Rosston notes that "Comcast increased E!'s annual programming expense from {{ }} in 2004 to {{ }} in 2009, and E!'s ratings have likewise increased over this period."[209] Dr. Rosston reported similar findings for Golf Channel and Versus.[210] Additional analysis provided in the Rosston/Topper Reply Report shows that between 2005 and 2009, Comcast's programming investments in E!, Style Network, Golf

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205 *See id.* ¶ 30.

206 *Id.* ¶ 32 (emphasis added). DirecTV's claims that the Rosston Benefits Report did not provide marginal costs of production and demand elasticities for different types of programming are inapposite. DirecTV Comments at 61. Drs. Rosston and Topper reply that "[i]t is well recognized that the production of video programming can involve significant upfront fixed costs, but that the marginal costs of serving an additional subscriber are negligible . . . . [T]he marginal cost to Comcast of distributing NBCU content to additional subscribers will include 49 percent rather than 100 percent of the variable margin earned by NBCU on sales to Comcast[,]" and "the elasticity of demand is used to calculate the pass-through rate. With an empirical estimate of the of the pass-through rate, it is not necessary to estimate the demand elasticity." Rosston/Topper Reply Report ¶¶ 33-34.

207 Rosston Benefits Report ¶ 83.

208 DirecTV Comments at 60.

209 Rosston Benefits Report ¶ 11.

210 *Id.*

Channel, Versus, and G4 increased, on average, at a greater rate ({{ }}) than the investments made in all "Sports," "Arts & Entertainment," and "Niche" networks not owned by Comcast, which increased, on average [[ ]].[211] Data from SNL Kagan also show that, between 2005 and 2009, ratings for these same Comcast networks experienced an average increase of [[ ]], greater than the [[ ]] average ratings increase for all "Sports," "Arts & Entertainment," and "Niche" networks not owned by Comcast.[212]

In sum, Applicants' showing of the benefits to consumers resulting from the reduction of double marginalization as a result of the proposed transaction should not suffer the same fate as DirecTV's claims in the *News Corp-Hughes Order*. Applicants' quantifications use both third-party and actual internal data, all of which are provided to the Commission in the record of this proceeding. DirecTV's argument ignores these facts and must be rejected.

2. Sharing Advertising Resources

The economies of scale and scope that are likely to result from the sharing of advertising resources present a benefit of the transaction that will provide more attractive advertising services to advertisers and consumers.[213] As Dr. Rosston observed, by combining resources among sales forces in local markets, "the joint venture should be able to offer improved advertising services."[214] According to Dr. Rosston, the NBCU O&O stations and Comcast

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211 Rosston/Topper Reply Report ¶ 14 & Ex. 1.

212 *Id.* ¶ 15 & Ex. 2.

213 Rosston Benefits Report ¶ 76; *see also* Rosston/Topper Reply Report ¶ 85 ("[T]he proposed transaction will allow the new entity to accelerate better tailoring and targeting of its advertising for consumers, including offering advanced, interactive advertising; offering more attractive packages and streamlined negotiations for advertisers; and enabling increased efficiency for Comcast and NBCU through economies of scale and scope in advertising sales.").

214 Rosston Benefits Report ¶ 76.

Cable's advertising division, Comcast Spotlight, could realize cost synergies at the local level, including market research and back office support.[215] As a result of having additional breadth and reach, Comcast could have more flexibility in designing attractive packages of advertising inventory to reach audiences sought by advertisers.[216] Furthermore, the transaction will allow NBCU to participate in targeted advertising and other advanced advertising initiatives in which Comcast has invested significant resources.[217]

In a letter to Assistant Attorney General Varney and Chairman Genachowski, Senator Herb Kohl urged the DOJ and the Commission to condition their approval of the transaction on, among other things, "a requirement that Comcast and NBC maintain a firewall between advertising in markets where NBC owns and operates broadcast station(s) with respect to the sales of advertising on NBC owned broadcast stations."[218] The advertising structural separation proposed by Senator Kohl would vitiate the efficiencies described by Dr. Rosston and the resulting benefits to consumers and advertisers alike with no countervailing benefit, and therefore should be rejected.[219]

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215 *Id.* ¶ 76, n.113.

216 *Id.* ¶ 76, n.113.

217 *Id.* ¶¶ 44-47.

218 Letter from Senator Herb Kohl, Chairman, Subcomm. on Antitrust, Competition Policy and Consumer Rights, Senate Comm. on the Judiciary, to Christine Varney, Assistant Attorney General, DOJ Antitrust Division, and Julius Genachowski, Chairman, FCC, MB Docket No. 10-56, at 6 (May 26, 2010).

219 Some commenters attempt to depict as a harm the increased advertising efficiencies that will result from the transaction. Of course, Comcast's ability to provide advertising services more efficiently will not harm competition, but, rather, will be procompetitive. *See* James B. Speta, Technology Policy Institute, Screening and Simplifying the Competition Arguments in the NBC/Comcast Transaction (May 5, 2010), http://www.techpolicyinstitute.org/files/nbc_comcast_speta.pdf. Of Dr. Mark Cooper's misguided claim that the transaction will harm competition in the market for local advertising, Speta says: "[T]his asserted harm is not caused by the merged company garnering market power in the advertising market. Rather, according to this theory, local broadcasters lose advertising revenues because the merged firm is able to offer advertisers a superior product: A standalone broadcaster will not be able to offer package deals and volume discounts for advertising across multiple channels the way that Comcast/NBC will be able to do post-merger. An injury to competitors because the new

Numerous advertising and marketing agencies with clients who value multiplatform advertising opportunities have expressed their support of the proposed transaction and agree with Applicants that increased access to multiplatform advertising opportunities presents a significant benefit, not the harm that Senator Kohl's proposed condition suggests.[220] For example, the CEO of Starcom MediaVest Group, one of the world's largest media communications firms, believes the joint venture will "expand the marketplace by improving our ability to reach mass audiences through [Comcast and NBCU's] national network of programming assets, broadcast stations, and cable networks."[221] Starcom MediaVest Group also believes that the NBCU transaction will spur the development of addressable advertising, thus increasing "the efficiency and effectiveness of advertising."[222] And increased marketer investment in addressable advertising products and services offered by Comcast and NBCU will result in "more money for content creators to develop quality programming."[223] The Founder and CEO of TargetCast tcm, a New York-based

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company is able to offer a better product is not an antitrust injury; it does not hurt competition. In fact, this scenario identifies not an anti-competitive effect of the merger, but a procompetitive efficiency." *Id.* at 8. Allegations that harm will result from Comcast's increased ability to provide more attractive advertising packages are addressed in Section IV.B.4, below.

220 *See* Rosston/Topper Reply Report ¶¶ 45-46. *See, e.g.*, Letter from Mark Petrosky, Chief Operating Officer, Duffey-Petrosky & Co., to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 15, 2010); Letter from Laura Desmond, Global CEO, Starcom MediaVest Group, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 18, 2010); Letter from Steve Farella, Chairman and CEO, TargetCast tcm, to Julius Genachowski, Chairman, FCC, and Michael J. Copps, Robert M. McDowell, Mignon Clyburn, and Meredith Attwell Baker, Commissioners, FCC, MB Docket No. 10-56 (June 18, 2010); Letter from Curt Hecht, CEO, VivaKi Nerve Center, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 18, 2010); Letter from Phil Cowdell, CEO, Mindshare N.A., to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 21, 2010); Letter from Paul Woolmington, Founding Partner, Naked Communications, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 21, 2010).

221 Letter from Laura Desmond, Global CEO, Starcom MediaVest Group, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 18, 2010).

222 *Id.*

223 *Id. See also* Rosston Benefits Report ¶ 67 ("If advanced advertising proves to be successful, then MVPDs, content owners, advertisers, and viewers will all benefit.").

independent media and marketing firm, believes that "[b]y placing highly-valued content and distribution under one roof, Comcast and NBC will be better able to provide advertisers what they want . . . namely, the ability to better reach the 'right' audience, to create an interaction between that audience and our customers, and to develop more reliable metrics that will show, for the first time in the history of television, exactly how many viewers are viewing and reacting to an ad."[224] Finally, the CEO of VivaKi, a digital media initiative of the Publicis Groupe, believes that the transaction "will encourage technological innovation that will ultimately make advertising more efficient and more relevant to consumers."[225] Applicants urge the Commission to seriously consider the views of these advertising industry professionals and reject any proposal for structural separation of advertising assets that would dilute or eliminate a demonstrably important benefit of the transaction for advertisers and consumers.

E. Competition and Competitors Will Respond to the Increased Investment in Programming, New and Innovative Services, and the Efficiencies That Will Flow from the Proposed Transaction.

The Commission has long recognized that the public interest is advanced when a transaction enables a newly combined entity to become a better and more efficient competitor, not only because such improved competition directly benefits consumers, but also due to the efforts of competitors to respond to new competitive pressures.[226] As Dr. Rosston explained, the

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224 Letter from Steve Farella, Chairman and CEO, TargetCast tcm, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56, at 1 (June 18, 2010).

225 Letter from Curt Hecht, CEO, VivaKi Nerve Center, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 18, 2010).

226 *See, e.g.*, *Cellco Partnership-Bell Atlantic/NYNEX Order* ¶¶ 45-46 (The Commission finds merit to applicants' claims "that the significant efficiencies and economies of scale will generate additional funds for investment in network infrastructure and for the provision of new products and that such additions will promote competition among wireless providers."); *Comcast-AT&T Order* ¶ 184 ("We . . . agree with the Applicants that the greater scale and scope of the merged entity is likely to spur new investment. The development and deployment of new technologies often entails a significant up-front, fixed investment. The merged company should have a greater

new entity's increased investment in national and local programming should stimulate competitive programmers and MVPDs to follow suit. "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."[227] Stakeholders such as Cisco recognize that this phenomenon is real: "Moreover, and as recent experience has shown, the combined entity may prompt other service providers and content developers and distributors to innovate, thereby creating a more competitive marketplace."[228]

The competitive development of VOD illustrates this dynamic. As described in Applicants' Public Interest Statement, Comcast was among the first MVPDs to provide VOD on a large scale. Consumers responded positively to this new service, and once Comcast demonstrated to content owners that the VOD model worked economically, more of them made compelling content available for the VOD platform. By championing the growth of VOD, Comcast has been able to benefit not only its customers but also program producers.[229] Other

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ability to spread those fixed costs across a larger customer base, which should in turn foster incentives for investment by the merged entity, as well as other businesses that seek to sell equipment, technology, and services to the merged entity."); *MCI-WorldCom Order* ¶¶ 198-99 (finding that the merger "will result in a stronger competitor" because, "as a result of combining certain of the firms' complementary assets, the merged entity will be able to expand its operations and enter into new local markets more quickly than either party alone could absent the merger").

227 Rosston Benefits Report ¶ 8.

228 Cisco Comments at 2. *See also* Common Sense Media Comments at 5 ("By improving access to – and promotion of – parent information, the Applicants are poised to set a powerful example for other industry players.").

229 Public Interest Statement at 6-7. As stated by Dr. Rosston, "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. These reactions by other companies will increase content

MVPDs – even MVPDs such as Dish Network and DirecTV, for whom VOD has presented significant technological challenges[230] – have embraced the VOD model, such that VOD service is offered on a widespread basis today.

HD television is another example of this competitive dynamic at work. DirecTV and Dish Network led the charge to roll out large numbers of program offerings in HD, and other MVPDs have responded with equal or greater efforts to meet this demand. As noted in the Public Interest Statement, "Comcast Cable has been engaged in a massive company-wide effort to convert its expanded basic tier of service – and soon broadcast basic as well – to digital-only delivery so that analog bandwidth can be reclaimed for even more HD channels, more and better VOD, faster Internet speeds, and other new services.[231]

Another promising technology provides an example of this dynamic process in its early stages: 3D television. As noted above, in early April 2010, Comcast partnered with the Augusta National Golf Club to provide two hours of 3D coverage for each day of the 2010 Masters Golf Tournament.[232] On June 11, 2010, ESPN 3D launched its services with the 2010 FIFA World Cup, available to approximately 45 million U.S. homes subscribing to Comcast, DirecTV, and AT&T.[233] On July 13, 2010, DirecTV exclusively telecast the 2010 Major League Baseball All-

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availability to the benefit of consumers. The vertical relationship and new ownership of NBCU is likely to create some of this competitive dynamic." Rosston Benefits Report ¶ 66.

230 *See* Mari Rondeli, *Advanced Services Drive DBS Set-Top Forecast*, SNL Kagan, Sept. 23, 2009.

231 Public Interest Statement at 112.

232 *See, e.g.*, Andrew Vuong, *3-D Broadcast of Golf's Masters Draws Raves,* The Denver Post, Apr. 9, 2010 ("Early adopters of 3-D TVs among Comcast subscribers, and those who attended the cable giant's viewing demonstration at Cherry Hills Country Club, were treated Thursday to a stunning visual display. Viewers were able to clearly see elevation changes in the fairways, the undulation on greens and the depths of the bunkers."), *available at* http://www.denverpost.com/business/frontpage/ci_14848605.

233 *See* Mike Snider, *At Home Review: Watching the World Cup in 3D*, USA Today Technology Live, June 17, 2010 ("Although most TV makers have had 3D TVs in stores for only a few months – only 4 million to 7 million

Star Game in 3D.[234] These developments are the sign of a fiercely competitive and healthy market. The proposed transaction will advance Comcast's ability to initiate additional innovations in the future, continuing the dynamic competitive process whereby new programs and services are created and emulated, all to the benefit of consumers.[235]

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The benefits of the proposed transaction demonstrate that the public interest, convenience, and necessity would be served by grant of the Applications.

IV. THE TRANSACTION WILL NOT HARM COMPETITION OR THE PUBLIC INTEREST.

The proposed transaction takes place against the backdrop of an extremely competitive and dynamic marketplace, and will not harm the public interest by diminishing competition in any relevant market.[236] Part A, below, responds to criticisms of the relevant market definitions

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are expected to be sold worldwide by year's end – ESPN launched its 3D channel with World Cup matches including South Africa vs. Mexico.") *available at http://content.usatoday.com/communities/technologylive/post/2010/06/espn-kicks-off-3d-channel-with-world-cup-soccer/1.*

234 *See* Press Release, DirecTV, Inc., *DIRECTV, Major League Baseball and FOX Sports to Deliver Historic National 3D Broadcast of the 2010 All-Star Game* (Jul. 9, 2010) *available at* http://dtv.client.shareholder.com/releasedetail.cfm?ReleaseID=486581.

235 As stated by Dr. Rosston, "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." Rosston Benefits Report ¶ 69.

236 The European Commission has completed its competition review of the transaction and determined that the proposed transaction is compatible with the European market and with the European Economic Area Agreement. The European Commission specifically concluded that the proposed transaction "does not significantly impede effective competition in the internal market or any substantial part of it in the EEA countries concerned" with respect to 1) licensing of TV content, 2) online advertising, 3) production and acquisition of motion pictures, and 4) home entertainment. The European Commission also concluded that the proposed transaction is "unlikely to harm consumer choice and cultural diversity in the EEA." European Commission, Merger Procedure Article 6(1)(b) Decision (EC) No. COMP/M.5779 of 13 July 2010, COMP Operations, Case No. COMP/M.5779 - Comcast/NBC Universal ¶¶ 43, 44, 52, 59, 76 (July 2010).

proposed in the Public Interest Statement. Part B explains that the proposed transaction presents no horizontal competitive concerns. Part C identifies and assesses the reasons that the combined entity cannot and will not pursue anti-competitive foreclosure strategies against competing MVPDs. Part D counters claims that the combined entity would pursue anti-competitive foreclosure strategies by withholding distribution from unaffiliated content providers. Part E demonstrates that the proposed transaction presents no threat of vertical harm to competition in online video. Part F concludes by addressing various commenters' efforts to employ this proceeding as a vehicle to air purported "competition" grievances that bear little, if any, relationship to the proposed transaction and are, in any event, unfounded.

A. Relevant Markets

An important part of determining whether the proposed transaction would harm consumer welfare is to assess whether competition from other entities would be sufficient to protect consumers from any purported diminution of competition between Comcast and NBCU. The delineation of relevant markets provides a structure within which to make that assessment, and the Commission has typically commenced its analysis of the potential adverse competitive effects of prior transactions by defining the relevant market(s) in which the applicants operate.[237] In evaluating prior transactions, the Commission has defined "[a] relevant market . . . as a product or group of products and a geographic area in which the product or products are produced or sold such that a hypothetical profit-maximizing monopolist would impose at least a

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[237] *News Corp.-Hughes Order* ¶ 50; *AT&T-Comcast Order* ¶ 42; *Adelphia Order* ¶ 59-60; s*ee also In the Matter of Application of EchoStar Communications Corporation (a Nevada Corporation), General Motors Corporation and Hughes Electronics Corporation (Delaware Corporations) (Transferors), and EchoStar Communications Corporation (a Delaware Corporation) (Transferee)*, Hearing Designation Order, 17 FCC Rcd 20559 ¶ 106 (2002) ("*EchoStar-DirecTV HDO*").

'small but significant and nontransitory' increase in price ("SSNIP"), assuming the terms of sale of all other products are held constant."[238]

In the Public Interest Statement, Applicants identified markets for MVPD services, video programming, and broadband Internet services that the Commission had defined in evaluating prior transactions.[239] Applicants also explained that the Commission need not define any formal market or markets for Internet content in order to assess the proposed transaction.[240] Should the Commission wish to define such markets, however, Applicants explained that it should consider two distinct, but related, markets for Internet content and online video distribution.[241] Below, Applicants review each of the markets identified in the Public Interest Statement, addressing, where applicable, objections that certain commenters have made to these definitions.

1. MVPD Services

MVPDs include cable operators, DBS providers, and wireline competitors, such as telephone companies and "overbuilders." MVPDs acquire programming and offer it to consumers, deriving revenues from subscription fees and often from the sale of advertising time (to the extent they obtain the right to sell it through their program carriage agreements). The

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238 *News Corp.-Hughes Order* ¶ 50; *see also* U.S. Department of Justice and the Federal Trade Commission, Horizontal Merger Guidelines, § 1.11 (1997) ("*Horizontal Merger Guidelines*") (explaining that an "agency, in most contexts" will use a "price increase of five percent lasting for the foreseeable future" to determine the effect of a "small but significant and nontransitory" increase in price as an "increase of five percent lasting for the foreseeable future"). A hypothetical monopolist could only impose and profit from such a price increase in the absence of sufficiently attractive alternatives to its products. If sufficiently substitutable products exist, consumers would respond to the monopolist's price increase by switching to those products, which in turn "would result in a reduction of sales [for the monopolist] large enough that the price increase would not prove profitable." *Horizontal Merger Guidelines* § 1.11. Therefore, the definition of a product market is adequately comprehensive when there are no sufficiently attractive alternatives not already included in the group of products comprising the definition. The relevant product market is "the smallest group of products that satisfies this test." *Id.*

239 *See* Public Interest Statement at 83-88.

240 *Id.* at 88-89.

241 *Id.* at 88.

Commission has repeatedly found that the relevant product market in which to analyze competition faced by cable operators includes services offered by all MVPDs.[242] No commenter has suggested a narrower product market definition for MVPD services, and there is no reason for the Commission to adopt one in this case.

In prior transactions, the Commission has concluded that "the relevant geographic market for MVPD services is local because consumers make decisions based on the MVPD choices available to them at their residences and are unlikely to change residences to avoid a small but significant increase in the price of MVPD service."[243] Moreover, to simplify the analysis, the Commission has aggregated consumers that can make the same choice among MVPDs into larger relevant geographic markets.[244] Again, no commenter has proffered a different analysis, and there is no reason for the Commission to diverge from its prior approach in this case.

2. Video Programming

As explained in the Public Interest Statement, the Commission should not define video programming markets any differently or more narrowly here than it did in the *News Corp.-Hughes* and *Adelphia* Orders.[245] In prior transactions, the Commission has found that markets that include video programming are "differentiated product markets," in which networks that differ "significantly in terms of characteristics, focus, and subject matter," may compete with

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242 *See, e.g., Adelphia Order* ¶ 63; *AT&T-Comcast Order* ¶ 89; *AOL-Time Warner Order* ¶ 244; *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor to AT&T Corp., Transferee*, Memorandum Opinion and Order, 14 FCC Rcd 3160 ¶ 21 (1999) ("*AT&T-TCI Order*").

243 *News Corp.-Hughes Order* ¶ 62.

244 *Adelphia Order* ¶ 64; *News Corp.-Hughes Order* ¶ 62.

245 *See* Public Interest Statement at 86; *Adelphia Order* ¶ 67; *News Corp.-Hughes Order* ¶ 60.

each other for MVPD carriage as imperfect substitutes.[246] The Commission adopted its most narrow and specific video programming market definitions in the *News Corp.-Hughes Order*. There, the Commission separated the programming offered by News Corp. into three categories: "(1) national and non-sports regional cable programming networks; (2) regional sports cable networks; and (3) local broadcast television programming."[247] Following this precedent, the Commission in the *Adelphia Order* (where no broadcast assets were at issue) evaluated two video programming markets: "(1) national cable programming networks and (2) regional cable networks, particularly regional sports networks."[248]

Among commenters in this proceeding, only Bloomberg has requested that the Commission deviate from its prior approach to defining the market for video programming.[249] For reasons detailed in Section IV.D.2.a below, the Commission should reject Bloomberg's request to define "TV business news programming" as a relevant product market. As discussed below in Section IV.D.2, the analysis that Bloomberg's retained economist, Dr. Marx, employs to define a distinct relevant market for "TV business news programming" is deeply flawed, both from an econometric and theoretical perspective.[250] Dr. Marx relies on a correlation analysis and a hypothetical-monopolist test that yield absurd results.[251] Employing Dr. Marx's invalid approach, one can purport to demonstrate that a variety of arbitrary network groupings constitute

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246 *Adelphia Order* ¶ 66; *News Corp.-Hughes Order* ¶ 60.

247 *News Corp.-Hughes Order* ¶ 60 (citations omitted).

248 *Adelphia Order* ¶ 67.

249 Bloomberg Petition to Deny at 28.

250 *See* Mark Israel & Michael L.Katz, Economic Analysis of the Proposed Comcast-NBCU-GE Transaction, MB Docket No. 10-56, ¶¶ 176-186 (July 21, 2010) ("Israel/Katz Reply Report") (Attached as Exhibit 2).

251 *Id.*

distinct "product markets."[252] Accordingly, the Commission should reject Dr. Marx's analysis, and adhere to the approach to defining video programming markets that it has taken in evaluating prior transactions.

3. High-Speed Internet Services

Comcast provides HSI services to approximately 16.4 million customers. In evaluating prior transactions, the Commission has found that residential broadband Internet services constitute a relevant product market.[253] The Commission concluded that the relevant geographic market for HSI services (like the market for MVPD services) is local.[254] The Commission reasoned that a "consumer's choice of broadband Internet access provider is limited to those companies that offer high-speed Internet access services in his or her area."[255] There is no reason, and no commenter has suggested one, for the Commission to define a narrower product or geographic market in this transaction.

4. Internet Content and Distribution

The Commission has never attempted to define a market or markets for Internet content and distribution.[256] Under any plausible market definition, however, any market(s) for Internet

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252 *Id.* at ¶ 172 (explaining that one of Dr. Marx's "princip[al] lines of argument supports the conclusion that CNBC and Teen Nickelodeon are substitutes for one another but the Disney Channel and Nickelodeon are not.")

253 *AOL-Time Warner Order* ¶ 56; *AT&T-Comcast Order* ¶ 128. The Commission has found that the market for high-speed Internet services includes, among other things, Internet access services provided "over coaxial cable in the form of cable modem service offered by cable operators, and over copper wires in the form of digital subscriber line ("DSL") services by local exchange carriers." *AT&T-Comcast Order* ¶ 128 (citations omitted).

254 *AOL-Time Warner Order* ¶ 74; *AT&T-Comcast Order* ¶ 128.

255 *AT&T-Comcast Order* ¶ 128.

256 The most extensive discussion of Internet content in the context of a merger may be found in *AT&T-Comcast Order* ¶¶ 140-45. There, the Commission rejected commenters' assertions that the merger would harm Internet content by causing the merged firm to discriminate against unaffiliated Internet content, to harm competing broadband access services by limiting the availability of its affiliated content to their subscribers, and to acquire monopsony power in the market for the purchase of broadband content. The Commission rejected these assertions

content and distributions would be dynamic, highly fragmented among numerous content providers and aggregators, and at least national – if not global – in geographic scope.

As discussed in the Public Interest Statement, the Commission need not formally define online video distribution market(s) in order to assess the proposed transaction. If it chooses to do so, however, the Commission should consider two distinct but related product markets: (1) an upstream market in which video content is licensed to online video distributors, and (2) a downstream market in which these distributors make that video content available to consumers online, whether via streams or downloads.[257] The upstream market would consist of both the professionally created video content that comprises the market definition for video programming discussed above, as well as a broad range of "user-generated" video content. In many cases, a single firm may participate at both levels of the chain of distribution.[258]

5. Online Video Distribution and MVPD Services Are Distinct.

As discussed in the Public Interest Statement and in Drs. Israel and Katz's report, titled *The Comcast/NBCU Transaction and Online Video Distribution* ("Israel/Katz Online Video Report")[259], the product market for MVPD services and any product markets for online video

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of harm as unduly speculative, not transaction-specific, and/or more appropriately addressed in rulemaking proceedings.

257 Public Interest Statement at 88–89.

258 The Commission should reject EarthLink's request to define the geographic market for Internet content (as opposed to broadband Internet service) as "inherently local in nature." EarthLink Petition to Deny at 16-17. Unlike the markets for MVPD and broadband Internet services, which are local by virtue of cable operators' and telcos' provision of these services within limited geographic areas, online video distributors distribute content over the Internet on a national or international basis. While some Internet content providers may gear their content towards local audiences, EarthLink has failed to substantiate its implausible claim that the geographic market for Internet content is local, as opposed to national or international, in scope.

259 Mark Israel & Michael L. Katz, The Comcast/NBCU Transaction and Online Video Distribution, MB Docket No. 10-56 (May 4, 2010) ("Israel/Katz Online Video Report").

distribution are distinct.[260] Certain commenters, however, recommend that the Commission deviate from this approach and include online video distribution within the product market for MVPD services.[261] The Commission should reject this approach. First, available data make it clear that MVPD services and online video distribution are *complementary*, not competitive. Second, for a number of technological, pricing-related, and rights-related reasons, online video is likely to remain complementary to MVPD services for the foreseeable future.[262]

a. MVPD Services and Online Video Distribution Are Complementary.

The available data support the view that online video distribution is a complement to, rather than a substitute for, MVPD services.[263] There is no evidence that significant numbers of consumers have replaced MVPD subscriptions with online video viewing.[264] Instead, "despite growth in video content available online, the number of MVPD subscribers has continued to grow in recent years, both in absolute terms and as a percentage of television households."[265] Similarly, television viewing has remained at an all-time high (with the average television viewer watching more than 158 hours of television per month), even as online video viewing has grown

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260 Public Interest Statement at 83–84, 88–89.

261 *See, e.g.*, Dish Petition to Deny at 23-26; Decl. of Mark Cooper & Adam Lynn at 62 (attached to CFA *et al.* Petition to Deny) ("Cooper/Lynn Decl.") (arguing that "cable operators will actively resist and seek to undermine that competition" from online video distributors); The Greenlining Institute Petition to Deny at 39 (arguing that "online video viewership is itself a competitive alternative to MVPD service").

262 As discussed in Sections IV.B.2 and IV.C.6, even if the Commission were to conclude that the product market for MVPD services includes online video distribution, the joint venture would not result in vertical or horizontal anti-competitive harm.

263 Israel/Katz Online Video Report ¶ 37.

264 *See* Craig Moffett, *et al.*, Quick Take – Pay TV Industry Continues to Grow . . . In Fact, It Accelerates. Still No Sign of Cord Cutting, Bernstein Research, Mar. 1, 2010, at 1, 2; Jon Gibbs & Howard Shimmel, Cutting the Cord? Unraveling the Relationship Between TV and Streaming Video, The Nielsen Company, Apr. 25, 2009, at 6.

265 Israel/Katz Online Video Report ¶ 37.

(with the average online video viewer watching 3 hours and 10 minutes of online video per month).[266] The Nielsen Company, a leading provider of media analytics, has recently reported that "for now the idea of a cord-cutting revolution appears to be purely fiction."[267] As the Vice Chair of The Nielsen Company recently testified: "[A]rguments about the rise of "cord cutting" – in which viewers cancel their TV service in favor of Internet or mobile video – are exaggerated. Only a limited amount of "cord cutting" is actually occurring, so the argument that cable operators will withhold content from online distributors due to concerns over revenue loss does not match up with the data."[268]

The very different ways in which consumers watch traditional television and online video reinforce the conclusion that consumers regard the two as complements, not substitutes. Viewers generally utilize online video to supplement their viewing of traditional television, which is greater than ever.[269] As discussed in the Israel/Katz Online Video Report, survey data and analyst reports have shown that the primary reasons consumers view network-quality content online include catching up on episodes of programs that consumers missed when they initially aired on television, watching video programming at work, and watching extra content, such as

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266 *See* The Nielsen Co., Three Screen Report, Vol. 8, at 4 (1st Quarter 2010) ("Nielsen Three Screen Report, 1st Quarter 2010"), *available at* http://en-us.nielsen.com/etc/medialib/nielsen_dotcom/en_us/documents/pdf/three_screen_reports.Par.67041.File.dat/Nielsen_Three%20Screen%20Report_Q12010.PDF; *see also* Statement of Susan Whiting, Vice Chair of The Nielsen Company, Before the FCC, Chicago, Illinois, July 12, 2010 at 3 ("First, at the present time, viewers appear to be adding to, rather than replacing, viewing platforms. Online video viewing and mobile video viewing are increasing at the same time that traditional TV viewing continues to rise. Online video thus currently appears to be a complement to TV rather than a substitute") (*available at* http://blog.nielsen.com/nielsenwire/wp-content/uploads/2010/07/Susan-Whiting-FCC-07-13-10.pdf).

267 Israel/Katz Reply Report ¶ 196 (quoting "Busting the Cord-Cutting Myth: Video in the Interactive Age," Nielsen Wire, June 16, 2010); *accord* Israel/Katz Online Video Report ¶ 37.

268 Susan Whiting, Vice Chair of The Nielsen Company, Statement before the FCC, Chicago, Illinois, at 3 (July 13, 2010).

269 Israel/Katz Online Video Report ¶ 37.

behind-the-scenes clips.[270] Viewers also spend vastly more time watching television than they do watching video delivered online or through a portable or mobile device.[271] And whereas online video viewing is sporadic and "default off" (*i.e.*, consumers go online only to seek on demand programming), television viewing is "default on" (*i.e.*, consumers leave the television on and change channels to find something to watch).[272]

Certain commenters nonetheless argue that online video distribution should be included in the definition of MVPD services.[273] Given that no data supports significant substitution between online video distribution and MVPD services, these commenters rely on anecdotes,[274] unsubstantiated claims, and, in some cases, outright mischaracterization. For example, CFA *et al.*, The Greenlining Institute, and Dr. Singer rely upon the few reports purporting to show that the expansion in online video distribution has resulted (or will result) in significant cord cutting.[275] In one such report, the Yankee Group hypothesizes on the basis of a consumer survey

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270 *Id.* ¶ 29-31 (citing The Nielsen Company, "Three Screen Report," Volume 7, 4th Quarter 2009, at 5 (3rd Party Attachment 25)).

271 *See* Nielsen Three Screen Report, 1st Quarter 2010, *supra* note 266, at 4.

272 Israel/Katz Online Video Report ¶ 28 (quoting Interview with Matt Bond, Executive Vice President of Content Acquisition for Comcast Cable (Mar. 24, 2010)).

273 Some commenters agree that online video is not sufficiently substitutable with the services provided by MVPDs to justify expanding the product market definition of MVPD services. *See, e.g.*, ACA Comments at 36; EarthLink Petition to Deny at 15-17; DirecTV Comments at 4 n.8; American Antitrust Institute Comments at 16-17.

274 *See* Marvin Ammori, *TV Competition Nowhere: How the Cable Industry is Colluding to Kill Online TV*, Free Press, 12-14 (2010) (attached to Cooper Decl.).

275 Some commenters assert that the Israel/Katz analysis fails to consider the potential impact of the proposed transaction on "cord shaving," whereby consumers subscribe to a traditional MVPD for their baseline service, but purchase fewer supplementary services (*e.g.*, premium channels or pay-per-view content) than they would have purchased in the absence of online video options. *See, e.g.*, AOL Comments at 7. Drs. Israel and Katz, however, have expressly addressed this possibility and concluded that Comcast would have little ability to use NBCU programming to limit cord shaving. *See* Israel/Katz Online Video Report ¶ 50 n.73. The transaction could affect cord shaving only if Comcast were acquiring premium channels that it could withhold from online video distributors in an effort to discourage MVPD subscribers from dropping the premium elements of their subscriptions. NBCU's channels, however, are broadcast and basic cable channels that cannot be used to limit cord shaving. *See id.* The only premium content that Comcast will acquire as part of the transaction is Universal Studios content, but, as Drs.

that "1 in 8 consumers will cut off pay TV services completely or move down to a basic service over the next 12 months."[276] This hypothesis, however, rests on arbitrary and implausible assumptions, including that "half of the 13 percent who say they didn't know about cord-cutting but would consider it" and five percent of the "47 percent who say they haven't thought about it at all," would in fact cut the cord within the next twelve months.[277] As Drs. Israel and Katz observe, according to this "strikingly aggressive" methodology, "if the entire sample had responded that they had not thought about cord-cutting at all, then the Yankee Group still would have concluded that 5 percent were likely to cut the cord. And, if the entire sample had said they had not even previously known cord cutting was an option but would consider it, then the Yankee Group would have concluded that fifty percent of households were likely to cut the cord."[278] Simply put, there is no empirical or logical basis for this interpretation of the survey results.

Commenters also cite to summaries of a report by Convergence Consulting, which claims that nearly 800,000 U.S. households had cut the cord as of year end 2009.[279] The basis, if any,

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Israel and Katz have explained, there is no basis on which to conclude that withholding Universal Studios content from an online distributor would significantly limit that distributor's ability to attract customers: over the last five years, Universal Studios has ranked sixth among studios in domestic box office receipts, with a share of only 10.1 percent. *See id.* {{

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[276] Vince Vittore & Dmitriy Molchanov, *Consumers Consider Axing the Coax*, Yankee Group, April 22, 2010 at 9; Cooper/Lynn Decl. at 62 n.124; Singer Decl. ¶ 115.

[277] *See* Vittore & Molchanov, *supra* note 277, at 9. Specifically, Yankee Group concludes that 1 in 8 pay TV subscribers will cut the cord in the next year on the basis of the following arbitrary assumptions: that a "high percentage" of those "considering" cutting the cord will do so; that "half" who "didn't know" about cord cutting, but said they "would consider it," will cut the cord; and that "less than 5 percent" of those who "haven't thought about it at all will" cut the cord. *Id.*

[278] Israel/Katz Reply Report ¶ 203.

[279] Convergence Consulting, *The Battle for the North America (US/Canada) Couch Potato: New Challenges and Opportunities in the Content Market*, April 2010; Cooper/Lynn Decl. at 62 n.124; Greenlining Institute Petition to Deny at 39 n.185; Singer Decl. ¶ 115.

for this claim is not disclosed in these summaries, and the Commission should therefore give the claim little credence. Moreover, even if this claim were accurate, 800,000 households would represent less than one percent of all U.S. MVPD subscribers.[280] And the summaries to which commenters cite do not disclose what percentage of the alleged cord cutters did so in favor of online video, as opposed to local broadcasting or eliminating video consumption altogether. In short, the summaries of this report provide no reliable evidence that a meaningful number of cable subscribers have cut the cord in favor of online video services.[281]

Commenters also mischaracterize Comcast's corporate disclosures. For example, Dish Network purports to demonstrate that Comcast has previously admitted that online video distribution is part of the market for MVPD services by misleadingly quoting from a Comcast SEC filing that briefly alludes to *possible* competition from online video distributors.[282] Dish Network fails to note that the quotation is contained in a catch-all list of "Other competitors"

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[280] Israel/Katz Reply Report ¶ 224.

[281] Beyond citing these reports, Dr. Singer also raises a host of additional objections to the conclusion that online video services are complementary to MVPD services. *See* Singer Decl. ¶¶ 201-206. Dr. Singer argues, for instance, that evidence that traditional television viewing remains at an all-time high even as online video viewing has grown is not evidence that they are complements, because complementarity requires that traditional television viewing increase as the *price* of online video viewing falls. *See id.* ¶ 201. This argument, however, fails to recognize online-video consumption has increased in tandem with increases in the *quality* of broadband and online offerings. As such, traditional television viewing has increased even as the *quality-adjusted* price of online video has fallen, satisfying the economic definition of complementarity. *See* Israel/Katz Reply Report ¶ 205. As explained in the Israel/Katz Reply Report, Dr. Singer's remaining objections are likewise without merit. *See id.* ¶¶ 215-221.

[282] Dish Network Petition to Deny at 24. Dish Network also cites a schedule to Comcast COO Steve Burke's employment agreement as evidence that MVPDs and online video distributors compete with one another. *Id.*; *see* Comcast Corp., Current Report (Form 8-K) at 15-16 (Dec. 22, 2009), *available at* http://files.shareholder.com/downloads/CMCSA/765068790xOxS950103-09-3354/1166691/950103-09-3354.pdf. The schedule, however, does not support Dish Network's claim. The clause identifies several online video distributors as engaged in "competitive video programming distribution;" it does not state that these distributors compete with Comcast's MVPD service, as opposed to its online video distribution services. Dr. Cooper and Mr. Lynn also cite to the same schedule to support similar claims. *See* Cooper/Lynn Decl. at 54 n.93.

with which Comcast's cable business "*may* compete *to some degree*."[283] This list includes competitors "other" than Comcast's principal competitors – DBS, phone, wireline, and SMATV – which, unlike online video distribution, are each discussed at length in the SEC filing.[284] Moreover, the fact that there "may" be "some degree" of competition between MVPD services and online video distribution is not sufficient to show that they are part of the same product market for antitrust purposes.[285] Indeed, the same catch-all list includes "local television broadcast stations," which the Commission has previously determined are not in the same relevant product market as MVPD services.[286]

In light of the evidence discussed above, defining a single product market that encompasses both MVPD services and online video distribution would be inconsistent with, among other things, the Commission's prior determination that MVPD services and local broadcast television services are *not* part of the same product market. Specifically, the Commission has noted that, "[a]lthough broadcast stations offer some degree of the specialized programming provided by the specialized basic cable network services," local broadcast television services do not offer sufficient "specialized programming" to be deemed "close

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283 Comcast Corp., Annual Report (Form 10-K) at 6 (Feb. 23, 2010) (emphasis added), *available at* http://files.shareholder.com/downloads/CMCSA/939359230x0xS1193125-10-37551/1166691/filing.pdf. CFA also cites to the same Annual Report to support similar claims. *See* CFA *et al.* Petition to Deny at 26; Cooper/Lynn Decl. at 54 n.93.

284 Comcast Corp., Annual Report (Form 10-K) at 5-6 (Feb. 23, 2010).

285 *See FTC v. Swedish Match*, 131 F. Supp. 2d 151, 165 (D.D.C. 2000) (holding that despite "some degree of competition between, and overlapping consumer usage of, [two products], . . . [the products] constitute[] distinct relevant product market[s]" for antitrust purposes).

286 Comcast Corp., Annual Report (Form 10-K) at 5–6 (Feb. 23, 2010); *see also News Corp.-Hughes Order* ¶ 75; *In the Matter of Competition, Rate Deregulation, and the Commission's Policies Relating to the Provision of Cable Television Services*, Report, 5 FCC Rcd 4962 ¶ 69 (1990); *EchoStar-DirecTV HDO* ¶¶ 109-115 (finding that the relevant product market is all MVPD services including DBS services).

substitute[s]" to MVPD services.[287] The same rationale compels the conclusion that online video distribution, which does not offer "specialized programming" such as premium network content and live sporting events, is not a "close substitute" to MVPD service.[288] Moreover, since the degree of substitution appears to be higher for local broadcast television than for online video distribution, it would be incongruous for the Commission to include online video distribution in the market for MVPD services while excluding local broadcast television.[289]

Commenters seeking to include online video distribution within the product market definition for MVPD services would have to show that a substantial number of consumers would switch from MVPD services to online video distribution in the face of a "small but significant and nontransitory" price increase for MVPD services.[290] Given the minimal evidence of any cord cutting to date, as well as the very different ways in which consumers use online video and traditional television, the possibility of a hypothetical monopolist of MVPD services being unable to profit from such a price increase because consumers would cut the cord *en masse* and switch to online video is implausible.

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[287] *In the Matter of Competition, Rate Deregulation, and the Commission's Policies Relating to the Provision of Cable Television Services*, Report, 5 FCC Rcd 4962 ¶ 69 (1990).

[288] While some online video sources feature programming aired simultaneously on cable channels (*e.g.,* ESPN3.com, mlb.com), these are isolated exceptions.

[289] Notably, an analysis performed for Comcast found that households more often cut MVPD service to watch local broadcast television than to watch video online. *See* Frank N. Magid Associates, Inc., "Video Content Everywhere Series: Video To PC, for Comcast Corporation," at COMCAST_0000962-964, 971 (finding that {{

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[290] *See News Corp.-Hughes Order* ¶ 50 (explaining that "[a] relevant market is defined as a product or group of products and a geographic area in which the product or products are produced or sold such that a hypothetical profit-maximizing monopolist would impose at least a 'small but significant and nontransitory' increase in price, assuming the terms of sale of all other products are held constant."); *Horizontal Merger Guidelines* § 1.11.

b. Online Video Distribution Is Likely to Remain Complementary to MVPD Services.

Online video is likely to remain complementary to MVPD services for the foreseeable future because online video distributors attempting to replace, rather than supplement, MVPD services would face substantial impediments related to technology, price, and rights.

i. There Are Technological Impediments to Online Video Competing with MVPD Service.

As an initial matter, there are the substantial technological impediments to both broadband Internet networks and mobile wireless networks delivering online video on the scale and reliability necessary to be a substitute for MVPD service.

First, an online substitute for an MVPD service would be technically infeasible, given network capacity constraints. As discussed above, the average television viewer watches more than 158 hours of television per month, while the average online video viewer watches only 3 hours and 10 minutes of online video per month. If consumers were to watch hypothetical online substitutes for MVPD service with the same frequency with which they watch traditional television, the average household would download more than 288 gigabytes of data per month, or approximately 100 times the bandwidth consumed by the median online household today.[291]

Online video viewing at such a scale would cause serious congestion and disruption to the Internet (*e.g.*, picture "freezes"), especially during peak viewing times, resulting in slower or

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[291] Israel/Katz Online Video Report at 43, n.58; Comcast Corporation, Frequently Asked Questions about Excessive Use, *available at* http://customer.comcast.com/Pages/FAQViewer.aspx?seoid=Frequently-Asked-Questions-about-Excessive-Use#normal (last visited July 18, 2010) (the average household with a Comcast high speed data subscription only downloads approximately 2 to 4 GB per month).

degraded service.[292] Such frequent service degradations (which customers do not experience when watching traditional MVPD service) would make it difficult for an online provider to position itself as an attractive alternative to traditional MVPD service.

These problems would be exacerbated by the peaks associated with traditional television viewing patterns. Unlike current online video viewing, which is generally steady and spread out over the course of the day, traditional television viewing is concentrated – ordinarily during primetime hours.[293] Live events, including sporting events and breaking news, can also cause very large spikes in viewership. Viewing peaks such as these could overwhelm local broadband Internet networks; indeed, if only a small percentage of customers in a geographic area simultaneously attempt to stream video, network congestion and degraded service can result.[294] An online video distributor could not position itself as a replacement for traditional MVPD service if it were unable to offer degraded service during prime-time hours, live sporting events, and breaking news coverage.[295]

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[292] *Id.* ¶¶ 45-47; Comcast Corporation, Frequently Asked Questions about Excessive Use, *available at* http://customer.comcast.com/Pages/FAQViewer.aspx?seoid=Frequently-Asked-Questions-about-Excessive-Use#normal).

[293] *Id.* ¶ 45 n.51 (observing that the number of streams recorded for YouTube's largest live streaming event, an October 2009 U2 concert, was substantially lower than the number of viewers in the U.S. for an airing of a typical top-20 rated television show).

[294] *Id.* ¶ 46 (describing the limitations of various wireline local Internet networks should they need to support an online substitute to traditional MVPD service). For example, Comcast's local broadband Internet networks are currently configured in such a manner that approximately 275 cable modems share access to each downstream port in a cable modem termination system ("CMTS"). One or more "downstream channels" are associated with each port, through which subscribers can download data via their cable modem. If consumers viewed as few as seven high-definition video streams at the same time, it would exceed the capacity of a downstream channel. And while today up to four downstream channels may be delivered out of a single CMTS port, even given this increase in capacity, just 10 percent of modems in a geographic area simultaneously streaming high-definition video would surpass the network capacity. *Id.*

[295] *Id.*

Second, the content delivery costs associated with providing an online substitute to MVPD service would be substantial. Online video distributors rely on content distribution networks ("CDNs"), such as Akamai and Limelight, to deliver their content to consumers.[296] NBCU's current cost for CDN services is approximately {{ }} per GB, which would translate to a cost of {{ }} per month to distribute the 288 GB of data estimated to be necessary for an online viewer with viewing habits similar to those of the traditional television viewer.[297] {{

}}[298] Thus, even if providing an online substitute to MVPD service were technically feasible, the high content delivery costs associated with providing that service would make it uneconomic.[299]

Similarly, mobile wireless networks do not have the capacity to deliver an online video in a volume that could serve as a substitute for traditional MVPD service.[300] Mobile data network capacity would be insufficient to accommodate large numbers of users watching television in traditional amounts via mobile devices.[301] Further, while the bit rates of 3G mobile data

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296 *See id.* ¶ 13.

297 *Id.* ¶ 44, n. 59 (citing Interview with Marc Siry, SVP, Digital Products & Services, NBCU, April 7, 2010 and Matthieu Coppet *et al.*, "Can Pay TV Benefit From Online Video?" *UBS Investment Research*, June 22, 2009, Table 7).

298 *Id.* ¶ 44 n.60 (citing Glenn Reitmeier, SVP, Technology Standards & Strategy, NBCU, April 29, 2010 interview).

299 *Id.* ¶ 46 n.68.

300 *See generally id.* ¶ 46.

301 The existing limitations of overall network capacity are notably demonstrated by the congestion AT&T Wireless has suffered, in part due to the demands of iPhone users, which has led AT&T to cease offering unlimited data plans. *See* Press Release, AT&T, AT&T Announces New Lower-Priced Wireless Data Plans to Make Mobile Internet More Affordable to More People (June 2, 2010), *available at* http://www.att.com/gen/press-

networks in place today can deliver a single stream of standard-definition video, they cannot handle high-definition video.[302]

Broadband Internet networks continue to improve, and Comcast is and will be at the forefront of these efforts. Nonetheless, given the considerable technological impediments, online video distribution providers are unlikely to find it either technologically feasible or economical to be able to offer consumers the scale and reliability necessary for online video to be a substitute for traditional MVPDs.

ii. There Are Significant Pricing Impediments to Online Video Programming Becoming a Substitute for MVPD Service.

In addition to the technological constraints described above, pricing impediments also indicate that online video distribution will remain a complement to MVPD services for the foreseeable future. An online video distributor that seeks to offer network-quality content to a large number of users over the Internet may face high content-acquisition costs. Content owners that currently license their content for exhibition on MVPD services may approach the licensing of content for online exhibition differently depending upon whether they view it as a complement to, or a substitute for, MVPD service. Online video distribution that is complementary to MVPD service provides programmers with both an opportunity to promote the viewing of their content on traditional MVPD service and a source of revenue that supplements their MVPD distribution revenue, which may lead them to license content to online services on

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room?pid=17991&cdvn=news&newsarticleid=30854&mapcode=financial|Wireless. *See also* Jennifer Valentino-DeVries, *Analysts' View: AT&T's New Plan Is Good for the Industry*, June 2, 2010, http://blogs.wsj.com/digits/2010/06/02/analysts-view-atts-new-plan-is-good-for-the-industry/ (citing complaints about AT&T's strained network, particularly in large cities like New York and San Francisco).

302 Israel/Katz Online Video Report ¶ 46.

more favorable terms. Programmers would likely recognize, however, that licensing content to an online service seeking to serve as a substitute for MVPD service would reduce the revenues they receive from MVPDs to the extent such services cannibalize traditional MVPD service.[303] In such a situation, programmers would charge a price for licensing their content to such an online provider that would at least make up for any hypothetical loss of their revenues from traditional MVPDs.[304]

The MVPD model, which provides a dual revenue stream of subscription fees and advertising revenue, historically has generated sufficient returns to content creators to support their investment in very expensive program production. As explained in the Israel/Katz Online Video Report, "there is little evidence that an advertising-only model will successfully support the distribution of broadcast and cable network programming at anything approaching the quality and variety available through traditional MVPDs."[305] Jeff Zucker, president and CEO of NBCU, has expressed the concern of programmers that they must find a workable economic model for online distribution to avoid "replacing analog dollars with digital pennies" (or more recently "digital dimes.").[306] David Zaslav, chief executive of Discovery expressed a similar sentiment: "Long form content on all these [Internet] platforms is diminishing the value of your cable

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303 Israel/Katz Reply Report ¶ 210.

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}} This would also be the case even if only a portion of the linear content were available for NBCU to license to the online video distributor.

305 Israel/Katz Online Video Report ¶ 19.

306 What's On - and Where? NBC Universal's Jeff Zucker on Why He Believes Television Is Still Paramount, Wall Street Journal, June 2, 2009, *available at http://online.wsj.com/article/SB10001424052970203431004574197742621635548.html*.

customer."[307] Les Moonves, president and CEO of CBS, made similar comments: "If too much of my audience shifts and it's just pennies online, I'm not going to be able to produce that content."[308] Put simply, online video is highly unlikely to develop as a substitute for MVPD service. Any potential switching from the MVPD dual-revenue stream model to one that generates less revenue for the same video content jeopardizes the ability of programmers to invest in expensive, high-quality programming, and thus there is limited if any incentive on their part to encourage such a development in the future.

iii. There Are Significant Rights Impediments to Online Video Programming Becoming a Substitute to MVPD Service.

Securing the rights to the content necessary to create an "online MVPD" service would also prove difficult. Content owners use release windows strategically to manage the distribution of their film and television content and to maximize the revenue they receive for that content.[309] The development and production of content are expensive, and windowing is widely employed in the industry as a means of providing distributors with attractive distribution rights while creating opportunities for content creators to profitably license their programming.[310] Pursuant to the windowing strategy, the rights granted by content owners to networks, and in turn by networks to distribution entities, are only limited-use rights and permit only certain types of

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307 *Cableshow - Cable Warns Programmers on Rush to Web*, Reuters, May 11, 2010, *available at* http://www.reuters.com/article/idUSN1112329120100512.

308 *Cableshow - Execs See New Web Models, iPads in Cable's Future*, Reuters, May 12, 2010, *available at* http://www.reuters.com/article/idUSN1222351520100512.

309 Israel/Katz Online Video Report ¶ 11.

310 *Id.*

exhibition.[311] As a result, the rights a cable network has to distribute content as part of its linear network often do not permit the network to license that content for use as part of one or more of the various potential online business models.[312] And while networks now typically seek to acquire certain additional digital exhibition rights for current-season episodes as part of their agreements with studios, the exact terms and scope of these exhibition rights can vary widely, and are evolving as they remain the subject of active negotiation between networks and studios.[313]

This complicated "thicket of rights," in which multiple rights holders may have partial rights (for particular distribution channels) or rights to restrict others from using the content at certain times or in certain ways, would pose a difficult challenge for an online video programming distributor that wishes to offer a broad range of programming in order to compete with traditional MVPDs.[314] Even in the common case in which a broadcast or cable network has obtained rights from the studio that include the rights for some on-demand airings of the programming, these rights may not extend to the particular business model that an online distributor has adopted.[315] Specifically, NBCU has obtained {{

}} that it licenses from third-party studios for

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311 *Id.*

312 *Id.*

313 *Id.* ¶ 12.

314 *Id.*

315 *Id.* ¶ 13. For example, a network's rights to exploit a program online may be limited to a free-on-demand ("FOD") ad-supported service, which must contain advertising but for which no transactional or subscription fee may be charged to the consumer. In such a case, the network would not be able to license this content to an online distributor that offers an SVOD service. *Id.*

exhibition on its linear broadcast and cable television networks.[316] Many programs on NBCU's broadcast and cable television networks are licensed from third-party studios, {{

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Even for programs produced by NBCU studios, {{

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316 {{ }} *See id.*

317 *Id.* ¶ 13.

318 *Id.*

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Accordingly, while the amount of video available online is expected to grow, an online video distributor attempting to replace MVPD service would face significant challenges. Moreover, even were an online provider to overcome the impediments related to technology, pricing, and acquisition of rights discussed above, it would still need to differentiate itself from at least three – and often four or five – MVPDs available in any given market. These considerations support the view that online video will remain a complement to, rather than a substitute for, MVPD service.

B. The Transaction Will Not Reduce Horizontal Competition.

The proposed transaction presents no horizontal competitive concerns. In general, horizontal concerns arise when a transaction diminishes competition by enhancing the likelihood of "coordinated interaction" among firms selling in the relevant market or of "unilateral effects," which result when the transacting firms find it profitable post-transaction unilaterally to raise prices while reducing output.[321] The proposed transaction poses no increased likelihood of either coordinated or unilateral harm to competition. The competitive overlap between Comcast's and NBCU's businesses is extremely limited, and the combined company will continue to face vigorous competition in every market in which there is any arguable competitive overlap.[322]

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321 *See Horizontal Merger Guidelines* §§ 2.1, 2.2; U.S. Department of Justice and Federal Trade Commission, *Draft Revised Horizontal Merger Guidelines* §§ 6-7 (rel. Apr. 20, 2010), *available at* http://www.ftc.gov/os/2010/04/100420hmg.pdf ("*Draft Revised Horizontal Merger Guidelines*").

322 Contrary to claims that the transaction would eliminate competition between NBC O&Os and Comcast's RSNs (*see* Franken at 3), the two are not particularly close substitutes. *See* Katz/Israel at 87. RSNs focus on providing local and regional sports content and especially live performances by local sports teams, whereas the NBC

In addressing these markets, Applicants supply estimates of the Herfindahl-Hirschman Index ("HHI"), a measure employed by the Horizontal Merger Guidelines to assess market concentration.[323] The Draft Revised Horizontal Merger Guidelines recently issued jointly by the Federal Trade Commission and U.S. Department of Justice, Antitrust Division, characterize markets with HHIs below 1,500 as unconcentrated, markets with HHIs between 1,500 and 2,500 as moderately concentrated, and markets with HHIs above 2,500 as highly concentrated.[324] Transactions are unlikely to have adverse competitive effects and ordinarily require no further analysis if they (1) result in unconcentrated markets; or (2) produce an increase in the HHI of less than 100 points.[325] A transaction falling outside these safe harbors is not necessarily anti-competitive, but may require further analysis to assess its pro- or anti-competitive effects.[326] The HHI levels in the proposed transaction fall well below these thresholds and so should raise no risk of horizontal anti-competitive effects. Moreover, a qualitative assessment of potential theories of anti-competitive effects confirms that the transaction will not reduce horizontal competition in any way.

1. Any Cable Network Overlap Is Very Limited.

The proposed transaction takes place against the backdrop of an entertainment programming marketplace that is highly dynamic and competitive. NBCU – both today and post-transaction – faces competition from a large and growing roster of content providers. There

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Television Network provides a range of programming including news, entertainment, and national sports content, and NBCU owns extremely limited broadcast rights to local sporting events. *Id.* at 87-89.

323 *Draft Revised Horizontal Merger Guidelines* § 5.3.

324 *Id.*

325 *Id.*

326 *Id.*

are literally hundreds of cable television networks. In this highly competitive and dynamic marketplace, with large and well-established competitors such as Time Warner, Disney, Viacom, News Corp., CBS, Discovery, Liberty Media, H.W. Scripps, as well as scores of smaller competitors, the combination of Comcast's and NBCU's cable television networks will not diminish competition or otherwise harm consumers.[327]

As an initial matter, merely combining multiple networks is insufficient to establish horizontal competition concerns. To pose horizontal competition concerns, a combination of multiple networks must lead to a significant increase in concentration in a relevant antitrust market and eliminate substantial pre-transaction competition among the combining networks. As shown below, the proposed transaction satisfies neither condition.

As Drs. Israel and Katz explain in their *Economic Analysis of the Proposed Comcast-NBCU-GE Transaction* ("Israel/Katz Reply Report"),[328] the assertion by some commenters that the joint venture would be able to charge higher programming fees to MVPDs (which would be passed on to subscribers in the form of higher subscription prices) ignores this fundamental principle of horizontal merger analysis.[329] In particular, the "simple example" of alleged horizontal competitive harm presented by Dr. William Rogerson on behalf of the American Cable Association is a contrived example that bears no resemblance to the relevant market facts.[330] First, Dr. Rogerson counterfactually assumes that there are very few competing network owners (indeed, in his simple example, there are only two owners) when, in fact, the cable

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327 Public Interest Statement at 90–91.

328 *See* Israel/Katz Reply Report ¶¶ 102-108.

329 *See* Israel/Katz Reply Report ¶¶ 104–110.

330 Letter from Jeremy M. Kissel, Counsel for American Cable Association, to Marlene H. Dortch, Secretary, FCC, Exhibit 3 at slides 4-6 (Apr. 16, 2010).

programming market includes dozens and dozens of competing network owners, some of which own multiple cable networks. Second, Dr. Rogerson's analysis is entirely static and ignores the real-world phenomena of network entry, expansion, and content modifications that make the cable network industry highly dynamic. Finally, and most importantly, Dr. Rogerson's analysis is based on the false premise that the networks being combined in this transaction are close substitutes.[331] As shown below, the networks that NBCU and Comcast will contribute to the proposed joint venture are *not* close competitors. When any of Dr. Rogerson's counterfactual assumptions is adjusted to reflect reality, his conclusion that the proposed transaction will lead to horizontal harms is rebutted. Another commenter, Dr. Christopher Yoo, reaches the appropriate conclusion when he notes that, "[n]o matter how the issue is framed, the level of horizontal concentration in the market for video programming resulting from this merger is sufficiently low to justify clearing the merger without any [material risk of] serious injury."[332] Drs. Israel and Katz reach the same conclusion.[333]

a. The Proposed Transaction Will Not Significantly Increase Cable Network Concentration.

As the Commission has previously recognized, there are literally hundreds of national cable television networks and scores of regional cable networks that compete vigorously with each other for consumers' attention.[334] And the development of new networks shows no signs of

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331 As Drs. Israel and Katz note, the horizontal merger concerns discussed in Dr. Rogerson's analysis arise only for mergers that involve "a consolidation of close substitutes and/or a significant increase in market concentration." Israel/Katz Reply Report ¶ 104.

332 Yoo Comments at 26 (May 21, 2010).

333 Israel/Katz Reply Report ¶ 128.

334 *In the Matter of Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, 24 FCC Rcd 542 ¶ 20 (2009) (identifying 565 satellite-delivered national programming networks in 2006, an increase of 34 networks over the 2005 total of 531 networks).

abating – network choices for consumers have continued to expand as new networks have been created and existing networks have reformatted.[335] These networks include Fox Business Network, which was launched by News Corp. in 2007 and garnered 31 million homes in its first year.[336] Other networks have announced plans to launch in the near future, such as the Better Black Television network owned by Percy Miller in 2010.[337] Against this highly competitive and dynamic backdrop, the proposed transaction will not significantly increase concentration in video programming supplied to MVPDs under any plausible market definition.

As Drs. Israel and Katz show, NBCU's cable networks account for 10.6 percent of basic cable television viewing while Comcast's national cable networks account for only 2.2 percent.[338] In total, the combined entity will account for only 12.8 percent of basic cable television viewing – well below levels that traditionally have attracted competition concern.[339] Furthermore, the combined entity's viewing share will be smaller than those of either Viacom or Time Warner, and will be essentially tied with Disney.[340]

Employing the Horizontal Merger Guidelines' yardstick for assessing concentration, the pre-transaction HHI for basic cable television viewing is 948, and the post-transaction HHI will

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335 For a partial list of the scores of networks that have launched in recent years, see Comcast Information Request Response No. 46.

336 SNL Kagan, *Economics of Basic Cable Networks,* at 25 (2008).

337 BetterBlackTV.com, The Founder, http://www.betterblacktv.com/aboutbbtv.html (last visited July 18, 2010).

338 Israel/Katz Reply Report ¶ 113, Table V.3. ("These shares are based on gross impressions (average impressions per minute multiplied by minutes per broadcast), using Nielsen total day monthly average P2+ Live +7 ratings, January-December 2009. Basic cable networks exclude premium channels such as HBO. NBCU impressions include NBCU's fully-owned cable networks tracked by Nielsen and The Weather Channel. Comcast impressions include all Comcast's fully-owned national cable networks.")

339 *Id.*

340 *See* Nielsen Total Day Monthly Average P2+Live+SD Ratings, January-December 2009.

be 995.[341] Under the DOJ and FTC's Draft Revised Horizontal Merger Guidelines, the proposed transaction will result in an unconcentrated market (with an HHI less than 1500) and therefore is "unlikely to have adverse competitive effects and ordinarily require[s] no further analysis."[342] Application of the Agencies' current Horizontal Merger Guidelines yields the same enforcement conclusion.[343]

Furthermore, the proposed transaction will not adversely affect competition between or among national broadcast networks or regional sports networks. The Commission has concluded that general interest cable networks are not "adequate substitutes" for national broadcast networks or regional sports networks – *i.e.*, that national broadcast networks and regional sports networks are in separate and distinct markets from (and do not compete with) general interest cable networks.[344] Comcast does not own a broadcast network, so the transaction obviously will not reduce competition among broadcast networks. And NBCU does not own any regional sports networks, so there can be no reduction in competition among regional sports networks. Under the Commission's approach, national broadcast networks, national cable networks, and regional sports networks are each in separate product markets – so *by definition* there can be no elimination of competition between networks in these different categories since they are not substitutes for one another in the first place. Drs. Israel and Katz confirm this conclusion through several empirical studies. Using viewership shares within detailed demographic

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341 Israel/Katz Reply Report ¶113.

342 *Draft Revised Horizontal Merger Guidelines* § 5.3.

343 Under the current Horizontal Merger Guidelines, the proposed transaction produces an increase in the HHI of less than 100 points in a moderately concentrated market. The current Guidelines indicate that mergers falling in this region "are unlikely to have adverse competitive consequences and ordinarily require no further analysis." *Horizontal Merger Guidelines* § 1.51.

344 *News Corp.-Hughes Order* ¶ 133.

categories, Drs. Israel and Katz find that estimated "diversion rates" between Comcast RSNs and NBC O&O broadcast stations are uniformly low within each of the six DMAs which "overlap."[345] A "viewer duplication" study likewise concludes that RSN viewers are generally no more likely to watch the NBC broadcast network than the average television viewer and that "duplication" with other major broadcast networks (ABC, CBS, and Fox) is higher than with NBC.[346] Finally, Drs. Israel and Katz demonstrate, by analyzing prior integration events, that neither joint ownership of an O&O broadcast station and an RSN within a DMA nor joint ownership of an O&O station and a national cable television network is likely to give rise to horizontal price effects.[347]

In summary, because the cable programming market (and therefore the broader video programming market) will not experience any significant increase in concentration, the proposed transaction will neither reduce competition nor lead to higher programming prices to MVPDs or consumers.

b. The NBCU and Comcast Cable Networks Are Not Close Substitutes.

The Commission has previously recognized that "general entertainment and news cable programming networks participate in a highly competitive segment of [the] programming market with available reasonably close programming substitutes."[348] This conclusion applies without

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345 *See* Israel/Katz Reply Report ¶¶ 119-120. This "diversion rate" analysis reflects the extent to which viewers of a Comcast regional sports network would divert to the NBC broadcast network (and vice versa) if either were to become unavailable (or more expensive, by placement on a premium tier or otherwise).

346 *See id.* ¶¶ 122-123.

347 See id. ¶¶ 129-136.

348 *News Corp.-Hughes Order* ¶ 129.

qualification to the cable networks that NBCU and Comcast propose to contribute to their joint venture.

MVPDs seek to maximize their profits earned from the sale of monthly subscriptions and advertising slots. When choosing the profit-maximizing portfolio of cable networks to offer to subscribers and advertisers, an MVPD will regard as substitutable two networks that produce similar overall value even if they are very differently positioned in terms of their audience reach, audience demographics, and programming content. For this reason, the set of cable networks that belong to a properly defined market is extremely broad and includes, at a minimum, all of the general entertainment and news cable programming networks previously recognized by the Commission as belonging to the highly competitive programming market.[349]

Even if one were to analyze network substitutability on the basis of individual network characteristics – an approach that would lead to an artificially and unduly narrow view of the relevant market – the inescapable conclusion is that the cable networks owned by NBCU and Comcast are not close competitors for each other.

As noted above, MVPDs receive two principal revenue streams from carrying cable networks: monthly consumer subscription fees and advertising revenues. All else being equal, advertisers tend to regard cable networks as being more closely substitutable if they have similar audience reach and demographics. All else being equal, some consumers may regard cable networks with similar programming content as being more closely substitutable. The NBCU and Comcast networks, however, are not close substitutes for each other in terms of audience reach, audience demographics, or programming content, and each of the combining networks has many

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349 *Id.*

reasonably close substitutes not owned by Applicants. As a result, the proposed transaction will not eliminate substantial pre-merger competition among the combining networks – regardless of whether one considers network substitutability narrowly on a characteristic-by-characteristic basis or, more broadly (and appropriately), on the basis of overall network value to the MVPD.

i. The NBCU and Comcast Networks Are Not Close Substitutes in Their Audience Reach.

The NBCU and Comcast cable networks are not particularly close substitutes in terms of their audience reach. Audience reach is relevant to the generation of advertising revenues, because a wide reach enables national advertisers efficiently to access an unduplicated audience of potential consumers. Based on Nielsen total daytime ratings for all adult viewers, E! is the highest rated cable network owned by Comcast and it is ranked only 32nd among all basic and pay cable networks.[350] By contrast, NBCU owns four networks with broader audience reach than E! – namely, USA, Syfy, MSNBC and Bravo. Each of Comcast's other wholly-owned national cable networks (Versus, Style, Golf Channel and G4) has smaller reach than each of NBCU's English-language rated cable networks.[351] The NBCU and Comcast networks are not particularly close substitutes in terms of their audience reach, and numerous other cable networks offer a total audience reach comparable to the reach of each of the networks that will be combined in the proposed joint venture.[352]

Audience reach is also a proxy for a network's level of demand and brand recognition – another factor that is essential to determining whether two networks can be considered

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350 These findings are based on Nielsen total daytime ratings for basic and premium networks, for the period December 28, 2008 through November 8, 2009, for adults 18 and older.

351 For purposes of this analysis, we consider only networks that Comcast/NBCU actually own, not ones in which they have small but "attributable" interests.

352 *See* Israel/Katz Reply Report ¶ 104-105.

reasonable substitutes. Once again, among Comcast's stable of national networks, only E! has viewer ratings and subscriber demand comparable to that of NBCU's rated national networks.[353]

ii. The NBCU and Comcast Networks Are Not Close Substitutes in Their Audience Demographics.

The NBCU and Comcast networks also are not close substitutes in terms of their audience demographics. Advertisers are interested not only in the total number of viewers they can reach through a cable network advertisement, but also in attracting particular demographic groups (*e.g.*, men or women, younger or older viewers) that they think will be particularly interested in their advertised products. Figure V.3 from the Israel/Katz Reply Report, reproduced below, illustrates viewer demographics graphically and indicates that NBCU's and Comcast's cable networks face many competing networks with more similar audience profiles. The figure shows the Nielsen ratings shares (represented by the size of the circles), gender skew and age skew of national cable networks.[354]

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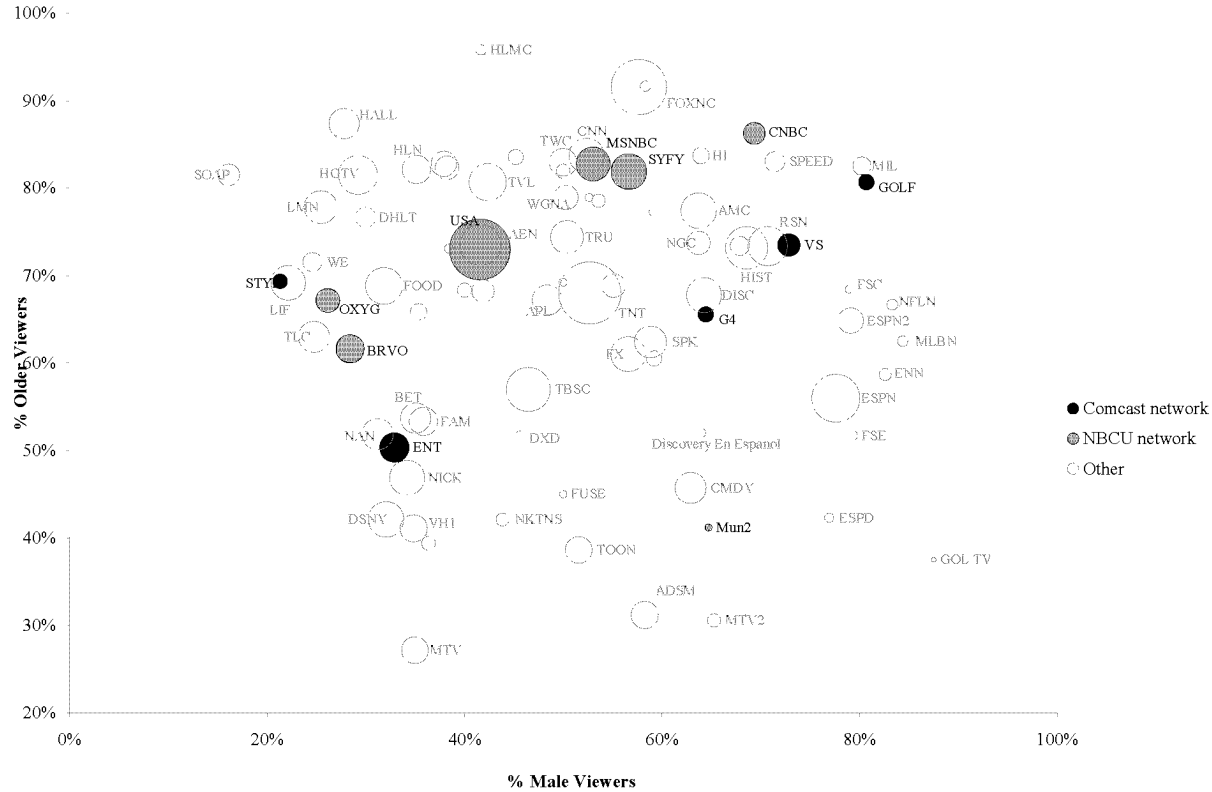
353 *See* Nielsen Ratings for Basic and Premium Cable Networks by Total Daytime Audience Reach, December 29, 2008–November 8, 2009; SNL Kagan, *Economics of Basic Cable Networks*, 2009, at 49–50.

354 This figure is based on National Nielsen total day Live+7 person ratings for the period April 26, 2010 to May 26, 2010.



Notes: Notes: "% Male Viewers" represents impressions by male viewers ages 18-64 as a percentage of impressions by all viewers ages 18-64. "% Older Viewers" represents impressions by viewers ages 35-64 as a percentage of impressions by viewers ages 18-64. Bubble size represents Nielsen shares for viewers ages 18 and over.
Source: National Nielsen total day Live+SD person ratings, 4/26/2010 - 5/26/2010

First, consider the networks owned by NBCU and Comcast that tend to attract predominantly male audiences. As the figure above shows, many networks owned by other firms have similar age and gender profiles. For example, the Speed Channel, the History Channel, and Fox Soccer Channel all have age/gender profiles similar to the Versus network. Similarly, Fox News Channel and AMC – among others – have age/gender audience profiles similar to CNBC. The Golf Channel has a gender profile similar to ESPN, ESPN2, and the NFL Network and an age profile similar to the Military Channel, the Speed Channel, and others.

Turning next to networks that attract female-skewed audiences, while Oxygen and Style skew highly toward female audiences and E! and Bravo skew somewhat toward a female audience, the figure clearly shows that several other networks owned by other firms have similar

age and gender profiles. For example, Lifetime has an age/gender profile that is more similar to both Oxygen and Style than they are to each other. In addition, WE tv and TLC have demographic profiles similar to Style, Oxygen, and Bravo. Similarly, the Disney Channel, ABC Family, Nickelodeon, BET, and Nick-at-Night all attract audience demographics that are similar to the profile of E!.

In summary, the national cable networks owned by NBCU and Comcast are not close substitutes from the perspective of their viewer demographics. Drs. Israel and Katz verify this conclusion through a "diversion rate" analysis on these cable networks' viewership data, which confirms the absence of any basis for finding horizontal effects.[355]

iii. The NBCU and Comcast Networks Are Not Close Substitutes in Their Programming Content.

The NBCU and Comcast networks also are not close substitutes in terms of their programming content. To begin, NBCU's cable news networks, CNBC and MSNBC, have no close programming substitutes within Comcast's roster of entertainment and sports-oriented cable networks.

NBCU's highest ranked cable network, the USA Network, is a general entertainment network showing a combination of movies and drama and comedy series. As the Commission has previously noted, there are many other general entertainment networks (including A&E, TNT, TBS, FX, Discovery Channel, and Lifetime among others), and none of Comcast's entertainment networks is uniquely close to the USA Network in its programming content. NBCU's other English language entertainment cable networks (Bravo, Chiller, Oxygen, Sleuth, and Syfy) tend to emphasize particular entertainment genres – for example, Sleuth highlights

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[355] Israel/Katz Reply Report ¶ 128.

mystery series and films and Syfy emphasizes science fiction and fantasy programming – but none can be considered a particularly close substitute to the various entertainment networks owned by Comcast. The same is true for NBCU's Bravo and Oxygen networks and Comcast's Style and E! networks; while these networks include a significant amount of programming appealing to female viewers, all belong to the same general competitive programming set as Lifetime, VH1, WE tv, ABC Family, HGTV, The Food Network, TLC, and other networks that attract (or will attract) largely female audiences.

Finally, Comcast's regional sports networks are not close programming substitutes to NBCU's cable networks and instead find closer substitutes among the various Fox regional sports networks, team-owned RSNs, and perhaps other cable networks with sports programming. Analyses of diversion rates and viewer duplication conducted by Drs. Israel and Katz confirm this conclusion.[356]

2. Any Internet Content Overlap Is Very Limited.

a. No Competitive Concerns in a Hypothetical Market for Online Video Distribution

Today, there are myriad websites on which video programming can be found. Applicants' websites account for no more than a small fraction of the viewership and advertising revenues associated with online video programming. Any suggestion that the combination of the NBCU and Comcast online properties will cause horizontal competitive concerns in a hypothetical online video programming "market" is without merit. And while various commenters complain of the elimination of "direct competition" between the parties,[357] none has

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356 *See* Israel/Katz Reply Report ¶¶ 121, 123.

357 *See, e.g.*, CFA *et al.* Petition to Deny at 22–23.

explained how consumers would be injured by a transaction that combines sites representing only a tiny fraction of all online video programming, and none has presented market share figures to dispute that Applicants' post-transaction share in online video, however defined, is negligible.

Comcast distributes long-form video content on Comcast.net (the portal for its HSI service), Fancast.com, and sites associated with its cable networks. NBCU's online video properties are those associated with its networks (*e.g.*, Bravo.com, nbc.com, and USA.com). NBCU also has a non-controlling minority stake in Hulu.com.[358] Several commenters (*e.g.*, CWA and Dish Network[359]) express concern about the elimination of "direct competition" between Hulu and Fancast. Even if NBCU controlled Hulu – which it does not – these are only two of the hundreds of websites on which video programming is viewed online. Each of the broadcast networks (*e.g.*, ABC.com and TV.com (CBS)) has its own site on which video programming can be viewed. There are a variety of other sites on which content from various sources is aggregated, such as yahoo.com, youtube.com, netflix.com, iTunes, and veoh.com.

Given the vast array of sites available, it is not surprising that the combined Internet products of Applicants account for only 0.3 percent of total daily unique page views and 1.6 percent of total Internet advertising revenue.[360] Measured by videos viewed, Comcast's online

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358 Hulu is a joint venture among Disney, Fox, and NBCU. Hulu sells advertising (until very recently, its only revenue stream) independently of, and in competition with, its joint owners. NBCU maintains only a non-controlling minority interest in Hulu, and post-transaction Hulu will remain independently managed. Accordingly, Hulu's 4.0 percent share of videos viewed online should not be attributed to NBCU.

359 Decl. of Mark Jackson at 9 (attached to Dish Network Petition to Deny) ("Jackson Decl."); CWA Comments at 47.

360 Public Interest Statement at 94 (citing comScore, Media Metrix Report, November 2009, *available at* http://www.comscore.com/; comScore, Ad Metrix report, October 2009, *available at* http://www.comscore.com/).

video properties make up only 0.3 percent of videos viewed online, and NBCU video properties make up 0.7 percent.[361]

Even if the relevant market were defined to include only professional online video content, the parties' market shares would remain quite low. Including only professional video content, the properties of Comcast and NBCU account for approximately 1.0 percent and 2.0 percent of the market, respectively, for a combined share of approximately 3.0 percent.[362] In a hypothetical market for professional online video content, the combination of Comcast and NBCU assets would produce an HHI increase of only 2.9, well below any conceivable threshold for competitive harm.[363] Neither advertisers – none of whom have filed comments opposing this transaction, and several of whom have filed comments supporting the transaction – nor viewers would find their online video programming options limited as a result of this transaction.

Additionally, online video is a highly competitive and dynamic marketplace, with new competitors frequently emerging and existing competitors expanding and improving their online offerings. No meaningful impediments prevent other entrants from developing and offering online video distribution services that, like the online distribution services offered by Comcast and NBCU, are complementary to traditional MVPD service.[364] The technology that is required to run such a website is widely available from third parties; in fact, Hulu currently relies on

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361 *Id.* at 94 (citing comScore, Media Metrix Report, November 2009, available at http://www.comscore.com/). Even if one improperly added the video views of Hulu, which NBCU does not control, the combined entities would represent only 5.0 percent of online video views. *Id.*

362 *Id.* at 96. Hulu's share of professional video is 10 percent, which if combined (inappropriately, as discussed above) with that of NBCU and Comcast, would result in a combined share under 15 percent. *Id.*

363 The HHI increase would be 19.2 if Hulu were to be included among NBCU's properties. *Id.* This increase in concentration would also be competitively insignificant. *Id.*

364 *Id.* at 97. As discussed above, however, there are significant impediments to offering an online video distribution service designed to serve as a *substitute* for traditional MVPD service.

several third parties to provide components necessary to run its web platform.[365] Moreover, online video distribution is complementary to MVPD service, and content owners are therefore willing to make available online to the extent that it supplements their existing revenue streams. For example, Netflix, Veoh, and Google have all recently reached agreements with content providers to make video content available on their online properties.[366]

b. Economic Realities – Not This Transaction – Will Determine Whether Hulu Continues to Provide Free, Ad-Supported Offerings.

Some commenters have expressed concerns that the transaction will eliminate Hulu as a free, advertising-supported service,[367] but these concerns are misplaced. To begin with, NBCU has long-term contractual commitments to provide content to Hulu on an advertising-supported basis, and these commitments will not be affected by the proposed transaction. NBCU does not control Hulu, and the combined entity will not control Hulu post-transaction – so there is simply no way that the transaction can result in a change in Hulu's business model. Additionally, post-transaction, Comcast will have no incentive to eliminate Hulu as a free, ad-supported service. Hulu, like other online video distribution services, is complementary to, and often beneficial to, Comcast's MVPD service – and, of course, to Comcast's HSI service as well.

Comcast has been a partner with Hulu through Fancast's free online service since Hulu launched. In fact, 40 percent of video views on Fancast are of Hulu content, and Fancast contributes three percent of Hulu's video views. In addition to helping Comcast promote Fancast, Hulu is a "popular destination[] for viewers looking to catch up on missed episodes, as

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365 Public Interest Statement at 97–98.

366 *Id.* at 98.

367 Greenlining Institute Petition to Deny at 39–40.

well as easily sample new programs and browse older fare," which enhances content value for both linear networks and MVPDs.[368]

Comcast will continue to be a supportive partner to Hulu, and it intends to be a driving force to bring *more*, not less, content to online video viewers, as distributing a broad array of content online is the best way to bring the greatest amount of viewers to both Fancast and Hulu; which in turn generates interest in Comcast's linear networks.[369] Even with this history, however, it should be noted that the online provision of network programming is still in an experimental stage. As discussed above, content owners[370] are seeking to find the right economic model for providing content online in a way that enables them to recoup the significant costs

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368 Will Richmond, *Online Video Creates New Complexities for TV Executives,* MediaPost Online Media Daily, Oct. 6, 2009, *at* http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=114918. S*ee also Web Play: Why Cable's Not Running from Online Video*, CableFax Daily, Mar. 2, 2009, *at* http://www.cablefax.com/cfp/cfax/ops/34306.html (reporting that "TV viewing continues to rise in tandem with Internet video viewing"). Hulu currently distributes its player on the Comcast online site Fancast, as well as on sites owned by AT&T and the Dish Network. Hulu also has deals in place for distribution of its player with nearly 50 other non-MVPD online distributors including MySpace, Yahoo, Microsoft, and AOL. Dish Network has complained that NBCU "downgrades" the quality of Hulu video streams provided on Dish Network's online video platform. Dish Network Petition to Deny at 16. This is inaccurate and misleading. Hulu – not NBCU – licenses its Hulu player on the same terms, including video quality, to all third-party distributors – including Comcast's Fancast. Hulu (which NBCU does not own or control) has chosen to provide its licensees a lower video resolution stream than is available on Hulu.com because, not surprisingly, Hulu seeks to draw traffic to its own website while at the same time seeking broad distribution of the Hulu player to third parties on equal terms.

369 Dish Network's claim that somehow Comcast would gain insight into future platforms Hulu may develop, giving it a competitive advantage post-transaction, has no merit. *See* Dish Network Petition to Deny at 20-21. To begin with, Dish Network fails to explain how this alleged harm will in fact hurt Dish Network or competition. Hulu will remain independently managed post-transaction, and it would not be in Hulu's economic interest to favor one MVPD over another because doing so would limit the number of access points to Hulu's owners' content for consumers and thus would limit its owners' ad revenue. Hulu will control access to information about what platforms it will support in the future, and Hulu has no interest in seeing any one of its members misuse such information to its narrow self-interest at the expense of Hulu's other members. Furthermore, Hulu has multiple MVPD distribution partners today – including Dish Network – and therefore Hulu has no incentive to advantage one over another.

370 For simplicity's sake, the discussion here frequently uses "content owners" as a shorthand for networks and other content suppliers. As discussed above, programming can involve a complex "thicket of rights." As a result, networks do not necessarily possess unfettered discretion in licensing all entities, modalities, business models, etc. While they may "own" the rights to aggregate a program into a channel that they can license to MVPDs, they may not "own" the rights to license that programming for over-the-top distribution, or on the Internet except to authenticated MVPD subscribers, or to a transactional or ad-supported distributor.

associated with producing network content.[371] Accordingly, some content owners have begun to pull back the amount of content available online out of concern that the free ad-supported model is insufficient to support their programming investments.

A number of content owners, including Hulu's owners, have already expressed concerns over whether online advertising revenues alone can support the creative infrastructure needed to produce and provide premium video content.[372] This is because online distribution typically allocates fewer minutes of advertising per show (and thus generates lower advertising revenues) than does traditional linear television distribution.[373] Evidence of the difficulty associated with bringing in online advertising dollars comes from the fact that *The Daily Show* and *The Colbert Report*, among Hulu's most-viewed shows, were removed from Hulu by Viacom after the company was not able to reach agreement with Hulu regarding the allocation of advertising revenues.[374] These difficulties will continue to exist for all the distributors in this market regardless of the proposed transaction.

Hulu recently launched a beta subscription-based service called Hulu Plus. {{

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371 *See* Israel/Katz Online Video Report ¶¶ 16–17.

372 *See* Yoo Comments at 26 (May 21, 2010) (discussing the challenges facing video programming distributors in their attempts to respond to reductions in advertising revenues); *see also* Michael Learmonth, *Hulu's a Towering Success—Just Not Financially*, Advertising Age, Mar. 29, 2010, *available at* http://adage.com/digital/article?article_id=143011 (explaining some of the difficulties of maintain a free, ad-supported model).

373 *See* Learmonth, *Hulu's a Towering Success – Just Not Financially*; *see also* Letter from Steve Wildman, Co-Director, James H. and May B. Quello Center for Telecommunication Management and Law at Michigan State University, to Marlene H. Dortch, Secretary, FCC, MD Docket. No. 10-56 (April 21, 2010).

374 *See, e.g.*, Brian Stelter, *Viacom and Hulu Part Ways*, New York Times, Mar. 2, 2010, *available at* http://www.nytimes.com/2010/03/03/business/media/03hulu.html ("'We tried to reach a deal. We got close. We continued to talk even over the weekend. But we could not agree on a price.'") (quoting an anonymous source involved in the negotiations).

}} NBCU believes Hulu as currently constituted is complementary to traditional linear television viewing (*e.g.*, by increasing interest in NBC television shows) and expects the addition of Hulu Plus will maintain the complementary nature of the service. As noted above, any attempt at this early stage in the emergence of online video programming to regulate the industry in any way risks stifling this experimentation and innovation.

As explained in Section IV.E.5 below, there is no basis to impose conditions or regulations on online video distribution in connection with this transaction (or otherwise). Post-transaction, the combined firm will continue to experiment with different economic models for the distribution of content on the Internet, including the free, ad-supported model and subscription-based model, and content will be provided online using different means depending on the particular economic considerations involved. Hulu's consideration of a subscription model as a supplement to the free ad-supported model it uses currently is but one example of the experimentation ongoing in the industry irrespective of the proposed transaction and which will continue post-transaction. Regulation in a nascent industry based on a speculative theory of harm would very likely prove detrimental to innovation, investment, and consumer welfare.

3. No Cable System/Broadcast Station Competition Issue

As explained in the Public Interest Statement, the services provided by NBCU's broadcast stations are not sufficiently substitutable with the services provided by Comcast cable

systems to constitute part of the same relevant product market.[375] For similar reasons, the Commission concluded in the *News Corp.-Hughes Order* that the combination of News Corp.'s Fox broadcast stations and DirecTV's MVPD business did "not present horizontal combination issues."[376] The same conclusion should obtain here. Aside from advertising sales (addressed below), no commenter has suggested a different result.

4. No Threat to Competition in Advertising

As established in Section IV.D.2, the economies of scale and scope that are likely to result from the sharing of advertising resources between Comcast and NBCU will provide a significant benefit to advertisers and consumers. Still, a small number of commenters – none of them advertisers or ad agencies – have erroneously claimed that the transaction will erode competition in certain purported markets for television advertising.[377] None of these commenters' statements is supported by an appropriate economic analysis. And, properly analyzed, the transaction does not raise competitive concerns in any plausible market for national or local advertising.

At the outset, it should be noted that a critical flaw in these commenters' purported definitions of the markets for national and local advertising is their exclusive and narrow reliance on *television advertising*. Both nationally as well as locally, advertisers employ a large number of ways to reach potential customers in addition to broadcast and cable television, including the Internet, radio, newspapers, mobile phones, billboards, yellow pages, direct mail, and other "out-

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375 *See* Public Interest Statement at 101-02.

376 *News Corp.-Hughes Order* ¶ 75.

377 *See, e.g.*, AOL Comments at 2, 4, 9; Bloomberg Petition to Deny at 45; CFA *et al.* Petition to Deny at 48-52; CWA Petition to Deny at 32-33; Dish Network Petition to Deny at 22-23.

of-home" advertising.[378] Television is by no means the dominant medium in this mix, and is under significant pressure from the rapid growth of online advertising media.[379] Seen from this perspective, the proposed transaction can have no plausible anti-competitive effects on advertising markets.

a. Product Improvements Are Not Anti-Competitive.

Several commenters, including CFA *et al.* and Dish Network, claim that the transaction is anti-competitive because it will allow the combined entity to offer a larger advertising inventory across platforms (*e.g.*, cable television, broadcast television, and online advertising) or across geographies (*e.g.*, local as well as national advertising) in its offerings to advertisers.[380] Under this theory, the transaction should be condemned because it will permit the combined firm to offer a superior product, which will have a competitive advantage in the marketplace. According to Dr. Cooper (writing for CFA): "A standalone broadcaster will not be able to offer package deals and volume discounts for advertising across multiple channels the way that Comcast/NBC will be able to do post-merger."[381]

The arguments advanced by these commenters are fundamentally flawed. A transaction that permits the merging parties to offer a superior product is *pro-competitive and efficiency-enhancing*. By allowing the parties to offer a package of complementary advertising inventory, and to offer volume discounts, the proposed merger will generate efficiencies, lower prices,

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378 *See* Rosston/Topper Reply Report ¶ 40.

379 *See id.* ¶¶ 41-42 & Exs. 5, 6.

380 *See* CFA *et al.* Petition to Deny at 50-52; Dish Network Petition to Deny at 22-23 & Jackson Decl. at 9-11.

381 CFA *et. al* Petition to Deny at 51; Cooper/Lynn Decl. at 20.

greater innovation, and an overall increase in competition.[382] It is well settled that "the purpose of the antitrust laws . . . is the protection of *competition*, not *competitors*."[383] The object of the Communications Act is no different. There is simply no basis to object to a transaction that permits a firm to offer an improved and enhanced product to consumers, even if this may harm some competitors.

Drs. Rosston and Topper observe that commenters claiming competitive harm ignore the reality that "neither NBCU nor Comcast currently has a large share in the broad, dynamic marketplace for advertising, and the proposed transaction will result in only a very small increase in concentration in that broad marketplace."[384] Moreover, the commenters' concerns are rebutted by those most likely to be affected – the advertising and marketing agencies themselves.[385] No advertisers or marketing agencies have filed comments objecting to the proposed transaction. Several, however, have filed comments expressing their support for the transaction, and agreeing that the innovations that will result present a significant benefit.[386] The CEO of Starcom MediaVest Group, for example, has commented that the joint venture will "expand the marketplace by improving our ability to reach mass audiences";[387] the founder and CEO of

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382 *See* Rosston/Topper Reply Report ¶ 45; *see, e.g.*, *Draft Revised Horizontal Merger Guidelines* § 10 ("[M]erger-generated efficiencies may enhance competition by permitting two ineffective competitors to form a more effective competitor, *e.g.*, by combining complementary assets."); James B. Speta, Technology Policy Institute, Screening and Simplifying the Competition Arguments in the NBC/Comcast Transaction (2010), *available at* http://www.techpolicyinstitute.org/files/nbc_comcast_speta.pdf.

383 *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338 (1990) (internal quotations omitted)).

384 Rosston/Topper Reply Report ¶¶ 45, 48.

385 *Id.* ¶ 46.

386 *See supra* Section III.D.2.

387 Letter from Laura Desmond, Global CEO, Starcom MediaVest Group, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 18, 2010).

TargetCast tcm has stated that, post-transaction, "Comcast and NBC will be better able to provide advertisers what they want";[388] and the CEO of VivaKi has said that the transaction "will encourage technological innovation that will ultimately make advertising more efficient and more relevant to consumers."[389]

Equally unwarranted is the concern expressed by AOL that the combined entity could harm competition by tying advertising across multiple media platforms or by requiring exclusivity from advertisers.[390] Such tying or exclusivity arrangements raise competition concerns only where a transaction would grant market power to the entity in question, and that is not the case here.[391] In addition, Bloomberg and CFA *et al.* raise more genre-specific concerns that also fail to describe any plausible competitive harms that could result from the transaction.[392] These arguments fail for the same reasons efforts to define overly narrow programming genre

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388 Letter from Steve Farella, Chairman and CEO, TargetCast tcm, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 18, 2010).

389 Letter from Curt Hecht, CEO, VivaKi Nerve Center, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 18, 2010).

390 *See* AOL Comments at 2, 4, 9.

391 Rosston/Topper Reply Report ¶ 46 ("A necessary but not sufficient condition for tying or exclusivity to harm advertisers is that the parties have significant market power in the sale of advertising, which Comcast and NBCU do not have. . . . In fact, advertisers have many options to reach potential customers and the new company's share of advertising sales will be small.").

392 Bloomberg claims that "Comcast could bundle advertising time on BTV with advertising on its own programming networks with similar demographic appeal." Bloomberg Petition to Deny at 45. Bloomberg's proposed definition of a narrow market for "TV business news programming," however, is implausible. *See* Rosston/Topper Reply Report ¶¶ 55-64 & Exs. 9-12. Moreover, Bloomberg's concern that Comcast would be able to bundle CNBC advertising at heavily discounted prices disregards the widely held view that discounted prices are generally good for consumers in the absence of predation (which is highly unlikely here). *See id.* ¶¶ 65-68. Similarly, CFA *et al.* have claimed that, post-transaction, "Comcast and NBC would all but corner the market for women-oriented programming." CFA *et al.* Petition to Deny at 20-21. Like Bloomberg, CFA *et al.* put forth an implausible market definition and make no effort to substantiate it. *See* Rosston/Topper Reply Report ¶¶ 53-54. CFA *et al.* then proceed to suggest that advertising on certain women-oriented networks is the only or even primary means advertisers have of reaching adult females, a claim that is demonstrably erroneous. *See id.* ¶¶ 53-54 & Ex. 8.

markets fail.[393]

b. No Reduced Competition in National Advertising

Certain commenters have incorrectly asserted that the transaction would reduce competition in a national market for television advertising.[394] These commenters present no economic evidence to substantiate the existence of such an implausible market. Even assuming that a national market encompassing only broadcast and cable television advertising exists – ignoring all the other media, including Internet and print advertising, that in reality compete with broadcast and cable networks for advertising dollars – the transaction would not alter the competitive landscape in any meaningful way.[395] To the extent that such a market exists, it would be highly fragmented, consisting of not only the "Big Four" broadcast networks, but also the well over 150 national cable television networks that generate advertising revenues.[396] As Drs. Rosston and Topper explain, in such a "market," the transaction would increase NBCU's 2009 share of national television advertising revenues by only 1.7 percent (from 19.5 percent to 21.1 percent) and the HHI by only 65 (from 1,196 to 1,261) – well below a level that might raise competition concerns.[397]

c. No Reduced Competition in Local Advertising

Some commenters have suggested that the transaction will reduce competition in local advertising, claiming that "the combination of local cable advertising shares with local broadcast

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393 *See supra* Section IV.D.2.a.

394 Dish Network Petition to Deny at 22-23; AOL Comments at 2, 4, 9; CFA *et al.* Petition to Deny at 50-51.

395 *See* Rosston/Topper Reply Report ¶ 48.

396 SNL Kagan, *Economics of Basic Cable Networks,* 2009, at 75–78.

397 *See* Rosston/Topper Reply Report ¶ 49 & Ex. 7. These calculations include all national broadcast, basic cable, and pay networks listed by SNL Kagan. As noted in their report, the NBCU and Comcast shares cannot be directly added to arrive at the combined share due to rounding.

advertising shares of NBC O&Os will give Comcast and NBCU significant power in specific markets at issue in this transaction."[398] A critical flaw of this reasoning is its assumption that broadcast television advertising is cable advertising's closest substitute and primary competitor. In fact, Comcast Spotlight and NBC O&O stations each focus to a large degree on advertisers that would be ill-served by the other. For example, broadcast stations can only offer advertising that blankets an entire DMA at once.[399] In contrast, Comcast is able to offer "local-zoned" advertising, which targets advertisements to pre-selected geographic zones within a given DMA.[400] As Exhibit 14 of the Rosston/Topper Reply Report (set forth below as Table 1) demonstrates, in the DMAs in which there is both a Comcast cable system and an NBC O&O station, there is little overlap between buyers of Comcast's local-zoned advertising – who tend to be smaller, more localized businesses – and buyers of advertising on the NBC station.[401] Moreover, local-zoned advertising is a significant source of advertising demand, {{

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398 CFA *et al.* Petition to Deny at 48; *see also* Letter from Susan P. Crawford, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56 (June 11, 2010). This claim is equally misguided with respect to any market for Spanish-language advertising. *See* Cooper/Lynn Decl. at 47. Even if one were improperly to define the market to include both MVPDs and local broadcasters, and to exclude all other advertising media, Comcast's shares of Spanish-language advertising in the seven "overlap" DMAs between Comcast and Telemundo O&Os are miniscule, ranging from 0.2 percent in New York to 2.0 percent in Chicago. While Comcast also owns cable systems in nine DMAs where a Telemundo O&O operates (Boston, Chicago, Denver, Fresno, Houston, Miami, New York, San Francisco, and Tucson), Comcast Spotlight does not operate in Tucson and Telemundo does not sell advertising in Boston.

399 *See* Rosston/Topper Reply Report ¶ 82.

400 *Id.* ¶ 81.

401 *Id.* ¶ 80 & Ex. 14. While there are seven DMAs where Comcast Spotlight overlaps with an NBC O&O (Chicago, Hartford, Miami, New York, Philadelphia, San Francisco/Bay Area, and Washington, D.C.), the Comcast system in New York only covers about 10 percent of the DMA and is a minor participant in the sale of local advertising. Dr. Cooper and Mr. Lynn's analysis excludes the New York DMA from consideration.

402 *Id.* ¶ 79.

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The transaction also will have no adverse competitive effect as to those advertisers that purchase DMA-wide advertising. As explained in the Rosston/Topper Reply Report, advertising services offered by other broadcast stations are much closer substitutes to those offered by NBC O&O stations than are Comcast's local advertising services.[403] As Drs. Rosston and Topper further explain, "Local cable operators and local broadcast stations differ in important ways in the inventory, reach, targeting, and demographics they offer to advertisers."[404]

Moreover, to the extent that certain advertisers might regard local cable and broadcast advertising as reasonable substitutes, those advertisers will continue to enjoy a number of alternatives to NBC O&O stations and Comcast Spotlight. These alternatives include at least seven non-NBCU broadcast stations, as well as myriad other media, in each city in which NBCU owns an NBC station and Comcast operates a cable system. Those other local advertising media include the Internet, radio, newspapers, mobile phones, billboards, yellow pages, direct mail, and

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403 *Id.* ¶¶ 82-84.

404 *Id.* ¶ 79. *See also* ¶¶ 79-84.

other "out-of-home" advertising.[405] With the addition of radio, newspapers, out-of-home, and online advertising in the six DMAs analyzed by Dr. Cooper and Mr. Lynn, broadcast television accounts for only [[ ]] percent of local advertising spending, the NBC O&Os account for only [[ ]] percent, and cable television accounts for only [[ ]] percent.[406]

In an effort to impart a semblance of precision to their analysis, Dr. Cooper and Mr. Lynn provide HHI calculations for the six DMAs they analyzed.[407] These calculations should be disregarded for the reasons already discussed: (i) they ignore other media that compete with television for advertising; (ii) they neglect the fact that other broadcast stations offer closer substitutes to NBC O&O station advertising than Comcast Spotlight offers; and (iii) they "fail to recognize that HHIs are not an appropriate tool for evaluating the likely competitive effects of a merger under a unilateral effects theory in an industry with differentiated products."[408]

Finally, contrary to CFA's claims,[409] comments that NBCU previously filed with the FCC do not establish that the transaction would diminish competition for local advertising. Rather, those comments explain that broadcasters operate in a dramatically different marketplace than 40 years ago. NBCU's comments explain that advertising revenues have grown faster for cable operators than for broadcasters and that local online spending is growing faster still: "the growth rate of local online spending is now outpacing all other forms of media, including cable,

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405 *See id.* ¶¶ 71, 73-74.

406 *Id.* ¶ 72.

407 *See* CFA *et al.* Petition to Deny, Cooper Decl. at 51.

408 Rosston/Topper Reply Report ¶ 69; *see also id.* at ¶¶ 70-76.

409 *See* CFA *et al.* Petition to Deny at 49-50.

broadcast (radio and television), newspapers, national online and outdoor advertising."[410] The principal points that NBCU made in those comments were that "[t]oday's highly competitive media environment provides Americans with access to an overwhelming amount of information from numerous and diverse local sources and offers advertisers a wealth of directly competing platforms on which to place ads" and that "[t]he Commission's consideration of the local television ownership rules must account for these dramatic developments and allow local stations the opportunity to compete fully and fairly."[411] These statements are by no means inconsistent with Applicants' analysis here.

C. The Transaction Will Not Facilitate Anti-Competitive Foreclosure of Competing MVPDs.

The combined entity will have no increased ability or incentive to pursue anti-competitive foreclosure strategies against competing MVPDs. For such strategies to prove successful, the integrated firm must (at a minimum) have "market power in an input market,"[412] and withholding this input from a competitor must cause a high rate of diversion from the weakened competitor to the integrated firm's downstream division.[413] Neither criterion is satisfied here.

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410 NBC Universal, Inc. and NBC Telemundo License Co. Comments, MB Docket Nos. 06-121& 02-277, MM Docket Nos. 01-235, 01-317, 00-244, at 10 (Oct. 23, 2006) ("NBCU Oct. 2006 Comments") NBC's prior comments are fully supported by the empirical evidence, which clearly indicates that "[t]he marketplace for advertising is extremely dynamic and competitive," and "[t]he rise of online advertising has increased choice and competition in the advertising marketplace." Rosston/Topper Reply Report ¶¶ 3, 41-43.

411 NBCU Oct. 2006 Comments at 26.

412 *News Corp.-Hughes Order* ¶ 78.

413 *Id.*

1. Analytical Framework

As Applicants have explained, and as several commenters acknowledge, the proposed transaction is principally a vertical transaction.[414] Certain commenters claim that there "is a growing belief" that the competitive effects of vertical transactions should be subject to close scrutiny,[415] but that claim is inconsistent with both economic knowledge and regulatory practice. Indeed, recent surveys of the economic literature confirm that the "vast majority" of studies support the conclusion that, "under most circumstances, profit-maximizing vertical-integration and merger decisions are efficient, not just from the firms' but also from the consumers' points of view."[416]

Both these surveys and Commission precedent recognize that the theorized pro-competitive and anti-competitive effects of vertical integration stem from the same source: the fact the merging parties will internalize each other's profits in their decision-making.[417] Theories of competitive harm are based on the notion that a vertical transaction, by causing the transacting parties to internalize each other's profits, may provide them with the incentive to harm each other's competitors.[418] By causing the parties to internalize each other's profits, however, a vertical transaction also creates strong incentives to reduce prices and expand output, as one firm

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414 Public Interest Statement at 103.

415 Cooper/Lynn Decl. at 9.

416 Francine Lafontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. Econ. Lit. 629, 680 (2007); Jeffrey Church, *Vertical Mergers*, *in* 2 Issues in Competition Law & Policy 1455 (2008) (acknowledging conditions under which vertical mergers can, in theory, be anti-competitive, but concluding that there should be "a presumption that vertical mergers are welfare enhancing and good for consumers").

417 Lafontaine & Slade, *supra* note 416, at 664; Church, *supra* note 416, at 1462; *News Corp.-Hughes Order* ¶ 70.

418 *News Corp.-Hughes Order* ¶ 78.

now captures the full profit margin from such efforts.[419] The literature concludes that the pro-competitive effects of internalization generally outweigh any anti-competitive effects, and vertical integration thus improves welfare.[420] As discussed below, the proposed joint venture is no exception.

The Commission has recognized that a vertical transaction, in certain circumstances, "may increase the incentive and ability of the integrated firm to raise rivals' costs either by foreclosing supply of the input it sells downstream competitors or by raising the price at which it sells the input to competitors."[421] To gauge these risks, the Commission has considered whether the integrated firm would find it profitable to engage in permanent or temporary foreclosure.[422] "The economic literature suggests that an integrated firm will engage in *permanent foreclosure* only if the present discounted value of the increased profits it earns in the downstream market as the result of foreclosure exceeds the present discounted value of the losses it incurs from reduced sales of the input in the upstream market."[423] According to the Commission, however, "temporary foreclosure may be profitable even where permanent foreclosure is not, because, during the period of foreclosure, downstream customers may switch to the integrated firm's

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419 Lafontaine & Slade, *supra* note 416, at 664; Church, *supra* note 416, at 1461; *News Corp.-Hughes Order* ¶ 70 (recognizing that vertical transactions, by reducing transaction costs and "internalizing incentives," "may generate significant efficiencies").

420 Lafontaine & Slade, *supra* note 416, at 658, 666-67; Church, *supra* note 416, at 1495-97.

421 *News Corp.-Hughes Order* ¶ 78.

422 The Commission has defined permanent foreclosure as the refusal to sell video programming to a rival MVPD on a permanent basis, *see Adelphia Order* ¶ 115 n.408, and temporary foreclosure as the refusal to sell (or the threat to refuse to sell) video programming to a rival MVPD on a temporary basis, *id.* ¶ 121.

423 *News Corp.-Hughes Order* ¶ 79.

downstream product and, due to inertia, then not immediately switch back to the competitor's product once the foreclosure has ended."[424]

Assessing the profitability of temporary foreclosure also supplies a means to evaluate whether a transaction will enable the integrated firm to extract higher input prices from downstream competitors. The Commission has stated that, "by threatening to engage in temporary foreclosure," an integrated firm may "be able to extract a higher input price from the downstream competitor than it could have negotiated if it were a non-integrated input supplier."[425] In order for an integrated firm successfully to pursue such a bargaining strategy, its threat "must be credible" – that is, competitors must believe that temporary foreclosure is profitable.[426]

In evaluating past transactions, the Commission has assessed the likelihood of vertical harm by applying a mathematical model, developed by the Commission staff. This model estimates the critical departure rates for vertical foreclosure to be profitable (*i.e.,* the minimum departure rates from rival MVPDs that would be required to outweigh the significant economic cost of refusing to deal with that MVPD).[427] This critical departure rate is then compared with empirical evidence of actual switching associated with foreclosure events. In their report, titled *Application of the Commission Staff Model of Vertical Foreclosure to the Proposed Comcast-NBCU Transaction* ("Vertical Foreclosure Report"), which they prepared at the request of

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424 *Id.*

425 *Id.* ¶ 80.

426 *Id.*

427 *News Corp.-Hughes Order*, App. D: Technical Appendix.

Commission staff, Drs. Israel and Katz applied the staff model to the proposed transaction.[428] After comparing critical and projected departure rates using a variety of assumptions and under several scenarios, they concluded that the proposed transaction does not pose a threat that NBCU programming would be used to engage in anti-competitive foreclosure.[429]

Petitioners CWA and Dish Network implicitly accept or expressly endorse the Commission staff model, but criticize the Vertical Foreclosure Report's implementation of that model.[430] As discussed below, these criticisms are without merit. Commenters DirecTV and ACA employ a different approach, a "Nash bargaining model," to evaluate the proposed transaction.[431] As discussed below, this model is incapable of providing sufficiently reliable and precise estimates of actual diversion rates to counter Drs. Israel's and Katz's analyses or meaningfully to guide the Commission's analysis of the proposed transaction.

Following Commission precedent, the discussion below evaluates Comcast's likely post-transaction conduct with respect to three categories of video programming: (1) local broadcast stations, (2) national cable networks, and (3) regional sports networks.[432] As discussed below, the proposed transaction will not enhance Comcast's incentive or ability to engage in anti-competitive foreclosure strategies with respect to any category of programming.

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428 Mark Israel & Michael L. Katz, Application of the Commission Staff Model of Vertical Foreclosure to the Proposed Comcast-NBCU Transaction, MB Docket No. 10-56, ¶ 2 ("Israel/Katz Vertical Foreclosure Report" or "Foreclosure Report"). Foreclosure strategies examined by Drs. Israel and Katz included temporary and permanent foreclosure involving all NBC affiliates, and only NBC O&O stations within particular DMAs. *Id.* ¶¶ 73-85.

429 *Id.* ¶ 132.

430 Singer Decl. ¶¶ 209-14; Dish Network Supplement to Petition to Deny at 2-3.

431 Report of Kevin M. Murphy ¶¶ 15-40 (attached to DirecTV Petition to Deny) ("Murphy Report"); Rogerson Report at 21-23.

432 *News Corp.-Hughes Order* ¶¶ 60, 76.

2. No Foreclosure of Local Broadcast Stations/Retransmission Consent

As the Vertical Foreclosure Report demonstrates, any attempt by the proposed joint venture to withhold retransmission consent to NBC O&O stations' signals as part of a foreclosure strategy would be unprofitable.[433] In the Vertical Foreclosure Report, Drs. Israel and Katz employed the Commission staff model to estimate the critical departure rate at which subscribers would have to switch away from a foreclosed MVPD in order for the gains to Comcast to offset the losses that a foreclosure strategy would impose on NBCU.[434] Drs. Israel and Katz then undertook a series of econometric analyses of historical events to determine the "actual departure rates" at which subscribers would be expected to switch away from a rival MVPD in response to the temporary loss of a single broadcast network.[435] As Drs. Israel and Katz lacked access to subscriber data of Comcast's MVPD competitors, they inferred actual departure rates from the (*de minimis*) observed gains in Comcast subscriber data, using an assumption of proportional diversion.[436] Based on their comparison of the high critical departure rates predicted by the Commission staff model with the low actual departure rates estimated by their econometric analysis, Drs. Israel and Katz concluded that "the analytical framework developed by the Commission staff indicates that profitable foreclosure is unlikely."[437]

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433 Israel/Katz Vertical Foreclosure Report ¶¶ 128-30.

434 *Id.* ¶ 5.

435 *Id.* ¶ 7. Drs. Israel and Katz analyzed two types of historical events: "(a) retransmission disputes in which an MVPD lost access to a broadcast station's signals for between two days and just less than six months, and (b) situations in which a direct broadcast satellite ('DBS') service provider's rollout of local-into-local broadcast service in a particular Designated Market Area ('DMA') was hampered by the inability to come to terms with one of the 'big four' broadcast networks, so that the offering was incomplete for some period of time." *Id.* ¶ 8 (emphases added).

436 Israel/Katz Reply Report ¶ 14.

437 Israel/Katz Vertical Foreclosure Report ¶ 9.

Commenters set forth no plausible basis on which to challenge this conclusion. As discussed below, (1) recent marketplace developments and newly available data reinforce the conclusion that profitable foreclosure is unlikely; (2) commenters' criticisms of the Vertical Foreclosure Report's implementation of the staff model are misguided, unsubstantiated, or both; and (3) the conclusion that a foreclosure strategy would be unprofitable is bolstered by additional considerations, including the long-term damage that a foreclosure strategy would inflict on the NBC broadcast network and the fiduciary duties that NBCU's officer and directors will owe to GE following consummation of the proposed transaction.[438]

a. Recent Marketplace Developments and Newly Available Data Reinforce the Conclusion that Profitable Foreclosure Is Unlikely.

Recent marketplace developments and newly available data imply that the critical departure rates are higher than those estimated in the Vertical Foreclosure Report and thereby reinforce the conclusion that foreclosure is unlikely to be profitable.

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438 *Id.* ¶¶ 16, 45.

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Second, the analysis contained in the Vertical Foreclosure Report assumed that, among those departing for another MVPD, the diversion rate to Comcast would be proportional to its market share in the DMA in question.[442] Empirical evidence submitted on behalf of Dish Network, however, indicates that diversion to Comcast following the DBS events available for study was substantially lower than the proportional-diversion assumption imply.[443]

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440 Singer Decl. ¶ 197.

441 Israel/Katz Reply Report ¶ 15.

442 Israel/Katz Vertical Foreclosure Report ¶ 55.

443 Israel/Katz Reply Report ¶ 16.

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In their Reply Report, Drs. Israel and Katz update the analysis undertaken in the Vertical Foreclosure Report to reflect {{

}} and to incorporate evidence presented by Dish Network in this proceeding.[446] The Israel/Katz Reply Report estimates critical departure rates associated with withholding retransmission consent from Dish Network for (1) all NBC O&O stations, and for (2) each NBC O&O station in a DMA in which Comcast operates a cable system. {{

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b. Dish Network's and Dr. Singer's Criticisms of the Vertical Foreclosure Analysis Are Without Merit.

Dish Network and Dr. Singer criticize the Vertical Foreclosure Report's implementation of the Commission staff model, but as discussed below, these criticisms are misguided, unsubstantiated, or both. Several criticisms stem from apparent misunderstandings of the staff model and its implementation. Dish Network, for instance, contends that the model applied in the Vertical Foreclosure Report ignored {{

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444 Kunz Decl. ¶ 6.

445 Israel/Katz Vertical Foreclosure Report ¶ 104.

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}} For purposes of their updated analysis, Drs. Israel and Katz adopted the conservative assumption that the diversion rate from DBS providers to Comcast equals one-third the rate that would be implied by proportional division based on market shares. *See* Israel/Katz Reply Report ¶ 16.

}} a "two-MVPD foreclosure strategy."[447] The Vertical Foreclosure Report analysis, however, assumed that NBCU *would* engage in a two-MVPD foreclosure strategy with respect to the DBS providers.[448] Notwithstanding this assumption, the Vertical Foreclosure Report analysis nonetheless found that foreclosure would be unprofitable. {{

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Dr. Singer likewise complains that the Vertical Foreclosure Report assumes that too many MVPD subscribers, following foreclosure, would obtain NBC content through alternative means (*i.e.*, over the air or online).[450] This criticism actually *bolsters* the conclusions of the Vertical Foreclosure Report. If *fewer* MVPD subscribers receive content through alternative means, foreclosure would be even *more* costly and *less* attractive to NBCU by *reducing* the advertising revenues that NBCU receives in the event of foreclosure. Hence, adjusting the Vertical Foreclosure Report analysis in this manner would simply *strengthen* the conclusion that the proposed joint venture would find foreclosure unprofitable.[451]

Several of the criticisms leveled by Dish Network and Dr. Singer are premised on unsubstantiated assertions that are flatly at odds with the evidence presented in this proceeding. Dr. Singer, for example, argues that diversion to Comcast among those leaving another MVPD

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447 Dish Supplemental Report at 8.

448 Israel/Katz Vertical Foreclosure Report ¶ 78.

449 *See supra* Section IV.C.2.

450 Singer Decl. ¶ 210.

451 Israel/Katz Reply Report ¶ 23.

would be *more* than proportional.[452] This argument is discredited by the evidence described above, which demonstrates that diversion to Comcast is substantially less than proportional. It is also contradicted by Dr. Singer's own observation that subscribers leaving one DBS provider are more likely to switch to another DBS provider than to cable.[453]

Dish Network similarly asserts that the Vertical Foreclosure Report's assumption that future retransmission consent fees will be between {{ }} (per-subscriber per-month) is "seriously flawed."[454] This assumption, however, was based on projections from an accepted industry source, and has since been confirmed by {{

}}.[455]

Dish Network and Dr. Singer also cite the "Philadelphia precedent," the fact that Comcast has never reached agreement with DirecTV or Dish Network regarding Comcast SportsNet-Philadelphia, as evidence that the proposed joint venture would withhold NBC O&O station signals from other MVPDs.[456] Comcast's decisions with respect to Comcast SportsNet-Philadelphia, however, are irrelevant to assessing NBCU's likely post-transaction conduct. The NBC broadcast network and Comcast SportsNet-Philadelphia are very different networks. Unlike broadcast networks, which rely on large-scale distribution to a broad range of viewers, RSNs rely on the intense loyalty of a relatively small subset of consumers (in a given DMA) to

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452 Singer Decl. ¶¶ 189-91.

453 *Id.* ¶ 197.

454 Dish Network Supplement to Petition to Deny at 7.

455 Other unsubstantiated criticisms leveled by Dish Network and Dr. Singer are addressed in paragraphs 22 through 23 of the Israel/Katz Reply Report.

456 Dish Network Supplemental Report at 3-4; Singer Decl. ¶ 124.

particular sports teams.[457] The Commission has repeatedly recognized the unique nature of RSN programming.[458]

Moreover, to the extent that the Commission staff's analysis in the *Adelphia Order* is accurate (which Applicants do not concede), the actual departure rate associated with Comcast SportsNet-Philadelphia is substantially higher than any estimate that has been presented in this proceeding for the departure rate induced by the loss of a broadcast network.[459]

In addition, the fact that exclusivity (whether achieved through contract or through vertical integration) may be profitable does not mean that it is anti-competitive – product differentiation is a legitimate and appropriate method of competition. Indeed, a notable example of exclusive distribution by an MVPD of sports content is DirecTV's exclusive deal with the NFL for "NFL Sunday Ticket," which provides the rights to out-of-market NFL games.[460] DirecTV has obviously concluded that the premium it pays for exclusive access to the NFL Sunday Ticket causes sufficient switching by subscribers to make this arrangement profitable, but that does not necessarily mean that DirecTV's conduct is anti-competitive. Likewise, Comcast is on record saying that it will make Comcast SportsNet-Philadelphia available to all competitors "as soon as DirecTV relinquishe[s] its exclusive access to NFL Sunday Ticket," indicating that Comcast's overall objective to bargain with DirecTV in support of an outcome that would increase overall access to sports content.[461]

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457 *News Corp.-Hughes Order* ¶ 133

458 *Adelphia Order* ¶ 124; *News Corp.-Hughes Order* ¶ 133.

459 Israel/Katz Reply Report ¶ 28; *Adelphia Order* ¶ 149.

460 Israel/Katz Reply Report ¶ 29.

461 John Eggerton, *Broadcasting and Cable*, "Comcast Won't Challenge FCC's Closing of Terrestrial Exemption," March 16, 2010.

c. The Structure of the Proposed Joint Venture and the Risk of Damage to NBC Further Reduce the Likelihood of Retransmission Consent Foreclosure.

The Vertical Foreclosure Report identified two additional factors, not captured by a narrow application of the staff model, that further diminish the likelihood that the proposed joint venture would pursue a foreclosure strategy by withholding retransmission consent to NBC broadcast stations' signals.[462] First, engaging in either permanent foreclosure or repeated temporary foreclosure would substantially and irreversibly damage the NBC broadcast network by disrupting the pattern of "ubiquitous distribution and relatively high viewership that distinguishes [that network] from a highly rated cable network."[463] No commenter has challenged this observation.

Second, so long as it retains a significant stake in NBCU, "GE has strong incentives to protect its ownership interest by [ensuring] that the joint venture does not engage in costly foreclosure strategies, regardless of the benefits to Comcast."[464] The agreement establishing the joint venture provides that the joint venture's directors and officers owe fiduciary duties to the joint venture and its members, including GE.[465] The joint venture's directors and officers would violate these duties if they made business decisions that intentionally sacrificed joint venture profits in order to increase Comcast's MVPD profits – as any foreclosure strategy necessarily

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462 Israel/Katz Vertical Foreclosure Report ¶¶ 16-18.

463 Israel/Katz Reply Report ¶ 24-25.

464 *Id.*

465 *Id.* ¶ 24.

would do. Given that GE would have every incentive to enforce these fiduciary duty provisions, this substantially reduces the risk of vertical foreclosure.[466]

Both Dr. Murphy and Dr. Rogerson nonetheless argue that, post-transaction, NBCU will assign the same weight to profits from Comcast's cable operations that it assigns to profits from its own networks.[467] Dr. Rogerson argues that, to achieve the transaction-related efficiencies that Applicants have described, Comcast and GE must engage in "close coordination" that will "necessarily result in the parties to the transaction taking advantage of opportunities to engage in coordinated anti-competitive behavior."[468] This argument is incorrect. As discussed below, the efficiencies that the transaction will bring about through reduction of double marginalization arise so long as Comcast internalizes its own ownership interest in NBCU, which it is free to do under the joint venture agreement. The proposed transaction is also expected to generate efficiencies by reducing negotiation and transaction costs.[469] While the fiduciary duties that the joint venture's directors owe to GE will prevent NBCU from internalizing Comcast profits, post-transaction, NBCU will know that Comcast is less likely to propose strategies that would harm NBCU when Comcast has an ownership interest in NBCU than when it does not.[470] This knowledge should make it easier for Comcast to lead NBCU toward mutually beneficial and output-enhancing strategic initiatives.[471]

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466 *Id.*

467 Murphy Report ¶ 76; Rogerson Report ¶ 36-37

468 Rogerson Report ¶¶ 19-20.

469 Rosston Benefits Report ¶ 60.

470 *Id.* ¶ 62.

471 *Id.* ¶¶ 62-66.

Dr. Murphy argues that, regardless of the terms of the joint venture agreement, "[i]f foreclosure is profitable and in the joint financial interest of NBCU and Comcast, then Comcast and GE have an incentive to reach an agreement whereby GE is better off than without foreclosure."[472] Dr. Murphy's argument apparently contemplates that Comcast and GE will enter into a side agreement *separate* from the joint venture agreement. (The joint venture agreement itself prohibits NBCU from internalizing the effects of its actions on Comcast's profits.) Accordingly, Dr. Murphy's concern is not transaction specific: Comcast and GE could just as easily agree today (absent the proposed transaction) to engage in foreclosure that is in their "joint financial interest."[473]

"Moreover, had Comcast and GE intended for NBCU to internalize Comcast profits, they could have structured the deal differently."[474] Applicants' decision to structure the proposed transaction as they did attests to the fact that the "fiduciary duty terms of the contract should be taken seriously."[475]

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472 Murphy Report ¶ 76.

473 Israel/Katz Reply Report ¶ 27.

474 *Id.*

475 *Id.* In the *News Corp.-Hughes Order*, the Commission concluded that temporary foreclosure of retransmission consent for Fox O&O stations would be profitable. *See News Corp.-Hughes Order* ¶ 153. There are a number of reasons why this conclusion should not apply to NBCU O&O stations following the transaction. First, in this proceeding, the Applicants have – for the first time – presented evidence on actual switching to rival MVPDs that resulted from temporary foreclosure. They have demonstrated that, as an empirical matter, there has been little or no switching to Comcast as a result of temporary foreclosure. Such data were not available in the *News Corp.-Hughes* proceeding. Second, the ratings for broadcast television networks have declined significantly since the time of *News Corp.-Hughes* – suggesting that fewer consumers may regard broadcast television network programming as "must have." *See* Public Interest Statement at 118-19. In this regard, note that NBC is the number four network, while Fox is the number one network. Third, with its national footprint, DirecTV is better able than regional cable companies to reap the benefits of foreclosure.

3. The Proposed Transaction Will Not Lead to an Anti-Competitive Increase in Retransmission Consent Fees for NBC Broadcast Stations.

Neither Dr. Murphy nor Dr. Rogerson dispute that the proposed joint venture is unlikely to withhold retransmission consent for NBC O&O stations from competing MVPDs. Nonetheless, Dr. Murphy and Dr. Rogerson both argue that the proposed transaction will lead to higher retransmission consent fees for NBC O&O stations.[476]

Dr. Murphy and Dr. Rogerson base these arguments on the Nash bargaining model, which posits that two players (a broadcast station and an MVPD, in this instance) may either reach or fail to reach an agreement (here, a retransmission consent agreement). If the players fail to agree, each player receives its "fallback" or "disagreement" payoff.[477] If the players reach an agreement, each player receives its fallback payoff plus some share of the agreement-generated surplus.

The generalized Nash bargaining model does not predict how the players will allocate the surplus generated by their agreement.[478] How the players allocate this surplus depends on their relative bargaining power, which is often represented by a parameter (γ) that can range between zero and one.[479] Dr. Murphy and Dr. Rogerson each assume that the players (*i.e.*, the NBC broadcast station and the rival MVPD) split the surplus evenly, *i.e.*, that $\gamma = ½$. If this

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476 Rogerson Report ¶ 36-40; Murphy Report 6.

477 Samuel Bowles, Microeconomics: Behavior, Institutions, and Evolution 178 (2004); Israel/Katz Reply Report ¶ 40.

478 Bowles, *supra* note 477, at 178; Israel/Katz Reply Report ¶ 46.

479 If the MVPD has all of the bargaining power and the broadcast station none ($\gamma = 1$), the MVPD would receive its fallback payoff plus the entirety of the surplus, while the broadcast station would receive only its own fallback payoff. Conversely, if the broadcast station has all the bargaining power and the MVPD none ($\gamma = 0$), the broadcast station would receive its fallback payoff plus the entirety of the surplus, while the MVPD would receive only its own fallback payoff.

assumption and others are accepted, the post-transaction increase in the per-subscriber price charged to non-Comcast MVPDs for NBCU programming (ΔP) is equal to:

$$\Delta P = \tfrac{1}{2} * (d * \alpha * \Pi_m)$$

where d is the fraction of the other MVPD's subscribers that will leave if the NBCU programming is withheld, α is the fraction of leaving customers that will switch to Comcast, and Π_m is Comcast's monthly profit per subscriber.[480]

As discussed below, both Dr. Murphy's and Dr. Rogerson's analyses supply no basis for concluding that the proposed transaction will result in an anti-competitive price increase: (1) Dr. Murphy's and Dr. Rogerson's model predicts that prices will increase materially only if a significant number of subscribers would switch away from a foreclosed MVPD to Comcast; no evidence presented in this proceeding indicates that such switching would occur; (2) Because the model is based on assumptions that lack factual or empirical basis, it cannot provide meaningful predictions of NBCU's post-transaction conduct; (3) An empirical analysis of past vertical integration events does not support Dr. Murphy's and Dr. Rogerson's hypothesis that vertical integration between network owners and MVPDs results in higher prices; (4) Finally, it would be inappropriate to consider the implied price increases predicted by Dr. Murphy's and Dr. Rogerson's bargaining model, without also considering the pro-competitive benefits that arise from Comcast's internalization of profits to NBCU. As discussed below, the benefits attributable to reduction of double marginalization alone substantially outweigh any effects predicted by both Dr. Murphy and Dr. Rogerson.

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480 Rogerson Report at 11-13; Murphy Report ¶ 38; Israel/Katz Reply Report ¶ 42.

a. Comcast Would Not Gain a Significant Number of Subscribers if Other MVPDs Lost Access to the NBC Broadcast Network.

The vertical-pricing theory presented by both Dr. Murphy and Dr. Rogerson posits that the proposed transaction will create upward pricing pressure only *if* Comcast would gain subscribers when other MVPDs lost access to NBCU networks.[481] No evidence presented in this proceeding, however, indicates that a significant number of subscribers would switch away from a foreclosed MVPD to Comcast. At most, the available evidence suggests that an MVPD that suffers a loss of retransmission consent may incur material costs, either in the form of a lower number of subscribers (because of subscribers who switch away) or in the form of lower margins (because of discounts and other promotions that the rival MVPD must offer to limit or avoid subscriber switching).[482] The evidence presented in this proceeding, however, also demonstrates that few subscribers would switch to Comcast.[483] Indeed, the econometric analyses presented in the Vertical Foreclosure Report demonstrated that the number of subscribers that switched to Comcast in response to DBS providers' past losses of retransmission consent was so low as to be undetectable in Comcast's subscriber data.[484] No commenter has presented any empirical evidence to the contrary. Accordingly, even if the assumptions underlying Dr. Murphy's and Dr.

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481 Israel/Katz Reply Report ¶ 34. Specifically, ΔP, the change in per-subscriber price predicted by Dr. Murphy's and Dr. Rogerson's model, is directly proportional to $d * \alpha$, the number of customers switch away from a foreclosed MVPD to Comcast in the event that NBCU programming is withheld.

482 *See, e.g.*, {{ }}; Murphy Report ¶¶ 34-46 (attempting to infer implied departure rates using a stylized bargaining model and assumptions about per-subscriber prices for retransmission consent). For reasons discussed in the Israel/Katz Reply Report, {{ }} *See* Israel/Katz Reply Report ¶¶ 58, 262-271.

483 Israel/Katz Vertical Foreclosure Report ¶ 124.

484 *Id.* ¶ 104.

Rogerson's vertical-pricing analyses were accepted, their model would not support the conclusion that the transaction would lead to anti-competitive price increases.[485]

b. Dr. Murphy's and Dr. Rogerson's Bargaining Model Cannot Yield Precise, Reliable Predictions Because It Relies on Assumptions that Lack Factual or Empirical Basis.

Dr. Murphy's and Dr. Rogerson's reliance on assumptions that lack factual or empirical basis prevents their model from predicting post-transaction price changes with any meaningful degree of precision. Despite the impression of precision that it conveys, the formula reproduced in Section IV.C.3 cannot yield precise predictions. Most notably, the ½ term on the right-hand side of equation is based on an *assumption* that NBCU and a negotiating MVPD evenly split agreement-generated surplus. As discussed above, this term could fall anywhere between zero and one. More generally, if γ represents the MVPD's bargaining power, the implied price increase predicted by Dr. Murphy's and Dr. Rogerson's bargaining model is given by the following equation:

$$\Delta P = \gamma * (d * \alpha * \Pi_m)$$[486]

The implications of this equation are clear. First, the Nash bargaining model cannot rule out the possibility that the proposed transaction will result in no price increase, a result that would obtain

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[485] The fiduciary duty provisions of the proposed joint venture agreement also indicate that price effects are particularly unlikely to arise post-transaction. The premise underlying the bargaining model proposed by Dr. Murphy and Dr. Rogerson is that, post-transaction, NBCU will internalize the effect of its actions on Comcast's profits. That premise, however, is fundamentally at odds with the joint venture agreement's fiduciary duty provisions, which prohibit NBCU's directors and officers from internalizing the effect of their actions on Comcast's profits.

More specifically, the bargaining model employed by Dr. Murphy and Dr. Rogerson predicts that prices will increase only to the extent that NBCU's disagreement payoff – that is, NBCU's profits if no deal is reached with the negotiating MVPD – increase following the transaction (due to internalization of Comcast gains). Any increase in disagreement payoff that NBCU may derive by (impermissibly) internalizing gains to Comcast, may well be entirely offset by the prospect that a failure to reach agreement with an MVPD would prompt GE to enforce the fiduciary duty provisions of the joint venture agreement.

[486] Israel/Katz Reply Report ¶ 50

if the negotiating MVPD has relatively little bargaining power (*i.e.*, γ is close to zero).[487] This scenario is not only possible, but plausible: Both Dr. Murphy and Dr. Rogerson acknowledge that smaller MVPDs may have relatively low bargaining strength.[488] NBCU may already be capturing most or all of the agreement-generated surplus in these cases, and the proposed transaction would not further enhance NBCU's bargaining position.[489]

More generally, any pricing predictions made by Dr. Murphy's and Dr. Rogerson's bargaining model are highly unreliable and imprecise. Indeed, any point estimate reported by Dr. Murphy's and Dr. Rogerson's model is more accurately understood as a range extending from zero to twice the reported figure.[490]

The Nash bargaining model's ability to supply meaningful predictions of post-transaction price changes is also subject to other serious limitations. As applied by Dr. Murphy and Dr. Rogerson, the bargaining model fails to account for ways in which rival MVPDs would respond to threats of foreclosure, and thereby overstates the extent to which loss of an NBC broadcast station signal would result in switching.[491] In general, an MVPD faced with a retransmission consent disruption may offer promotions (including over-the-air antennas for direct reception of the station) or lower its subscription fees, and thus reduce its subscriber losses. When negotiating with a broadcast station owned by a rival MVPD, the MVPD has an even greater incentive to offer promotions and lower its subscription fees (or otherwise improve its

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487 *Id.* ¶ 51

488 Murphy Report n.12.

489 Israel/Katz Reply Report ¶ 51.

490 *Id.* ¶ 52.

491 *Id.* ¶¶ 59 & n.92, 266-269.

price/value proposition). By doing so, the MVPD can minimize the number of its subscribers that switch to the integrated MVPD and render foreclosure unprofitable for the integrated firm. Dr. Murphy and Dr. Rogerson ignore these strategic responses, and thereby overstate the number of subscribers that would switch from a rival MVPD in the event of a retransmission consent disruption.

Finally, Dr. Murphy's and Dr. Rogerson's simplified bargaining model, while often used in academic work, cannot account for complexity of actual content owner-MVPD negotiations.[492] Specifically, it cannot address the effect of numerous non-price terms that are jointly negotiated with price, the dynamic nature of negotiations, and limitations on information possessed by content owners and MVPDs, among other complicating factors.[493] As a result, the bargaining model cannot meaningfully predict post-transaction pricing changes and preference should be given to empirical evidence from previous vertical integration events, discussed below.

c. Empirical Evidence Demonstrates that Vertical Integration Does Not Lead to the Systematic Pricing Effects Predicted by Dr. Murphy and Dr. Rogerson.

As Drs. Israel and Katz demonstrate, there is no evidence that previous vertical integration events have caused the systematic pattern of price increases that Dr. Murphy's and Dr. Rogerson's model would suggest. In their Reply Report, Drs. Israel and Katz consider historical events in which a programming network either became integrated with or separated

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492 *See Id.* ¶¶ 43-44; *see generally* Bowles, *supra* note 477, at 178 (explaining that the Nash bargaining model was not designed "to illuminate real world bargaining processes").

493 Israel/Katz Reply Report ¶ 46.

from an MVPD, and examine whether those transactions had an effect on the price (*i.e.* the "affiliate fees") charged to other MVPDs for the affected networks.[494]

To examine the effects of these transactions on the price of programming, Drs. Israel and Katz evaluate annual data on affiliate fees paid by MVPDs for programming between 2000 and 2009.[495] To distinguish the effect of integration from the effects of unrelated factors that may also affect price and quantity, Drs. Israel and Katz employ a "difference-in-difference regression" methodology. This methodology involves comparing changes in the price and ratings following integration (or dis-integration) for the networks that were affected, relative to the changes, over the same time-period, for networks that were not affected by integration.[496]

The results of this regression show no systematic effect of integration on pricing. On average, the integration between cable networks and MVPDs did not have a significant effect on the affiliate fees paid by MVPDs for those networks. Moreover, none of the individual networks exhibited significantly higher fees while integrated with MVPDs, with the only statistically significant integration effect being the reduction in fees for the National Geographic Channel.[497]

d. Transaction-Related Efficiencies Outweigh Even the Most Aggressive Predictions of Harms.

Finally, it would be inappropriate to consider the potential programming-cost increases that may arise because NBCU may internalize Comcast's profits (which it may not do under the joint venture agreement) without also accounting for programming cost decreases flowing from efficiencies – notably the reduction of double marginalization – that will arise because Comcast,

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494 *Id.* ¶¶ 80-87.

495 *Id.* ¶ 82.

496 *Id.* ¶ 85.

497 *Id.* ¶ 86.

while paying the same price to NBCU for programming as determined in arm's-length negotiations, will internalize NBCU profits (as it is perfectly free to do under the joint venture agreement).[498] These efficiencies are particularly important given that double marginalization savings will begin as soon as the transaction closes, while any potential cost increases for other MVPDs can occur only later, after current carriage contracts have expired.[499] Once these efficiencies are incorporated, the net effect of the transaction on average MVPD programming costs is negative, even if fairly aggressive assumptions are used to generate large price increases under Dr. Murphy's and Dr. Rogerson's theory.[500]

As explained in Section III.D.1 above, double marginalization exists today because, although 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.[501] As a separate firm, Comcast uses the price it pays NBCU for content (rather than the true, near-zero marginal cost of that content) to determine the packages and rates that it offers consumers.[502] Post-transaction, however, for every dollar that Comcast pays to NBCU, it will retain ownership of 51 cents through its interest in NBCU. As a result, although paying NBCU the same price for content, Comcast's actual cost

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498 *See generally SBC-AT&T Order*, 20 FCC Rcd at 18384 ¶ 182 ("The Commission has recognized that 'efficiencies generated through a merger can mitigate competitive harms if such efficiencies enhance the merged firm's ability and incentive to compete and therefore result in lower prices, improved quality, enhanced service or new products.'" (quoting *Application of EchoStar Commc'ns Corp. (a Nv. Corp.), General Motors Corp., and Hughes Elecs. Corp. (De. Corps.) (Transferors) and EchoStar Commc'ns Corp. (a De. Corp.) (Transferee), Hearing Designation Order*, 17 FCC Rcd 20559, 20630 ¶ 188 (2002))).

499 Israel/Katz Reply Report ¶ 63.

500 *Id.* ¶ 66.

501 Rosston Benefits Report ¶ 80.

502 *Id.*

for NBCU programming will fall to 49 percent of its pre-transaction cost after internalizing the margin it receives from NBCU. Comcast currently pays NBCU approximately {{ }} for programming for its [[ ]].[503] Hence, if Comcast acquires 51 percent interest in NBCU, its costs will fall to 49 percent of {{ }} or {{ }}. If Comcast acquires 100 percent of NBCU (as modeled by Dr. Murphy and Dr. Rogerson), its cost for NBCU programming will fall by {{ }}. A portion of these costs savings will be "passed on" to MVPD subscribers, potentially in the form of lower costs per program and an increased number of programs, or increased investment in network upgrades and the development and deployment of innovative services.[504] The economic literature indicates that changes in programming costs are passed through to MVPD subscribers at a rate of approximately 50 percent.[505] These double marginalization savings represent a true reduction in the average cost (across MVPDs) for NBCU programming, which cannot be ignored when calculating the transaction's effect on MVPD programming costs.

In their Reply Report, Drs. Israel and Katz combine Comcast's double marginalization savings from the transaction with the higher prices for NBCU programming predicted by the Dr. Murphy's and Dr. Rogerson's Nash bargaining model in order to compute the average change in MVPDs' cost for NBCU programming. Even under an aggressive implementation of Dr. Murphy's and Dr. Rogerson's model (generating relatively high predicted price increases from

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503 Rosston/Topper Reply Report ¶ 39, Ex. 4. Dr. Rosston includes only the [[ ]] NBCU cable networks {{ }} in this calculation {{ }}, making this calculation conservative. For each of these networks, Comcast's payments to NBC are made on a per-subscriber basis.

504 *See id.* ¶ 29; AT&T and Comcast Corp. Reply to Comments and Petitions to Deny Applications for Consent to Transfer Control, MB Docket No. 02-70, App. 4 (Declaration of Howard Shelanski), pp. 21-22 (May 21, 2002).

505 *See* Rosston Benefits Report ¶ 86.

the Nash bargaining model from the Nash bargaining model), the predicted price increases are swamped by the price effects of transaction-related efficiencies.[506]

e. The Retransmission Consent Rules and Applicants' Voluntary Commitments Further Mitigate Any Possibility of Competitive Harm.

The combined company's economic incentive to ensure widespread distribution of the broadcast networks' programming is also backstopped by an existing regulatory regime. The retransmission consent rules require parties to negotiate in good faith and prohibit exclusive retransmission consent agreements.[507] In addition, Applicants have voluntarily committed to import key components of the program access rules to retransmission consent negotiations.[508] Under this commitment, (1) Comcast will be prohibited in retransmission consent negotiations from unduly or improperly influencing the NBC and Telemundo O&O stations' decisions about the price or other terms and conditions on which the stations make their programming available to unaffiliated MVPDs;[509] (2) the "burden shifting" approach to proof of discriminatory pricing in the program access rules will be applied to complaints regarding retransmission consent negotiations involving the NBC and Telemundo O&O stations; and (3) the "shot clock" applied

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506 Israel/Katz Reply Report ¶ 77 (reporting that if affiliate fees for NBCU's cable networks and a common price for retransmission consent for the NBC O&O broadcast stations are jointly negotiated, the transaction will yield a reduction in the average MVPD cost for NBCU programming of 31 cents per subscriber per month, or more than 20 percent of Comcast's per-subscriber, per-month costs for NBCU programming); *id.* ¶ 79 (reporting that if retransmission consent fees are negotiated separately with each NBCU O&O station in each DMA, the transaction will lead to a reduction in the average cost of NBCU programming of between 8 and 73 cents across DMAs and scenarios).

507 *See* 47 U.S.C. § 325(b)(3)(C); 47 C.F.R. § 76.65; *In the Matter of Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445 ¶ 40 (2000).

508 Public Interest Statement at 121.

509 Additionally, as discussed in Section III above and in the Non-NBC Affiliates Associations Agreement, NBCU will remain solely responsible for retransmission consent negotiations for NBCU-owned stations with non-Comcast MVPDs.

to program access adjudications would apply to retransmission consent disputes involving the NBC and Telemundo O&O stations. This voluntary and unprecedented commitment is more than sufficient to address any transaction-specific concerns raised by competing MVPDs.

There will continue to be pressure to change the way retransmission consent works, but that is an industry-wide issue and should be addressed, if at all, in a pending, industry-wide proceeding. That proceeding – not this transaction review proceeding – is the proper forum for considering any changes to the retransmission consent rules.[510]

4. No Foreclosure of National Cable Networks

The transaction will not enhance Comcast's incentive or ability to engage in foreclosure strategies with respect to licensing of national cable networks to rival MVPDs. As discussed above, the combined company lacks the market power needed to implement a successful temporary or permanent foreclosure strategy with respect to NBCU's cable networks.[511] In the *News Corp.-Hughes Order*, the Commission found that the record did "not support a conclusion that either News Corp. or other MVPDs consider News Corp.'s national and non-sports regional programming networks to be so highly desired by subscribers that they will switch MVPD providers to obtain it if temporarily foreclosed from accessing it on their incumbent providers' systems."[512] The present record similarly does not support a conclusion that temporary

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510 *See* Public Notice, Media Bureau Seeks Comment on a Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent, DA 10-474 (Mar. 19, 2010). As DirecTV stated in the *News Corp.-Hughes* proceeding: "The Commenters have . . . collectively proposed a truly breathtaking array of more than 40 separate conditions, most of which appear designed to preserve or promote the interests of other MVPDs, including incumbent cable operators, and to achieve goals unrelated to the proposed transaction, such as securing FOX broadcast content for free. This suggests that what the Commenters fear is not that News Corp. and Hughes will act anti-competitively, but rather that they will compete more effectively." DirecTV 2003 Reply Comments at i.

511 *See* Section IV.B.1; Public Interest Statement at 114.

512 *News Corp.-Hughes Order* ¶ 129.

foreclosure of NBCU's national cable programming networks would cause a substantial number of subscribers to switch MVPDs. Indeed, the likelihood that the proposed joint venture would pursue a foreclosure strategy involving national cable networks is even lower than the likelihood that News Corp. would have pursued such a strategy, given that Comcast, unlike DirecTV, does not have a national footprint.[513] If NBCU were to withhold a cable network from a DBS provider on a nationwide basis, it would reduce the audience of that network on a nationwide basis, but only potentially benefit Comcast in those areas in which Comcast operates cable systems.[514]

a. The Proposed Transaction Will Not Result in an Anti-Competitive Price Increase for NBCU's Cable Networks.

Dr. Rogerson argues that the proposed transaction will lead to increased prices for NBCU's national cable networks.[515] This argument is based on the same bargaining model described above, and the assumption that withholding NBCU's cable networks from an MVPD would cause five percent of that MVPD's subscribers to switch to another MVPD.[516] Dr. Rogerson bases this assumption on the observation that the ratings of NBCU's networks, when added together, are "comparable" to the ratings of a "Big Four" broadcast network, and on his prior assumption that withholding a broadcast network from an MVPD would cause five percent of that MVPD's subscribers to switch.[517] Based on these and host of other assumptions, Dr.

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513 *See* Israel/Katz Vertical Foreclosure Report ¶ 2 n.4.

514 *See id.*; Public Interest Statement at 115-16.

515 Rogerson Report at 31. Dr. Murphy speculates that "[p]opular national cable networks, including USA Network, Bravo or MSNBC, may be sufficiently important to potential subscribers that, if withheld, they would cause a portion of an MVPD's subscribers to move to a competing MVPD that offers that programming." Murphy Report ¶ 53. Dr. Murphy, however, does not purport to demonstrate either that withholding one of these networks would cause significant switching to Comcast or that the proposed transaction will lead to higher affiliation fees for any of these networks.

516 Rogerson Report at 31.

517 *Id.*

Rogerson concludes that the proposed transaction would lead to a 28 cent per subscriber per month increase in fees paid by DBS and telco operators for NBCU cable networks, and a 66 cent per subscriber per month increase in fees paid by overbuilders for the same networks.[518]

Dr. Rogerson's analysis of NBCU cable networks shares all of the flaws of his analysis of NBC broadcast station retransmission consent. Notably, Dr. Rogerson ignores efficiencies, including those attributable to reduction of double marginalization, and assumes an even split of agreement-generated surplus, even though the relative bargaining power of a cable overbuilder may be quite low.[519]

Dr. Rogerson's analysis of NBCU's cable networks suffers from additional flaws as well. Dr. Rogerson assumes that loss of NBCU's cable networks would cause the same proportion of MVPD subscribers to switch as a loss of a broadcast network based on a comparison of the ratings of a broadcast network with the aggregate ratings of NBCU's national cable networks. The Commission has recognized, however, that switching is not a function of ratings alone, but also a function of the availability of substitutes.[520] The Commission has previously concluded that the absence of national cable networks like NBCU's would be unlikely to induce a significant number of subscribers to switch MVPDs. Instead, in the event such networks were

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518 *Id.* at 38-40.

519 *See, e.g.*, Murphy Report ¶ 16 (acknowledging that smaller MVPDs may have little bargaining power and thus "receive a smaller fraction of the surplus").

520 *Adelphia Order* ¶ 42 (recognizing that the absence of "services for which there may be substitutes" from an MVPD's program lineup "would have little impact" (quoting *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 17 FCC Rcd at 12139 ¶ 33 (internal quotation marks omitted))); *News Corp.-Hughes Order* ¶ 126.

withheld, subscribers would likely "substitute different programming carried by their chosen MVPD."[521] Dr. Rogerson supplies no rationale for his assumption to the contrary.

Dr. Rogerson's conclusions are also at odds with the empirical evidence. As described above, Drs. Israel and Katz have performed a regression analysis of past vertical integration events. That regression analysis shows that these events caused no systematic pricing effects for either broadcast or national cable networks.

In addition, in their Reply Report, Drs. Israel and Katz apply Dr. Rogerson's bargaining model (with all of its attendant assumptions) to a scenario in which NBCU simultaneously negotiates with a rival MVPD for retransmission consent and for carriage for all NBC national cable networks. They conclude that the price effects from reduction of double marginalization alone substantially outweigh any price increases predicted by the simplified bargaining model.[522] This remains the case although Drs. Israel and Katz assume a departure rate of 13.35 percent due to the loss of all NBCU networks, a departure rate higher than the 10 percent departure rate that Dr. Rogerson himself assumes.[523]

b. Dr. Singer's Claim that NBCU Would Move Sports Programming from NBC to Versus in Order to Foreclose Other MVPDs Is Unfounded and Contrary to Marketplace Realities.

Dr. Singer advances the novel theory that, post-transaction, Comcast might induce NBCU to move some of NBC's national sports content to Comcast's Versus network and then to

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521 *News Corp.-Hughes Order* ¶ 129.

522 Israel/Katz Reply Report ¶¶ 77-79.

523 *Id.* ¶ 72.

withhold Versus from other MVPDs.[524] Alternatively, others have argued that, as a way to avoid the Commission's program access rules, Comcast could induce NBCU to move some of its sports content online in order to limit its availability to only Comcast subscribers.

Such a national sports foreclosure strategy is infeasible for several reasons. First, Comcast has reached an agreement with NBC's affiliate stations under which Comcast has committed itself not to move major sporting events off NBC in general, or onto Comcast-owned linear networks in particular. As noted above, the agreement provides that, subject to certain conditions, major sporting events for which NBC holds broadcast rights will continue to be broadcast on the NBC network, and with certain qualifications, Comcast will not migrate such events to any linear channel in which Comcast has an ownership interest.[525]

Second, the terms of NBCU's agreements with the ultimate sports rights owners generally require NBCU to air a substantial portion of the relevant content on the NBC broadcast network.[526] As such, NBCU would be unable to shift this content to cable or online, even if it wished to do so. {{

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524 Singer Decl. ¶¶ 175-79.

525 Summary of NBC Affiliates Association Agreement, *supra* note 46.

526 Israel/Katz Reply Report ¶ 31

527 *Id.*

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c. The Program Access Rules Further Mitigate Any Risks of Competitive Harm.

The competitive discipline of the marketplace is backstopped by the Commission's program access rules. Comcast has always followed these rules and has never been found in violation of them. Claims by certain commenters that the program access rules and the arbitration conditions do not work are unjustified. To the extent problems have arisen in the program access complaint process or in arbitrations, those problems have resulted from complainants attempting to misuse the processes.[528] In any event, the operation of the program access rules is the subject of a pending rulemaking, and that rulemaking – not this transaction review proceeding – is the proper forum for considering any changes to the program access rules.[529]

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[528] For example, in *In the Matter of WaveDivision Holdings, LLC et al. v. Comcast Corporation et al.*, CSR-8257-P, the complainants served 220 document requests and 99 interrogatories on Comcast after it had filed its answer and simultaneously with the filing of their reply pleading. As Comcast explained in that proceeding, the 319 discovery requests are entirely unnecessary given the issues and record evidence in the case and are abusive (seeking, among other things, "[c]opies of all bonus computations for any persons with managerial responsibilities for one or more of the Comcast Affiliates;" "[a]ll guidelines, scripts, strategies and other materials provided to salespeople by or working as agents for Comcast . . . related to obtaining or renewing subscriptions;" and "[a]ll documents reflecting or addressing budget variance analyses for each of the Comcast Affiliates"). These kind of tactics result in needless motions practice and only prolong and complicate program access proceedings.

[529] As DirecTV stated in the *News Corp.-Hughes* proceeding: "This transaction is surely the wrong place to consider, for example, the general efficacy of the Commission's rules governing program access." DirecTV 2003 Reply Comments at I. Seven years later – in order to support its bid to convince the Commission to apply program access remedies to the joint venture's national programming networks – DirecTV wrongly alleges that Comcast engaged in "withholding Versus from DIRECTV." DirecTV Comments at 37. As DirecTV knows, no such withholding occurred. The parties simply failed to reach an agreement over economic terms upon the expiration of their carriage agreement. As DirecTV told the media at the time, "At this [point], the deal is terminated and we are treating this as a new network, from scratch. So we're attempting to gauge the market and Dish seems like a good barometer." Mike Reynolds, *Updated: Versus-DirecTV Dispute About Subscriber Loss; Network President Davis Says DBS Provider Wants Sports Service To Shed 6 Million Subscribers*, Multichannel News, Sep. 2, 2009, *available at* http://www.multichannel.com/article/339295-Updated_Versus_DirecTV_Dispute_About_Subscriber_Loss.php. The dispute was subsequently resolved without any need for regulatory intervention.

5. No Foreclosure of Regional Sports Networks

The transaction will not enhance Comcast's incentive or opportunity to engage in foreclosure with respect to RSNs in any way. Comcast is acquiring no RSNs in this transaction, nor is it increasing its regional concentration in the MVPD business in any way. To the extent that commenters have raised concerns about the baseball-style arbitration process for access to certain RSN programming that the Commission implemented in the *Adelphia Order*, the Commission has already established a process whereby it will issue a report on "regional sports network access" six months prior to the expiration of that condition (in 2012) and "may determine if further action is warranted" at that time.[530]

In any event, across Comcast's 39-state footprint, there is only one RSN that Comcast has chosen not to license to all competing MVPDs, and that is its RSN in its hometown of Philadelphia. Comcast chose long ago not to license this RSN to two distributors, while licensing it to others, and the FCC and the D.C. Circuit both previously have ruled that its decision to do so was entirely lawful – and specifically that it was not an "unfair practice."[531]

6. No Foreclosure of Online Video to MVPDs

DirecTV and Dish Network among other commenters also argued that Applicants' efforts to provide certain of their content online on an "authenticated" basis somehow represents a form of foreclosure and that post-transaction, Applicants would use authentication as a means to discriminate against rival MVPDs.[532] Commenters' claims are both inaccurate and disingenuous,

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530 *Adelphia Order* ¶ 165.

531 *In the Matter of DIRECTV, Inc. and EchoStar Communc'ns Corp. v. Comcast Corp.*, Memorandum Opinion and Order, 15 FCC Rcd 22802 ¶ 2 (2000), *pet. review denied, Echostar Communc'ns Corp. v. FCC*, 292 F.3d 749, 756 (D.C. Cir. 2002).

532 DirecTV Comments at 29-31; Dish Network Petition to Deny at 19-22.

particularly so in the case of DirecTV, {{

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Post-transaction, the combined entity would plainly lack the ability to pursue a foreclosure strategy by withholding online content from other MVPDs. The combined entity would account for only 13.7 percent of national broadcast and basic cable television viewing, and only 12.8 percent of basic cable television viewing. These figures significantly overstate Applicants' shares of authenticated online content, as NBCU and Comcast do not have key online rights for many of the programs shown on their linear networks.[533] If the combined entity were to withhold online content from either Dish Network or DirecTV, the DBS provider could continue to obtain online content from content owners responsible for more than 85 percent of national broadcast and basic cable television viewing.

The combined entity would also have no incentive to withhold online content from other MVPDs.[534] Any effort by the combined entity to withhold online content would harm NBCU's

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[533] Israel/Katz Online Video Report ¶ 13.

[534] ACA repeats baseless allegations that (1) Comcast delayed WOW!'s access to Comcast-affiliated authenticated programming and that (2) this delay "hampered" WOW!'s plans to offer authenticated online video to its own subscribers. ACA Comments at 35-36. As ACA acknowledges, Comcast expressed willingness to provide authenticated programming to WOW! as early as February 2010; Comcast's networks had then only recently begun offering authenticated content. (At the time of WOW!'s initial approach to Comcast, Comcast had not even begun its own national beta rollout of authenticated online access.) Comcast has already entered into agreements to provide authenticated content to two of its major MVPD rivals, Dish Network and AT&T, and an agreement with WOW! is pending. Moreover, any delay, had it occurred, would not have had a material impact on WOW!'s plans or on its ability to compete: The content that the Comcast-affiliated networks at issue currently offer on an

content business by causing it to forego profitable online distribution deals. As discussed above, GE would have a strong incentive to oppose such a strategy. In addition, such online foreclosure would harm Comcast's broadband business to the extent such a foreclosure strategy would lead to less Internet usage by Comcast broadband customers that are also DirecTV subscribers; doing so would be a "lose-lose" scenario for Comcast, not a "win-win" as DirecTV claims.[535] There is simply no basis to believe the joint venture would do anything other than place itself at a competitive disadvantage by withholding online and VOD rights ancillary to linear carriage from DirecTV and Dish Network.

DirecTV makes a similarly incredible claim that Comcast would use what DirecTV claims is an "online loophole" to move high-profile NBC Sports programming to the Internet, where it would be available only to authenticated Comcast subscribers.[536] This claim is implausible for several reasons. First, {{

}} Second, it is implausible as a matter of economics to believe that, after paying the substantial sums needed to acquire the rights to popular sports programming like NFL games or the Olympics, the combined entity would decide to forego the

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authenticated basis is competitively insignificant, and the authentication model, more generally, has only been recently introduced and is not a driver of competitive outcomes.

Comcast's authenticated online service model is evolving rapidly. When the Applications were filed in January, Comcast advised the Commission that it was "working . . . to provide its cable customers with the ability to access [authenticated] Fancast Xfinity TV content using the network of any [ISP]." Public Interest Statement at 23. The Fancast Xfinity TV authenticated service is now available online to all Comcast digital video subscribers, even if they don't subscribe to Comcast's HSI service.

535 DirecTV Comments at 34.

536 *Id.* at 29-30.

national advertising revenues it would earn from a television broadcast by moving the content to the Internet in order to limit access to Comcast's smaller subscriber base. Third, Comcast has specifically agreed with NBC affiliate stations that, subject to certain conditions, major sporting events for which NBC holds broadcast rights as of the date of Comcast's agreement with the affiliates (June 3, 2010) will continue to be broadcast on the NBC Television Network.[537] Fourth, it is inconceivable that GE (the 49 percent owner of the joint venture) would agree to such a strategy, which would curtail distribution and revenues for NBC Sports. Fifth and finally, this would prove an entirely self-defeating maneuver, as it would adversely affect Comcast's 23.5 million cable customers, who would be forced to view streaming live sports programming in a sub-optimal manner.[538]

Dish Network erroneously claims that the joint venture threatens to increase Comcast's incentives to discriminate against other online video distributors.[539] For example, Dish Network argues that Comcast might systematically enhance the quality of NBCU online video content on Fancast Xfinity TV as compared to DISHOnline.[540] Dish Network even speculates that Comcast intends to engage in an online video foreclosure strategy.[541] As discussed above, commenters

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537 This agreement is further detailed in Section III.A above. For the same reason the combined firm has no incentive to restrict linear and online content, it will have no incentive to foreclose VOD content, which often consists of library content or content that is more limited than linear content and thus is unlikely to cause people to switch MVPDs.

538 Plus, as discussed above, at present there are considerable technological impediments to broadband Internet networks delivering online video as a substitute for MVPD services. Absent significant advances in technology, online video viewing at the scale required to replace MVPD services would cause serious congestion and disruption to the Internet – especially during peak viewing times – resulting in slower and degraded service. Israel/Katz Online Video Report ¶¶ 45-47. Moreover, even if the transfer of sufficient data over the Internet were technologically possible (and it currently is not), it would be quite expensive. *Id.* ¶¶ 42, 46 n.68.

539 Dish Network Petition to Deny at 18-23.

540 *Id.* at 19-20.

541 *Id.* at 25.

have presented no evidence that the foreclosure of television content would result in large numbers of subscribers switching to Comcast. The same is true here – Dish Network provides no empirical support for the argument that any purported foreclosure or discrimination strategy would cause subscribers to switch from rival MVPDs to Comcast. Without such evidence, the Commission should disregard this implausible accusation.

Both Dish Network and DirecTV also misleadingly cite the NBC Olympics online coverage as an example of "discrimination."[542] But this authentication system was made available on an equal basis to all MVPDs who purchased access to additional NBCU Olympic cable programming. *Indeed, both Dish Network and DirecTV participated in this arrangement*, and made Olympic content available to their subscribers on an authenticated basis. Their "discrimination" claims are not credible.

D. The Transaction Will Not Facilitate Anti-Competitive Foreclosure of Competing Video Programming.

A few commenters claim that the combined entity could pursue anti-competitive foreclosure strategies by withholding distribution opportunities from competing "unaffiliated" content providers, such as "independent" cable networks or content providers.[543] Neither economic theory nor any evidence supports this argument. In addition, various parties have attempted to exploit this proceeding to air preexisting complaints that bear no relationship to the proposed transaction and, regardless, are entirely devoid of merit.[544]

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542 Dish Network Petition to Deny at 17-18. Amazingly, DirecTV makes this claim while at the same time acknowledging in a footnote that "DirecTV subscribers had access to this programming." DirecTV Comments at 30 n.82.

543 *See, e.g.*, Bloomberg Petition to Deny at 25; DirecTV Comments at 37; WealthTV Petition to Deny at 3.

544 MASN Comments at 4-5; Wealth TV Petition to Deny at 3; Tennis Channel Comments at 17-18.

1. Comcast Has No Ability to Pursue Anti-Competitive Foreclosure Strategies Against Unaffiliated Content Providers.

There is simply no economic basis for concluding that Comcast would have the ability to pursue anti-competitive foreclosure strategies against unaffiliated content providers. First and foremost, Comcast has less than a 24 percent share of MVPD subscribers in the United States.[545] In a recent decision, the D.C. Circuit held that "it was arbitrary and capricious for the Commission to conclude that a cable operator serving more than *30 percent* of the market poses a threat either to competition or to diversity in programming."[546] In support of this holding, the court cited "evidence of ever increasing competition among video providers," including the fact that "[s]atellite and fiber optic video providers have entered the market and grown in market share since the Congress passed the 1992 Act, and particularly in recent years.[547] The court concluded that "[c]able operators, therefore, no longer have the bottleneck power over programming that concerned the Congress in 1992."[548] The Commission's analysis in *Comcast/AT&T Broadband* confirms that Comcast lacks the market position to engage successfully in foreclosure of independent programmers.[549] Here, even if Comcast were to deny

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545 Israel/Katz Reply Report ¶ 132.

546 *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009) (emphasis added).

547 *Id.*

548 *Id.*

549 *See In the Matter of Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, Memorandum Opinion and Order, 17 FCC Rcd 23246 ¶ 56 (2002) (concluding that "the merger would not enable Applicants to successfully foreclose unaffiliated national programmers" because "[t]he merged firm would reach fewer than 30 percent of the nation's MVPD subscribers" and "the national percentage of non-AT&T Comcast subscribers . . . could support unaffiliated programming"), *aff'd sub nom. Consumer Fed'n of Am. v. FCC*, 348 F.3d 1009 (D.C. Cir. 2003); *see also* Adelphia Order ¶ 36. Dr. Christopher S. Yoo of the University of Pennsylvania has similarly concluded that that the level of concentration in the market for video programming sales to MVPDs was "not even remotely close" to the "level of concentration needed for vertical integration to even plausibly pose an anti-competitive threat." Yoo Comments at 28.

carriage to an unaffiliated network such as Bloomberg, it would not foreclose that network from the vast bulk of the MVPD marketplace; the unaffiliated network could continue to seek carriage on MVPDs serving more than 76 percent of U.S. MVPD subscribers.

Commenters proffer no empirical evidence to refute the D.C. Circuit's recent and controlling conclusion that neither Comcast nor any other single MVPD has the ability to threaten competition or diversity in programming.[550] Bloomberg relies exclusively on self-serving claims that Comcast operates in DMAs that are "particularly important for business news" and that losing access to Comcast's subscribers [[ ]][551] Bloomberg's economist, Dr. Marx, offers no data and no documents to support these assertions.[552] Nor does she mention that Bloomberg is a well-established player in the

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550 *See* CFA *et al.* Petition to Deny at 46-47; Cooper/Lynn Decl., Part II(C)(2); Marx Report ¶ 89.

551 Marx Report ¶ 89.

552 Even where Dr. Marx has purported to provide econometric evidence for her assertions on behalf of Bloomberg, her conclusions must be viewed with extreme skepticism. After Comcast's experts determined that Dr. Marx failed to include any relevant supporting data with her submission, Comcast requested that Bloomberg's counsel provide backup data and programs sufficient to replicate and test her calculations and analyses. (By contrast, Dish Network and DirecTV provided full backup data with their original submissions.) Specifically, Comcast requested the raw data that underlay Dr. Marx's analyses, any programs used to clean or alter these data, the programs used to run the analyses on the cleaned data, and all output from those programs. These are the same types of materials that Drs. Israel and Katz supplied with their economic reports that have been filed with the Commission in this proceeding and made available to authorized third party representatives (including Bloomberg's outside counsel and outside experts). With that set of Dr. Marx's backup materials, Comcast's experts would be able to replicate Dr. Marx's work, as well as test the importance of assumptions and the decisions she made throughout the process in generating the reported results. Despite Comcast's repeated requests, Bloomberg's counsel has refused to provide sufficient backup data for this purpose. Bloomberg's counsel provided only Dr. Marx's "log files" – effectively, the output from her computer programs – and one spreadsheet. Notably, Bloomberg's counsel did not provide the underlying computer programs for Dr. Marx's work and, more importantly, did not provide the data that feeds into these programs. Instead, Bloomberg's counsel indicated in a letter dated June 29, 2010, that Dr. Marx's "calculations may be replicated by purchasing a license or licenses to use the data." Putting aside the time and expense that would be required to pursue this course during Applicants' 30-day period to respond to the points raised in Bloomberg's Petition to Deny, it would be nearly impossible to ensure that Applicants received precisely the same data in the same format as Dr. Marx used in her programs. Even a small difference in data or format would make it impossible to properly run Dr. Marx's programs and thus impossible to replicate her work. Applicants understand that Bloomberg's counsel also have not filed Dr. Marx's backup data with the Commission. Absent such backup, Dr. Marx's results are unverifiable and untestable – by Applicants or the Commission – and, for this reason alone, should be given no weight.

financial news sector, with multiple non-network assets and revenue streams that include its lucrative Bloomberg-terminals business.

Moreover, a network only confronts a true threat to its viability when it loses carriage on *multiple* MVPDs.[553] It follows that any decision by Comcast to deny carriage to a network would incentivize the network to obtain carriage on other MVPDs – an outcome that could generally be achieved only by reducing the price that the network would charge those MVPDs.[554] Such an outcome could prove problematic for Comcast on two levels: first, lowering programming prices for other MVPDs would make Comcast's MVPD service more expensive and therefore less competitive to consumers, and second, lowering the asking price for Bloomberg would disadvantage the joint venture by making Bloomberg more attractive than CNBC to other MVPDs.[555]

Equally unavailing is any claim that, even if Comcast could not drive a network such as Bloomberg out of business entirely, it could shrink the network's subscriber base, thereby limiting its potential size, reducing its incentives to invest, and lowering the quality of its programming.[556] The fundamental assumption underlying this theory – that Comcast's denial of carriage would necessarily cause a network to *reduce* its investment incentives – is entirely unsupported. In fact, "[i]f the loss of Comcast would be harmful to Bloomberg, then an

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553 *See Comcast Corp. v. FCC*, 579 F.3d 1, 4 (D.C. Cir. 2009).

554 Israel/Katz Reply Report ¶ 134.

555 *Id.*

556 *See* Marx Report ¶ 86.

increased risk that Comcast might choose not to carry Bloomberg could well induce Bloomberg to invest *more* in product quality to ensure that Comcast will carry its television network."[557]

2. Comcast Has No Incentive to Pursue Anti-Competitive Foreclosure Strategies Against Unaffiliated Content Providers.

The combined entity would not only lack the ability to pursue an anti-competitive foreclosure strategy against Bloomberg or other cable television networks, but also would lack any incentive to do so. As discussed in the Public Interest Statement, given the number of available substitutes to NBCU's national cable television networks, Comcast would need to deny carriage to a substantial number of unaffiliated cable networks before NBCU's cable networks could theoretically realize any appreciable benefit.[558] Dropping such a large number of networks, however, would significantly degrade the quality of Comcast's MVPD service.[559]

In an effort to support its claim that the combined entity would have an incentive to pursue an anti-competitive foreclosure strategy against it, Bloomberg argues that the Commission should recognize a distinct market for "TV business news programming" (consisting of Bloomberg Television Network, CNBC, and Fox Business News), and argues that diversion from Bloomberg to CNBC would be high within such a market.[560] Bloomberg also argues that integrated MVPDs have historically favored their own networks to the detriment of unaffiliated networks serving similar audiences.[561] Neither claim withstands scrutiny. As discussed below, the evidence that Dr. Marx presents in support of her claim that TV business

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557 Israel/Katz Reply Report ¶ 138.

558 Public Interest Statement at 110.

559 *Id.*

560 Bloomberg Petition to Deny at 28; Marx Report ¶ 62.

561 Bloomberg Petition to Deny at 32.

news programming constitutes a relevant market is deeply flawed. Moreover, empirical evidence demonstrates that integrated MVPDs in general – and Comcast in particular – *do not* tend to disadvantage unintegrated networks, even those operating in similar categories to MVPDs' own networks.[562]

a. There Is No Basis for Defining a Narrow Market for "TV Business News Programming."

Bloomberg's attempt to define a distinct market for "TV business news programming" has no basis in either logic or Commission precedent. As discussed above, the Commission adopted its most narrow video programming market definitions in the *News Corp.-Hughes Order*, where it separated programming owned by News Corp. into three categories: "(1) national and non-sports regional cable programming networks; (2) regional sports cable networks; and (3) local broadcast television programming."[563] Dr. Marx's report cites the FTC's *Time Warner-Turner Order*, but the FTC did not recognize a market for "TV business news programming" in that order.[564] The FTC did define a category of "news and information national video programming," but that category, even if it were deemed a relevant market, would be of no assistance to Bloomberg in this proceeding.[565] As Drs. Israel and Katz explain, Bloomberg's contention that a combined Comcast-NBCU would have an incentive to pursue a foreclosure

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562 Israel/Katz Reply Report ¶¶ 147-153.

563 *News Corp.-Hughes Order* ¶ 60 (internal citations omitted).

564 *See* Marx Report ¶ 46 n.40 (citing *In the Matter of Time Warner Inc., Turner Broadcasting System, Inc., Tele-Communications, Inc., and Liberty Media Corp.*, Docket No. C-3709, 1997 FTC LEXIS 13 (February 3, 1997)).

565 *In the Matter of Time Warner Inc., Turner Broadcasting System, Inc., Tele-Communications, Inc., and Liberty Media Corp.*, Docket No. C-3709, 1997 FTC LEXIS 13, *50 (February 3, 1997))

strategy against it depends entirely on Bloomberg's implausible market definition.[566] If the relevant market proposed by Bloomberg were expanded to include other national cable news programming networks, even that limited expansion would dramatically affect both CNBC's market share and the predicted diversion ratio from Bloomberg to CNBC – causing the latter to plummet from {{ }} thereby rendering a foreclosure strategy plainly implausible.[567]

Neither Bloomberg nor Dr. Marx is able to offer any competent evidence supporting the existence of a market for "TV business news programming." Dr. Marx cites DirecTV's channel placements,[568] but, in fact, DirecTV's (and Dish Network's) placements mix business news and other news networks.[569] Dr. Marx also attempts to show that Bloomberg and CNBC do not compete with other cable and broadcast networks by examining correlations between decisions by MVPDs' "head ends" to carry various networks.[570] Dr. Marx claims that her analysis supports "a business news market that is distinct from the market for general news networks," because she finds a negative correlation between carriage of Bloomberg and carriage of CNBC on the basic or expanded-basic tiers, but does not find negative correlation between carriage of Bloomberg and carriage of other news networks.[571] Dr. Marx's analysis is incapable, however, of answering the questions that matter: whether Bloomberg and CNBC are substitutes from the perspectives of advertisers and consumers, and if so, whether other networks are also meaningful substitutes

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566 Israel/Katz Reply Report ¶ 167.

567 *Id.* ¶ 170

568 Marx Report ¶ 60.

569 Israel/Katz Reply Report ¶¶ 179-182, Table VI.9.

570 *Id.* ¶ 174.

571 Marx Report at Table 4.

for Bloomberg and CNBC.[572] Just as clothing stores in cold climates are more likely to carry many coats (although their customers regard those coats as substitutes), head-ends in DMAs with populations of viewers with a strong taste for news programming are more likely to carry multiple networks, even though their subscribers and advertisers regard those networks as substitutes.[573] Applying Dr. Marx's methodology, however, one would incorrectly conclude that the news networks were complements, rather than substitutes.[574] As Drs. Israel and Katz demonstrates, this flaw in Dr. Marx's methodology is not simply hypothetical.[575] Applying her methodology, one would also conclude that CNBC and Teen Nickelodeon are substitutes and belong in the same relevant market, but Nickelodeon and Disney do not (because the head-ends that carry Nickelodeon on the analog tier are also more likely to carry Disney on that tier).[576] Positive correlations between carriage of Bloomberg and carriage of other news networks likewise reveals nothing about whether consumers and advertisers regard these networks as substitutes.[577]

Dr. Marx also purports to demonstrate the existence of a business television programming market by inappropriately applying a hypothetical monopolist test to a bargaining model. While an appropriate application of the hypothetical-monopolist test would examine whether a firm controlling all business news networks would profitably be able to *bargain* for affiliate fees 10 percent higher than they are today, Dr. Marx instead examines whether MVPDs

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572 Israel/Katz Reply Report ¶ 157.

573 *Id.* ¶ 158.

574 *Id.*

575 *Id.* ¶ 159.

576 *Id.*

577 *Id.* ¶¶ 156-159.

would still find it profitable to carry business television networks at the higher prices.[578] As a result, her approach can be used to demonstrate, among other absurd conclusions, that (1) many individual networks comprise their own markets (*i.e.*, a market of one), and (2) many arbitrary network groupings (such as CNBC and Lifetime or CNBC, A&E, and BBC America) constitute separate relevant markets as well.[579]

In sum, Dr. Marx has presented no meaningful evidence that a distinct "TV business news programming" market exists. In evaluating this transaction, the Commission should not define video programming markets more narrowly than it has defined them in evaluating past transactions. If the Commission concludes that it must revisit the market definition issue, the relevant market within which CNBC and Bloomberg compete should be defined no more narrowly than all national news networks.

b. Pursuing a Vertical Foreclosure Strategy Against Bloomberg or Any Other Unaffiliated Content Provider Would Be Unprofitable.

Dr. Marx presents a vertical foreclosure model that measures gains to CNBC from a distribution-foreclosure strategy against losses to Comcast's cable operations from dropping Bloomberg. Dr. Marx's conclusion that Comcast would have anti-competitive incentives to deny Bloomberg carriage, however, stems from her reliance on incorrect values for Comcast's profit margin and CNBC revenues.[580] As Drs. Israel and Katz show, once correct values are input, Dr. Marx's own model implies that it would not be profitable for Comcast to drop Bloomberg.[581]

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578 *See id.* ¶¶ 160-161.

579 *Id.*¶ 161.

580 *Id.* ¶ 154, 168-172.

581 *Id.* ¶ 171.

c. There Is No Evidence that Vertically Integrated MVPDs Discriminate Against Genre Programming.

Bloomberg also asserts that integrated MVPDs have historically tended to disadvantage unintegrated networks in an anti-competitive manner via channel placement decisions. This is not the case.

As Drs. Israel and Katz explain, the economic literature and their own empirical analysis at most indicate that vertically integrated MVPDs carry their own networks at a higher rate than do other MVPDs.[582] This, however, does not indicate the presence of anti-competitive foreclosure and, indeed, may supply evidence of efficiencies of vertical integration that create incentives for the MVPD to provide access to these networks to a larger set of subscribers.[583]

The evidence does not support the hypothesis that vertically integrated MVPDs tend to deny carriage to, or otherwise disadvantage, networks with which they are not affiliated, particularly those that are "similar" to integrated networks.[584] A study conducted by Greg Crawford in 2009 and presented to the FCC as part of this proceeding provides little support for a claim that integrated MPVDs reduce their carriage of (or otherwise disadvantage) unintegrated networks operating in categories in which the MVPDs have affiliated networks.[585] Consider, for example, channels "targeting black audiences." Dr. Crawford's results indicate that Comcast is more likely than most other cable operators (aside from Charter) to carry TV One, but also show

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582 *Id.* ¶ 142.

583 *Id.* ¶¶ 143 & n.192, 148.

584 *Id.* ¶¶ 163-65.

585 Letter from Gregory S. Crawford, University of Warwick, to Marlene H. Dortch, Secretary, FCC, MB Docket No 10-56 (Apr. 28, 2010) (attaching Gregory S. Crawford, The Empirical Measurement of Foreclosure Incentives in U.S. Pay Television Markets (Nov. 20, 2009)).

that Comcast was more likely than any cable operator to carry the Black Family Channel[586] and was more likely than any operator other than Time Warner Cable to carry BET (both of which are unaffiliated with Comcast).[587]

Drs. Israel's and Katz's own empirical study, based on Rovi Corp. data, likewise yields no support for a claim that Comcast systematically disadvantages networks competing in the same categories as its own networks (*e.g.*, women's programming or sports programming), through carriage, tier, or channel neighborhood decisions. The results show, if anything, that Comcast is *more* likely to carry non-Comcast women's and sport networks. Accordingly, Bloomberg's assertions that the combined company will have the incentive and ability to pursue anti-competitive foreclosure strategies against unaffiliated networks are unfounded.

d. Bloomberg's Attempt To Extract Superior and Unjustified Terms of Carriage Should Be Denied.

Not only are Bloomberg's assertions of competitive harm baseless, but its proposed remedies bear only a tenuous relationship to these asserted harms and instead represent an attempt to extract superior and unjustified terms of carriage from Comcast. Bloomberg speculates that, as a result of the transaction, Comcast may place Bloomberg in a different "programming neighborhood" than CNBC,[588] and proposed that the Commission deny the Applications, or, alternatively, require that "as soon as possible and in no case later than six months after a decision, Comcast reorganize its channel placement alignment so that business

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586 *See* WealthTV and other commenters recite specious and wholly unsupported accusations against Comcast about this channel. WealthTV Petition to Deny at 17-18; Entertainment Studios, Inc. Comments at 6; National Coalition of African American Owned Media Petition to Deny at 12.

587 Letter from Gregory S. Crawford, University of Warwick, to Marlene H. Dortch, Secretary, FCC, MB Docket No 10-56 (Apr. 28, 2010) (attaching Gregory S. Crawford, The Empirical Measurement of Foreclosure Incentives in U.S. Pay Television Markets at 43 (Nov. 20, 2009)).

588 Bloomberg Petition to Deny at 29-30.

news channels are adjacent and contiguous to CNBC and any similar Comcast business news channels."[589] Bloomberg, however, is *currently* in a different "programming neighborhood" than CNBC: CNBC is carried on Comcast's expanded basic tier in almost all Comcast systems (including those in which expanded basic is delivered in analog), whereas Bloomberg is generally carried only in digital (including on newly-digitized expanded basic tiers).[590] Moreover, this circumstance arose long before Comcast contemplated any ownership interest in CNBC and so could not have any anti-competitive purpose.[591] And this treatment of Bloomberg is consistent with Bloomberg's treatment by many other major MVPDs, none of which has an ownership interest in a competing business news network.

Bloomberg's proposed "remedy" is inappropriate given the fact that CNBC is a more successful and established network. Bloomberg is essentially demanding full equality with CNBC which it has not earned in the marketplace. According to SNL Kagan, CNBC ranks 16th among basic cable networks by estimated 2010 subscribers, reaching over 100 million households, while Bloomberg ranks 80th, reaching fewer than 60 million households.[592] CNBC has been a proven performer for many years. In contrast, Andrew Lack, CEO of Bloomberg's multimedia group, said that as recently as 2008 Bloomberg TV "felt more like a start-up. There wasn't an infrastructure here to produce a professional cable television channel. . . . Four or five

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589 *Id.* at 33.

590 Bloomberg fails to inform the Commission that Comcast has substantially and recently expanded distribution of Bloomberg TV after a contract amendment that Bloomberg freely negotiated. Bloomberg TV's distribution on Comcast's systems has soared from approximately {{ }} subscribers in 2008 to over {{ }} today.

591 *See Israel/Katz Reply Report* ¶ 178 ("[A]ny such theory of harm is entirely speculative, as by Professor Marx's own evidence, Comcast rarely places Bloomberg TV in a channel position near CNBC today: CNBC is generally inside the first 100 channel numbers . . . , while Bloomberg TV is generally outside the first 100 channel numbers.").

592 SNL Kagan, *Economics of Basic Cable Networks,* 2009, at 32-33.

years from now, this will be a business."[593] Bloomberg is attempting to use this transaction review as leverage to re-negotiate its channel placement, which is the product of arm's-length negotiations with Comcast untainted by any competitive issues.

3. This Proceeding Is an Inappropriate Forum for Commenters to Air Meritless, Preexisting Grievances Which Have No Bearing on the Transaction.

No court or agency has ever found that Comcast engaged in unlawful or anti-competitive discrimination against unaffiliated programmers. Indeed, in the nearly 20 years since the program carriage rules were promulgated, only four networks have brought program carriage complaints against Comcast – none of which was determined to be meritorious.[594] Despite this record, a few commenters have attempted to utilize the comment process in this proceeding to advance claims of program carriage discrimination that bear no relation to the consideration of the transaction.[595]

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[593] Stephanie Clifford and Julie Creswell, *At Bloomberg, Modest Strategy to Rule the World*, N.Y. Times, Nov. 15, 2009, at BU1, *available at* http://www.nytimes.com/2009/11/15/business/media/15bloom.html?_r=1&scp=1&sq=bloomberg%20%22modest%20strategy%20to%20rule%20the%20world%22&st=cse.

[594] Several commenters point to certain past complaints as evidence of Comcast's alleged propensity to engage in distribution foreclosure. *See, e.g.*, Letter from Sen. Al Franken, U.S. Senate, to Marlene H. Dortch, Secretary, FCC at 6 (June 21, 2010) ("The consistency of this type of complaint demonstrates that Comcast has already engaged in troubling, discriminatory behavior that would only be encouraged by a greatly expanded in-house programming library."); Bloomberg Petition to Deny at 34-37; CFA *et. al* Petition to Deny at 43; Tennis Channel Comments at 3. But when the cited complainants' allegations of affiliation-based discrimination and unreasonable restraint were put to the proof, they fell well short of the mark. Thus, if these cases are indicative of anything, it is the potential dangers of creating a climate that is hospitable to regulatory gamesmanship, as undeniably occurred during the period when the majority of the complaints cited were filed. *See In the Matter of Herring Broadcasting Inc. d/b/a WealthTV et al. v. Time Warner Cable Inc. et al.* Order, 24 FCC Rcd 1581 (2009) (Commission unanimously rescinded two Media Bureau orders issued in six consolidated program carriage complaint cases, only one week after Chairman Martin left office).

[595] CFA *et al.* make the reckless charge that "cable incumbents have acted in unison to punish programmers who seek redress under the FCC's carriage complaint procedure." CFA *et al.* Petition to Deny at 44. Yet the only "source" cited for this bald assertion is a 1991 Senate Report *that pre-dates the 1992 Cable Act that authorized the creation of the program carriage rules. See id.* at n.87.

WealthTV is one such commenter. In the program carriage case it brought against Comcast and three other cable operators, the FCC's Chief Administrative Law Judge ("ALJ") found that WealthTV had "failed completely" to prove its allegations, that its evidence was "unreliable," and that its witnesses were "not credible."[596] The ALJ also specifically found that Comcast's decision not to carry WealthTV was based on "nondiscriminatory business reasons."[597] Despite this unambiguous ruling (which WealthTV does not acknowledge in its pleading), WealthTV asks the Commission to require that "Comcast carry all 'Established Independent Networks' on its basic or expanded basic programming tiers across all of its subscribers"[598] – a proposal that is transparently self-serving. WealthTV brings no credibility to this proceeding; it recklessly repeats claims about its network and Comcast's conduct that have been thoroughly disproved in the crucible of an adversarial hearing.[599] Accordingly, WealthTV's allegations of discrimination by Comcast against unaffiliated programmers and predictions of future harm should be given no weight.

Like Bloomberg, discussed above, Mid-Atlantic Sports Network ("MASN") requests that the FCC consider placing "conditions on the channel placement practices of the merged

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596 *In the Matter of Herring Broadcasting, Inc. d/b/a/ WealthTV et al. v. Time Warner Cable Inc. et al.*, Recommended Decision of Chief Administrative Law Judge Richard L. Sippel, 24 FCC Rcd 12967 ¶¶ 60, 63% 18, 117, 130, 179, 238 (Oct. 14, 2009) ("*WealthTV ALJ Recommended Decision*"). By contrast, the ALJ found both of Comcast's witnesses to be "consistent, competent, and credible." *Id.* ¶ 44. WealthTV's Exceptions Brief to the ALJ's Recommended Decision is pending with the Commission.

597 *Id.* ¶ 67.

598 WealthTV Petition to Deny at 6 (internal citation omitted).

599 For example, WealthTV continues to assert that its network was "strikingly similar" to the defunct Comcast-affiliated network MOJO, *see id.* at 17, whereas the ALJ found that "[t]he preponderance of the evidence establishes that MOJO and WealthTV neither aired the same type of programming, nor targeted the same audience." *WealthTV ALJ Recommended Decision* ¶ 21 (Oct. 14, 2009); *see also id.* ¶¶ 22-26 (elaborating the two networks' dissimilarities). In addition, certain allegations made by WealthTV that the ALJ rejected as not credible have been repeated by other commenters in this proceeding. *See, e.g.*, Letter from Sen. Al Franken, U.S. Senate, to Marlene H. Dortch, Secretary, FCC at 6 (June 21, 2010); CFA *et al.* Petition to Deny at 43 & n.86.

entity."[600] MASN's particular complaint appears to be that its channel placement is not adjacent to other sports-related programming in Comcast's Washington, D.C., cable system.[601] As an initial matter, MASN has twice aired its carriage-related grievances before the Commission in complaint proceedings, both of which it settled with Comcast. With respect to its most recent complaint, which received a full hearing before the FCC's Chief ALJ, the Enforcement Bureau submitted post-hearing comments stating that "MASN's claims in support of its theory [of affiliation-based discrimination] are speculative, not supported by the record, or otherwise contradicted by legitimate business explanations advanced by Comcast."[602]

MASN's professed concerns about Comcast's alleged "discriminatory channel placement" are similarly baseless for several reasons: First, MASN's channel placement was determined when Comcast and MASN reached a carriage agreement in August of 2006. In order to accommodate MASN's desire to be launched immediately (before the close of the 2006 baseball season) in its core markets, including Washington, D.C., Comcast provided channel positions that were then immediately available, with the least possible disruption to customers.[603] Second, in the four years since, in several systems where it has been operationally appropriate to do so, Comcast has initiated several channel changes to position MASN adjacent to ESPN, CSN

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600 MASN Comments at 5.

601 *Id.* at 4, n.5.

602 Investigations and Hearings Division (Enforcement Bureau) Comments, MB Docket No. 08-214, ¶ 22 (Aug. 10, 2009). This proceeding was terminated with the parties' consent after they reached a mutually agreeable settlement and before the ALJ issued a recommended decision. *See In the Matter of TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Comcast Corp.*, Order Dismissing Program Carriage Complaint with Prejudice and Terminating Proceeding, 24 FCC Rcd 14776 (ALJ 2009).

603 MASN does not – and cannot – suggest that Comcast's channel positioning of MASN is inconsistent with the terms of the carriage agreement that MASN negotiated and that the parties have amended several times.

Mid-Atlantic, and other sports networks.[604] Third, on Comcast systems throughout MASN's territory, the HD feeds of MASN and its sister network MASN 2 occupy the channel positions adjacent to the HD feeds of CSN and other sports networks. For example, throughout the greater Washington D.C. and Baltimore markets, the HD feeds of MASN, MASN 2, CSN Mid-Atlantic, Versus, Golf Channel, ESPN, and ESPN2 are all grouped on contiguous channels between 844 and 851.[605] Finally, MASN neglected to inform the Commission in its pleading that, while MASN is on channel 42 in Comcast's Washington, D.C. lineup, MASN 2 is on channel 5, which is in close proximity to ESPN, CSN Mid-Atlantic, and other sports networks.[606] MASN's complaints are meritless, and its arguments deserve no weight in this proceeding.

Tennis Channel is likewise attempting to use this proceeding to advance litigation objectives that have no relevance to the transaction.[607] Although Tennis Channel acknowledges its pending carriage dispute in its comments, it claims that its "[c]omments are *not* intended to litigate Tennis Channel's program carriage dispute with Comcast Cable Communications."[608] Its comments do precisely that, however. In the litigation it initiated, Tennis Channel has asked that the Commission require Comcast to afford Tennis Channel far broader carriage than it enjoys on any other major MVPD. Tennis Channel's theory for this extraordinary and unwarranted

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604 *See, e.g.*, Comcast's Baltimore County, Maryland channel lineup, *at* http://www.comcast.com/Customers/Clu/ChannelLineup.ashx?print=1&CGID=5499 (last visited July 18, 2010); *see generally* MASN web site, *at* http://www.masnsports.com/masn_news_information/find-masn.html (last visited July 18, 2010).

605 Thus, for those Comcast subscribers who watch sports networks only or primarily in HD, it is largely irrelevant how the MASN analog or SD services are positioned on Comcast systems.

606 *See* Comcast's Washington, DC channel lineup, *at* http://www.comcast.com/Customers/Clu/ChannelLineup.ashx?print=1&CGID=5062 (last visited July 18, 2010).

607 Tennis Channel Comments at 4.

608 *Id.* (emphasis in original).

demand is that Comcast discriminates against Tennis Channel on the basis of affiliation and in favor of its own sports networks Versus and Golf Channel (a theory that it repeats in its comments).[609] Comcast has thoroughly refuted these allegations.[610]

In its comments, Tennis Channel asks that it no longer be required to prove unlawful discrimination. Instead, Tennis Channel proposes that, if a complainant is merely in the same very broad "category" (*e.g.*, "sports") as a Comcast-affiliated network, it should automatically be deemed to compete with that affiliated network, and Comcast should be required to carry the complainant's network at "at least" the same distribution level as the affiliated network.[611] This proposal is ill-advised and contrary to established precedent.[612] Tennis Channel's comments should be viewed as simply its latest effort to use regulatory processes to help it renegotiate the terms of a carriage agreement that Tennis Channel freely agreed to years ago. Accordingly,

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609 *Id.* It should not be overlooked that Tennis Channel tendered its trigger letter to Comcast announcing its intent to file a program carriage complaint just one week after the public announcement of the proposed transaction.

610 Like WealthTV and MASN, Tennis Channel omits important information relevant to its comments: first, Tennis Channel is receiving precisely the carriage it bargained for in 2004 – there is no dispute that Comcast has fully complied with its contract with Tennis Channel; second, Comcast's carriage of Tennis Channel on a sports tier is consistent with the carriage that Tennis Channel receives on most major MVPDs; third, Comcast's carriage of Versus and Golf Channel (both of which were launched a decade before Tennis Channel) on highly-penetrated tiers is consistent with the carriage that those networks receive on other major MVPDs; fourth, Tennis Channel itself has recognized that placing its network on a sports tier is a legitimate "cost/business" decision, not a function of affiliation; and finally, far from being competitively harmed, Tennis Channel has directly and substantially benefited from carriage on Comcast's sports tier. *See In the Matter of The Tennis Channel, Inc., v. Comcast Cable Communications, LLC,* File No. CSR-8258-P, Answer of Comcast Cable Communications, LLC (Feb. 17, 2010); *see also In the Matter of The Tennis Channel, Inc., v. Comcast Cable Communications, LLC,* File No. CSR-8258-P, Motion for Acceptance of Surreply and Surreply of Comcast Cable Communications, LLC (Apr. 14, 2010).

611 Tennis Channel Comments at 15-16.

612 *See WealthTV ALJ Recommended Decision* ¶ 3 (citing previous ALJ orders). As the ALJ recognized, it is entirely appropriate – and customary in civil litigation – for the complainant, as the accuser, to bear the burden of proof, and it in no way impairs the complainant's ability to seek effective relief. In any event, this type of proposed revision to the program carriage rules is the subject of a pending industry-wide rulemaking proceeding. *See In re Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage*, MB Docket No. 07-42. It should be noted that the Commission adopted a program-carriage arbitration condition in the *Adelphia Order* but, based on its experience with the condition, subsequently suspended it. *See Petition for Declaratory Ruling that The America Channel is not a Regional Sports Network*, Order, 22 FCC Rcd 17938 ¶ 24 (2007).

Tennis Channel's claims should be addressed in its chosen forum rather than a transaction review process.

E. The Transaction Will Not Cause Anti-Competitive Effects in the Nascent Online Video Distribution Business.

1. Analytical Framework

In evaluating past media transactions, the Commission has considered two principal theories of vertical anti-competitive harm. The first (discussed above in Section IV.C) posits that a vertically integrated MVPD might refuse to license key "must-have" content to competing MVPDs in order to induce customers to switch from competing MVPDs to the vertically integrated MVPD. A permutation of this theory is that the vertically integrated MVPD might threaten to refuse to license such content in an effort to extract higher prices from competing MVPDs. The second (discussed in Section IV.D) posits that a vertically integrated MVPD might deny or otherwise disfavor carriage of content owned by other companies that compete with the distributor's own content in order to benefit its own content.

Several commenters attempt to apply these vertical foreclosure theories in the context of online video distribution.[613] There is no Commission precedent for such an approach. To the extent that the Commission concludes that it must evaluate the applicability of these theories to the current transaction, several points should be emphasized: Anti-competitive harm may arise when one division of a vertically integrated firm refuses to enter into an otherwise profitable and efficient transaction with another firm because the integrated firm wants to weaken the competition faced by another of its divisions. Such a strategy can be profitable only if the refusal to deal significantly weakens the independent competitor and that weakening leads to gains for

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[613] *See, e.g.*, Dish Network Petition to Deny at 18-20; AOL Comments at 4-6; CFA *et al.* Petition to Deny at 22-27.

the integrated firm's other division. Typically, the integrated firm would have to have market power in both the upstream and downstream markets in order for this strategy to be effective. Moreover, there would have to be a high rate of diversion (or "diversion ratio") from the weakened competitor to the integrated firm's division in order to render this strategy profitable.

By definition, engaging in foreclosure requires a firm to sacrifice profits in one division in an attempt to benefit another division. For example, the first strategy noted above would require an MVPD to sacrifice content revenues in order to benefit its distribution business. In short, there are clear costs and risks to pursuing any foreclosure strategy, and these must be considered in analyzing the likelihood that any such strategy will be pursued.

2. The Transaction Will Not Facilitate Anti-Competitive Foreclosure of Content to Online Video Distributors.

Various commenters argue that post-transaction, the joint venture will have the ability and incentive to disadvantage or otherwise foreclose unaffiliated online video distributors by refusing to provide them online content or by doing so on discriminatory terms.[614] Petitioners also argue that the combined entity will somehow (despite its small share in video programming content) prevent the emergence of an online multichannel video programming distribution service that would rival traditional MVPD service.[615] As explained below, these arguments fail as a matter of economic theory and marketplace reality, and are inconsistent with both the way consumers use online video today and the manner in which the nascent marketplace for online

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614 *See, e.g.*, Dish Network Petition to Deny at 18-20; AOL Comments at 4; CFA *et al.* Petition to Deny at 22-27.

615 *See, e.g.*, CFA *et al.* Petition to Deny at 24-27; AOL Comments at 5-6.

video distribution has been developing.[616] As the Commission recently concluded, *it is premature to posit competitive harms where "a nascent market . . . is not yet mature enough to allow us to assess confidently the competitive effects of [the] transaction."*[617]

a. The Combined Firm Will Lack the Market Power to Implement an Online Foreclosure Strategy.

In order for any potential foreclosure strategy to be successful, the combined entity would need to have market power in online video programming content.[618] The combined entity will not. Certain commenters have argued that the joint venture would be able to leverage its content assets to thwart the development of an online video service competitive with MVPD service.[619] As discussed in Section IV.B.1, however, the joint venture would account for only 13.7 percent of national broadcast and basic cable television viewing, and only 12.8 percent of basic cable

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616 Ironically, certain commenters who seek regulation of Comcast and NBCU through this transaction recently submitted comments warning of the dangers of regulation in an emerging marketplace. In recent comments submitted in the Commission's AllVid proceeding, Dish Network and EchoStar urged the Commission to "be mindful of the Hippocratic edict, 'first, do no harm'" in regulating in the area of interoperable set-top boxes because "[t]he relative infancy of the online content market" means the market for complementary devices also is still young. Dish Network and EchoStar Joint Comments, MB Docket No. 10-91, at 2 (July 13, 2010). . Likewise, DirecTV urged the Commission to reject standards for interoperable, cross-platform set-top boxes because such standardization would be "at the cost of entrenching current technology and limiting innovation . . . ." DirecTV Comments, MB Docket No. 10-91, at 26-27 (July 13, 2010).

617 *In the Matter of SkyTerra Communications, Inc., Transferor and Harbinger Capital Partners Funds, Transferee, Applications for Consent to Transfer of Control of SkyTerra Subsidiary, LLC*, Memorandum Opinion and Order and Declaratory Ruling, 25 FCC Rcd 3059 ¶ 67 (2010) (emphasis added). The Commission further explained:

> [I]t would be premature to evaluate the effect of this transaction on "next generation" mobile satellite services. Next generation services have not yet been commercially launched, and no customers yet exist. Indeed, the MSS companies' business plans, and the very nature of the service offerings, are fluid. The fact that companies have changed their plans over the past years, both in response to changing economic times and to changes in Commission rules, weighs against making any predictions about any potential harms that might arise from this transaction. Accordingly, it would be speculative as to whether any competitive harm would occur and, if there were harm, the extent of its magnitude.
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> *Id.* ¶ 54.

618 Public Interest Statement at 105.

619 *See, e.g.*, Singer Decl. ¶¶ 163-183.

television viewing.[620] Similarly, the transaction will only increase NBCU's share of overall national cable network advertising and affiliate revenues to 12 percent from approximately 9 percent.[621]

And even this quite modest share of linear cable networks significantly overstates the amount of online video content the parties will have. NBCU and Comcast do not have key online rights for many of the programs shown on their linear networks.[622] {{

}} For these reasons, the combined firm will lack sufficient online rights to engage successfully in vertical foreclosure.[623]

Further, there is no evidence that content created by any single cable programmer is necessary for the viability of an online video distributor. This is illustrated by the fact that the loss of Comedy Central programs (including *The Daily Show* and *The Colbert Report*, which were among Hulu's most-viewed shows) does not appear to have had a meaningful impact on Hulu's size or growth.[624] This demonstrates both that the withholding of even very popular

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620 Israel/Katz Reply Report ¶ 113 (providing pre-transaction data for each company). Due to data constraints, the Comcast share number excludes Comcast RSNs. Nationally, however, all RSNs (including both Comcast and non-Comcast RSNs) account for just one percent of total impressions. National Nielsen total day ratings, P2+, Live + same day DVR impressions, 4/26/2010 - 5/26/2010.

621 Public Interest Statement at 91. As Comcast does not own any broadcast networks, the transaction would have no effect in increasing concentration in markets in which broadcast networks are licensed. *Id.* at 90 n. 191.

622 Israel/Katz Online Video Report ¶ 13.

623 Virtually all of the commenters in the proceeding who speculate about the proposed transaction's effect on online video fail to grapple with these limitations. For example, Public Knowledge's Petition to Deny, which is exclusively about online video issues, does not even mention the issue of online rights. These commenters appear to assume, contrary to the complex marketplace reality, that online distribution rights are completely within the control of network owners.

624 *See id.* ¶ 33.

programming is not sufficient to make an online distributor lose its viability, and that the owner of such programming must have many alternative distribution platforms other than Hulu.[625]

As such, the merged entity would lack any ability post-transaction successfully to foreclose unaffiliated video programming providers as such firms would continue to have a wide array of potential sources for their online content.[626] Similarly, consumers would remain able to access content of their choosing from a wide variety of sources online post-transaction and could readily turn to other sources to obtain online content.[627] There is no basis to believe that a post-transaction strategy of withholding content from unaffiliated online video distribution providers would undermine the ability of an online provider to obtain significant video content rights.

b. The Combined Firm Will Have No Incentive to Foreclose Online Video Distributors.

The combined firm would also lack the incentive to attempt to carry out an online content foreclosure strategy to protect Comcast's MVPD revenues for at least two reasons: (1) online video is not a substitute for traditional linear MVPD service, and (2) foreclosure of competing online video distributors would not be profitable for the joint venture.[628]

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625 *Id.*

626 Public Knowledge has asserted that Comcast would be able to obtain NBCU content without having to pay itself license fees. Public Knowledge Petition to Deny at 5. That is simply factually incorrect. Comcast will not have full ownership of the NBCU joint venture for several years, if ever, and will still have to pay for content on arm's-length terms. *See* Public Interest Statement, App. 4, p. 93, § 10.02(a). Even if Comcast became the 100 percent owner in the future, Comcast would not embark on an economically irrational foreclosure strategy that lost profits to the joint venture where it necessarily would bear 100 percent of the costs of foreclosure.

627 As noted in Applicants' Public Interest Statement, the notion of "switching" in the Internet context makes no sense. Consumers do not turn to a single website to obtain all of their online video content today, and will not do so post-transaction. Even if the merged entity were to provide its video content exclusively to its affiliated online websites, consumers would presumably continue to use such websites to view NBCU/Comcast content while continuing to use other websites to obtain other online video content. Public Interest Statement at 122-123.

628 In addition, it is worth noting that GE, as the 49 percent owner of the joint venture, would likely object to any attempt to sacrifice joint venture profits in pursuit of a foreclosure strategy to benefit Comcast's MVPD

First, as discussed in Section IV.A.4. above, both programmers and consumers view online video as a complement to, rather than as a substitute for, traditional linear MVPD service. In addition, as discussed in Section IV.A.5, several impediments – technological, pricing-related, and rights-related – make it highly unlikely that online video will become a substitute for MVPD service in the foreseeable future. Consumers do not today, nor will they for the foreseeable future, view online video as a sufficient substitute for MVPD service. Indeed, consistent with the complementary nature of online video and linear MVPD service, the joint venture would in fact seek to promote views of its content online in order to generate increased interest in its linear network programming in the hopes of increasing linear ratings. It follows that the combined entity would want relatively wide distribution of its content online. For these reasons, the joint venture would have no enhanced incentive to foreclose unaffiliated online video distribution providers in an effort to protect traditional linear MVPD services.

Second, even assuming to the contrary that an online video distributor designed to replace traditional linear MVPD service were to emerge, any foreclosure of that distributor would be unprofitable to the joint venture. As an initial matter, the parties' joint venture agreement prohibits NBCU from sacrificing its own profits in order to benefit Comcast. So long as GE retains a significant stake in the joint venture, GE has the incentive and ability to enforce this prohibition. Moreover, even if NBCU were wholly owned by Comcast, Comcast would still not find foreclosure of online video distributors to be profitable. Drs. Israel and Katz have demonstrated this by applying the Commission staff's methodology used in the *News Corp.-*

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business, and any attempt to do so by the Comcast executives serving as the joint venture's officers or directors would violate their fiduciary duties owed to the joint venture and its members (including GE).

Hughes Order.[629] As Drs. Israel and Katz explain, for an online distributor to create a service that is substitutable for MVPD service, it would likely have to offer content owners revenues on par with the revenue streams content owners enjoy from traditional MVPDs today.[630] A foreclosure strategy would require the combined firm to forego these substantial revenues. The combined firm would obtain only a fractional share of any benefits from such a foreclosure strategy. Given the nature of the Internet, if an online substitute for MVPD services were to emerge, in all likelihood it would be at least national, if not global, in scope.[631] Comcast, however, does not have a ubiquitous nationwide footprint. Comcast's share of all MVPD subscriptions nationwide is less than 24 percent.[632] As a result, while the combined entity's programming networks would forego 100 percent of the revenue from selling NBCU content to an online distributor that serves the entire country, only one quarter of any benefits of that strategy could conceivably be captured by Comcast.[633]

Another factor to consider in analyzing whether foreclosure of online video distributors would be profitable is the positive impact such online distributors would have on Comcast's HSI business. As discussed in Section IV.C.a.iii above, an online substitute for traditional MVPD service would require substantial bandwidth because subscribers of an online distributor would

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629 *See generally* Israel/Katz Online Video Report ¶¶ 49-134 for a detailed analysis of the results of applying the Commission Staff's foreclosure methodology.

630 Israel/Katz Online Video Report ¶ 68. Indeed, it is possible that those revenues may even be greater on a per subscriber basis than those offered by traditional MVPDs, because new forms of MVPDs (DBS, telco) have historically paid higher subscriber fees upon entry than established MVPDs.

631 While as a general matter, anyone with an Internet connection can view Internet content regardless of their location, online rights are typically at the country level. For example, Hulu is limited to the United States.

632 Israel/Katz Online Video Report ¶ 107 (citing MediaBusiness Corporation, *Media Census, All Video by DMA*, 4th Quarter 2009).

633 *Id.*

be expected to consume approximately 100 times more data than the average broadband user today. It follows that, if a hypothetical online distributor were to become competitive with Comcast's MVPD service, its offering would be complementary to Comcast's HSI operations because it would increase consumer demand for broadband services and thus would benefit Comcast by increasing its revenues as a provider of broadband Internet service.[634] If the combined company were to foreclose the online distributor by withholding NBCU content, and as a result the online distributor lost subscribers, some of that increased demand for broadband service would disappear as consumers downgraded their level of Internet service. If demand for Comcast's HSI service fell, that could lead to a drop in Comcast's broadband profits, further decreasing its incentives to impair the development of online video.

After consideration of all of these factors, Israel and Katz conclude that the costs of online foreclosure would outweigh any potential benefits.[635] In sum, a foreclosure strategy would be unprofitable for the combined entity to undertake.

AOL claims that Drs. Israel and Katz fail to address the potential impact of "cord-shaving," whereby consumers continue to subscribe to basic MVPD service, but purchase fewer premium services (such as HBO) than they would have in the absence of online video options.[636] AOL is incorrect. As explained above, Drs. Israel and Katz expressly considered and rejected the possibility that Comcast could use NBCU programming to limit cord shaving.[637] The transaction could affect cord shaving only if Comcast were acquiring premium channels that it

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634 *Id.* ¶ 49.

635 Israel/Katz Online Video Report ¶ 129.

636 AOL Comments at 7.

637 *See* Israel/Katz Online Video Report ¶ 50 n.73.

could withhold from online video distributors in an effort to discourage MVPD subscribers from dropping the premium elements of their subscriptions. NBCU's channels, however, are broadcast and basic cable channels that cannot be used to limit cord shaving.[638] AOL also argues that Israel/Katz discounts the ability of NBCU to develop premium content in the future. This ignores the fact that NBCU has no unique ability to do so as compared with the many other programmers and studios; nor does the proposed transaction change this.[639]

c. The Combined Firm Will Not Prevent Third Parties from Distributing Online.

Some commenters have complained that the combined firm will prevent third-party content from being made available online. In particular, Bloomberg and WealthTV claim that Comcast will pressure unaffiliated channels not to put content online if they want carriage on Comcast's cable systems.[640] FACT makes similar assertions.[641] Commenters also claim that Comcast would seek limitations on online distribution in order to protect its MVPD business from new competition. These claims have nothing to do with the present transaction. The proposed transaction does nothing to increase Comcast's incentive or ability to obtain such limitations from unaffiliated programmers. Furthermore, Comcast generally does not seek to prevent content owners from distributing content online.[642] Of course, when Comcast incurs

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638 *Id.*

639 Conceding the absence of significant premium content controlled by NBCU, Dr. Singer claims that Drs. Israel and Katz should also have considered *Time Warner's* video content. This reflects a misunderstanding of the model, which considers costs to NBCU and gains to Comcast. Israel/Katz Reply Report ¶ 216. Time Warner's profits do not enter the analysis. *Id.*

640 *See* Bloomberg Petition to Deny at 42-43; WealthTV Petition to Deny at 38.

641 FACT Comments at 20.

642 In limited circumstances during program carriage negotiations, Comcast previously has proposed to content owners contractual language that limited online distribution more broadly. However, when asked by a content owner to modify the limitation, Comcast has agreed to do so. Comcast no longer proposes this language. In other

substantial costs to distribute content, it is entirely reasonable for Comcast to seek common industry contractual protections to ensure that the same content is not distributed online for free and that Comcast is treated in parity with other distributors (online or otherwise). But such terms do not amount to "foreclosure" and are entirely consistent with a vibrant online video distribution marketplace.

3. No Risk of Online Distribution Platform Foreclosure

Just as there is no risk of online content foreclosure, there is no risk of online distribution platform foreclosure. Commenters like WealthTV speculate that the combined entity could limit distribution for unaffiliated content by denying access to portals like Fancast.com,[643] but such speculation has no basis in reality. Given the highly competitive and open nature of the Internet, it would be impossible for the combined entity to "foreclose" the distribution of independent content.

First, as noted above, the combined entity lacks the market power in online video distribution necessary for a successful foreclosure strategy. Content owners like WealthTV currently have and will continue to have innumerable other outlets for their programming on the Internet.[644] Following the deal, online distributors like YouTube.com, Veoh.com, Sling.com, and CBS's TV.com (among countless others) would continue to account for at nearly 90 percent or

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cases, Comcast's agreements with content owners extend to Comcast the benefit of contractual provisions those content owners have negotiated with other distributors, but that Comcast has not sought itself. These contractual provisions may include certain "window" limits on a content owner's ability to distribute premiere or current season content online. Such online provisions are plainly industry-wide practices, and do not raise transaction-specific issues. As such, they should not be considered in this proceeding.

643 *See, e.g.*, WealthTV Petition to Deny at 22.

644 Among other portals where WealthTV video content is available online, WealthTV has had – for nearly four years – its own dedicated "channel" on YouTube. You Tube, WealthTV in High Definition, http://www.youtube.com/user/WealthTV (last visited July 18, 2010). Whether or not WealthTV has attracted – or will attract in the future – a substantial number of online viewers has nothing to do with its lack of availability on Comcast's or NBCU's online platforms.

more of professional video content viewed online. Beyond the existing major online sites, there are a host of new companies entering this field, which has relatively low barriers to entry.[645] By contrast, Comcast's online video sites account for less than one percent of professional videos viewed, NBCU's online video sites account for less than two percent of professional videos viewed, and Hulu accounts for approximately ten percent of professional videos viewed.[646] Hulu's percentage should not be attributed to the combined entity because the new firm will hold only a minority, non-controlling interest in Hulu – and thus could not "cause" Hulu to refuse to deal with third parties.[647]

Second, the new combined firm will lack any economic incentive to pursue a distribution platform foreclosure strategy. As in the traditional MVPD business, it is bad for business to exclude desirable content from an online video distribution site. Indeed, the negative impact would likely be even greater and more immediate, since the "switching costs" of going to an alternative website are virtually nonexistent (a few keystrokes) and the number of alternative sites almost limitless. Rather than excluding unaffiliated content from its web portal, Comcast has repeatedly sought to bring *more content* to Fancast.com.[648] A primary objective of this joint

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645 In a recent speech, for instance, FCC Commissioner Mignon Clyburn noted that Rowdy Orbit IPTV, an online platform featuring professionally produced original programming for minority audiences, was launched with an initial investment of only $526. *See* Mignon L. Clyburn, Remarks at the MMTC Broadband and Social Justice Summit, John H. Johnson School of Communications, Howard University, at 2-3 (Jan. 22, 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-295888A1.pdf.

646 *See* comScore, Media Metric Report, November 2009, *available at* http://www.comscore.com. All references to online video in this section exclude adult video.

647 NBCU jointly owns Hulu with News Corp., The Walt Disney Company, and Providence Equity Partners. NBCU's share is 32 percent.

648 Comcast's vision for Fancast is to be "THE top entertainment site dedicated to celebrating television," with access to "an extensive video collection of television shows, movies, trailers and clips" for fans to follow "their favorite television programming." Fancast, About Fancast, http://www.fancast.com/info/about (last visited July 18, 2010).

venture is to expand Comcast's access to high-quality content on demand and online.[649] Moreover, Comcast's and NBCU's agreement with IFTA is further evidence of the joint venture's strong motivation to broaden the types of content available on its various distribution platforms.[650] Initiating a foreclosure strategy post-transaction would simply undercut one of the deal's primary strategic objectives.

4. No Risk of ISP Foreclosure/Discrimination

Some critics claim that Comcast will block or degrade access to online video content from unaffiliated portals for its HSI customers. Dish Network, for instance, expresses concern that Comcast could "enhance the quality of NBCU online video content on both companies' online video distribution platforms, relative to that of competing online video providers."[651] EarthLink claims Comcast could "degrad[e] competing [online video programming distributor] offerings in an effort to diminish the competitive threat of online programming."[652] These speculative allegations are without merit.

Again, Comcast lacks the market power necessary to implement such a foreclosure strategy. Even though Comcast is one of the largest broadband ISPs in the country, the fact remains that it accounts for only about 20 percent of broadband ISP customers nationwide.[653] This means that four out of five American homes with broadband do not receive broadband

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649 *See* Rosston Benefits Report ¶¶ 48-50; *Competition in the Media and Entertainment Distribution Market: Hearing Before the House Comm. on the Judiciary*, 111th Cong., Joint Written Testimony of Brian L. Roberts & Jeff Zucker, at 6 (Feb. 25, 2010) (discussing Comcast's acquisition of an ownership interest in Metro-Goldwyn-Mayer to "break the ice" and begin offering widespread VOD).

650 *See* IFTA Agreement Summary Letter, *supra* note 102.

651 Dish Network Petition to Deny at 19.

652 EarthLink Petition to Deny at 24.

653 *See* David L. Cohen, *Comments on Comcast NBCU Joint Venture Due Today at FCC*, Comcast, June 21, 2010, http://blog.comcast.com/2010/06/comments-on-comcast-nbcu-joint-venture-due-today-at-fcc.html.

Internet service from Comcast, and so would be unaffected by any such attempted foreclosure. As both the U.S. Court of Appeals for the D.C. Circuit and the FCC have recognized in the MVPD context, such a small total national presence is insufficient to implement an effective foreclosure strategy.[654] Dish Network insists that "a precipitous decline in competition from DSL" and "practical consumer behavior" make the precise number of Comcast's HSI penetration irrelevant.[655] Dish Network's arguments, however, ignore the fact that cable and telco broadband Internet market shares have been trending toward 50 percent over the past several years, and, as demonstrated in the public interest statement, cable and telco broadband Internet services are extremely rivalrous.[656] Dish Network also fails to take into account the continuing improvements in DSL and wireless broadband technology.[657] Even excluding DSL and wireless, Verizon FiOS, AT&T U-verse, and other cable broadband ISPs alone serve more than 32 million subscribers.[658] Thus, Dish Network fails to demonstrate that Comcast has the bottleneck power required to implement an effective foreclosure strategy.

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654 *See Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009); *AT&T-Comcast Order* ¶ 56 (explaining that MVPD with less than 30 percent share is unable to engage in successful foreclosure of unaffiliated national programmers); *see also Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 7, 46 (1984) (Brennan, J. and Marshall, J., concurring) ("*Jefferson Parish*") (30 percent market share is unlikely to create a "bottleneck"); *Adelphia Order* ¶ 36.

655 Dish Network Petition to Deny at 25–26.

656 *See* Comcast Comments, GN Docket No. 10-127, at 33-35 (July 15, 2010); Public Interest Statement at 125-26 & n.275.

657 *See* Sinead Carew, *Top U.S. Carriers Plot Faster Gadgets, Services*, Reuters, May 17, 2010 ("AT&T said it is planning to triple speeds for home internet services, and double speed on its wireless network, while Verizon Wireless said it will be ready with a slew of high-speed phones earlier than it had previously suggested."), *available at* http://www.reuters.com/article/idustre64e01p20100517; Todd Spangler, *U-verse Gets Into Bonding, AT&T Using DSL-Extension Technology To Boost Bundle's Reach*, Multichannel News, July 15, 2010, *available at* http://www.multichannel.com/article/454799-U_verse_Gets_Into_Bonding.php?rssid=20059.

658 SNL Kagan, *Top Cable MSOs*, first quarter 2010; Verizon Communications Inc., Form 10-Q, at 16 (Mar. 31, 2010); AT&T Inc., Form 10-Q, at 20 (Mar. 31, 2010).

More importantly, Comcast has never blocked HSI subscribers' access to lawful content, and the proposed transaction will not provide it with any incentive to alter that practice. Comcast would need to block or degrade its HSI subscribers' access to a broad range of Internet applications and services before its affiliated Internet content would realize any material benefit. For whatever small benefit it received, Comcast would pay a steep price for such a strategy, both economically and in public perception.

Dish Network asserts that Comcast "could impose a usage cap on all of its HSI subscribers, ensuring that NBCU content would not count against that cap for subscribers to Comcast's video service, while, for DBS subscribers who rely on Comcast HSI service, the NBCU content would count against the usage cap."[659] Comcast, however, does not treat its Fancast Xfinity TV content – or, for that matter, any Internet-delivered content, applications, or service – differently than it treats any other content, applications, or service delivered over the Internet. Thus, Fancast Xfinity TV content is subject to the same Comcast usage cap and congestion management practices as, for example, Netflix's streaming video service, or the online content delivered from anywhere else. After the transaction, Comcast will continue to treat its affiliated Internet content the same as all other content delivered over the Internet, for all HSI customers.

Comcast supports an open Internet and has consistently done so. Since the company began offering HSI service in 1996, as one of the first companies to deliver broadband to American homes, Comcast has operated in a manner consistent with the openness embodied by

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[659] Dish Network Petition to Deny at 19. Although Dish Network says the Commission should require Comcast to disclose its HSI network management practices, *see id.* at 29, the plain fact is that Comcast's network management practices have been disclosed in extraordinary detail and are available for review at Comcast's Network Management page, http://networkmanagement.comcast.net/ (last visited July 18, 2010).

the four principles of the FCC's Internet Policy Statement. It has never "divide[d] its broadband service into 'lanes' for fast traffic and other 'lanes' for slow traffic," depending on the owner of that content.[660]

Assertions by certain commenters that Comcast's management of P2P protocols demonstrates its ability and incentive to act anti-competitively misapprehend the facts.[661] Comcast's sole objective in managing the use of bandwidth-intensive P2P traffic was to prevent degradation of the Internet experience for everyone on the network.[662] Comcast did not prohibit the use of P2P (as other providers and network operators have done), nor did it manage P2P downloads, and the vast majority of P2P flows on Comcast's network (billions and billions daily) were utterly unaffected.[663] Once Comcast came to understand the level of concern in the Internet community with this approach to congestion management, it voluntarily agreed to transition to a protocol-agnostic network management practice,[664] which now has been fully implemented across Comcast's network for more than 18 months.[665] As Richard Whitt, Senior

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660 Dish Network Petition to Deny at 19-20.

661 *See, e.g.*, CFA *et al.* Petition to Deny at 29-30; WealthTV Petition to Deny at 21-22; Bloomberg Petition to Deny at 67-68.

662 *See, .e.g.*, Letter from Mary McManus, Senior Director, FCC and Regulatory Policy, Comcast Corp. and Gerard J. Lewis, Jr., Vice President, Deputy General Counsel & Chief Privacy Officer, Comcast Cable Communications, LLC, to Kris A. Monteith, Chief, Enforcement Bureau, FCC at 4-6 (Jan. 25, 2008); Statement of David L. Cohen, Executive Vice President, Comcast Corp. at FCC Public En Banc Hearing on "Broadband Network Management Practices," WC Docket No. 07-52, at 11-15 (Feb. 26, 2008); Letter from Kathryn A. Zachem, Vice President of Regulatory Affairs, Comcast Corporation, to Marlene H. Dortch, Secretary, FCC, WC Docket. No. 07-52, at 3-5 (July 10, 2008) ("Technical Detail Letter").

663 Technical Detail Letter at 3 (reporting that, under Comcast's past congestion management practices, "on a typical day, an estimated 9 billion P2P TCP flows traverse Comcast's network, and, even for the most heavily used P2P protocols, more than 90 percent of these flows are unaffected by Comcast's network management").

664 *See* Press Release, Comcast Corp., *Comcast and BitTorrent Form Collaboration To Address Network Management, Network Architecture and Content Distribution* (Mar. 27, 2008), *available at http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=740.*

Policy Director for Google, explained, "Comcast was engaging in rather inelegant network management and not anti-competitive blocking."[666] Even a persistent critic of Comcast and other ISPs, Harold Feld, has acknowledged that Comcast "did not block P2P for anti-competitive reasons."[667]

Despite the accusations of petitioners EarthLink and Bloomberg,[668] Comcast's 2009 petition for review of the FCC order concerning Comcast's management of P2P protocols[669] does not contradict its abiding commitment to the four principles of the FCC's Internet Policy Statement. This appellate litigation focused on whether the FCC had acted within its statutory authority when it found that Comcast had violated the federal Internet "policy,"[670] and the Court unanimously agreed with Comcast that the Commission had failed to act within that authority. Comcast is and will remain committed to the principles of the Internet Policy Statement, regardless of whether the FCC adopts any of the rules or reclassifications it is currently considering in its other proceedings, or reclassifies broadband Internet services.[671]

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665 *See* Letter from Kathryn A. Zachem, Vice President of Regulatory and State Legislative Affairs, Comcast Corporation, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-52, at 1 (Jan. 5, 2009).

666 *See* Richard Whitt, Senior Policy Director, Google Inc., *Net Neutrality Regulation: Why Now or Ever?*, Speech at the Free State Foundation Winter Telecom Policy Summit, Video 1, at 10:04 (Jan. 29, 2010) (explaining that Google "reached out to Comcast . . . to talk. Our engineering level discussions led us to conclude that Comcast was engaging in rather inelegant network management and not anti-competitive blocking. So we refrained from piling on at the FCC"), *available at* http://www.nextgenweb.org/news-and-blog-clips/free-state-foundation-winter-telecom-policy-summit-net-neutrality-regulation.

667 Harold Feld, *Evaluation of the Comcast/BitTorrent Filing,* Tales of the Sausage Factory, Sept. 22, 2008, *available at* http://www.wetmachine.com/totsf/item/1333.

668 *See* EarthLink Petition to Deny at 37-38; Bloomberg Petition to Deny at 43-44.

669 *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

670 Saul Hansell, Comcast Appeals F.C.C. Sanction, NY Times, Sept. 4, 2008, *available at* http://bits.blogs.nytimes.com/2008/09/04/comcast-appeals-fcc-sanction/?pagemode=print.

671 *See, e.g.*, David L. Cohen, *Comcast, the FCC, and "Open Internet" Rules: Where We Stand*, Comcast, Jan. 11, 2010, http://blog.comcast.com/2010/01/comcast-the-fcc-and-open-internet-rules-where-we-stand.html.

Moreover, the pendency of those proceedings underscores the point that issues involving ISP network management practices should be addressed on an industry-wide basis. The Commission has published a notice of proposed rulemaking with thoughtful questions and detailed proposed rules,[672] and the Commission has initiated a related proceeding to consider the Chairman's "Third Way" proposal and two alternative options regarding the classification of broadband Internet services.[673] Comcast is participating constructively in both proceedings and hopes to assist the Commission in reaching policy decisions that continue to promote investment and innovation while preserving an open Internet. There is nothing about the facts of this transaction that would warrant the imposition of special "net neutrality" or other unique ISP obligations on Comcast. The issues of net neutrality and an open Internet affect all ISPs and all participants in the Internet ecosystem, and are most appropriately considered in industry-wide proceedings such as those the FCC now has underway.[674]

Regardless of whether the FCC ultimately decides to reclassify broadband under Title II or move forward under Title I and adopt the open Internet rules currently under consideration, Comcast's commitment to an open Internet will not change. Comcast's continuing goal is to give consumers access to all Internet content, applications, and services, without regard to affiliation, so that Comcast can be the provider of choice for what consumers want – anytime, anywhere.

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672 *See In the Matter of Preserving the Open Internet Broadband Industry Practices*, Notice of Proposed Rulemaking, 24 FCC Rcd 13064 (2009).

673 *See In the Matter of Framework for Broadband Internet Service*, Notice of Inquiry, FCC 10-114, GN Docket No. 10-127 (rel. June 17, 2010).

674 Dish Network tries to use "net neutrality" as an excuse to commandeer bandwidth on Comcast's plant, asserting that it is wrong for Comcast to reserve bandwidth for its own VOD service. *See* Dish Network Petition to Deny at 35. There is nothing the least bit inappropriate about a *cable* operator allocating some of its *cable* bandwidth to provide this *cable* service.

Because there is no reason for the combined entity to thwart or hinder the development of online video, there is no reason to consider "remedies" such as EarthLink's proposal for a requirement that Comcast sell its HSI service "at least 40 percent less than the current advertised retail rates" to four "national unaffiliated" ISPs, one of which would, of course, be EarthLink.[675] Proposals like these have been around for years; EarthLink has advocated them in transactions and industry-wide rulemakings for a decade.[676] These arguments consistently have been rejected,[677] except in the singular case more than a decade ago when AOL, the largest ISP at the time, sought to merge with one of the largest broadband ISPs, Time Warner, in what was viewed as a horizontal transaction.[678]

The proposed conditions should once again be rejected. In a report submitted with EarthLink's comments, Dr. Simon Wilkie attempts to marshal anecdotal evidence to support the claim that the AOL/Time Warner condition should be imposed on the proposed transaction. He claims that, although Time Warner Cable has a "higher degree of vertical integration in comparison to Comcast," "Time Warner Cable stand-alone Internet pricing is actually lower than

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675 EarthLink Comments, App. 1, at 1.

676 *AT&T-Comcast Order* ¶¶ 131–32, 135; Comments of EarthLink, Inc., *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185 (Dec 1, 2000), pp. 53–54; Reply Comments of EarthLink, Inc., *In the Matter of Preserving the Open Internet Broadband Industry Practices*, GN Docket No. 09-191 (Apr. 26, 2010).

677 *See, e.g., Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, Memorandum Opinion and Order, MB Docket No. 02-70 ¶ 135 (2002).

678 Complaint, *In the Matter of America Online, Inc., and Time Warner Inc.*, FTC Docket No. C-3989 (Dec. 14, 2000) ¶ 25 ("The merger will eliminate existing and potential competition between AOL and Time Warner nationally and in Time Warner cable service areas, and will increase AOL/Time Warner's ability to exercise unilateral market power."). At the time, AOL was the nation's largest narrowband ISP, with a 50 percent market share nationwide and was, in the FTC's judgment, "positioned and likely to become the leading provider of Internet access as well." *Id.* at ¶ 8. In that case, EarthLink persuaded the FTC to require that Time Warner's cable systems launch EarthLink-branded Internet service before they could launch Time Warner-branded Internet service. Consent Decree, *In the Matter of America Online, Inc., and Time Warner Inc.*, FTC Docket No. C-3989 (Dec. 14, 2000) pp. 6–7.

the comparable service of Comcast," evidence he deems "consistent with the hypothesis that the AOL/Time Warner condition is pro-competitive."[679] But Dr. Wilkie's anecdotal evidence is flawed: He not only relies on inaccurate pricing information,[680] he also fails to recognize that, following the 2009 separation of Time Warner and Time Warner Cable, Comcast is actually the more vertically integrated of the two firms.

Dr. Wilkie also attempts to justify EarthLink's proposed condition by arguing that, absent that condition, the proposed transaction will create incentives for Comcast to raise prices for stand-alone broadband service. Dr. Wilkie recognizes that Comcast's internalization of advertising revenues that NBCU earns from additional cable subscribers will make it more profitable for Comcast to sell cable subscriptions.[681] Comcast's internalization of these revenues lowers its marginal costs of selling cable services, whether on a standalone or bundled basis.[682] Dr. Wilkie argues, however, that these lower costs will cause Comcast to *raise* its prices for standalone broadband service in order to induce consumers to subscribe to its bundled cable and broadband service instead.[683] As Drs. Israel and Katz explain, Dr. Wilkie's argument is contrary to fundamental economic logic: Properly analyzed, Comcast's internalization of NBCU revenues will *benefit* consumers by creating incentives for Comcast to promote cable service by

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679 Wilkie Report ¶¶ 51, 52.

680 Dr. Wilkie's analysis includes only promotional pricing for Time Warner broadband, but does not provide the prices to which customers revert after the promotional period. A comparison between Time Warner's regular broadband prices and Comcast's regular broadband prices reveals that the prices are similar, and that in some cases, Comcast's prices are lower than Time Warner's. Israel/Katz Reply Report ¶ 93.

681 Wilkie Report ¶ 40.

682 Israel/Katz Reply Report ¶ 89.

683 Wilkie Report ¶¶ 39–40.

lowering the prices it charges for cable service, either on a standalone basis or as part of a broadband/cable bundle.[684]

Dr. Wilkie's argument also fails to account for the increased value that Comcast may derive from the sale of broadband Internet service as a result of the proposed transaction. Specifically, the sale of broadband Internet service to additional consumers will benefit both NBCU's online content and its traditional, linear-television offerings (because of the complementarities between online content and traditional television viewing), and Comcast will internalize these benefits. This internalization lowers Comcast's marginal costs of providing broadband Internet service and supplies yet another reason why the proposed transaction may lead to lower broadband Internet service prices.[685]

EarthLink's proposed conditions should also be rejected because the market decidedly has moved on. The Commission chose to encourage facilities-based competition, and that competition has been the driving force behind the massive investments cable, telephone, and wireless companies have made and continue to make in expanding and improving broadband Internet service (and the lesser investments that companies like EarthLink made in broadband over powerlines and in municipal Wi-Fi networks). It is this facilities-based competition that the Commission has placed its confidence in going forward. As Chairman Genachowski recently noted, even were the Commission to classify broadband Internet services as Title II telecommunications services, it "would not change established policy understandings at the FCC,

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684 Israel/Katz Reply Report ¶¶ 89–91.

685 *Id.* ¶ 92.

such as the existing approach to unbundling."[686] He declared that the notion of requiring wholesale unbundling requirements was "off the table."[687] EarthLink is therefore asking the Commission to do precisely what it said it will not do: mandate that a cable operator provide access to its systems to unaffiliated ISPs.[688]

5. Government Regulation in a Nascent Online Distribution Business Could Chill Innovation.

For all the reasons set forth above, imposing conditions on Applicants in the area of online video distribution would not be appropriate. But there is another reason. As the Commission has recognized on numerous occasions, any attempt to regulate a nascent industry must be governed by a great deal of restraint and caution.[689] Regulation of a nascent industry

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686 Statement of Julius Genachowski, Chairman, FCC, *The Third Way: A Narrowly Tailored Broadband Framework*, at 5 (May 6, 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297944A1.pdf. On the same day, FCC General Counsel Austin Schlick noted that the FCC had "not taken any action to implement mandatory access to cable broadband networks" since that issue was raised in a Notice of Proposed Rulemaking in 2002, and he asserted that "a consensus seems to have developed that it should not be ordered." Statement of Austin Schlick, General Counsel, FCC, *A Third-Way Legal Framework for Addressing the* Comcast *Dilemma*, at 8 (May, 6, 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297945A1.pdf. Accordingly, "identifying a separate telecommunications component of broadband access service [would not] afford competing ISPs any new rights to the incumbents' networks on a wholesale basis under the old *Computer Inquiry* rules." *Id.* at 7.

687 *See* John Eggerton, *Cable Show 2010: Genachowski: Rate Regs, Unbundling Off the Table*, Multichannel News, May 13, 2010, *available at* http://www.multichannel.com/article/452614-Cable_Show_2010_Genachowski_Rate_Regs_Unbundling_Off_The_Table.php.

688 *Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, Memorandum Opinion and Order, MB Docket No. 02-70 ¶ 135 (2002) ("We have never mandated, as a merger condition or in any other context, that any cable operator provide access to its systems to unaffiliated ISPs.").

689 *See, e.g*, *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, ¶ 1 (2005) (establishing "a minimal regulatory environment for wireline broadband Internet access services [in order] to benefit American consumers and promote innovative and efficient communications," thereby allowing providers "to respond to changing marketplace demands effectively and efficiently, spurring them to invest in and deploy innovative broadband capabilities that can benefit all Americans"); *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Notice of Inquiry, 15 FCC Rcd 19287, ¶ 11 (2000) ("The Commission has shown regulatory restraint with respect to emerging services in a number of contexts. In the *Computer Inquiries*, for example, the Commission refrained from regulating data processing services, relying in part on the fact that the market for such services, while still nascent, was functioning in a competitive manner. As another recent example

based on a speculative theory of market development and an equally speculative theory of harm would very likely prove detrimental to innovation, investment, and consumer welfare. To the extent that there are concerns, they are not specific to, nor exacerbated by, the proposed transaction and would be better addressed in separate adjudicatory or industry-wide rulemaking proceedings.[690] Indeed, while DirecTV and Dish Network are using this proceeding to lobby for imposition of onerous restrictions on Comcast and the combined entity,[691] in another regulatory proceeding, Dish Network has urged that the Commission "avoid over-regulating" and allow consumer demand to drive the marketplace,[692] and DirecTV has cautioned that "unwise

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of restraint, the Commission in the *UNE Remand Order* declined to unbundle packet switching and DSLAM functionality used to provide advanced telecommunications services in the incumbent LEC's network, except in limited circumstances."); *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Report, 14 FCC Rcd 2398, ¶¶ 74, 105 (1999) (The Commission noted that "we need to be particularly careful about any action we take to promote broadband deployment, given the nascent nature of the residential market for broadband. . . . Moreover, some actions could contravene the intent of section 706 . . . and could skew a potentially competitive marketplace." The Commission further recognized that "premature regulation 'might impose structural impediments to the natural evolution and growth process which has made the Internet so successful.'"); *In the Matter of Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, Fifth Report and Order, 12 FCC Rcd 12809, ¶¶ 2-7, 33 (1997) (In establishing the initial regulatory framework for digital television, the Commission "generally refrained from regulation" in order to "maximize broadcasters' flexibility to provide a digital service to meet the audience's needs and desires" and to "foster[] the growth of innovative services to the public."); *In the Matter of Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service*, Memorandum Opinion and Order, 84 FCC 2d 584, ¶¶ 42-43 (1981) (noting that the Commission's early regulatory actions with respect to satellite technology were designed "to insure an early opportunity for this new communications technology to develop" by establishing an "open entry" policy and "minimiz[ing] the delays which attend the traditional regulatory process").

690 *See, e.g.*, *AT&T-Centennial Order* ¶ 141 ("We find that the proposed conditions prohibiting exclusive handset arrangements are not narrowly tailored to prevent a transaction-specific harm, but apply broadly across the industry and are more appropriate for a Commission proceeding where all interested industry parties have an opportunity to file comments."); *AT&T-BellSouth Order* ¶ 56 n.154 ("To the extent commenters allege that . . . contracts of the type used by AT&T and BellSouth are anti-competitive in general, this is not a merger-specific harm, but rather is an issue that has been raised, and is better addressed, in the Commission's pending special access rulemaking."); *AOL-Time WarnerOrder* ¶ 6 ("It is important to emphasize that the Commission's review focuses on the potential for harms and benefits to the policies of the Communications Act that flow from the proposed transaction – *i.e.*, harms and benefits that are 'merger-specific.'").

691 DirecTV Comments at 28, 35, 40; Dish Network Petition to Deny at iii, 2, 26, 35-37 (requesting the Commission deny the Application or impose "strict conditions").

692 Dish Network Comments, MB Docket No. 10-91, at 9 (July 13, 2010).

regulatory intervention could have seriously negative consequences – interfering with market-based initiatives already in place and harming consumers." [693]

The online viewing of video, which makes up only a small fraction of total video viewing, is new and evolving. Ongoing experimentation is occurring at all levels of the online business, including content creation, content packaging and presentation, transport, and navigation. No clear business model has emerged, and firms in the marketplace continue to work with several options, including advertiser-supported, subscription, transactional (individual program sales and rentals), and various hybrid models.[694] Subscription models and other forms of online distribution are all further affected by "rights issues" – the fact that cable and broadcast networks often do not own all the relevant online rights to the content provided on their linear networks and that the content may be subject to blocking rights from other licensing agreements.

Studios initially license to networks the rights for first-run linear exhibition of their content. When licensing content from a studio, some networks have obtained additional rights that include ways in which licensed programming can be made available to viewers other than through the initial linear feed. These additional rights are often limited to network-branded free-on-demand ("FOD") distribution, where the network is granted limited FOD rights to the current season episodes. Typically, studios will allow the network to only offer the five most recent episodes via FOD on a "rolling" basis such that the oldest episode is removed as soon as a more recent one is made available. An online video provider might not be able to obtain certain content at all because its business model conflicts with the rights that the network has available

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693 DirecTV Comments, MB Docket No. 10-91, at 1 (July 13, 2010).

694 *See* Israel/Katz Online Video Report ¶ 17 for explanations of these models and examples of providers utilizing each one. NBCU currently delivers its video content to third-party online video distribution providers that utilize all of these models.

to license. For example, a network that has licensed only the rights for free, on-demand viewing, as described above, could not license content to an online provider that offers a subscription service. These different models make it difficult, if not impossible, to determine which models are likely to be successful in any given circumstance and must be evaluated on a case-by-case basis.

Given the uncertainty presented by all these factors, it would be premature to place restrictions on Applicants at this point in time as doing so would have significant and long-lasting ramifications on the entire online video distribution industry.[695] Government regulation imposing a "one-size-fits-all" solution with respect to online video distribution risks stifling future innovation and evolution in this changing environment, to the detriment of consumers who benefit today from ongoing industry experimentation and the resulting ability to access content online through various means.[696] The point AAI makes in support of regulation – that the marketplace is rapidly changing – is in fact a better argument for why one should be exceedingly cautious about regulating it: "[I]n any nascent market, there is the distinct possibility that firms will conceive new competitive strategies to respond to changing incentives and a fluid market

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695 *See In the Matter of SkyTerra Communc'ns, Inc., Transferor, and Harbinger Capital Partner Funds, Transferee, Applications for Consent to Transfer of Control of SkyTerra Subsidiary, LLC*, Memorandum Opinion and Order, 25 FCC Rcd 3049 ¶ 54 (2010); William E. Kennard, Chairman, FCC, The Unregulation of the Internet: Laying a Competitive Course for the Future (July 20, 1999), *available at* http://www.fcc.gov/Speeches/Kennard/spwek924.html ("So how do we get Americans broadband pipes? . . . [B]y letting a competitive marketplace thrive. . . . [T]he FCC has taken a hands-off, deregulatory approach to the broadband market."); Deborah A. Lathen, Chief, Cable Services Bureau, FCC, The Mind's Eye: Remarks as Prepared for Delivery (Nov. 9, 1999), *available at* http://www2.fcc.gov/Speeches/misc/spdal902.html ("By using competition as a touchstone, we put our faith in the belief that the market will find the best solution to the questions that the new technologies create. With consumers and competition as our guideposts, the FCC has chosen not to regulate at this time, and to monitor this industry as it develops.").

696 *See* Yoo Comments at 26 ("[T]he level of horizontal concentration in the market for [online] video programming resulting from this merger is sufficiently low to justify clearing the merger without any serious inquiry.").

environment. These effects may be difficult for enforcers to predict in the context of a forward-looking merger analysis."[697] Any regulation could thwart the evolving marketplace.[698]

F. Other "Competition" Complaints Are Not Transaction-Specific and Are Without Merit.

A number of commenters attempt to use the transaction as an opportunity to air grievances against Comcast that have no bearing on the transaction and do not turn on whether the transaction is completed. These complaints are not transaction-specific and are in any event entirely without merit.

1. Authentication Is Pro-Competitive and Pro-Consumer.

Several commenters attack authenticated content initiatives such as TV Everywhere and Comcast's Fancast Xfinity TV on a variety of grounds, contending that these initiatives restrict

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[697] American Antitrust Institute Comments at 25. Despite this acknowledgement, AAI presses for regulatory conditions on the proposed transaction premised on AAI's concern that the transaction will facilitate foreclosure strategies in the evolving online video marketplace.

[698] To the extent that Dish Network and others request the Commission to extend program access rules to online video distribution, this mode of distribution is nascent, rapidly evolving, and highly competitive. Commission intervention in the absence of any demonstrated need could stifle investment and innovation and would raise extremely complex issues involving a wide range of stakeholders.

For example, who would qualify to invoke program access rights – anyone who has made the minimal investment needed to acquire a web address? Would entities upon whom program access rights are conferred also have corresponding public interest obligations – as MVPDs do today under the Communications Act and Commission rules – like emergency alert system notifications, closed captioning, must-carry/retransmission consent, etc.? What is to be done about the many technical issues, like signal formatting, encryption, and metadata? Would the requirements apply to networks or to individual programs as well? How would a licensing requirement take account of the fact that networks often do not possess rights from third-party content creators, sports leagues, etc. to authorize online distribution of all of their programming? How must content owners respond to requests by customers who seek protection against one or more types of online exhibition of the content as part of an agreement to license the content for a particular use (for example, as part of a cable network or as a syndicated program to be aired by local television stations)? Must networks agree to distribute their content via all business models – advertising-supported video streaming, advertising-supported on-demand, subscription with advertising, subscription without advertising, pay to view, pay to own, and other variations and hybrids? If there is to be mandatory licensing of entities whose business models are different from today's MVPDs, what benchmarks would be used to evaluate whether a licensing decision or a proposed term and condition is unreasonable or discriminatory?

These are just some of the complex issues implicated by the proposal to extend program access rights to online providers. To the extent the Commission believes it is time to address these issues, the Commission must do so thoughtfully, carefully, and fairly, and this requires an industry-wide proceeding that involves all stakeholders.

online distribution of programming,[699] constitute collusion,[700] and prevent the emergence of potential over-the-top competitors.[701] Others object to Fancast Xfinity TV because it requires an authenticated MVPD subscription to access certain content via the Internet during a window period after the airing of the content on the linear cable entertainment network.[702]

As an initial matter, authentication is not a Comcast-specific initiative. It is a concept that is being pursued by an array of content owners and distributors looking to appropriately monetize their content as Internet delivery becomes a more significant factor, and Comcast is an early adopter of the concept. Moreover, the transaction will have little if any impact on the evolution of authentication, except perhaps to facilitate and expand the online distribution of NBCU content by Comcast and other MVPDs. Authentication arrangements such as Fancast Xfinity TV are pro-consumer, pro-competitive, and nonexclusive, and are necessary to strike a proper balance between (a) providing consumers access to video content "where and when they want it"[703] and (b) providing content producers with an economically sustainable business model that supports the significant costs associated with production of high-quality video content.[704]

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699 Marx Report ¶¶ 107, 116; Cooper/Lynn Decl. at 18, 63-64; Singer Report ¶¶ 156-59; Marvin Ammori, *TV Competition Nowhere: How the Cable Industry is Colluding to Kill Online TV*, Free Press (Jan. 2010) ; CFA *et al.* Petition to Deny at 41-43.

700 Marx Report ¶ 117; Singer Decl. ¶ 59; CFA *et al.* Petition to Deny at 22.

701 Singer Decl. ¶ 157; Cooper/Lynn Decl. at 18; CFA *et al.* Petition to Deny at 41-43.

702 DirecTV Comments at 29-30; FACT Comments at ii, 27; AOL Comments at 4; WealthTV Petition to Deny at 7, 35; Cooper/Lynn Decl. at 18; American Antitrust Institute Comments at 19-21; Greenlining Institute Petition to Deny at 38-39; CWA Petition to Deny at ii, 43-46; Letter from Al Franken, U.S. Senator, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56, at 10-11 (June 21, 2010).

703 Motorola Comments at 1; Cisco Comments at 7.

704 Petitioner CWA claims that Fancast Xfinity constitutes an unlawful tying argument, "with Comcast's cable television service serving as the tying product and the online content serving as the tied product." CWA Petition to Deny at 44. CWA's claim is without merit. Because "a tying arrangement cannot exist unless two separate product markets have been linked," *Jefferson Parish,* 466 U.S. at 21, CWA's claim is inconsistent with the remainder of its petition, in which it characterizes cable television service and online content as belonging to the same product

Several commenters claim that authentication restricts the online availability of content to consumers.[705] Authentication, however, enables *more* content to be available online than would otherwise be economically feasible. The 2010 Vancouver Olympics provides a case in point. NBCU's comprehensive coverage of the Olympics presented a significant financial challenge. NBCU paid substantial sums to acquire the rights to the Olympics – more than $800 million for the 2010 Vancouver Olympic rights, with production costs bringing NBCU's total investment to nearly $1 billion. In order to recoup a part of these expenses, NBCU sought increased subscriber fees from MVPDs for additional Olympics programming carried on several of NBCU's cable networks. In order to obtain those increased fees, NBCU agreed to provide a window during which subscribers of those MVPDs that paid the additional Olympics programming fee would have online access to certain long-form Olympics programming immediately after it aired on NBCU's linear networks. According to Feb. 2010 Nielsen estimates, the MVPDs that chose to participate in this offering served approximately 94 percent of MVPD households or 97.5 million subscribers.

The Vancouver Games set a record for the amount of video content provided on the Internet at www.nbcolympics.com – including both video content made available immediately to everyone on an ad-supported basis as well as video content initially made available only to authenticated MVPD subscribers. A substantial amount of short-form clip content was available to all viewers on the ad-supported portion of NBC's Olympics website immediately after NBC's West Coast telecast. Forty hours after the live event, all of NBCU's long form Olympic content

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market. CWA Petition to Deny at 39. CWA's claim is also meritless because "no portion of [any] market which would otherwise have been available to other sellers has been foreclosed." *Jefferson Parish*, 466 U.S. at 16 (explaining that, in these circumstances, "there can be no adverse impact on competition").

[705] CWA Petition to Deny at 45; Dish Network Petition to Deny at 17–18; FACT Comments at 19.

– originally available to subscribers of MVPDs who had paid for the additional content – was made available on an ad-supported basis to anyone accessing the NBC Olympics website.

Notwithstanding the obvious pro-competitive benefits of authenticated content, Dr. Marx speculates that MVPDs such as Comcast, Time Warner Cable, Verizon, and DirecTV may have colluded in developing their authentication initiatives,[706] and Dr. Cooper asserts that TV Everywhere constitutes "a blatant market division scheme" through which MVPDs have agreed not to offer authenticated video services outside of their "footprints" in competition with each other.[707] Both Dr. Marx's speculation and Dr. Cooper's assertion lack merit. Dr. Marx's speculation as to collusion rests on her statement that she "would not expect the TV Everywhere principles to be something that could be implemented profitably by a single MVPD because then only the subscribers to that MVPD would have access to the programmer's on-line content."[708] MVPDs derive obvious benefits from delivering additional value to their subscribers through authenticated content; Dr. Marx fails to explain either the factual basis or logic underlying her statement to the contrary.

Dr. Cooper's assertion that authentication initiatives constitute a "market division scheme" is likewise baseless. As an initial matter, many MVPDs in fact compete with each other to offer authenticated video services – DirecTV's national footprint means that it competes with all other MVPDs. Moreover, this argument presupposes that individual MVPDs have an incentive to offer a standalone online video service. This is simply incorrect. As Drs. Israel and Katz explain, Comcast has a unilateral incentive to provide Fancast Xfinity TV as a supplement

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706 Marx Report ¶ 117.

707 Cooper/Lynn Decl. at 5-6

708 Marx Report ¶ 117.

or add-on to its traditional MVPD offerings, rather than as a national, over-the-top product. Offering the latter product is economically unattractive for Comcast because it would entail substantial programming fees and marketing and overhead costs associated with investing in a new line of business, and limited ability to generate enough revenues to cover these costs.[709]

Both Comcast and NBCU favor widespread availability of content online, but also understand that online access must be provided through sustainable business models that ensure continued production of high-quality content. Comcast believes that the Fancast Xfinity TV approach strikes the right balance between giving consumers what they want – anytime, anywhere access to compelling content – and supporting the economic viability of high-quality programming, which relies heavily on the tens of billions of dollars that cable networks currently receive from cable, satellite, phone company, and other multichannel video programming distributors.

While critics of the transaction profess concern that it will "reduce content available online for non-MVPD subscribers,"[710] they are simply mistaken. Comcast is committed to expanding the content available for consumers to view online, and TV Everywhere/Fancast Xfinity TV is an important part of that commitment – the transaction will accelerate Comcast's goal of making more, not less, content available online.

2. Prices/Volume Discounts

Some critics have seized upon this proceeding to revive general criticism of prices and volume discounts with regard to the sale of cable programming, which have a long history in MVPD distribution. In this proceeding, they complain that Comcast's potential for volume

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709 Israel/Katz Reply Report ¶¶ 207, 213.

710 CFA *et al.* Petition to Deny at 23.

discounts places "smaller MVPDs at an extreme disadvantage in the distribution market," and creates significant challenges in enforcing the program access rules.[711]

This issue is not specific to the proposed transaction.[712] Volume discounts exist in virtually every sector of the American economy.[713] Volume discounts make simple economic and business sense and video programming distribution is not unique in this regard. Cable networks license their content on more favorable terms to large operators for a variety of legitimate economic reasons, including the cost savings that result from securing distribution to large numbers of consumers through a single contract, and the economic benefit to a network of securing exposure to more consumers. When certain programming audiences are larger, and potentially more profitable, than others, one can expect programming sellers to compete more vigorously for the larger customer base. One way to do this is to offer programming to the larger customer base on more attractive financial terms.

The program access provisions adopted by Congress and embodied in the Commission's rules do not prohibit differences in terms and conditions in programming-related contracts – they prohibit only unjustified discrimination.[714] The Communications Act expressly permits volume

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[711] *See* ACA Comments at 39. This is not the first transaction targeted by critics of volume economies and pricing. *See News Corp.-Hughes Order* ¶ 116 (in which ACA argued that the "transaction-specific program access problems include imposing more costly terms and conditions of program access on smaller cable operators and using "volume" discounts to justify favorable pricing for DirecTV and entering into exclusive programming arrangements targeted at DirecTV's smaller cable system competitors").

[712] The Commission already has a docket open to address these issues on an industry-wide basis. ACA and others have been actively pursuing this issue in the Commission's pending program access rulemaking proceeding. *See, e.g.*, ACA Comments and Reply Comments, MB Docket No. 07-198 (filed Jan. 3, 2008 and Feb. 12, 2008, respectively).

[713] Numerous courts have recognized that volume discounts generally benefit consumers and "offend no antitrust principles." *Advo, Inc. v. Phila. Newspapers*, 51 F.3d 1191, 1203 (3d Cir. 1995); *W. Parcel Express v. UPS*, 190 F.3d 974, 976 (9th Cir. 1999).

[714] *See* 47 U.S.C. § 548(c)(2)(B)(i)-(iii).

discounts in content licensing agreements. The Act states that differences in prices need not be based solely on "cost differences," but can be based on "economies of scale . . . or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor."[715] The FCC explicitly has recognized that discrimination in the prices and terms of the sale of video programming is justified by such statutorily permitted factors as cost-based differences and volume discounts.[716]

There are several legitimate economic benefits underlying volume discounts and other pricing differentials. First, there are major economies of scale in video programming. Content providers incur significant up-front fixed costs in producing content. The marginal costs of distributing programming to each additional viewer are negligible by comparison. Consequently, content providers seek access to broad-scale distribution to spread their fixed cost over as many subscribers as possible. It makes economic sense to offer volume discounts to secure access to broader distribution.

Second, additional subscribers yield disproportionate benefits to programmers in terms of additional advertising revenues. These include both the incremental revenues from additional advertising impressions and the ability to show advertisers that their advertisements will reach viewers on a national basis.[717] A broader subscriber base increases advertising revenue both by increasing the number of viewers and increasing the advertising rate per viewer. The advertising

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715 *Id.*

716 *See In re Applications of Turner Broadcasting System, Inc. and Time Warner Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 19595 ¶ 20 (citing 47 C.F.R. §§ 76.1000 - 76.1003).

717 *See generally In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, First Report and Order, 8 FCC Rcd 3359 ¶ 108 (1993) (explaining that, "in addition to cost economies, a large number of subscribers confers direct non-cost 'economic benefits' by delivering more viewers, thus increasing revenue from advertising more than proportionally, and providing a larger base for amortizing the costs of the programming service").

rate increases per viewer because some advertisers are willing to pay significantly more to cable networks with a national reach. Advertising revenue is an increasing, nonlinear function of the number of subscribers, and rises sharply for networks with national reach.[718]

It is essential to recognize that the benefits of volume discounts are available to small cable operators and other distributors, who can and do avail themselves of volume discounts through buying consortia, including the National Cable Television Cooperative ("NCTC").[719] NCTC negotiates master agreements with programming networks on behalf of member companies and, in many cases, NCTC member companies obtain the benefit of volume-based discounts based on the aggregate carriage of all members that have opted-in to a particular NCTC agreement. This is true, for example, regarding all Comcast networks that have negotiated master agreements with NCTC and that offer any volume discounts. NBCU has an agreement in place with NCTC.

3. Bundling/Tying of Programming Networks

Some parties have alleged that NBCU inappropriately offers MVPDs wholesale "bundles" of broadcast and/or non-broadcast channels.[720] The criticism of wholesale transactions

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[718] Israel/Katz Vertical Foreclosure Report at 68-70.

[719] The NCTC is a not-for-profit corporation that operates as a programming and hardware purchasing organization for many hundreds of small (and not-so-small) cable operators that serve 26.7 million subscribers nationwide. *See Lafayette City-Parish v. Nat'l Cable Television Coop.*, Answer & Motion to Dismiss, File No. CSR-8357-P, at 16 (filed June 28, 2010) ("NCTC's members serve approximately 26.7 million customers."); *see also id.* Ex. 1, at 1 ¶ 2 (Declaration of Scott Abbott, Executive Vice President, NCTC) (same).

[720] *See* CWA Petition to Deny at 14; Entertainment Studios, Inc. Comments at 3, 7–8; FACT Comments at 11, 17-18, 26; Independent Telephone & Telecommunications Alliance Comments at 2; Writers Guild of America, West Comments at 16; Greenlining Institute Petition to Deny at 32; WealthTV Petition at 9; Franken Comments at 2. *See also* Letter from Herb Kohl, Chairman, Subcomm. on Antitrust, Competition Policy and Consumer Rights, to Christine Varney, Assistant Attorney General, Antitrust Division, United States DOJ and Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (May 26, 2010) (noting that competing MVPDs fear that, by gaining more content, Comcast "will have even greater leverage [to bundle] dozens of channels together so that MVPDs have to purchase all of them in order to get the 'must have' programming they need.").

between network owners and MVPDs also is neither new nor specific to the proposed transaction.[721] The Commission is considering the bundling issue in an ongoing rulemaking proceeding and NBC already has responded to such critics at length in its filings in the Commission's rulemaking on wholesale bundling of video programming (MB Docket No. 07-198).[722] While the Commission's resolution of this matter can and should remain confined to the rulemaking proceeding, NBCU addresses the issue briefly again here to ensure that the Commission has a complete and fully accurate record when reviewing the public interest benefits of the transaction.

a. NBCU Does Not Engage In Unlawful Tying.

As a threshold matter, commenters continue to make the fundamental mistake of categorizing NBCU's wholesale bundling of video programming as a "tying" arrangement.[723] The term "tying" has a defined legal meaning under antitrust jurisprudence. Specifically, a "tying" claim requires proof that: (i) a firm possesses market power in one product market (the "tying" product); (ii) the firm uses that power to coerce a buyer into purchasing a second product in a second market (the "tied" product); (iii) the tying and tied products are separate and distinct

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721 *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition; Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791 ¶ 119 (2007); *EchoStar Satellite L.L.C. v. Home Box Office, Inc.*, Order, 22 FCC Rcd 11095 (MB 2007) (dismissed at the request of the parties on June 15, 2007).

722 *See, e.g.*, NBC Universal, Inc. & NBC Telemundo License Co. Comments, FCC, MB Docket No. 07-198 (Jan. 4, 2008) ("NBCU 07-198 Initial Comments"); NBC Universal, Inc. & NBC Telemundo License Co. Reply Comments, MB Docket No. 07-198 (Feb. 12, 2008) ("NBCU 07-198 Reply Comments"). The NBCU 07-198 Initial Comments included, *inter alia*, a substantial economic study by Dr. Bruce Owen confirming that the purported anti-competitive effects of wholesale bundling of video programming are illusory. *See* NBCU 07-198 Initial Comments, Exhibit B ("2008 Owen Report").

723 *See, e.g.*, FACT Comments at 17 ("[Tying], already engaged in by NBCU, will worsen as the Venture will have significantly more channels to bundle and even greater incentive to raise prices of its video to its telco rivals.").

products in separate and distinct product markets; and (iv) the effect of the tying arrangement is to foreclose competition in the tied product market.[724] NBCU's conduct meets none of these requirements.

First, NBCU has demonstrated that it does not possess market power in any relevant programming market.[725] As demonstrated in Section IV.B.1, this will remain true following the proposed transaction.

Second, NBCU does not "coerce" or "force" MVPDs to select any particular combination or bundle of channels.[726] To the contrary, upon an MVPD's request NBCU will offer any of its non-broadcast networks on a standalone basis (except with respect to the HD simulcast versions of NBCU's SD networks) and will negotiate a rate that reflects the value of any such networks on a standalone basis. This approach is reflected in the fact that most MVPDs choose to carry

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724 *See, e.g.*, *Jefferson Parish*, 466 U.S. at 12-18; *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5-6 (1958).

725 *See* NBCU 07-198 Initial Comments at 42-45.

726 FACT's comments are barren of any credible showing to the contrary. For example, FACT alleges that "NRTC found that it was frequently compelled by the multichannel programmers, including NBCU, to carry all channels offered by the programmers and to carry them on the most widely distributed tier of service." FACT Comments at 15. Yet nowhere does FACT specify exactly what programming NBCU allegedly "forced" NRTC to carry, nor does it explain exactly how NBCU "forced" NRTC to carry unwanted channels. Likewise, FACT offers no specific evidence (or even a sworn statement from any of the supposedly affected parties) to support its broad allegation that "NBCU has required many of FACT's members to carry as many as 10 channels on the most widely distributed tier of programming even if neither the telcos nor their subscribers desire those channels. . . . NBCU has even mandated that telco distributors reserve space on their expanded basic tier for a yet-to-be-launched, yet-to-be-named channel." *Id.* at 26.

only a subset of NBCU networks.[727] Ironically, this is also true of the smaller MVPDs who claim the greatest "harm" from wholesale bundling.[728]

Third, commenters have never attempted to establish which products are the tying products and which are the tied products or to show that these products are in separate and distinct markets. As noted, the Commission has generally declined to define narrow product markets within the broader video programming business, so there is no reason to believe that the alleged tying and tied products (whatever they may be) are in separate product markets.

Finally, commenters have not demonstrated that NBCU's alleged conduct has foreclosed (*i.e.*, excluded) competition in the tied product market.[729] To the contrary, there is no evidence of tied market foreclosure – as demonstrated above, the video programming business is vibrant, dynamic, and highly competitive.[730]

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[727] *See* NBCU 07-198 Initial Comments at 35 ("Dr. Owen examined the carriage patterns among 1,402 MVPD operators and/or systems for six non-broadcast networks owned by NBCU: Bravo, CNBC, CNBC World, MSNBC, Sci Fi and USA (the "NBCU Networks"). His analysis revealed that 18 percent of the MVPDs taking *any* NBCU network take only a *single* NBCU network. Only *two percent* of the MVPDs took all six of the networks.") (emphasis in original).

[728] *Compare id.* ("Dr. Owen also examined a subset of the NBCU data, focusing only on the carriage patters of small MVPDs that carry at least one NBCU network, but that do not contract for any NBCU networks through the National Cable Television Cooperative ("NCTC"). Based on this examination, Dr. Owen concludes that it is unusual for any of these small operators to take more than one or two of the six NBCU networks studied. Almost 50 percent take only one network, and an additional 35 percent take only two networks.") (footnotes omitted) *and* NBCU 07-198 Reply Comments at 7 ("Dr. Owen analyzed the carriage patterns of 271 cable operators with fewer than 400,000 subscribers that carry at least one NBCU network but that do not contract for any NBCU networks through NCTC. Of the 161 operators in this group carrying USA Network, only – approximately nine percent – carry a package of channels consisting of USA, MSNBC, CNBC, Sci Fi and Bravo. In fact, more than half the operators in this group carrying USA Network do not carry any of the other NBCU networks in this alleged 'bundle.'") (footnotes omitted) *with* CWA Petition to Deny at 15 ("Tying arrangements are particularly problematic for small rural operators and new video competitors with a smaller subscriber base.").

[729] As the Supreme Court explained, plaintiffs must show that the challenged restraint "foreclosed so much of the market from penetration by [the defendants'] competitors as to unreasonably restrain competition in the affected market." *Jefferson Parish*, 466 U.S. at 31 n.51.

[730] Note that "[T]here can be no adverse impact on competition" "when a purchaser is 'forced' to buy a product he would not have otherwise bought even from another seller in the tied product market." *Id.* at 16.

It should be noted that the Commission has explicitly declined to condemn the practice of offering carriage of a broadcast signal in conjunction with one or more non-broadcast channels. The Commission has stated that examples of bargaining proposals "presumptively . . . consistent with competitive marketplace considerations and the good faith negotiation requirement" include "*proposals for carriage conditioned on carriage of any other programming,* such as a broadcaster's digital signals, an affiliated cable programming service, or another broadcast station either in the same or a different market."[731] The Commission also has held that such a proposal contains "presumptively legitimate terms and conditions or forms of consideration" and found nothing to suggest that such a request is "impermissible" or anything "other than a competitive marketplace consideration."[732]

b. Package or Bundled Discounts Are Generally Pro-Competitive.

While NBCU does not engage in tying, it does often offer MVPDs discounted prices if they purchase a larger package of NBCU programming networks. Such packages or bundled discounts are as ubiquitous in the U.S. economy as volume discounts and are generally pro-competitive. As the Ninth Circuit recently found, "[s]eason tickets, fast food value meals, all-in-one home theater systems – all are bundled discounts. Like individual consumers, institutional purchasers seek and obtain bundled discounts, too."[733] The pervasive use of bundled discounts

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731 *Implementation of the Satellite Home View Improvement Act of 1999; Retransmission Consent Issues, Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445 ¶ 56 (2000) (emphasis supplied).

732 *Id.* The Commission has also considered, but refused to adopt rules specifically prohibiting channel-bundling arrangements. *Carriage of Digital Television Broadcast Signals; Amendments to Part 76 of the Commission's Rules, Implementation of the Satellite Home View Improvement Act of 1999*, First Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 2598 ¶ 35 (2001).

733 *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 894 (9th Cir. 2008).

throughout American industries shows that they are an essential, arm's-length bargaining tool for both buyers and sellers.[734]

Programming is no different from other aspects of telecommunications, where bundling has proved beneficial to customers.[735] Congress expressly endorsed the right of broadcasters to bargain for carriage of an affiliated non-broadcast programming service in exchange for retransmission consent.[736] Cable operators also made clear to broadcasters that they strongly preferred to provide in-kind consideration (such as carriage of additional content) rather than cash in exchange for the right to retransmit broadcast signals. As a result, a negotiated combination of in-kind consideration, cash subscriber fees, and other elements tailored to the preferences of MVPD purchasers evolved as the form of transaction generally preferred by parties in the wholesale video programming marketplace.[737]

Bloomberg and others argue that, by increasing the portfolio of networks that Comcast-NBCU can include in a "bundle" for carriage, the transaction potentially excludes carriage of networks that are substitutes for Comcast-NBCU networks, such as unaffiliated business news networks.[738] Bloomberg asks the Commission to prohibit Comcast from offering to any MVPD

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734 *Id.*

735 It is common for telecommunications firms to offer phone service, Internet service, and television service with bundled discounts for customers who purchase a package. *See* Ken Belson, *Dial M for Merger,* N.Y. Times, Jan. 28, 2005, at C1; Ken Belson, *Cable's Rivals Lure Customers with Packages,* N.Y. Times, Nov. 22, 2004, at C1. Similarly, consumers receiving video programming by cable typically subscribe to a "tier" of service that allows them to access a bundle of channels and pay a monthly subscription fee for that service.

736 *See* NBCU 07-198 Initial Comments at 9-10.

737 *Id.* at 13.

738 Marx Report ¶ 13. Bloomberg asserts that the transaction "will provide Comcast with the incentive to discriminate against [Bloomberg TV] by offering programming bundling opportunities involving CNBC." Bloomberg Petition to Deny at 70. HDNet also identified as a potential carriage obstacle the bundling of "must have" programming by some large programming providers with networks of little interest to consumers that are under the same ownership. HDNet described the practice of bundling as common and taking up "valuable channel

any combination of NBCU's and Comcast's network programming as a condition of receiving more favorable licensing terms than Comcast offers on an "a la carte" basis.[739]

At bottom, Bloomberg is seeking to use this proceeding to deprive the combined entity of any opportunity to reduce prices and benefit consumers through discounts for the acquisition of multiple programming networks. But reducing prices to increase business – whether by bundling, volume, or package discounts – promotes competition and benefits consumers.[740] Bundled discounts in particular benefit buyers because the discounts allow the buyer to get more for less and increase overall output.[741] Bloomberg ignores evidence that bundled discounts reflect the efficiencies of a multi-programming firm exhibiting economies of scope. Such economies of scope in producing or distributing a bundle of programming typically result in lower costs than could be achieved by a firm that sells only a single item from the bundle.

Programmers also can use bundled discounts in lieu of advertising or other forms of promotion to increase demand for or to expose customers to a new product.[742] This can be especially important in introducing viewers to new media programming. Bundling thus helps drive the abundance, quality, and diversity of programming. The prevalence of bundled

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space which could be used by other more popular networks, including independent programmers." Letter from David S. Turetsky, Dewey & LeBoeuf LLP, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 07-42, 07-198, 10-71, 10-56 (June 16, 2010). Importantly, HDNet explicitly noted that it has general industry-wide concerns on this issue and that its experience in negotiating with Comcast has been unusually favorable. *Id.*

739 Bloomberg Petition to Deny at 70.

740 *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) ("[C]utting prices in order to increase business often is the very essence of competition.").

741 *Cf. Jefferson Parish*, 466 U.S. at 12 ("Buyers often find package sales attractive; a seller's decision to offer such packages can merely be an attempt to compete effectively – conduct that is entirely consistent with the Sherman Act.").

742 *See, e.g.*, Antitrust Modernization Comm'n, *Report and Recommendations* 95 (2007), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm.

discounts in both programming and non-programming telecommunications sectors suggests that such discounts are generally beneficial to both consumers and distributors.

Finally, wholesale packaging of programming networks allows programmers to realize economies of scale and scope that reduce the costs of producing, marketing, and distributing their programming.[743] These cost savings, in turn, allow programmers to offer a price for a program package that is lower than the aggregate price if each channel were purchased separately. Offering wholesale packages also helps programmers to launch and distribute new programming services, not by "coercing" MVPDs into carrying the new services, but by offering discounts on popular, established networks in exchange for distribution of new channels. This in turn promotes greater competition among programmers and substantially increases programming choices for consumers.

Comcast and NBCU have offered and will continue to offer their networks for sale on an individual basis; no MVPD is required to carry any one channel to obtain another. Comcast and NBCU have each negotiated at arm's-length and in good faith with MVPDs for all program contracts, and will continue to provide full and non-discriminatory access to their programming services. The pending transaction is not the place to address any industry-wide concerns about the wholesale bundling of video content. It is clear that no specific harms can be attached to the practices of NBCU or Comcast in licensing their content to MVPDs, and therefore no "bundling" condition to regulatory approval is warranted.

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743 *See* NBCU 07-198 Initial Comments at 7, 50-51.

4. Alleged NBCU Withholding of Programming from Boxee, Sling, and Kylo

Some commenters have suggested that NBCU has improperly withheld programming from Boxee, Sling, and Kylo.[744] These allegations are obviously not transaction-specific. They are also not true.

With respect to Boxee, NBCU could not legally provide to Boxee the distribution rights to the type of content Boxee sought – ad-supported, FOD video – as Hulu had the exclusive contractual rights to this content. NBCU informed Boxee that it would need to talk with Hulu if it wanted to explore embedding Hulu content in its browser. Instead Boxee decided to circumvent Hulu's terms-of-use restrictions by streaming through Boxee's interface (which disables significant, commercially important functionalities of Hulu's site, to Boxee's commercial benefit, in addition to disabling access to closed captioning provided by Hulu) without an agreement with Hulu for distribution. As a result, Hulu halted Boxee's unauthorized access to that content.

Kylo is an interface that makes itself available on Internet-ready television sets. With Kylo, it is possible to load the Hulu player on the television. Hulu took steps to halt Kylo's unauthorized access to its content, and Kylo has attempted to circumvent these restrictions. Hulu's business model is to make content available on the Internet for viewing on personal computers. Kylo took Hulu's content in an unauthorized fashion to make it available through the television without payment.[745] Such "withholding" – if one were to call it that – was entirely appropriate and a unilateral decision made by Hulu, and therefore is not a basis for concern in

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744 *See* Writers Guild of America, West Comments at 18-19; Greenlining Institute Petition to Deny at 39-40.

745 In fact, Hulu had reserved the viewing of its content on television as a premium service that Hulu is now planning to make a feature on a new subscription service called Hulu Plus.

this transaction. It also bears noting that, unlike Hulu, NBCU has not taken any steps to halt Kylo's access to content from NBCU websites.

Dish Network has complained that NBCU has taken steps to restrict its ability to put content online by interfering with the operation of Sling.[746] This complaint is both false and, by definition, not transaction specific, since it is based upon conduct that allegedly occurred prior to the transaction. The technology offered by Sling allows a user of an MVPD's set-top box user to attach the Slingbox, using an Internet connection, to that set-top box and then forward whatever content can be accessed through the set-top box to other remote devices anywhere in the world, regardless of the MVPD provider's licensed area of service.[747] The Slingbox uses the Internet to deliver the content from an attached set-top box to any Internet-connected screen anywhere in the world. NBCU licenses its programs for in-home residential viewing in particular geographic areas. Sling circumvents those licensing terms and has declined to negotiate for a license to exhibit NBCU content worldwide over the Internet (again, to the extent NBCU has those rights). Dish Network contends that its Sling-related activities do not violate any of NBCU's copyright or contractual protections. NBCU has made clear in its content licensing agreement with Dish Network that it is not providing Dish Network with the rights to distribute NBCU content online (to the extent NBCU has those rights). Dish Network has not yet attempted to negotiate for these

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746 *See* Dish Network Petition to Deny at 21-22.

747 The additional viewing screen has typically been a computer screen or a mobile device. For example, Sling offers an iPhone application that allows an individual to virtually view content available on a home set-top box from anywhere in the world. The user interface looks identical to what the customer would see if watching the set-top box at home on a connected television. The Slingbox uses a 1:1 ratio, which means that the set-top box can only be manipulated to a single interface, *i.e.* an individual at home cannot view one program on the set-top box and allow a person utilizing Sling to view something else from that same set-top box. However, if the set-top box at home is not in use, a person utilizing the Slingbox can watch any programming that can be accessed via the set-top box, including any content stored on a connected DVR. It is possible for an individual to add a set-top box to an existing MVPD subscription for the sole purpose of connecting to a Slingbox in order to have the linear and/or recorded MVPD content available for viewing on a remote device.

rights. While it has reserved all of its rights, NBCU has not made any attempts to block Sling from operating. Further, NBCU did enter into a transaction with Echostar (a sister company of Dish Network) that permitted Echostar to provide certain "clip" capabilities for some NBCU programs that allows viewers to take small excerpts of designated programs and post or email them via Sling. That agreement expired, and Echostar did not seek to have it renewed. In sum, there has been no conduct by NBCU to restrict Dish Network's use of Sling, nor is there any basis to believe the transaction will change that.

Similarly, allegations by Public Knowledge[748] that Universal's decision on how to license its movies to Netflix shows a fundamental lack of understanding of the content business. Universal negotiated with Netflix to license its movies on a basis that provides for a 28-day delay between the time that a movie is made available for sale to the public on DVD and the time Netflix can make the DVD of that movie available by mail to its subscribers. This step by Universal is simply part of a well-recognized industry practice of "windowing" content. Just as Universal made an economic decision to release its motion pictures to movie theatres for a period of time before making them available for DVD or VOD distribution, it has also determined to make them available for sale or rent on DVD before making them available by mail to Netflix subscribers. NBCU uses release windows to manage the distribution of its content and generate sufficient revenues to sustain the production of that content. The production of content is expensive and windowing has been widely accepted in the industry for decades as a means of providing distributors with attractive distribution rights while creating opportunities for content creators to profitably create and sell their programming. NBCU's use

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748 Public Knowledge Petition to Deny at 11.

of windowing in licensing its DVDs to Netflix is similar to the approach taken by a number of other content owners.

V. CONTRARY TO PETITIONERS' AND COMMENTERS' CLAIMS, APPLICANTS POSSESS THE QUALIFICATIONS FOR APPROVAL OF THE TRANSACTION.

In addition to considering the numerous benefits of the transaction discussed in Section III above, the Commission also must determine that Applicants possess the basic qualifications necessary to hold or obtain broadcast station licenses.[749] The record in this proceeding and the lengthy history of Applicants' behavior as Commission licensees show unequivocally that Applicants "will comply with the Communications Act and [the FCC's] rules and policies" and will "deal truthfully with the Commission," as the FCC's *Character Policy Statement* requires.[750] All of this evidence is underscored by the numerous letters filed in support of Applicants by community groups, state and local government officials, and others with extensive experience interacting with Applicants; no petitioner or commenter has offered credible evidence to the contrary.[751] Specifically, and contrary to arguments made by opponents; (1) Applicants comply

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749 *See* 47 U.S.C. § 309.

750 *In the Matter of Policy Regarding Character Qualifications in Broadcast Licensing,* Report, Order, and Policy Statement, 102 FCC 2d 1179 ¶ 7 (1986) ("1986 Character Policy Statement"), *recon.,* Memorandum Opinion and Order, 1 FCC Rcd 421 (1986). The Commission's character inquiry involves separate analyses for FCC-related and non-FCC related conduct, with a significantly narrower range of relevant conduct for the latter. In any analysis of non-FCC misconduct, the Commission limits its consideration to factors that, in its view, bear on a licensee's truthfulness and reliability in its dealings with the FCC. *Id.* ¶ 34. There are no arguments in the record that Applicants have engaged in adjudicated fraudulent statements or misrepresentations before another government agency, have been convicted of a felony, have been adjudicated to have engaged in broadcast-related antitrust or anti-competitive misconduct, or have been adjudicated to have engaged in discrimination, the classes of relevant non-FCC misconduct.

751 As a threshold matter, pursuant to Section 309(d) of the Act, petitioners must submit "specific allegations of fact sufficient to show . . . that a grant of the application would be prima facie inconsistent with [the public interest, convenience, and necessity]." 47 U.S.C. § 309(d)(1); *see also Astroline Commc'ns Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988) (noting that "[p]arties challenging an application by means of a petition to deny and who seek a hearing thereon must satisfy a two-step test established in 47 U.S.C. § 309(d)(1) & (2). At the threshold, the protesting party must submit a petition containing specific allegations of fact sufficient to show . . . that a grant

with the Commission's broadcast ownership rules and will be in full compliance with the television duopoly rule at closing; (2) the NBCU O&O stations and Comcast local cable systems serve the public interest and the goals of localism and diversity (including programming, employment, and procurement diversity); and (3) Applicants have dealt truthfully with the Commission, fully demonstrating that they can be trusted to meet the Commission's regulatory obligations. Accordingly, the Commission should dismiss or deny the petitions to deny discussed below and find that Applicants possess the basic qualifications necessary for approval of the transaction.[752]

A. Applicants Comply With the Commission's Ownership Rules and Will Be in Compliance with the Commission's Television Duopoly Rule at Closing.

Both Comcast and NBCU currently comply with the broadcast ownership restrictions in Section 73.3555 of the Commission's rules.[753] NBCU does, however, hold three television stations in the Los Angeles, California Designated Market Area ("DMA"), pursuant to a temporary waiver of Section 73.3555(b):[754] (1) KNBC (a station airing NBC programming,

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of the application would be prima facie inconsistent with [the public interest, convenience, and necessity].") (internal quotations and citations omitted). Here, no party has presented facts or submitted evidence with respect to Comcast, GE, or NBCU to establish a prima facie case, and there certainly are no substantial and material questions of fact regarding any such matters. 47 U.S.C. § 309(d)(2).

[752] As fully addressed above in Section III, Applicants have offered a series of voluntary commitments regarding diversity, localism, and other issues, which go well beyond any legal requirement and promise to create a combined entity with diversity and localism efforts greater than the sum of its parts.

[753] *See* Public Interest Statement at 73. Comcast, of course, currently owns no TV or radio broadcast stations. *Id.* at 72.

[754] *See In the Matter of Telemundo Communications Group, Inc. (Transferor) and TN Acquisition Corp. (Transferee)*, Memorandum Opinion and Order, 17 FCC Rcd 6958 ¶ 46 (2002) (granting a conditional waiver of 47 C.F.R. § 73.3555(b)) ("*Telemundo Order*"). In addition, as explained in the Applications and Public Interest Statement, General Electric Capital Corporation ("GECC"), an indirect, wholly owned subsidiary of GE, currently holds debt and non-voting equity constituting 36.41 percent of the total asset value of American Community Newspapers ("ACN"), following ACN's emergence from a bankruptcy proceeding in which a portion of GECC's debt was converted to non-voting equity. These interests are now attributable to GE and GECC under the equity-debt-plus attribution rule due to the decline in the value of ACN assets and the conversion of a portion of GECC's loans to equity. In these circumstances, the Commission affords parties a reasonable time to come into compliance

licensed to Los Angeles, California); (2) KVEA (a Spanish-language station airing Telemundo programming, licensed to Corona, California); and (3) KWHY-TV (an independent Spanish-language station, licensed to Los Angeles, California). In order to come into compliance with Section 73.3555(b) without a waiver, NBCU has committed either to divest one of its three television stations in the Los Angeles DMA to a third party prior to the consummation of the proposed joint venture transaction, or place one of the stations in a divestiture trust at closing, in either case pursuant to prior Commission consent.[755] Under either circumstance, NBCU's television ownership interests in Los Angeles will be in compliance with Section 73.3555(b) at the closing of the proposed transaction.

Any concerns regarding NBCU's current ownership of three television stations in Los Angeles[756] or suggestions that the Commission should take enforcement action with regard to

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with any ownership restrictions made applicable as a result of a change in attributable status. GECC will bring its interest in ACN into compliance with section 73.3555(b) of the Commission's rules prior to closing of the instant transaction. *See* NBCU Response to the Commission's May 21, 2010 Information and Discovery Request, Narrative Response to Request 59, at 38 (resubmitted July 6, 2010).

[755] *See* Letter from Michael H. Hammer, Willkie Farr & Gallagher LLP, Counsel for Comcast Corporation, A. Richard Metzger, Jr., Lawler, Metzger, Keeney & Logan, LLC, Counsel for General Electric Company, and Kenneth E. Satten, Wilkinson Barker Knauer, LLP, Counsel for NBC Universal, Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56, at 1 (May 4, 2010); *see also* FCC Form 315 Lead Application File Nos. BTCCDT-20100128AAG, BTCCDT-20100128ABL, BTCCDT-20100128ABN, and BTCCDT-20100128ABR; *In the Matter of Applications of Shareholders of AMFM, Inc. (Transferor) and Clear Channel Communications, Inc. (Transferee)*, Memorandum Opinion and Order, 15 FCC Rcd 16062 ¶ 24 (2000) ("The Commission previously has approved the use of properly insulated trust arrangements as a legitimate means to avoid attribution of a broadcast interest under the Commission's multiple ownership rules.") (*citing Attribution of Ownership Interests*, Report and Order, 97 FCC 2d 997 ¶¶ 54-56 (1984)).

[756] *See* CFA *et al.* Petition to Deny at 59-61; Lepicier Petition to Deny at 6-10; Greenlining Institute Petition to Deny at 43. To the extent that parties are concerned about the ownership of multiple television stations in a given market more generally (*see* Franken Comments at 4-7; Cooper/Lynn Decl. at 69-72), these issues are not transaction specific and should be addressed by the Commission in broader, industry-wide, media ownership rulemakings. *See supra* Section II. In addition to expressing concerns regarding NBCU's ownership in the Los Angeles market, Ms. Rita Guajardo Lepicier has asked the Commission to deny the application to assign Station KWHY-TV to a divestiture trust. *See* Lepicier Petition to Deny at 1.

these matters[757] are fundamentally immaterial to the Commission's evaluation of the instant transaction. The simple fact is that NBCU will be in full compliance with Section 73.3555(b) when the transaction closes.

1. Los Angeles DMA

NBCU is moving aggressively to divest Station KWHY-TV prior to closing. NBC Telemundo License, LLC, the licensee of Station KWHY-TV, Los Angeles, California, filed an application on May 17, 2010, to assign the license to a divestiture trust, with Bahia Honda, LLC as trustee ("Bahia Honda" or the "Trustee").[758] That application has been accepted for filing and is pending before the Commission.[759] NBCU also has engaged Moelis & Company LLC ("Moelis"), an investment banking firm, to solicit proposals to purchase the station. Moelis has contacted potential purchasers, executed confidentiality agreements with interested parties, and sent a confidential information memorandum ("CIM") and a bid letter to those parties.

Moreover, recognizing that its divestiture of Station KWHY-TV represents an important opportunity to promote ownership diversity, NBCU also is making significant efforts to sell the station to a minority-owned entity. In this connection, NBCU has entered into an agreement with the Minority Media and Telecommunications Council ("MMTC") to assist in identifying prospective qualified buyers for the station, particularly minorities.[760] More than a dozen

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757 *See* CFA *et al.* Petition to Deny at 61 & n.124.

758 *See* FCC File No. BALCT-20100517ADJ.

759 *See* Public Notice, Report No. 27240 (rel. May 20, 2010).

760 *See, e.g.*, Letter from Antonio R. Villaraigosa, Mayor, Los Angeles, CA. to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56, at 1 (June 18, 2010) Villaraigosa Letter ("[NBCU] has announced it intends to divest KWHY-TV, and is making a good faith effort to help secure a minority owner to acquire the station.").

potential purchasers have been identified through the arrangement with MMTC, many of whom have signed confidentiality agreements and received the CIM.

In short, NBCU's ownership interests in Los Angeles will be in full compliance with Section 73.3555(b) when the proposed transaction closes, and any concerns regarding NBCU's common ownership of three television stations in the Los Angeles DMA are immaterial to consideration of the instant transaction. Indeed, should NBCU's efforts in conjunction with MMTC bear fruit, NBCU's divestiture of Station KWHY-TV will benefit the public by promoting ownership diversity in the Los Angeles DMA. Similarly, there is no basis for any enforcement action with regard to NBCU's ownership of Station KWHY-TV.[761] The Commission approved NBCU's ownership of three Los Angeles stations in the *Telemundo Order*, and NBCU remains in compliance with that order.[762]

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761 *See* CFA *et al.* Petition to Deny at 61.

762 *See generally Telemundo Order*. Although the *Telemundo Order* granted a temporary waiver of Section 73.3555(b), NBCU filed a request to extend that temporary waiver before it expired. *See* Letter from F. William LeBeau, Sr. Regulatory Counsel and Assistant Secretary, Telemundo of Los Angeles License Corp., to Marlene H. Dortch, Secretary, FCC, BTCCT-20011101ACN, *et seq.* (Mar. 14, 2003). Consequently, under Commission precedent, the temporary waiver remains in force until such time as the Commission acts on the pending extension request. *See* Letter from W. Kenneth Ferree, Chief, Media Bureau, to Tribune Television Co. (Sept. 5, 2003) cited in *In the Matter of Counterpoint Communications, Inc. and Tribune Television Co.*, Memorandum Opinion and Order, 20 FCC Rcd 8582 ¶ 21 (2005). NBCU also has submitted periodic reports outlining its efforts to divest one of the television stations in the Los Angeles DMA. *See, e.g.,* Letter from Margaret L. Tobey, Assistant Secretary, NBC Telemundo License Co., to Marlene H. Dortch, Secretary, FCC (July 12, 2010).

Even assuming *arguendo* that there were some basis upon which the Commission could initiate an enforcement action, this would have no bearing on whether the Commission should approve the NBCU transaction. The Commission will decline to approve a license transfer or assignment based on prior rule violations by the transferee or assignees unless "the number, nature and extent" of the violations indicate that the licensee "cannot be relied upon to operate [the station] in the future in accordance with the requirements of its licenses and the Commission's Rules." *See In the Matter of Eli and Harry Daniels, D.B.A. The Heart of the Black Hills Stations*, Decision, 32 FCC 2d 196 ¶¶ 10-11 (1971) (recon. denied, 36 FCC 2d 568 (1972)). Isolated instances of potential rule violations, by contrast, do not justify denial of an assignment or transfer of control application. *See In the Matter of Application of James K. Sharp*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 2267 (MB 2010) (renewal granted despite failure to file timely renewal, dismissal of late renewal because of delinquent debt, and operating without a license or an STA); *In the Matter of Application of Louisiana State University*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 24 FCC Rcd 10173 (MB 2009) (renewal granted despite public file violations); *In the Matter of Application of Urban*

2. Station KWHY-TV Divestiture Trust Application

In addition to challenging the Comcast-NBCU transaction, Ms. Lepicier's Petition also urges the Commission to deny the application to assign Station KWHY-TV to Bahia Honda.[763] Ms. Lepicier alleges that NBCU has not been a good steward of Station KWHY-TV based on her allegations that the station has not complied with certain Commission regulations.[764] Ms. Lepicier argues, therefore, that the Commission should not permit NBCU to place the station in trust, but should deny the assignment application and defer consideration of the proposed Comcast-NBCU transaction until after NBCU has divested Station KWHY-TV to an independent (and, in Ms. Lepicier's preference, Hispanic) owner.[765]

NBC Telemundo License, LLC, the licensee for Station KWHY-TV, and Bahia Honda demonstrate in their separately filed Joint Opposition to Ms. Lepicier's Petition to Deny that Ms. Lepicier's Petition lacks merit.[766] In any event, even if true, Ms. Lepicier's allegations of rule violations on the part of WKHY-TV represent isolated incidents that (standing alone or taken together) do not raise basic qualification issues sufficient to justify the Commission denying the

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Radio I, LLC, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 18453 (2008) ("*Urban Radio*") (renewal granted despite EEO violations).

763 *See* Lepicier Petition to Deny at 1.

764 *Id.* at 9-10.

765 *Id.* at 2, 7.

766 NBC Telemundo License, LLC and Bahia Honda, LLC are filing a Joint Opposition to Ms. Lepicier's Petition to Deny under separate cover. *See* FCC File No. BALCDT – 20100517ADJ, Joint Opposition to Petition to Deny of NBC Telemundo License, LLC and Bahia Honda, LLC (July 21, 2010). The Joint Opposition is hereby incorporated herein by reference.

assignment application.[767] Thus, the Commission should reject Ms. Lepicier's request to deny the assignment application and should not defer action on the Comcast-NBCU transaction.

In sum, the Commission should reject the petitions to deny discussed in this Section V.A and find that Applicants possess the basic qualifications necessary for approval of the transaction.

B. The NBCU O&O Stations and Comcast Local Cable Systems Serve the Public Interest and the Goals of Diversity and Localism.

The record in this proceeding and NBCU's long history as a broadcast pioneer leave no question that the company is committed to serving the public interest and the local communities in which its O&O stations operate. NBCU has recognized the critical role that broadcasters play as trustees of the public airwaves and consistently has gone beyond threshold regulatory requirements to meet community needs. Although Comcast, as a cable operator, currently is not subject to the requirements for broadcast licensees, its behavior demonstrates that the Commission also can trust Comcast to comply with all applicable rules once it holds broadcast licenses.

1. Programming, Employment, and Procurement Diversity

Applicants conduct their businesses in a manner that is consistent with the Commission's diversity-related rules and promotes the Commission's goal of fostering diversity. This record is

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[767] *See supra* note 762. "It is well settled that the Commission may grant an assignment application despite the potential for subsequent enforcement action, if it can make the necessary qualifications findings." *FM Broadcasters of Douglas County*, Memorandum Opinion and Order, 10 FCC Rcd 10429, 10430 (1995). *See also Rockland Public Schools*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 21691 (MB 2007) (renewal application granted despite 21 public file violations and two ownership report violations); *In the Matter of Application of Access.1 New York License Company LLC,* Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 15205 (MB 2007) (false certification of compliance with the public inspection file rule did not rise to such a level or pattern of misconduct so as to warrant designation for evidentiary hearing); *In Re Applications Cumulus Licensing LLC*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 13711 (MB 2007) (same).

supported by an overwhelming number of commenters who have affirmed Applicants' commitment to diversity. Indeed, contrary to the assertions of four allied California organizations that act effectively as a single petitioner – the Greenlining Institute, Mabuhay Alliance, Latino Business Chamber of Greater Los Angeles, and the Black Economic Council (collectively, the "Greenlining Parties")[768] – Comcast and NBCU have strong, positive diversity records in all facets of their operations. Both companies are, and always have been, committed to diversity because it is the right thing to do and because it is good business. Specifically, as discussed in more detail below, NBCU and Comcast provide niche and multicultural programming responsive to the demands of all their viewers, maintain hiring practices consistent with Commission rules, demonstrate a commitment to a diverse workforce, and seek to obtain products and services from a diverse range of suppliers. The Greenlining Parties' allegations are factually incorrect and largely unconnected to the Commission's rules or policies – or to any legal requirement.

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[768] The Greenlining Coalition includes the Black Economic Council, the Latino Business Chamber of Commerce of Greater Los Angeles and the Mabuhay Alliance. *See* Greenlining Coalition, http://www.greenlining.org/about/coalition.php (last visited July 20, 2010). These four organizations are often aligned and joined in their advocacy. *See* Reply of the Black Economic Council, the Latino Business Chamber of Greater Los Angeles and the Mabuhay Alliance to Comments on Workshop Two Utility Response, *Order Instituting Rulemaking to Review and Potentially Amend General Order 156, To Consider Other Measures to Promote the Economic Efficiencies of an Expanded Supplier Base, and to Examine the Composition of the Utilities' Workforce*, R. 09-07-027, at 1 (Cal. PUC, July 30, 2009); Letter to President Barack Obama & U.S. Treasury Secretary Timothy Geithner, *Mortgage Modifications Must Come from Grass Roots, Not Trickle Down*, http://www.greenlining.org/publications/pdf/474 (last visited July 20, 2010); Greenlining Inst. Comments, *In the Matter of Pfizer Pharmaceuticals, Inc., for the Authority to Acquire Wyeth,* FTC File No. 091-0053, at 1 (Oct. 23, 2009) (filing comments signed by the Black Economic Council, Latino Business Chamber of Greater Los Angeles, Mabuhay Alliance and Greenlining Institute on Greenlining Institute letterhead). The Greenlining Institute's Board of Directors includes Jorge Corralejo, the chair and founder of the Latino Chamber of Greater Los Angeles, and Ortensia Lopez, listed as an "officer, director, trustee, or key employee" for the Black Economic Council. *See* Greenlining's Board of Directors, http://www.greenlining.org/about/board.php (last visited July 12, 2010); Black Economic Council, 2008 Internal Revenue Service 990 Short Form Return of Organization Exempt from Income Tax at 2, *available at* http://www.guidestar.org/FinDocuments/2008/061/749/2008-061749466-05b921ee-Z.pdf.

As outlined in Section III above, Applicants have made a number of unprecedented voluntary commitments, and entered into additional consensual agreements, designed to ensure that the joint venture responds to the needs and interests of diverse communities. Even without taking into account these forward-looking transaction-related benefits, however, the record in this proceeding confirms that Comcast's and NBCU's existing diversity efforts make them outstanding corporate citizens *today*. The very few comments to the contrary have been overwhelmed by a chorus of affirmation of Applicants' commitment to diversity. The organizations that have filed letters in support of Applicants' diversity records are both large and small, span the entire country, and represent people from all walks of life. The letters are from respected individuals and organizations that interact with Comcast and NBCU frequently and have seen first-hand the companies' longstanding commitment to diversity. Representative quotes from some of the scores of supporters that submitted letters praising Comcast's and/or NBCU's diversity records include:

- *National Urban League*: "[O]ur experience with Comcast and [NBCU] is this: both Comcast and [NBCU] have had a positive record in promoting diversity and the other important interests of our constituents. First, Comcast and [NBCU] have been committed to supplier diversity in a way that provides opportunities to minority-owned suppliers. Second, Comcast and [NBCU] have made significant philanthropic investments in the community, supporting the work of institutions that serve the needs of communities of color. Third, Comcast and [NBCU] have taken steps to increase the diversity of their workforce at all levels through recruitment and mentoring programs, and best practices in hiring. Fourth, Comcast and [NBCU] have strongly indicated their support for the goal of closing the digital divide, a critical barrier to education, career and entrepreneurship opportunities for people of color."[769]

- *Reverend Al Sharpton (National Action Network)*: "Comcast has been an industry leader on diversity when it comes to their core business operations as evidenced

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[769] Letter from Marc H. Morial, President & CEO, National Urban League, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56, at 1 (June 21, 2010).

by the leadership positions held by several African Americans in cable and programming operations and elsewhere."[770]

- *National Black Chamber of Commerce*: "It is our view that Comcast's long and distinguished record in promoting diversity – through its hiring and promotion practices, programming choices, and support for African American charities and community groups – has provided ample evidence of this company's good works and the positive impact it will have on diversity and equality at [NBCU]."[771]

- *National Black Caucus of State Legislators*: "We strongly believe that Comcast's commitment to promoting diversity in programming, as well as its support for the economic advancement of communities of color, provides ample evidence that the new Comcast-[NBCU] will promote the important value of diversity, a critical element of the FCC's review."[772]

- *National Association of Black County Officials*: "Comcast supports the economic advancement of African Americans. The company has demonstrated a commitment to supporting minority-owned businesses . . . . Comcast is also a positive force in African American communities across the country through its support for charitable organizations."[773]

- *National Organization of Black Elected Legislative Women*: "It is without question that Comcast stands as a leader in the world of corporate social responsibility and because of this leadership and continued support for policies endorsed by NOBEL Women we believe this important transaction merits timely approval."[774]

- *National Conference of Black Mayors*: "We strongly believe that Comcast's exemplary record in creating sustainable urban jobs, as well as the company's support for the economic advancement of people of color throughout our diverse communities, provides ample evidence that the new Comcast-NBC Universal will continue to promote diversity and urban economic expansion – principles which

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770 Letter from Rev. Al Sharpton, President & Founder, National Action Network to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56, at 2 (May 24, 2010).

771 Letter from Harry C. Alford, President & CEO, National Black Chamber of Commerce, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56, at 1 (May 24, 2010).

772 Letter from Rep. Calvin Smyre, NBCSL President, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56, at 1 (June 3, 2010).

773 Letter from Robert Steele, President, NABCO, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56, at 1 (May 5, 2010).

774 Letter from Sharon Weston Broome, National President, NOBEL Women, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56, at 2 (May 11, 2010).

you have identified as critical measures in your review of the two companies' proposed transaction."[775]

- *U.S. Hispanic Chamber of Commerce*: "I am pleased to report that Comcast has demonstrated its commitment to working with the USHCC to identify Hispanic-owned businesses as potential vendors and partners. While Comcast has been successful in working with Hispanic owned businesses, it is always interested in new ways to increase the diversity of its suppliers."[776]

- *National Hispanic Caucus of State Legislators*: "In working with the company, it is clear that Comcast shares our values with respect towards intellectually engaging and strengthening the communal interests of Hispanic Americans."[777]

- *California Asian Pacific Chamber of Commerce*: "Comcast has been a long standing partner of the Chamber supporting many of our programs that fulfill our mission, from our educational program for youth (JumpStart21) that trains and places area youth into internships to our procurement activities like the website that matches ethnic business owners to contract opportunities."[778]

Scores of other local officials,[779] independent programmers,[780] business groups,[781] and community organizations,[782] among others, similarly praised Applicants' diversity efforts. These

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[775] Letter from Vanessa R. Williams, Executive Director, National Conference of Black Mayors, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56, at 1 (May 19, 2010).

[776] Letter from Javier Palomarez, President & CEO, U.S. Hispanic Chamber of Commerce, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (May 19, 2010).

[777] Letter from Rep. David Casas, National Chairman, National Conference of Hispanic Legislators, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 2, 2010).

[778] Letter from Pat Fong-Kushida, President & CEO, California Asian Pacific Chamber of Commerce, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 21, 2010).

[779] S*ee, e.g.*, Letter from Rep. Tyrone Ellis, Majority Leader, Mississippi House of Representatives, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Mar. 26, 2010); Letter from Rep. Sylvester Turner, Texas House of Representatives, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Mar. 29, 2010).

[780] *See, e.g.*, Letter from Collie Burnett, President, Atlanta Interfaith Broadcasters, Inc., to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (July 1, 2010); Letter from Daija Arias, Senior Vice President, NTN24 USA, Inc., to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 24, 2010); Letter from Luis Torres-Bohl, President, Castalia Communications Corporation, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Apr. 22, 2010); Letter from William Airy, Chief Strategy Officer, Inspiration Networks, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 18, 2010); Letter from Tracy Jenkins Winchester, President & CEO, CoLours TV, to Rick Boucher, Chairman, Subcommittee on Communications, Technology, and the Internet, U.S. House of Representatives (July 6, 2010) *available at* http://www.comcast.com/nbcutransaction//pdfs/Programmers/Chairman%20Boucher%20July%202010.pdf.

efforts with respect to programming diversity, employment diversity, and procurement and supplier diversity are discussed in more detail below.

a. Programming Diversity

Contrary to claims by some commenters [783] (in particular, the Greenlining Parties), Applicants have demonstrated that they produce, air, and carry programming that is diverse by any metric. Even if commenters' allegations were true, they do not demonstrate violation of any Commission rule, nor may the Commission interfere with programming decisions within the editorial discretion of licensees. In any event, as addressed in the Public Interest Statement and in Section III, the new venture will expand the amount, quality, variety, and availability of content better than either company could on its own, including extraordinary commitments to promote source diversity and independent programming.

i. NBCU

Licensees are entitled to broad discretion in their selection of community-responsive programming, and the Commission "will not interfere with the broadcaster's judgment without a

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781 *See, e.g.*, Letter from Lilian Lopez, President, South Florida Hispanic Chamber of Commerce, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (May 18, 2010); Letter from Pat Fong-Kushida, President/CEO, California Asian Pacific Chamber of Commerce, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 21, 2010).

782 *See, e.g.*, Letter from Sol Flores, Executive Director, La Casa Norte, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 10, 2010); Letter from Steve Bruntos, Executive Director, Chinese Mutual Aid Association, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Apr. 23, 2010); Letter from Christine Miller-Betts, Director, The Lucy Craft Laney Museum of Black History, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 16, 2010).

783 *See, e.g.*, Greenlining Institute Petition to Deny, MB Docket No. 10-56, at 7-8, 44; Latino Business Chamber of Greater Los Angeles Comments, at 2 (Mar. 26, 2010); Letter from Samuel Kang, Managing Attorney, The Greenlining Institute, to Mignon Clyburn, Commissioner, FCC, MB Docket No. 10-56 (May 11, 2010); Letter from Hyepin Im, President & CEO, Korean Churches for Community Development, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Apr. 14, 2010) ("Korean Churches for Community Development Comments"); Letter from Faith Bautista, President & CEO, Mabuhay Alliance, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Apr. 6, 2010) ("Apr. 6 Mabuhay Letter"); Black Economic Council Opposition, at 3 (Mar. 29, 2010) ("Black Economic Council Opposition").

showing that the broadcaster was unreasonable or discriminatory in its selection of issues or that the licensee has offered such nominal levels of responsive programming as to have effectively defaulted on its obligation to contribute to the discussion of issues facing its community."[784] Here, commenters have failed to provide any evidence that NBCU or its stations have "defaulted" in their selection of programming. To the contrary, the record illustrates the many benefits of NBCU's multicultural and community-oriented programming.[785] For example, Oscar Goodman, Mayor of Las Vegas, Nevada, commends the local Telemundo O&O station for a "commitment to Spanish-language local news [that] is unparalleled" and states that the recent addition of public affairs programming "is not only important, but is essential" in Las Vegas,

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[784] *In the Matter of License Renewal Applications of Certain Commercial Television Stations Serving Philadelphia, Pennsylvania*, Memorandum Opinion and Order, 5 FCC Rcd 3847 ¶ 8 (1990) (citations omitted). Section 326 of the Act and the First Amendment "prohibit any Commission action which would improperly interfere with the programming decisions of licensees." *In the Matter of Application of National Broadcasting Co, Inc*, Memorandum Opinion and Order and Notice of Apparent Liability, 14 FCC Rcd 9026 ¶ 18 (MB 1999) ("WNBC Renewal"); *see also Adelphia Order* ¶ 204, n.636 ("The no-censorship provision of the Communications Act of 1934, as amended, which embodies First Amendment free speech principles, prohibits the Commission from involving itself in the content of specific programs or otherwise engaging in activities that might be regarded as program censorship. The Commission can neither prevent licensees from airing a particular program, nor require that particular speech contained within specific programming be balanced."); 47 U.S.C. § 326.

Accordingly, "[a] broadcaster is afforded a great deal of discretion in the scheduling, selection and presentation of programming responsive to issues of concern to its community," and a licensee is permitted to address such issues, in good faith, "by whatever program mix it believes appropriate in order to decide which programming responds to the needs of its community." *In the Matter of KGAN Licensee, LLC,* Memorandum Opinion and Order, 25 FCC Rcd 2549 ¶ 21 (MB 2010) ("*KGAN Order*") (citation omitted); *see also WNBC Renewal* ¶ 18 ("With certain limited exceptions, such as the broadcast of obscene or indecent programming, licensees are accorded a great deal of discretion in the scheduling, selection and presentation of programs and announcements to be aired by their stations.").

[785] *See, e.g.*, Letter from Marc H. Morial, President & CEO, National Urban League to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56, at 2 (June 21, 2010) ("[NBCU has] taken steps towards increasing the availability of minority-focused content within their programming line-ups."); Letter from Kathy A. Johnson, President, National Association for Multi-ethnicity in Communications to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 16, 2010) ("NAMIC (National Association for Multi-ethnicity in Communications) is pleased to attest that . . . NBC Universal [has] demonstrated strong leadership in . . . programming . . . diversity."); Letter from Alfonso Barrera, Founder, HispanicPro – The Hispanic Professional Network to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 21, 2010) ("I am a first-hand witness of . . . [NBCU's] commitment to serve the Spanish speaking television viewing market with quality programming."); Letter from Aida Alvarez, Chair, Latino Community Foundation to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (May 28, 2010) ("NBC Universal's history of delivering quality Spanish language programming via its Telemundo network will only add to Comcast's already substantial and constructive impact on California's Latino communities.").

which has the fastest growing Hispanic population in America.[786] As another example, the San Francisco AIDS Foundation, Silicon Valley Faces, and the Fremont Chamber of Commerce have all recognized that KNTV (an NBCU O&O television station in the Bay area affiliated with the NBC Television Network) devotes significant resources to public service and has the ability to inform large numbers of viewers.[787] In light of the facts, as underscored by Applicants' numerous supporters, the Commission should give no weight to petitioners' unsupported assertions and should reject them as it has in prior cases.[788]

Telemundo. NBCU's history with Telemundo is an instructive example of NBCU's commitment to multicultural programming. GE/NBCU acquired Telemundo for $2.7 billion in 2002, and subsequently invested an additional $900 million to acquire stations and create Telemundo Studios and Telemundo International to develop and produce original programming. Under NBCU's ownership, Telemundo has become the nation's second-largest Spanish language content provider, with substantial Spanish-language production facilities located in the United States.[789] Today, Telemundo produces more than 3,000 hours of original content a year,

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786 Letter from Oscar B. Goodman, Mayor, Las Vegas, NV, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56, at 1 (May 27, 2010).

787 *See* Letter from Debra Holtz, Media Relations Manager, San Francisco AIDS Foundation, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Apr. 30, 2010); Letter from Pat Mitchell, Executive Director, Silicon Valley Faces, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (May 3, 2010); Letter from Cindy Bonior, Chief Executive Officer, Fremont Chamber of Commerce, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Apr. 30, 2010).

788 *See, e.g.*, *Telemundo Order* ¶ 15 ("[The Hispanic Groups] suggest [] that we should withhold a grant on the transfer applications because NBC has failed to demonstrate how the Telemundo Stations will continue to meet the needs of the Hispanic community when NBC takes over operation of the stations. We see no basis in the record here to do so. Moreover, we note that NBC has pledged to continue the Spanish-language programming at the Telemundo Stations.").

789 *See* Written Testimony of Paula Madison, Executive Vice President, Diversity, NBCU, Vice President, GE, to the H. Comm. on Energy and Commerce, Subcomm. on Commc'ns, Tech. and the Internet, at 5 (July 8, 2010) ("Madison July Testimony").

including *Enfoque*, a recently-launched Sunday morning public affairs shows that focuses on key issues facing Hispanics.[790] Furthering its commitment to the Hispanic community, Telemundo owns and operates mun2, the bilingual lifestyle cable network for Hispanics aged 18-34. As the fastest growing cable network targeted to young Hispanic Americans, mun2 reaches more than 34 million U.S. households and is the only national bilingual cable network measured by Nielsen ITI.[791] mun2 is proof positive that NBCU and Telemundo recognize the importance of the bicultural Hispanic audience and want to serve these viewers with quality content.

NBC Programming. NBCU has been and remains firmly committed to diversity in programming, as evidenced by the shows that it has selected for NBC's fall lineup and its summer reality shows. Three of the most widely anticipated pilots scheduled to air in the fall feature diverse actors in significant roles: *Undercovers*, *Outlaw*, and *The Event*.[792] In addition, all of NBC's seven summer reality shows this year feature diverse contestants, and three will have diverse hosts.[793] NBCU continues to increase diversity in front of and behind the camera. Over the past year, NBC increased its use of minority actors (31 to 33 percent), writers/producers (12 to 14 percent), and directors (9 to 11 percent).[794]

Positive Depictions. NBCU strives to depict minorities in positive and leading roles.[795] Further, Telemundo incorporates positive social and public interest themes into its originally

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790 *Id*; Amy Chozick & Susan Davis, *Politics Show in Spanish Set to Debut*, Wall St. J., Apr. 15, 2010, *available at* http://online.wsj.com/article/SB10001424052702304159304575184200297666836.html.

791 Written Testimony of Paula Madison, Executive Vice President, Diversity, NBCU, Vice President, GE, to the H. Judiciary Comm., Field Hearing in Los Angeles, Cal., at 6 (June 7, 2010) ("Madison June Testimony").

792 *Id.* at 8.

793 *Id.*

794 Madison July Testimony at 8.

795 *See, e.g.,* Undercovers, http://www.nbc.com/undercovers/ (last visited July 15, 2010).

produced programming. These themes have recently included, for example, the significance of Latino participation in the 2010 U.S. Census and the importance of enhanced Latina self-esteem. Also, NBCU's Program Standards Department carefully reviews all entertainment program material – from concept through final production – to ensure that all network program content comports with NBCU's high standards for programming.[796]

Independently Produced Programming and Source Diversity. NBCU has a long-established history of airing programming that is diverse in its viewpoints, its target audiences, and its sources. For example, during the week of March 1-7, 2010, approximately 30 percent of prime time programs on the NBC Television Network came from independent producers.[797] That figure will increase to 33 percent for NBC's fall 2010 schedule. With respect to source diversity, the Commission has considered the availability of content to consumers from a variety of producers in its industry-wide ownership reviews.[798] Any demand for a primetime "set-aside" for programming from diverse or independent sources[799] thus is inappropriate here. Mandating

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[796] Any allegation of stereotyping (*see* Apr. 6 Mabuhay Letter ; Mabuhay Alliance Opposition, at 2 (Mar. 15, 2010)) cannot be sustained as a factual or legal matter. *See In the Matter of Applications of Citicasters Licenses, L.P. and AMFM Broadcasting Licenses, LLC*, Memorandum Opinion and Order and Notice of Apparent Liability, 22 FCC Rcd 19324 ¶ 19 (MB 2007) (rejecting programming-related petitions alleging licensee's content contains offensive stereotyping because "[l]icensees have broad discretion – based on their right to free speech – to choose, in good faith, the programming they believe serves the needs and interests of their communities. This holds true even if the material broadcast is insulting to a particular minority or ethnic group in a station's community. Indeed, as we have held in earlier decisions, if there is to be free speech, it must be free for speech that we abhor and hate as well as for speech that we find tolerable and congenial.") (internal quotations and citations omitted).

[797] Responses to Questions from Several Members of Congress, *supra* note 88, at 36-41.

[798] *See, e.g., 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, 17 FCC Rcd 18503 ¶ 37 (2002).

[799] *See* Entertainment Studios, Inc. Comments at 17 (June 21, 2010) ("The only way to promote diversity and protect African American owned programming networks and the viewing public is to require . . . NBC prime time programming to be programmed by wholly-owned African American media companies."); Caucus for Producers, Writers & Directors Comments at 1 (June 17, 2010) ("The Caucus urges a 25% 'carve out' of the prime time schedule of the domestic cable and free broadcast networks of Comcast/NBC Universal for the protection of the independent producer of creative program content as a condition of approval by the FCC of this Comcast/NBC-

source diversity quotas in the instant transaction not only would infringe upon the companies' First Amendment rights, but also would be unwarranted in light of NBCU's dedication to diverse programming, Applicants' past performance with respect to diversity in general, and the forward-looking commitments discussed in Section III.

It should be emphasized that no Commission rule requires that any broadcast outlet carry any specified amount of independently-produced programming.[800] The former financial interest and syndication ("Fin/Syn") rules[801] were denounced by academic experts from the outset, by the Commission's staff in the late 1970s, by the Commission itself as early as the 1980s, by the U.S. Court of Appeals for the Seventh Circuit in 1992, and, finally and definitively, by the

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Universal filing."); *see also* Cooper/Lynn Decl. at 6 ("the repeal of the Fin-Syn rules . . . led to a tight oligopoly that pushed independent content producers out of the prime time and most lucrative distribution channels, and that quality suffered severely as a result"); Writers Guild of America, West Comments at 3-7 (raising concerns regarding the lack of independent programming in the wake of the repeal of Fin-Syn regulations.).

800 As the Commission explained in the 2002 Quadrennial Review Order, there is no basis to conclude that independently-produced programming necessarily is superior to network programming: "It is up to consumers and viewers to determine what programming they want to watch, and networks, as they compete for viewers, must be responsive to those demands. It is not for this agency to intervene in the decisions that determine the content of programming (absent obscenity or indecency concerns)." *In the Matter of 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620 ¶ 655 (2003) ("2002 Quadrennial Review Order").

801 The Fin/Syn rules were adopted in 1970 to address the Commission's perception that the (then three) major broadcast networks held excessive market power. *Amendment of Part 73 of the Commission's Rules and Regulations With Respect to Competition and Responsibility in Network Television Broadcasting*, 23 FCC 2d 382 ¶¶ 36-37 (1970), *aff'd sub nom. Mt. Mansfield Television v. FCC*, 442 F.2d 470 (2d Cir. 1971). At that time, the three networks collectively captured 90 percent of the nation's viewing audience each night. James L. Gattuso, *et al.*, *Adjusting the Picture: Media Concentration or Diversity?*, Heritage Foundation Lecture #798, Oct. 6, 2003. The rules prohibited a broadcast network from (i) syndicating programs for rebroadcast by independent television stations; (ii) purchasing syndication rights to programs it obtained from outside producers; or (iii) obtaining any other financial stake in such programs. *See In the Matter of Evaluation of the Syndication and Financial Interest Rules*, 6 FCC Rcd 3094 ¶ 3 (1991). In 1990, the Commission reviewed the Fin/Syn rules and concluded that the networks still exerted some level of market dominance. *In the Matter of Evaluation of the Syndication and Financial Interest Rules*, 5 FCC Rcd 6463 (1990). The Commission then modified the Fin/Syn rules to require networks to purchase at least 40 percent of primetime programming from independent producers. *In the Matter of Evaluation of the Syndication and Financial Interest Rules*, 6 FCC Rcd 3094 ¶ 2. This outcome, which had been opposed by the U.S. Department of Justice, ultimately was vacated by the U.S. Court of Appeals for the Seventh Circuit. *Schurz Commc'ns, Inc. v. FCC*, 982 F.2d 1043 (7th Cir. 1992).

Commission more than a decade ago. As evidenced in this transaction and throughout many pending Commission proceedings, today's media marketplace is fiercely competitive with more programming networks, more MVPDs, and thus more source, outlet, and content diversity than ever before. The key to success – and the challenge that all programmers face – is to offer content that consumers want to watch, on any of the many and growing numbers of platforms: whether on broadcast networks, cable networks, On Demand, or on the Internet, and regardless of the source. It is against this background that any call for a return to 1970s-style regulation of programming networks must be measured and soundly rejected.[802] There is no conceivable justification to consider re-imposing such requirements.[803] In any event, if the Commission does choose to consider requirements regarding independently-produced programming, this should only be done in an industry-wide rulemaking, not applied to a single company as a result of a specific transaction.

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802 *See* NBCU Reply Comments, MB Docket No. 07-269 (Aug. 28, 2009). Today, viewers and advertisers "have more choices, not fewer, and the shares of the broadcast networks have declined, not increased. This reality leaves the Commission with no sound basis to insert itself into the business decisions of individual distributors, at the risk of raising costs and prices in the market, when neither horizontal concentration nor diversity concerns remotely raise issues requiring such a risk." *See* Bruce Owen, *Protecting Inefficient Producers Harms Consumers: Preliminary Comments on IFTA's Proposal and Dr. Mark Cooper's Supporting Paper* at 6, attached to Reply Comments of CBS Corp., Fox Entertainment Grp., Inc. and Fox Television Stations, Inc, NBC Universal, Inc. and NBC Telemundo License Co., and The Walt Disney Company, MB Docket Nos. 06-121, 02-277, MM Docket Nos. 01-235, 01-317, 02-44 (filed Jan. 16, 2007).

803 As Commissioner McDowell explained in a 2008 speech regarding Fin/Syn, "[p]rofound changes have occurred since 1992. Today, the average consumer has a choice of at least three subscription video providers, and sometimes five. Cable companies pass over 92 percent and serve approximately 60 percent of households. DirecTV and Echostar . . . serve over 30 million consumers and have grown to a 30 percent market share among MVPDs. Now phone companies are in the video business too . . . . The reach of the broadcast networks has fallen far below the 62 percent of the prime-time audience cited by the court in 1992. During the current season, the combination of 77 ad-supported cable networks posted higher ratings among the key 18 to 49 demographic than the broadcast networks . . . . In 1992, there was no public Internet, let alone Internet video." Robert McDowell, Commissioner, FCC, Keynote Address 2008 Quello Communications Law and Policy Symposium, at 7 (Apr. 23, 2008) *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-281772A1.pdf.

Irrespective of petitioners' demands, however, Applicants consistently have recognized and continue to value the benefits of a diversity of programming sources for their audiences. In this connection, Applicants have entered into an agreement intended to facilitate independent producers' opportunities to reach viewers on the joint venture's platforms. This agreement and the associated obligations on the part of Comcast and NBCU are discussed above in Section III.

ii. Comcast

Minority Programming. As both a cable and content provider, Comcast is committed to providing programming that meets the needs of minority audiences. There is no substance whatsoever to the handful of allegations[804] that Comcast has been unwilling to provide programming targeted to multicultural audiences or that the transaction poses a threat to the interest of minority viewers. As a legal matter, it would be inappropriate for the Commission to intervene in the programming decisions of Comcast in the context of this transaction,[805] and, in any event, such intervention is unwarranted in light of Comcast's strong record of diverse programming and its forward-looking commitments.

Comcast provides a wide array of programming appealing to minority and niche audiences. Comcast is keenly aware of the importance of providing programming that serves

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804 *See, e.g.*, Greenlining Institute Petition to Deny at 10; National Coalition of African American Owned Media Petition to Deny at 24-25.

805 The U.S. Constitution and Supreme Court precedent generally restrict the Commission from involving itself in the content of cable television programs or otherwise engaging in activities that could be regarded as censorship of programming. *See* U.S. Const. amend. I; *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813-15 (2000). Cable providers have "wide discretion in choosing the programming that is available on a cable system." *In the Matter of Emergency Complaint of Dennis J. Kucinich v. Cable News Network*, Memorandum Opinion and Order, 23 FCC Rcd 482 ¶ 2 (MB 2008); *see also Turner Broad. Sys. v. FCC*, 512 U.S. 622, 636 (1994) ("There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment. Through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, cable programmers and operators seek to communicate messages on a wide variety of topics and in a wide variety of formats.") (internal quotations and citations omitted).

diverse audiences, and it has worked hard to increase the diverse programming options available to its subscribers. Comcast licenses a significant amount of content for diverse audiences, and in the past eight years has expanded from 20 to 130 the number of carriage agreements it has with broadcast and cable networks that serve minority communities.[806] As Comcast transitions from delivering channels in an analog format to the more efficient digital format across its systems, it has been able to increase further the delivery of diverse and multicultural programming networks.[807] Additionally, Comcast regularly cooperates with broadcast stations to add independently- and minority-owned multicast streams to its systems. For Hispanic audiences, for example, Comcast has added multicasts of V-Me, Estrella TV, and LATV in several markets, and Comcast also carries several Asian multicasts in Northern California from independent Asian channels.[808]

As illustrated below, Comcast is focused on providing pertinent and entertaining content to minority audiences. There is no requirement that any MVPD carry a specified number of networks that are 100 percent minority-owned on widely available tiers.[809] The allegation that Comcast does not carry "enough" minority-owned networks on widely-available tiers thus is not a basis for denial of the transaction. Moreover, such a claim simply ignores Comcast's many efforts to facilitate minority programming opportunities. For example:

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806 Responses to Questions from Several Members of Congress, *supra* note 88, at 4.

807 *Id.* at 8.

808 *Id.* at 6.

809 *See* National Coalition of African American Owned Media Petition to Deny at 11-12. However, other than certain carriage restrictions surrounding local broadcasting and PEG channels, cable operators are entitled to discretion in the selection of their video services.

African American Programming. Comcast carries 11 cable networks that specifically target the African American community.[810] Comcast also features On Demand programming that delivers a variety of TV entertainment and music choices from various networks and programs that target African American audiences, including BET, TV One, and H2O (Hip Hop On Demand).[811] Comcast recently launched Black Cinema on Demand, a celebration of black films, filmmakers, and actors past, present, and future focusing on the wide range of experiences, accomplishments, and points-of-view of black people, as expressed through the artistic medium of film. Black Cinema provides 20 hours per month of content and offers a forum for diverse independent programmers and frequently showcases the works of both famous and relatively unknown African American actors, directors, and producers.[812]

Hispanic Programming. In 2009, Comcast launched a program package that currently delivers more than 58 Hispanic cable networks on Comcast Cable systems representing a majority of Comcast's subscribers.[813] This package of Hispanic cable programming, when coupled with Comcast's carriage of local Hispanic broadcast stations, exceeds 60 channels in major Hispanic markets. It is by far the largest Hispanic programming offering from any MVPD in America and includes a diverse mix of general entertainment, kids, news, sports, and movie networks as well as geographic-specific content from Argentina, Colombia, the Dominican

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810 Responses to Questions from Several Members of Congress, *supra* note 88, at 4.

811 *Id.*

812 *Id.*

813 Comcast systems in Boston, Chicago, Detroit, Seattle, Portland, and all of Northern California offer this expanded Hispanic package. Additional systems are offering this expanded package as more bandwidth is made available throughout the Comcast Cable footprint.

Republic, Ecuador, Mexico, Venezuela, and other countries, as well as significant U.S.-produced content.[814]

Asian American Programming. Comcast carries a variety of Asian content from a number of providers including SET Asia (SONY), STAR India PLUS, Zee TV, Bollywood Hits On Demand, STAR One, STAR India GOLD, VIJAY, tvK24, GMA Pinoy TV, GMA Life, The Filipino Channel, Phoenix Info News, Phoenix North American, CTI-Zhong Tian, SBN, and others.[815] In all, Comcast carries 25 cable networks geared toward the Asian American community. In addition, Comcast offers two subscription VOD services: Filipino On Demand, with up to 40 choices of movies and celebrity concerts from the Philippines, and Bollywood Hits on Demand, featuring 100 choices of movies and music comprising 40 hours per month of content from India. Comcast also launched MYX, an Asian-owned network that delivers programming targeted at young Asian Americans. Comcast currently is an investor in two Asian-focused channels – Saigon Broadcasting Network (SBN) for Vietnamese Americans and tvK24 for Korean Americans.[816] Comcast also has partnered with the Center for Asian American Media (CAAM) for the creation of new On Demand programming focusing on culture, arts and education.[817]

Innovations in Programming Diversity. In addition to carrying diverse programming, Comcast also has a history of proactively identifying and closing the gaps in multicultural

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814 Responses to Questions from Several Members of Congress, *supra* note 88, at 5.

815 *Id.* at 5.

816 *Id.* at 5.

817 *Id.* at 5-6.

programming.[818] For instance, in 2003, Comcast recognized there was a need for another entertainment quality channel targeting the African American community as an alternative to BET, so it partnered with an experienced African American radio programmer to create TV One, an alternative to BET, which is now available to over 50 million subscribers.[819]

Comcast also created On Demand, which has expanded its ability to offer more programming that speaks to more diverse and niche audiences. Comcast continues to experiment with innovative ways to use the On Demand platform to deliver new content for multicultural audiences. Although business models are still evolving, these platforms present substantial new ownership opportunities for independent, minority, and female owners, and Comcast is proud to be a trailblazer in this area. On Demand affords independent and minority owners of content an unparalleled opportunity to reach niche audiences in a direct way and scheduling directed by the viewer's time preference. Several examples are cited above.

Independent Programming. Comcast's goal is to obtain and distribute on its cable systems the widest possible array of content from myriad sources, and petitioners' and commenters' allegations[820] that Comcast does not provide "enough" opportunities for

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818 Not all of Comcast's efforts to expand the diversity of its program offerings have been successful. Several years ago, for example, Comcast operated a network called AZN, which offered a diverse array of programming for Asian communities. AZN offered opportunities for owners of the U.S. distribution rights of Indian, Chinese, Korean, and Japanese programming, many of whom were minorities, to license foreign language content to Comcast. Comcast operated AZN for almost four years and invested approximately $25 million in the channel. Unfortunately, AZN was unsustainable for three significant reasons: it was never meaningfully distributed by MVPDs other than Comcast; it did not attract the targeted audiences in substantial numbers; and advertisers did not support AZN as a means of reaching the pan-Asian audience in America. *Id.* at 2-3.

819 *Id.* at 2.

820 *See, e.g.*, WealthTV Petition to Deny at 4; Tennis Channel Comments at 3; FACT Coalition Comments at 27. Further, any allegations that Comcast gives preferential treatment to its affiliated channels are without merit and have never been successfully adjudicated. *See, e.g.*, WealthTV Petition to Deny at 16-19. In fact, affiliation is no guarantee of continued carriage: two Comcast-affiliated networks have been shuttered in recent years because they did not offer what Comcast, other MVPDs, and their customers wanted.

independent network carriage are unfounded. As a preliminary matter, such allegations are immaterial to the Commission's review of the proposed transaction, especially in light of Applicants' unprecedented commitments to further expand opportunities for independent programming. Moreover, it is a competitive imperative for Comcast to provide its customers with programming that they find attractive and desirable (irrespective of affiliation), and the Commission's program carriage rules provide safeguards for independent programmers.

Independent programmers have been very successful at gaining carriage on Comcast's cable systems. In recent years, Comcast has launched or expanded carriage of unaffiliated channels including The Africa Channel, Altitude, Bloomberg TV, Gospel Music Channel Hallmark Movie Channel, HDNet, ION Life, Jewelry TV, NESN, The Outdoor Channel, Ovation, qubo, ReelzChannel, RFD-TV, SiTV, Sportsman Channel, TeleFormula, VeneMovies, WAPA America, WFN, YES, and many others. This successful history of affording carriage to unaffiliated, independent networks has been recognized by many commenters in the proceeding.[821] One commenter noted that "Comcast has worked . . . to expand the number of independent, Spanish-language networks available to the market" and that "[o]ther pay TV

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[821] *See, e.g.*, Letter from Phil Blazer, President & CEO, Jewish Life Television, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56, 1-2 (May 25, 2010) ("JLTV is an independent full-time, national programming network, unaffiliated with Comcast, NBCU or any of the top 15 owners of networks . . . . [O]ur network has enjoyed support from Comcast . . . all of the way to the top of its organization and is very appreciative."); Letter from Jane Rosenthal, Co-Founder, Tribeca Enterprises, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56, at 1 (June 2, 2010) ("Launched earlier this year, the objective of Tribeca Film is to provide independent filmmakers with an integrated national marketing and distribution platform to reach new and expanded audiences. As video-on-demand is a critical component of Tribeca Film's distribution strategy, Comcast was a natural partner, and one that we determined early on would play a significant role in our success . . . . [W]e've found Comcast to be committed, generous and collaborative."); Letter from Collie Burnett, President, Atlanta Interfaith Broadcasters, Inc., to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56, at 1-2 (July 1, 2010) ("with Comcast and other carrying AIB without charge, we have grown into a full-time cable channel that is shared by all faiths in Atlanta and carried to an estimated 1.2 million cable households . . . . All of this is made possible in part by Comcast's long and steady willingness to carry an innovative, experimental, diverse, and sometimes-impoverished local programmer like AIB. We think it demonstrates Comcast's historical commitment to the community and to the public interest.").

providers such as AT&T, Verizon, DirecTV, Time Warner Cable and others have also expanded their business with independent channels as a result of Comcast's support of these same channels."[822] The independent cable network ReelzChannel praised Comcast for its "advice and support," stating that "Comcast personnel are consistently accessible, openly communicative . . . and organized in a way that provides guidance, creative suggestions and committed follow-up to help our business grow with them. We truly feel there is a commitment to our growth and economic well-being that is built on a sense of overall fairness and continuing mutual respect."[823] Similarly, HDNet characterized Comcast as "a strong supporter of independent programming."[824]

Notably, post-transaction, nearly six out of every seven channels carried by Comcast will remain unaffiliated with Comcast.[825] And, as outlined above in Section III, Comcast has made unprecedented diversity and independent programming commitments, including a commitment to add at least ten new independently-owned and -operated programming services (most of which will be minority-owned) over the next eight years following closing of the transaction.

In addition to linear carriage, Comcast offers independent programmers and networks the opportunity to distribute their video content through its On Demand platform. For independent programmers who may not have the library to fill the 24/7 slots of a linear channel, VOD is an excellent way to reach viewers. Comcast's On Demand lineup currently provides consumers

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822 Letter from Burke Berendes, Partner, Condista, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56, at 1-2 (May 3, 2010).

823 Letter from Stanley E. Hubbard, President & CEO, ReelzChannel, to Julius Genachowski, Chairman, FCC, *et al.*, MB Docket No. 10-56, at 3-4 (Mar. 10, 2010).

824 Letter from Stanley E. Hubbard, President & CEO, ReelzChannel, to Julius Genachowski, Chairman, FCC, *et al.*, MB Docket No. 10-56, at 3-4 (Mar. 10, 2010).

825 *See* Public Interest Statement at 8.

with access to independent content from IFC, Tribeca Enterprises, Concert TV, Havoc, Here Networks, RHI Entertainment, Shalom TV, and others.

Beyond Comcast's demonstrated commitment to work with independent programmers, the FCC's program carriage rules provide further safeguards against any potential harms to independent programmers on Comcast or other cable systems.[826] Comcast has always conducted its business in full accordance with these rules. Nevertheless, parties who believe that they have been treated unfairly have available a complaint process at the FCC through which claims of violations can be adjudicated. In nearly 20 years, only a handful of cases have been brought against Comcast, none of which has ever resulted in a finding that Comcast engaged in unlawful or anti-competitive discrimination against independent programmers.[827]

Applicants produce, air, and carry diverse programming today, and the new venture will expand the amount, quality, variety, and availability of content better than either company could on its own. No party has demonstrated that Applicants fail to comply with any Commission rule in this regard. Accordingly, the Commission should deny petitions that allege a lack of programming diversity as a basis for conditioning or denying the transaction.

b. Employment Diversity

Contrary to some allegations,[828] Applicants' employment structures reflect a dedication to diversity fully consistent with the Commission rules. Indeed, Comcast and NBCU's

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826 47 U.S.C. § 536. Suggested conditions or changes to the Commission's program carriage regime are not part of this transaction and are not properly addressed here. *See* Bloomberg Petition to Deny at 39, 56-57; WealthTV Petition to Denyat 7-8, 33-36; Tennis Channel Comments at 14-18; FACT Coalition Comments at 28-32.

827 *See* Section IV.D.3 above.

828 *See, e.g.*, Letter from Faith Bautista, President & CEO, Mabuhay Alliance, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 1, 2010).

commitments to employment diversity have been widely recognized, and each has a history of compliance with FCC Equal Employment Opportunity ("EEO") rules.[829]

i. NBCU

At the outset, no party claims that NBCU has failed to comply with FCC EEO obligations.[830] In fact, since 2007, the Commission has conducted routine random audits of three NBCU O&O station employment units (Philadelphia, Chicago and Las Vegas), and in each case, the stations were found to have been in compliance with the EEO rules. Moreover, no party has brought a successful challenge to any NBCU station's EEO compliance during either renewal or transaction-related review.

Beyond compliance with the Commission's recruiting requirements, NBCU has a solid record in minority hiring and professional development that has been recognized positively by numerous commenters.[831] Parties ranging from the Governors of California, Pennsylvania, and

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[829] As prior transactions demonstrate, there is no basis to deny or impose employment-related conditions on the grant of the Applications. *See, e.g.*, *Adelphia Order* ¶ 231 (dismissing petition to deny because "[petitioner] fail[ed] to raise a substantial and material question of fact regarding Comcast's compliance with the Commission's cable EEO outreach rules."); *Telemundo Order* ¶ 16 ("we do not find that the Hispanic Groups have raised a substantial and material question of fact with respect to the employment matters contained in their petition to deny. The Hispanic Groups have provided no evidence, other than their own opinion, that Hispanic employment will suffer if NBC is permitted to own Telemundo Stations . . . . Therefore, we conclude that the Hispanic Groups have not met the standard under Section 310(d) of the Act and we deny their petition to deny."); *In the Matter of Applications of Heritage-Wisconsin Broadcasting Corp. For Transfer of Control of Licenses of Stations WEMP/WMYX-FM Milwaukee, Wisconsin from James M. Hoak, Jr. to Shareholders of Heritage Media Corporation*, Memorandum Opinion and Order and Notice of Apparent Liability, 8 FCC Rcd 5607 ¶ 16 (1993) (dismissing NAACP petition to deny because "NAACP has presented no evidence that the licensee is not engaging in EEO efforts . . . [and] NAACP has not established a prima facie case demonstrating that unconditional grant of stations [] transfer of control applications would be inconsistent with the public interest.").

[830] Some parties, including the Greenlining Parties, raise claims surrounding alleged deficiencies in GE-NBCU employment diversity that are unsubstantiated or generalized. *See, e.g.*, Letter from Lynn Dangtu, Founder, President and CEO, Economic Business Development, Inc., to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Mar. 29, 2010); Mabuhay Alliance Comments at 2 (June 17, 2010); Black Economic Council Opposition at 3 (Mar. 29, 2010); Korean Churches for Community Development Comments at 1 (Apr. 14, 2010); Greenlining Institute Petition to Deny at 11.

[831] *See, e.g.*, Letter from Maria Eugenia Ayala, President Mas Enterprises and Marketing, Inc., to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 7, 2010) ("I believe the pending acquisition will

New York to the Mayors of Allen Park, Michigan; Orlando, Florida; Las Vegas, Nevada; Meggett, South Carolina; and others have acknowledged the important employment role that NBCU, as well as Comcast (discussed below), plays in their communities.[832] The National Urban League has acknowledged that NBCU, as well as Comcast, has "taken steps to increase

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provide . . . the men and women of Telemundo with broader career opportunities. I also believe Telemundo will benefit with more investment in content and better distribution. This will help secure and generate more professional jobs for hundreds of Hispanics and provide the Hispanic community with high quality, relevant original content.").

[832] *See* Letter from CA Governor Arnold Schwarzenegger, NY Governor David Paterson, PA Governor Edward G. Rendell, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56, at 1 (May 25, 2010) ("Between them, Comcast and NBCU account for almost 130,000 jobs in 40 states and the District of Columbia. Comcast has made clear that this venture is not about cutting jobs, but about growing NBCU's businesses."); Letter from Gary Burtka, Mayor, Allen Park, MI, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Apr. 23, 2010) ("As of last December the State of Michigan suffered from an unemployment rate of 14.6%. In times like these, we must support businesses that are growing and dedicated to keeping jobs. Comcast and NBCU are leading examples of these types of businesses."); Letter from Buddy Dyer, Mayor, Orlando, FL, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (May 6, 2010) ("It is no secret that NBC Universal is Orlando's largest employer, providing over 13,500 jobs; or one of its most important business operators, investing over $4 billion to develop 850 acres of land within our city limits . . . . NBC Universal has not only invested significantly in Orlando, but done so in a way that supports our community . . . ."); Letter from Oscar Goodman, Mayor, Las Vegas, NV, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (May 27, 2010) ("Las Vegas also greatly values Telemundo's decision to locate its studio in the heart of downtown. In doing so, it brought jobs to and created a cultural and economic center for Hispanic content and culture in our city. I believe that Telemundo's and NBC's record of paying close attention to the changing needs of the Las Vegas community in recent years says volumes about their overall commitment to program localism and diversity."); Letter from Maria Eugenia Ayala, President, Mas Enterprises and Marketing, Inc., to Julius Genachowski, Chairman, FCC, *et al.*, MB Docket No. 10-56 (June 7, 2010) ("Over the past six years I have worked closely with Telemundo [Chicago] and have become exceptional business partners. Telemundo Chicago is constantly and consistently in support of the Hispanic community, this has helped business owners such as myself grow. I believe the pending acquisition will provide . . . the men and women of Telemundo Chicago with broader career opportunities."); Letter from Stephen Precourt, Representative, Florida House District 41, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (May 28, 2010) ("Universal is very important to our local economy, generating jobs and revenue and attracting tourists to the area."); Letter from Grange S. Coffin, Jr., Mayor, Meggett, SC, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 9, 2010) ("Comcast has become one of this region's finest corporate citizens and a significant provider of jobs, economic stability and tax revenue. . . . I firmly believe that Comcast's commitment to event the smallest of the communities it serves will be strengthened by the success it can realize through partnering with NBC."); Letter from Alexander R. Bennett, Jr., Mayor, Borough of Baldwin, PA, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (May 21, 2010) ("Comcast has had a strong presence in our borough for over 35 years now, bringing jobs, and innovation to our neighborhoods and diverse communities."); Letter from Stephanie Rawlings-Blake, Mayor, Baltimore, MD, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 21, 2010) ("Comcast is an essential source of employment in the Greater Baltimore area, supporting jobs for over 1,800 workers and providing a significant boost to the local economy through its work with local suppliers, many of which are small businesses and minority-owned firms.").

the diversity of their workforce at all levels through recruitment and mentoring programs and best practices in hiring."[833]

Organization and Vision. NBCU has a strong track record of dedication to the principles of diversity and will be able to do even more in combination with Comcast. Attracting and retaining the best and most diverse talent provides a secure, powerful and competitive advantage in the media and entertainment industry. To that end, in April 2007, Jeffrey Zucker, NBCU President and CEO, identified diversity as one of NBCU's five key business imperatives.[834] This move not only further strengthened NBCU's institutional commitment to diversity, but also infused diversity into all aspects of NBCU's vision for the future. As further described below, NBCU, in partnership with Comcast, has made this vision a centerpiece of the proposed transaction.

In conjunction with NBCU's identification of diversity as a key business imperative, Paula Madison was named Executive Vice President responsible for Diversity and Chief Diversity Officer in 2007.[835] Ms. Madison's appointment marked the first time in the company's history that a senior executive was charged with diversity as his or her sole responsibility.[836] In addition, NBCU has established a corporate Diversity Council, which is made up of the heads of each division within NBCU and reports directly to the CEO. Each of NBCU's business divisions

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833 Letter from Marc H. Morial, President & CEO, National Urban League, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 21, 2010).

834 *See* NBC Universal, NBC Universal's Inclusive Culture, http://www.nbcuni.com/About_NBC_Universal/Diversity/ (last visited July 15, 2010).

835 Madison June Testimony at 1. Ms. Madison has worked as a reporter, professional journalist, and news executive for more than 30 years and was recently honored with the 2010 Whitney M. Young Jr. award from the Los Angeles Urban League in recognition of her leadership. *See* Los Angeles Urban League, Whitney M. Young, Jr. Awards Dinner, http://www.laul.org/whitney-m-young-jr-awards-dinner (last visited July 15, 2010).

836 *See* NBC Universal, NBC Universal's Inclusive Culture, http://www.nbcuni.com/About_NBC_Universal/Diversity/ (last visited July 15, 2010).

has an individual business Diversity Council that sets goals at the division level and reports directly to each division head.[837]

Advancement. NBCU gives motivated employees the resources and opportunities to develop and succeed, including support for training opportunities aimed at its diverse workforce.[838] NBCU also develops diverse talent through its Directors Fellowship Program, Diverse Writers Program, and other professional development programs.[839]

Newsgathering Opportunities. NBCU has made diversity in newsgathering operations a priority, engaging in both recruitment outreach to minority journalists and a professional development program.[840]

Diversity Successes. NBCU is extremely pleased that the company's recruitment and development efforts have led to concrete results in the form of significant diversity employment

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837 Madison June Testimony at 8.

838 Among NBCU's inclusive strategies are: internships, early career pipeline programs (Page Program, Associates Program, GE Leadership Programs), Taller Telemundo, Directors In Training, Writers on the Verge, Emma Bowen Foundation, Talent Diversity Initiative, Diversity Initiative for Writers, Supplier Diversity, and Affinity/Networking Groups (African American Forum, Asian Pacific American Forum, Women's Network, Hispanic Forum, OUT@NBCU), among others. *See* NBC Universal, NBC Universal's Inclusive Culture, http://www.nbcuni.com/About_NBC_Universal/Diversity/ (last visited July 15, 2010).

839 Madison June Testimony at 10-11. Through the Directors Fellowship Program, NBCU offers diverse participants opportunities to shadow a Directors Guild of America (DGA) director, as well as gain exposure to other aspects of NBCU Television Studios productions. Through the Diverse Writers Program, NBCU has funded a writer from a minority group for three years for each scripted series on the NBC broadcast network and for NBC's three late-night programs. NBCU's professional development and pipeline programs, including the Entertainment Associates program and the Universal Pictures Leadership Program, offer hands-on experience in programming development and management, and other areas of NBCU's business.

840 *Id.* at 11. For example, NBC's Diversity Leadership Program for mid-career diverse producers and associate producers is an 18-month program designed to train and develop producers for executive producer roles. The NBC News Summer Fellowship Program sponsors paid internships every summer for diverse candidates selected jointly with trade associations representing diverse journalists, and the News Associate Program identifies aspiring journalists who bring diverse backgrounds to news production and news coverage. Finally, NBC recruits every year at the annual conventions of trade associations representing diverse journalists and participates in career fairs, networking events, and other outreach to minority journalists.

gains.[841] Since 2007, the diversity of the NBCU full-time employee population has increased from 24 percent to nearly 30 percent (excluding Telemundo).[842] Including Telemundo, NBCU's diverse full-time employees constitute more than 35 percent of the staff population.[843] Women and minorities combined represent over 60 percent of the full-time workforce, and women and minority executives constitute nearly 40 percent of the NBCU executive ranks.[844] NBC's two largest O&O television stations – in New York and Los Angeles – have African American general managers. Three of these stations have African American news directors/news leaders, two of whom are women. A fourth station has an interim news leader who is Hispanic/Latino.[845]

Of the 11 general managers responsible for the 16 NBCU-owned Telemundo and independent Spanish-language stations, four are Hispanic/Latino women and six are Hispanic/Latino men.[846] Telemundo Studios provides hundreds of creative and production jobs to talented Hispanics, and today Telemundo has more Hispanic executives in its senior executive leadership than at any other time in the history of the company. In 2002, when NBCU bought

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841 NBCU has previously submitted diversity employment information to the Commission. *See* Responses to Questions from Several Members of Congress, *supra* note 88, at 41-43. Further, NBCU is proud to recently have been recognized as a leader in newsroom management diversity. NBCU was the only company among the major media entities surveyed to have increased its percentage of minority managers in 2009. *See* National Association of Black Journalists, "NBC News and NBC O&O Local TV Stations to Receive Best Practices Honor, NBCU Executive Paula Madison to Receive Legacy Award from Black Journalists Group," http://www.nabj.org/newsroom/news_releases/2010/newsrel042810legacy.php; Richard Prince, NBC Stations Lead in Management Diversity (Aug. 6, 2009), http://www.mije.org/richardprince/nbc-stations-lead-management-diversity (noting that NBC was only company of those studied to increase its minority management).

842 Madison June Testimony at 8.

843 *Id.* at 8.

844 *Id.* at 9.

845 Responses to Questions from Several Members of Congress, *supra* note 88, at 42.

846 *Id.*

Telemundo, 33 percent of Telemundo's leadership team was Hispanic; today, Hispanics constitute more than 80 percent of the network's senior executive leadership.[847]

Employment-related claims raised by a few commenters fail to establish that grant of the transaction would not be in the public interest,[848] and, in any event, this transaction is not the appropriate venue for such claims. Moreover, as explored above, NBCU remains dedicated to improving both its diversity employment and advancement opportunities.

ii. Comcast

Comcast provides equal opportunities in employment and is proud of its diverse workforce. Currently over 60 percent of Comcast employees are women or people of color; and nearly 40 percent are people of color.[849] Comcast has a comprehensive series of initiatives to continually improve diversity at all levels.

Comcast complies with all applicable EEO reporting requirements, including, but not limited to, the Commission's MVPD EEO rules. In fact, over the last six years, the Commission has conducted more than 75 EEO routine random audits on Comcast employment units. No adverse findings have been issued on Comcast's compliance with the rules.

Organization and Vision. Comcast is committed to developing a workforce where leadership diversity is reflective of Comcast's employee base and customer demographics. Indeed, Comcast's business success hinges on preserving its connections with the diverse

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847 Madison June Testimony at 5.

848 Other parties raise specific *non-adjudicated* grievances within the context of their employment situations. *See* Letter from Charles Giles, to Congresswoman Maxine Waters, MB Docket No. 10-56 (June 17, 2010) (alleging racial discrimination and retaliation claims as well as workplace safety and Americans with Disabilities Act claims); Letter from Harold Barber, to Congresswoman Maxine Waters, MB Docket No. 10-56 (June 15, 2010) (alleging age discrimination); Winnikoff Comments (alleging poor track record for employee satisfaction); Balsamo Comments (alleging dissatisfaction with daily hire practices).

849 Responses to Questions from Several Members of Congress, *supra* note 88, at 16.

communities it serves. Since the company's inception, Comcast founder Ralph Roberts and his son Brian have emphasized the importance of diversity.[850] After acquiring AT&T Broadband, Comcast set a top-down priority of diversity hiring. In 2002, Comcast Executive Vice President David L. Cohen and Comcast Chief Operating Officer Stephen B. Burke created the company's Diversity Council, which set out to "implement, promote and sustain diversity" throughout the company.[851] In 2007, Comcast created its Director of Diversity and Inclusion position to work closely with Human Resources and senior leaders to identify opportunities to increase leadership diversity and develop workforce practices that foster a culture of inclusion. In 2009, Comcast talent acquisition, talent management, and leadership diversity initiatives were combined into a single unit.[852] Increasing diversity at Comcast is driven by its national talent management and succession planning process and led by the Senior Vice President of Talent. Meanwhile, Mr. Cohen, one of the top four executives at Comcast Corporation, serves as Comcast's Chief Diversity Officer. In this role, he is responsible for ensuring that diversity of employment, suppliers, programming and community investment is treated as a company-wide

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[850] Comcast, *Diversity: Everyone's Invited*, http://www.comcast.com/Corporate/About/Diversity/Diversity.html (last visited July 15, 2010). Ralph Roberts earned the Urban League of Philadelphia's Whitney M. Young Jr. Award for Leadership, Diversity and Excellence. Comcast.com, *Biography, Ralph J. Roberts*, http://www.comcast.com/corporate/about/pressroom/corporateoverview/corporateexecutives/ralphroberts.html (last visited July 15, 2010).

[851] *See* Kathy Haley, *'E' for Really Big Effort: Brian Roberts Honored for His Diligent Diversity Agenda*, Multichannel News, Nov. 27, 2005, http://www.multichannel.com/article/102235-_E_for_Really_Big_Effort.php; *see also* Comment, http://www.comcast.com/corporate/about/diversity/executive/council.html (last visited July 15, 2010) (explaining "When it comes to diversity, it's not enough to 'talk the talk.' At Comcast, to make sure the message is put into practice, we've brought together a management team that represents the various departments within our business.").

[852] Responses to Questions from Several Members of Congress, *supra* note 88, at 18.

priority.[853] As a result of these efforts, an internal focus on diversity exists at all levels of the company.

Contrary to the claims of the Greenlining Parties, Comcast also is focused on the diversity profile of its corporate governance team.[854] The Board currently includes an African American director and a female director and has identified diversity as a key criterion for future appointments.[855] In fact, the appointment of a Hispanic director has been a priority for the Governance and Directors Nominating Committee for over a year,[856] By July 2012, Comcast will appoint and/or elect to its board a U.S.-based Hispanic director with a demonstrated track record of commitment to the Hispanic community.[857]

Recruitment. To enhance its diversity recruiting, Comcast has partnered with a number of organizations[858] and has developed entry-level internship programs. Comcast is the premier sponsor of the Emma Bowen Foundation, which creates opportunities for students in the fields of communications, journalism, broadcasting, and media and entertainment.[859] (Coincidentally,

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853 *Id.*

854 Greenlining Institute Petition to Deny at 10. The Commission has explicitly refused to condition approval of a transaction based on concerns regarding inadequate minority board representation where commenters failed to make a *prima facie* showing that applicants "engage in discriminatory conduct in the selection of the board of directors . . . ." *MCI-WorldCom Order* ¶ 212.

855 *See* 2010 Comcast Proxy Statement at 15 (2010), *available at* http://files.shareholder.com/downloads/CMCSA/906984883x0x363666/c20f707b-7e19-40b8-8c84-ddc1795f2742/cmcsa_proxy2010.pdf.

856 Comcast has a relatively small Board of Directors with limited opportunity to add directors. Nominees to Comcast's Board are determined by the Board's Governance and Directors Nominating Committee, which consists entirely of independent directors. *See id.*

857 *See* Hispanic MOU at 3.

858 Comcast's partner organizations include the Hispanic Association on Corporate Responsibility, National Society of Black Engineers, the National Black MBA Association, National Association of Asian American Professionals, National Society of Hispanic MBAs, National Association for Multi-Ethnicity in Communications, Association of Latino Professionals in Finance and Accounting, and Women in Cable Telecommunications.

859 The Emma Bowen Foundation five-year internship program provides minority students with the opportunity to work for partner companies, such as Comcast, during summers and school breaks following their

NBCU has for many years also provided office space and support to the Foundation on a *pro bono* basis).[860] Finally, Comcast sponsors conferences and career events that its representatives attend to provide career information and networking opportunities.

Advancement. Comcast employs over 100 executives of color and over 1,350 managers of color, almost half of whom have been promoted through the ranks. Comcast strives to improve the diversity of its leadership and has specifically established a goal of increasing its leadership diversity by 10 percent in 2010 at the vice-president level and above.[861]

Diversity Successes. Like NBCU, Comcast is proud of the results of its diversity efforts. Seven of Comcast Cable's 21 regions are led by women or persons of color, and the top two largest systems (each with approximately two million subscribers), are run by diverse leaders. Steve White is the first African American to become a Comcast division president, and is responsible for nine billion dollars of revenue and 22,000 employees. Comcast's Corporate Senior Vice President of Investor Relations and the Regional Senior Vice President for the South Florida Region are Hispanics.[862] Comcast's Senior Vice President of Finance and Accounting

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junior year in high school until they graduate from college. *See* Written Statement of Joseph W. Waz, Jr. Senior Vice President, External Affairs and Public Policy Counsel, Comcast Corp., and President, Comcast Foundation, to the H. Comm. on Energy and Commerce, Subcomm. on Commc'ns, Tech. and the Internet, at 11 (July 8, 2010).

[860] *See* http://www.emmabowenfoundation.com; *see also* NBC Universal Careers, Internships, Emma Bowen Foundation, http://www.nbcunicareers.com/internships/emmabowen.shtml (last visited July 15, 2010); Comcast, The Emma L. Bowen Foundation, http://www.comcast.com/Corporate/About/InTheCommunity/Partners/EmmaBowen Foundation.html (last visited July 15, 2010).

[861] To help achieve this goal, Comcast University offers premier leadership training and development for all levels of the workforce. Comcast also has an array of other internal leadership development programs, including: CommTech Program for Field Technicians and the CommCare program for Customer Account Executives, Fundamentals of Leadership Program, Executive Leadership Forum, and Emerging Leaders Program. *See* Comcast Diversity, Diversity in Recruitment, http://www.comcast.com/corporate/about/diversity/recruitment.html (last visited July 15, 2010).

[862] Contrary to the claims of the Latino Business Chamber of Greater Los Angeles, Comcast does not lack Latinos in key positions. Latino Business Chamber of Greater Los Angeles Comments at 1 (Mar. 26, 2010). Moreover, outreach to the Hispanic community is embedded in Comcast's recruitment processes. Comcast's online

and Chief Software Architect are Asian Americans. And Comcast has senior women leading Comcast Interactive Media, Investor Relations, Corporate Communications, Comcast University, Community Investment, and one of Comcast's programming networks.[863]

Comcast's efforts in workforce diversity have been widely recognized. In 2009, Comcast ranked #6 (up from #13 in 2008) in *Diversity MBA* magazine's "50 Out Front for Diversity Leadership: Best Places for Diverse Managers to Work" (and it was the fourth year in a row that Comcast was included on the list).[864] Comcast was also selected for *Diversity Edge* magazine's "Best Companies for Diverse Graduates 2009." For the third year in a row, Comcast was named one of *LatinaStyle* magazine's "50 Best Companies for Latinas." For the fifth year in a row, Comcast was named one of the Hispanic Business "Diversity Elite 60: Top 60 Companies for Hispanics."[865] And, in 2009, Comcast was selected as one of the Most Admired Employers for Minority Professionals by the readers of *US Black Engineer*, *Hispanic Engineer*, and *Women of Color* magazines.[866]

The record is replete with praise for Comcast's efforts to promote employment opportunities in its communities.[867] For example, the Centro de la Familia de Utah has

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presence in the Hispanic community includes job postings with diversityinc.com, monster.com/diversity (formerly iHispano.com) and social networking site babbalu.com. Comcast also seeks to source diverse talent through partnerships with multicultural associations including the National Society for Hispanic MBAs, Association of Latino Professionals in Finance and Accounting and the Consortium for Graduate Studies in Management.

863 *See* Waz July Testimony at 10.

864 *See* Responses to Questions from Several Members of Congress, *supra* note 88, at 16.

865 *See id.*

866 *See id.*

867 *See, e.g.*, Letter from Elizabeth A. Murray, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 18, 2010) ("I ask that in your deliberations you give consideration to the commitment Comcast has made to diversity in the workplace and to ensuring that all members of the Comcast 'family' really do feel at home. From the day I walked through the door at Comcast seven years ago, my partner and I have been accepted and included in

applauded "Comcast's dedication to promoting diversity both in its corporate culture and in the communities it serves."[868] The Chinese Mutual Aid Association highlighted Comcast's "work with our employment program to develop jobs for our community members at Comcast."[869]

And Mississippi State Representative Tyrone Ellis explained, "[w]hile our nation's education system often fails the African American community, Comcast has sought to promote education and economic opportunities for its minority employees. Comcast invests heavily in continuing education, providing the opportunity to rise through the ranks and turn a job into a

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everything from company benefits to small talk around the water cooler. When we needed domestic partner benefits, we had them – health insurance, life insurance, AD&D insurance – everything Comcast offers has been available to both of us."); Letter from Calvin Smyre, President, National Black Caucus of State Legislatures, to Julius Genachowski, Chairman, FCC, MB Docket 10-56 (June 2, 2010) ("Within its own business, Comcast has also supported the economic advancement of African Americans."); Letter from John DeBerry, Representative, Tennessee General Assembly, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 7, 2010) ("As a past member of the Governor's Minority Business Development Advisory Committee, I worked to address the needs of minority-owned businesses. I've been pleased to see Comcast similarly encourage diversity. The company attends minority recruiting events regularly, and has a formal program to promote diversity among its suppliers and vendors."); Letter from Patrick Demmer, Reverend, Graham Memorial Community Church of God in Christ, to Julius Genachowski, Chairman, FCC, MB Docket No. (Apr. 16, 2010) ("I have been most impressed with Comcast's commitment to promoting diversity in its programming and providing economic opportunities for minorities in our community. Comcast has shown great dedication to people of color."); Letter from Vanessa Williams, Executive Director, National Conference of Black Mayors, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (May 19, 2010) ("Comcast is also a major jobs provider in our communities. Throughout its ranks, Comcast's workforce reflects the diversity of our community. More importantly, Comcast provides jobs that grow along with their employees and as such they invest in the continuing education of their employees. The importance of Comcast's investment in its employees cannot be overstated. It not only allows employees to advance within Comcast's corporate ranks, but imparts knowledge and skills that strengthen our community. In addition, the company participates in more than 100 diversity recruiting events each year . . . . Comcast is among a select group of companies that play a key role in revitalizing our nation's urban centers.").

[868] *See* Letter from Gonzalo Palza, CEO, Centro de la Familia de Utah, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Apr. 7, 2010) (also noting that "[i]n its recruitment and career development efforts, Comcast partners with such professional and community based Hispanic organizations as the U.S. Hispanic Chamber of Commerce, the National Society of Hispanic MBAs and the League of the United Latin American Citizens.").

[869] *See* Letter from Steve Brunton, Executive Director, Chinese Mutual Aid Association, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Apr. 23, 2010).

career. It is no wonder that Comcast has been ranked among the 'Most Admired Employers for Minority Professionals' by US Black Engineer and Women of Color Magazines."[870]

c. Procurement Diversity

Comcast and NBCU are and will continue to be committed to doing business with a diverse group of suppliers. This approach is bolstered by Applicants' voluntary commitments, discussed below, and the numerous letters of support submitted to the Commission.[871] With

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[870] *See* Letter from Tyrone Ellis, Majority Leader, Mississippi House of Representatives, to Julius Genachowski, Chairman, FCC MB Docket No. 10-56 (Mar. 26, 2010).

[871] *See* Letter from Marc H. Morial, President & CEO, National Urban League to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56, at 1 (June 21, 2010) (Comcast and NBCU "have been committed to supplier diversity in a way that provides opportunities to minority-owned suppliers."); Letter from Jaime Lucero, President, Casa Puebla New York, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56, at 2 (June 15, 2010) (finding the proposed transaction in the public interest based on potential opportunities for greater supplier diversity); Letter from Antonio R. Villaraigosa, Mayor, Los Angeles, CA, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56, at 1-2 (June 18, 2010) (discussing Comcast's long-standing commitment to diversity and specifically, the additional opportunities for supplier diversity provided by the proposed transaction); Letter from Congressmen Lo Biondo, Sires, Adler, Andrews, Rothman, Smith, & Lance to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56, at 1-2 (June 21, 2010) (finding that the proposed transaction will promote additional opportunities for greater supplier diversity); *see also* National Coalition of African American Owned Media Petition to Deny at 7 (stating that the NAACP 2008 Consumer Choice Guide scored Comcast with "3.00 [out of 5] or B for Supplier Diversity") Letter from Javier Palomarez, President & CEO, U.S. Hispanic Chamber of Commerce, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (May 19, 2010) ("I am please to report that Comcast has demonstrated its commitment to working with the USHCC to identify Hispanic-owned businesses as potential vendors and partners."); Letter from Harry C. Alford, President & CEO, National Black Chamber of Commerce to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56, at 1 (May 24, 2010) ("In 2009, Comcast drove $84 million of its business to African American vendors. It is clear that Comcast operates as part of, and values, a diverse community and as such its growth creates a place where African American entrepreneurship, which is our organization's primary concern, can grow and thrive. It is in recognition of this that for the fifth consecutive year, DiversityBusiness.com named Comcast as one of 'America's Top 50 Corporations for Multicultural Business Opportunities' due to their record of seeking out Black-owned businesses as suppliers."); Letter from Della Clark, President, The Enterprise Center, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 2, 2010) ("I can attest to Comcast's commitment to providing minority entrepreneurs with opportunities to generate and sustain businesses in the Philadelphia region."); Letter from Garry L. Maddox, Principal & CEO, Pomerantz Acquisition Corp., to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 7, 2010) ("[Comcast's] support of Diversity is unmatched in this country as the owner of a minority owned company doing business nationally, I can attest to it firsthand."); Letter from Jon J. Fernandez, President & CEO, Trinet Communications, Inc. to Julius Genachowski, Chairman, FCC, MB Docket 10-56 (June 11, 2010) ("[O]ur success would not have been possible without the ongoing support from customers like Comcast. Through their Minority Business initiatives, they have proactively brought us into their supply chain process that has allowed us to offer a wide variety of products for their network."). Even those opposing this transaction admit that Comcast has a solid record of supplier diversity. *See* National Coalition of African American Owned Media Petition to Deny at 7 (citing the NAACP 2008 Consumer Choice Guide).

respect to Applicants' qualifications and compliance with the rules, however, there are no FCC rules requiring a particular level of procurement diversity or spending on female and minority-owned businesses.[872] Thus, as it has done in past transactions, the Commission should deny petitions to deny, such as those here, that are based on set-aside requests.[873] The Commission should find that the transaction review context is "not the appropriate forum for determining whether . . . a merged entity should allocate a certain portion of its contracts to small and minority businesses."[874]

No Commission rule is necessary to encourage Comcast and NBCU to work with diverse suppliers. For instance, in 2009, NBCU spent $100 million with female-owned businesses and $140 million with minority-owned suppliers.[875] In 2003, Comcast began a formal supplier diversity program. From 2003 through 2009, the percentage of spending attributed to diverse suppliers grew from 7.4 percent to 11.9 percent and in actual dollars, from $322 million to $627

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872 No party has alleged that Comcast or NBCU currently is in violation of any Commission rule relating to procurement or supplier diversity, or that the proposed transaction will cause a violation of any such rule. Of course, no such rule exists. The cable EEO rules do require that a cable operator "[e]ncourage minority and female entrepreneurs to conduct business with all parts of [the organization]." 47 C.F.R. § 76.75(e). Comcast is in compliance with this rule and no one has alleged otherwise. (NBCU is not subject to Section 76.75(e), and the broadcast EEO rules do not contain any similar requirement). 47 C.F.R. § 73.2080. Even if Section 76.75(e) were applicable to the proposed joint venture based on Comcast's controlling interest, NBCU's existing efforts, as well as the voluntary commitments, readily meet the requirement of this rule.

873 *See, e.g.*, Latino Business Chamber of Greater Los Angeles Comments at 3 (Mar. 26, 2010); Black Economic Council Opposition at 3 (Mar. 29, 2010); Economic Business Development Comments, at 1-2 (Mar. 29, 2010); Korean Churches for Community Development Comments at 1 (Apr. 14, 2010); Mabuhay Alliance Comments at 2 (June 17, 2010); Greenlining Institute Petition to Deny at 10.

874 *Bell Atlantic-NYNEX Order* ¶ 226. Nor is the transaction the appropriate venue for unadjudicated claims that Comcast's reporting on its supplier diversity violates California law. *See* Greenlining Institute Petition to Deny at 14-15 ("Comcast's filing with [California PUC] did not follow the designated reporting structure, consisting only of four pages of narrative, with only two actual data points provided and absolutely no data specific to minority business enterprises."). In any event, Comcast is not in violation. Even the petitioner who raised this concern admits that Comcast and other cable companies are not required to file diversity reports with the CPUC. Greenlining Institute Petition to Deny at 14 n.79 (admitting that "Comcast is not required to file supplier diversity reports"). Although not required to do so, Comcast is currently developing the needed internal processes to capture and voluntarily report the data as set forth in General Order 156.

875 Madison June Testimony at 9.

million, an increase of 94.7 percent. While Comcast's total procurement-related spending has decreased in recent years, it continues to successfully increase the amount spent with diverse suppliers continues to increase.[876] In addition, Comcast made diversity a priority in the construction of its new building, Comcast Center, which officially opened in 2008.[877] As part of the proposed transaction, Comcast and NBCU have also voluntarily committed to further increase their supplier diversity as detailed below.

d. Corporate Governance, Employment, Procurement, and Philanthropic Diversity Commitments

The transaction has presented unique opportunities for the companies to assess their performance in key areas, engage in constructive dialogue with other responsible stakeholders, and develop concrete plans to enhance their diversity efforts in the following areas:[878]

- *Corporate Governance*. Comcast and NBCU will establish four external Diversity Advisory Councils representative of African American, Hispanic, Asian Pacific American, and other diverse communities to facilitate open communications on the development, monitoring, and evaluation of the companies' diversity initiatives. Comcast will also appoint and/or elect to its Board of Directors a U.S.-based Hispanic member with a demonstrated track record of commitment to the Hispanic community within two years.

- *Employment/Workforce Recruitment and Retention*. Comcast and NBCU will increase minority representation at all levels of their respective organizations and will recruit and retain more minorities so that their workforces more accurately reflect the communities they serve. Specifically, Comcast has agreed to implement the following: career path and mentoring programs; minority internship and scholarship programs; diversity forums to increase director-level representation of minorities; focus groups to help create more opportunities for

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876 Responses to Questions from Several Members of Congress, *supra* note 88, at 16-17.

877 The company exceeded its goal of 25 percent inclusion for construction and 50 percent inclusion for design, furniture, fixtures and equipment, ultimately awarding to minority and women-owned firms 30 percent of qualified construction contracts, 40 percent of design work, and 60 percent of furniture, fixtures and equipment contracts. *See* Athena D. Merritt, Comcast Made Diversity Key, Phila. Bus. J. (June 13, 2008).

878 These plans are reflected in the Summary of Diversity Commitments and in the Hispanic MOU. *See supra* notes 99 and 120, respectively.

minority employees and identify high potential employees; a boot camp program for mid-level vice president candidates comprised of at least 80 percent diverse candidates; the use of search firms with track records of successfully recruiting diverse pools of talent; and mandatory inclusion of at least one person of color in each pool of candidates for vice president level positions and above.

- *Supplier Diversity*. Applicants have agreed to do the following with respect to supplier diversity: increase spending on diverse business partners; strive to increase the percentage of business conducted with minority-owned vendors to be on par with the percentage of minority-owned businesses in the communities they serve; partner with diverse organizations, such as minority-led chambers of commerce, to enhance the utilization of minority-owned enterprises; expand "second tier" procurement programs that encourage top suppliers to purchase goods and services from minority-owned vendors; develop and expand relationships with minority investment and banking firms; increase spending on advertising with minority-owned media by at least $7 million; expand business with minority-owned law firms; and provide annual procurement-related data to the Diversity Advisory Councils.

- *Philanthropy and Community Investment*. Comcast and NBCU have determined to increase by their philanthropic efforts to support minority-led and minority-serving institutions by 10 percent per year for each of the next three years. Comcast will enhance its community outreach programs, including Comcast Cares Day, Digital Connectors, and Leaders and Achievers Scholarships, by increasing outreach to diverse participants.

As detailed above, Applicants' long-standing commitments to diversity are demonstrated throughout the record of this proceeding and bolstered by specific voluntary commitments that will further promote diversity.

2. Localism

In addition to the diversity efforts described above, both NBCU and Comcast have proven track records demonstrating their commitment to the local communities they serve. A few parties, including the Greenlining Parties, have questioned the companies' commitment to local news, local public affairs and information programming,[879] as well as local community

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[879] *See, e.g.*, CFA *et al.* Petition to Deny at 56-57 & App. C – Stan Santos Decl.; Latino Business Chamber of Greater Los Angeles Comments at 2-3 (Mar. 26, 2010); Greenlining Institute Petition to Deny at 20-21 & 26-27;

investment and philanthropy.[880] These commenters assert no specific rule violations and provide no evidence in support of their claims. Moreover, as described above in Section III, the proposed transaction will increase local programming, and Applicants have made additional voluntary commitments that will ensure that result.

a. Local News, Public Affairs and Information Programming

NBCU has a well-established and widely recognized commitment to local news, public affairs, and information programming.[881] For instance, in 2009, the NBC O&O stations produced over 15,000 hours of local news, averaging approximately 30 hours per week per station of first-run, locally produced news programs. Each O&O station also produces public affairs, informational and special programs in addition to regularly scheduled newscasts.[882]

CWA Petition to Deny at 31-32. Although one petitioner implies that NBCU improperly airs English-only emergency warnings or disaster coverage on its Telemundo stations (Greenlining Institute Petition to Deny at 25), the FCC's rules do not require otherwise. *See* 47 C.F.R. §§ 11.54(b)(8) & 11.55(c)(4). Accordingly, there is no legal basis for such a claim. Nevertheless, NBCU-owned Telemundo stations strive to air (aurally and/or via crawls) emergency alerts and disaster coverage in Spanish. In addition, contrary to allegations that "[t]he proposed transaction may result in less effective disaster and emergency warnings," (Greenlining Institute Petition to Deny at 25) the transaction will not impact EAS service in any way.

[880] *See* Black Economic Council Comments at 2 (Mar. 29, 2010), Economic Business Development Comments at 1 (Mar. 29, 2010); Korean Churches for Community Development Comments at 1 (Apr. 14, 2010); Mabuhay Alliance Comments at 2 (June 17, 2010); Greenlining Institute Petition to Deny at 10.

[881] *See, e.g.*, Letter from Mayors Nutter, Becker, Lawrence, Marks, Rybak & Walker, National Conference of Democratic Mayors to Julius Genachowski, Chairman, FCC, *et al.*, MB Docket No. 10-56 (June 21, 2010) ("Local NBC broadcast stations have been supporters of public service programs on health care, youth and the homeless."); Letter from Sonya Galvan, President & CEO, Child Advocates, Inc. to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 16, 2010) ("NBC has a strong history of local programming . . . ."); Letter from Monty Trainer, President, Coconut Grove Arts Festival to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 3, 2010) ("WSCV Telemundo 51 and WTVJ NBC Miami have hosted 30-minute feature shows to promote the arts and, in particular, our annual Arts Festival. Members of our board of directors routinely appear on both stations to highlight the event. The on-going support of these stations helps to remind our community of just how significant a role culture and the arts play in enhancing ones quality of life."); Letter from Jill Michal, President & CEO, United Way of Southeastern Pennsylvania to Julius Genachowski, Chairman, FCC, MB Docket 10-56 (May 5, 2010) ("As part of NBC10's continued efforts to strengthen our local community, the station helps United Way produce and air a discussion segment in which we discuss the major issues facing our community with other local leaders."); *see also* CFA *et al.* Petition to Deny at 20 ("NBC is similarly strong in the provision of local news . . . .").

[882] The Commission should not be misled by the claim of a single petitioner that NBC failed to adhere to a 2000 election political programming pledge. *See* Greenlining Institute Petition to Deny at 41-42. Greenlining's

NBCU-owned stations have also made local news, public affairs and information content available online, providing this information to the local community on demand, anytime and anywhere.[883] Local NBC O&O stations have won numerous journalism awards and have been recognized repeatedly for outstanding service to their local communities.[884]

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claim is baseless, and a full and fair analysis of the Lear Study confirms that NBC exceeded its political programming commitment at the two stations studied. The Greenlining Institute points to one study to suggest that "NBC owned and operated stations averaged just over two and a half minutes of candidate centered discourse per night." *Id.* (citing Martin Kaplan & Matthew Hale, Local TV Coverage of the 2000 General Election, available at http://www.learcenter.org/pdf/campaignnews.PDF ("Lear Study")). However, Greenlining selectively reads the data and overlooks several critical facts. In the month leading up to the 2000 election, NBC committed that, between 4 p.m. and the conclusion of the late news on its owned and operated stations, these stations would air five minutes of "comprehensive coverage of national and local campaigns, including candidate-centered discourse, in-depth newscast segments covering the national and local candidates' policy positions, debates between local candidates and live interviews with local candidates running for various positions." *See* Press Release, NBC, NBC Commits to In-Depth Coverage of Candidate Centered Discourse on Its Owned and Operated Stations for the 2000 Election (Oct. 4, 2000). NBC has fulfilled this commitment in its entirety. Greenlining's claim misleadingly relies on a single finding in the Lear Study, which was derived from measuring just one of the political programming areas covered by NBC's pledge – candidate-centered discourse – with respect to two NBC O&O stations. *See* Lear Study at 8. It also bears noting that the Lear Study compiled statistics only with respect to programming between 5:00 p.m. to 11:35 p.m., a time period different from the "4 p.m. to conclusion of the late news" window applicable to NBC 2000 commitment. Importantly, Greenlining fails to mention more significant data from the Lear Study that actually confirms NBC's fulfillment of its commitment. Indeed, summary data for the two NBC O&O stations that were included in the study shows that, when accounting for "political stories of all kinds," the nightly average for these two stations (WTVJ (Miami) and WJAR (Providence)) was 10 minutes and 56 seconds and 7 minutes and 27 seconds, respectively. *See* Lear Study at 21. WTVJ was one of only seven television stations to rank in the top 20 for each type of measurement conducted. *See* Lear Study at 22.

883 The websites of the NBCU-owned stations provide constantly updated national, local and even hyper-local news, weather, traffic, sports and other information of interest to their viewing audiences. *See, e.g.*, NBC Los Angeles, http://www.nbclosangeles.com/ (last visited July 20, 2010).

884 For example, KXAS, Fort Worth, Texas, received a 2009 American Women in Radio and Television ("AWRT") award for outstanding feature/hard news program, as well as several awards from the National Association of Black Journalists. KNBC in Los Angeles, California, was nominated for more 2010 local Emmys than any other station in the market. KNBC previously has won Radio Television Digital News Association ("RTDNA") awards for best documentary, best investigative reporting, and best light feature reporting. The station also is a winner of the APTRA Mark Twain award for best investigative reporting.

Recently, WVIT, Hartford, Connecticut, received a first place Connecticut Broadcast Associated Press award for best enterprise reporting in a large market, as well as an Agriculture Journalism Award from the governor of Connecticut and the Connecticut Agriculture Information Council for Best TV Feature. WVIT also received a national "Excellence in Journalism" award from the American College of Emergency Physicians ("ACEP") for an investigative piece on hospital emergency rooms. The ACEP recognizes significant contributions made by members of the news media to cover emergency medicine issues and to educate the public about them.

WNBC-TV in New York received seven New York Emmy Awards this year, including Outstanding Morning Newscast and two Outstanding On-Camera Talent awards for reporters. The station also was recognized

Furthermore, although economic pressures previously caused Telemundo to scale back some news operations,[885] NBCU is taking steps to reverse this trend,[886] and these efforts have been recognized.[887] Just last year, Telemundo introduced a comprehensive news strategy to enhance and expand its news content across key dayparts and multiple platforms, including increasing investment in local newscasts at the Telemundo stations and strengthening multimedia news strategies across all of the Telemundo platforms. As Las Vegas Mayor Goodman states, in the last year, the local Telemundo station has "tackled such topics as the 2010 Census, immigration, low self-esteem of Hispanic women, literacy, domestic violence and health – actions which carry great impact both locally and nationally."[888] In this connection, as discussed

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last month by the New York State Broadcasters Association in four categories, among them Outstanding Public Affairs Program or Series, Outstanding Hard News Story, and Outstanding Locally Produced TV Show.

In Washington, D.C., WRC has won local Emmy awards for its morning news program and 11 p.m. newscast. Groups such as the American Diabetes Association, Salvation Army, Animal Welfare League, Epilepsy Foundation, and others have recognized the station's service to the local community. In addition, NBC's Chicago O&O station, WMAQ has won the 2010 Associated Press (Illinois) awards for best reporter and second place for best newscast and best hard news story. It also has been recognized by the Illinois Broadcaster Association for best website, best PSA, and best reporter.

885 CFA *et al.* Petition to Deny at 57.

886 *See* Letter from Jeffrey Zucker, President & CEO, NBC Universal, Inc., to Luis Gutierrez, U.S. House of Representatives (Apr. 9, 2010).

887 *See, e.g.*, Letter from Sol Flores, Executive Director, La Casa Norte to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 10, 2010) ("Telemundo Chicago has been a great advocate for the Hispanic community and a highly-valued resource for news and information important to us. Telemundo Chicago's community service efforts are extraordinary. They are the only local Spanish TV station that really gets out into the community to report on stories and news as well as provide support that makes a difference."); Letter from Eligio W. Goodwin, President, Cowtown Events Inc., to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 17, 2010) ("We have had the privilege of working with NBC Universal/Telemundo's television station, NBC5/KXAS-TV and Telemundo Dallas/KXTX-TV for 11 years. Telemundo Dallas identifies with the people of the community which has enhanced the relationship with the Hispanic viewers. They are an exceptional television station in delivering the news whether it is national or local."); Letter from Alejandro Ramos, Executive Director, United States-Mexico Chamber of Commerce, Northeast Chapter, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 15, 2010), at 2 ("[W]hen deemed appropriate according to the USMCOC-NE policies and nature of the events, Telemundo New York has provided coverage contributing to the communication and strengthening of the relations between the USMCOC-NE members and the Latino community.").

888 Letter from Oscar B. Goodman, Mayor of Las Vegas, NV, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56, at 1 (May 27, 2010) (discussing NBCU-owned Telemundo station, KBLR).

in Section III above, Applicants have committed not to reduce the number of current local Telemundo newscasts and to consider expanding these newscasts, as well as expanding the local content included in station newscasts.[889]

Notwithstanding NBCU's strong record with respect to local news and public affairs programming, a few petitioners express concerns regarding shared service agreements and news-sharing agreements.[890] These concerns are both overstated and immaterial to the proposed transaction. These types of agreements and arrangements are commonly used throughout the industry, and no petitioner has alleged that any such arrangement is contrary to the Commission's rules. The instant transaction is not an appropriate venue for concerns regarding industry-wide issues, particularly where there are open proceedings considering these issues.[891] Even more importantly, the Commission has recognized that broadcasters' use of news-sharing arrangements for events such as press conferences or other sharing agreements can create efficiencies and cost savings, enabling those broadcasters to provide more entrepreneurial and investigative local news and public affairs programming than they would otherwise be able to provide.[892] This Commission finding is consistent with NBCU's experience – indeed, the NBCU

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889 Hispanic MOU at 9.

890 CWA Petition to Deny at 31-32; Greenlining Institute Petition to Deny at 26-27.

891 *See, e.g.*, *In the Matter of 2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Notice of Inquiry, FCC 10-92, MB Docket No. 09-182, ¶ 99 (May 25, 2010) (seeking comment on the treatment and permissibility of shared news arrangements); *In the Matter of Rules and Policies Concerning Attribution of Joint Sales Agreements In Local Television Markets*, Notice of Proposed Rulemaking, 19 FCC Rcd 15238 ¶ 12 (2004) (seeking "comment on whether or not to attribute TV JSAs").

892 *See, e.g.*, *In the Matter of Rules and Policies Concerning Attribution of Joint Sales Agreements In Local Television Markets*, Notice of Proposed Rulemaking, 19 FCC Rcd 15238 ¶ 17 (2004) ("We have seen TV JSA agreements that are accompanied by non-attributable TV LMAs, sometimes involving a situation where a stronger station provides local news programming to a weaker station in the market as part of the agreements. This may enable such stations to provide news that they were not able to provide previously.").

O&O stations engage in news-sharing arrangements precisely because it allows them to better serve their local communities.

Finally, it should be noted that broadcast licensees have significant discretion with respect to programming decisions,[893] and "in the absence of extrinsic evidence that a licensee has falsified, distorted or suppressed news, the agency will not substitute its judgment for that of a licensee in determining news issues of interest to its listening or viewing audience and the manner in which it should be presented."[894] There is no such evidence here.

b. Local Community Investment and Philanthropy

Comcast and NBCU share a strong history of local community investment and philanthropy, including contributions to minority-focused community organizations.[895] The strong support for the companies' record that is evidenced in numerous filings in this proceeding overwhelms the allegations of a few petitioners and commenters to the contrary.[896] NBCU-owned stations provide important support to non-profit community organizations in the form of

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893 The Commission has recognized that "in accordance with the First Amendment to the Constitution and the non-censorship provisions of the Act, each broadcast licensee retains broad discretion to make programming decisions." *In the Matter of Existing Shareholders of Clear Channel Communications, Inc. (Transferors) and Shareholders of Thomas H. Lee Equity Fund VI, L.P., Bain Capital (CC) IX, L.P., and BT Triple Crown Capital Holdings III, Inc. (Transferees)*, Memorandum Opinion and Order, 23 FCC Rcd 1421 ¶¶ 18, 20 (2008) (internal citations omitted).

894 *Id.*; *see also Dr. Paul Klite et al.*, Letter, 12 Com. Reg. (P&F) 79, 81-82 (MMB 1998) ("Because journalistic or editorial discretion in the presentation of news and public information is the core concept of the First Amendment's Free Press guarantee, licensees are entitled to the widest latitude of journalistic discretion in this regard. Thus, with regard to news programming in particular, the Commission has repeatedly recognized that the choice of what is or is not to be covered in the presentation of broadcast news is a matter committed to the licensee's good faith discretion, and that, the Commission will not review the licensee's news judgments.") (internal citations and quotations omitted).

895 "Public Interest Petitioners commend Comcast and NBCU for their involvement with, and monetary contributions to, [charitable organizations]." CFA *et al.* Petition to Deny at 63.

896 *See* Black Economic Council Comments at 2 (Mar. 29, 2010), Economic Business Development Comments at 1 (Mar. 29, 2010); Korean Churches for Community Development Comments at 1 (Apr. 14, 2010); Mabuhay Alliance Comments at 2 (June 17, 2010); Greenlining Institute Petition to Deny at 10.

donated air time for public service announcements, fundraising assistance, logistical support, direct financial contributions, board service and other involvement by station personnel and coverage of events in news and public affairs programming.[897]

Comcast has an equally strong record of supporting local community organizations, including minority-focused organizations.[898] Through in-kind and cash contributions from

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[897] The record contains dozens letters of support from various community organizations, detailing the support they receive from NBCU and its local broadcast stations. *See, e.g.*, Letter from Robert Federico, Executive Director, Repertorio Espanol, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 14, 2010) ("NBCU and its subsidiary Telemundo WNJU 47 have been instrumental partners in our mission of making Spanish-language theatre accessible to seniors, students and Hispanics of all national backgrounds."); Letter from Keri Procunier McLain, Ph.D., CEO, YWCA of Silicon Valley, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Apr. 28, 2010) ("[KNTV] devotes significant resources to public service and therefore has the ability to inform large numbers of viewers about important community events . . . and increases awareness of issues such as sexual assault and domestic violence facing local residents within our community."); Letter from Stephen Becker, EdD, President & CEO, HARC, Inc., to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Apr. 30, 2010) ("HARC, Inc. is proud of the long standing partnership it has had with NBC CT. . . . NBC CT has been involved with HARC's mission on many levels including serving on our board of director's development committee; providing many opportunities over the years for HARC to bring its message and mission to the broader community, and most recently hosting an art show for our ArtSparks program. Our participation in events such as the NBC CT Health Expo and most recently New England's largest Latino Expo would not have been possible without the support of NBC CT."); Letter from Ed Spitzberg, Executive Director, Sitar Arts Center, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (May 3, 2010) ("NBC Universal and NBC4 have been essential supporters of Sitar Arts Center's Teen Initiative for the past two consecutive years through generous grants totaling $40,000.").

[898] The docket contains hundreds of letters of support from non-profit community organizations from across the country that Comcast has partnered with and supported for many years, including many minority-focused organizations. *See, e.g.*, Letter from Richard R. Farias, President & CEO, Tejano Center for Community Concerns, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Mar. 13, 2010) ("For the last four years, Comcast has supported not just the Tejano Center for Community Concerns with financial and volunteer support, but many other organizations serving those in need in our community."); Letter from Louise Brown, President & Founder, Wood-to-Wonderful, to Julius Genachowski, Chairman, FCC, MB Docket 10-56 (June 14, 2010) ("Comcast is dedicated to the children we serve – 90% of whom live at or below the poverty level and are exposed to significant risk factors. Comcast provides philanthropic support to Wood-to-Wonderful, but the company also invests time and people to help further the mission."); Letter from Karen J. Mathis, President & CEO, Big Brothers Big Sisters, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 15, 2010) ("Comcast has not only contributed significantly to Big Brothers Big Sisters in telecommunications services and other donations; many in the company have volunteered their time as youth mentors."); Letter from Laura S. Thrall, United Way of Metropolitan Chicago, to FCC, MB Docket No. 10-56 (Apr. 15, 2010) ("It is through partnerships with corporate partners, like Comcast, that the United Way is able to work towards its goals and vision for Chicagoland: all families can earn a living income, all children enter kindergarten ready to learn and young people graduate from high school ready for college and a career, and everyone has guaranteed access to primary and preventive health care."); Letter from Ann Turner, Executive Director, Cheyenne Village, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56, at 1 (Apr. 13, 2010) ("Comcast has been a long term partner in helping us fulfill our mission. . . . Comcast volunteers last year made our organization their choice site for Comcast Cares Day. . . . Our program has been featured on Comcast Newsmakers time and again, bringing greater attention to our work celebrating the and achievements . . . ."); Letter from Grover Johnson, President, Tacoma Chapter of the A. Philip Randolph Institute, to Julius Genachowski,

Comcast Corporation and cash contributions from the Comcast Foundation, Comcast has invested more than $1.8 billion in cash and in-kind support in community organizations throughout its footprint over the past nine years.[899] Comcast's non-profit partners include numerous diverse organizations[900] as well as numerous non-profit organizations that serve diverse clienteles.[901] For instance, Comcast has partnered with the One Economy Corporation to create the Comcast Digital Connectors Program.[902] In addition, one of Comcast's signature community investment programs is Comcast Cares Day, its annual nationwide day of service. Since Comcast Cares Day began in 2001, Comcast employees, family members, friends,

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Chairman, FCC, MB Docket No. 10-56 (Apr. 1, 2010) ("Comcast has been an incredibly valuable partner. . . . In addition to its unwavering support for our mission, Comcast has provided a tremendous gift to the students of Tacoma by funding our branch's summer education program."); Letter from Dr. Warner Dickerson, President, Memphis Branch NAACP, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (May 10, 2010) ("Comcast has been and continues to be a strategic partner in supporting the many programs and projects that we have created to fulfill our mission."); Letter from Cindy Myers, Ph.D., CEO, Marin Services for Women, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 1, 2010) ("Comcast has supported numerous MSW programs, including our transitional housing and trauma recovery services offered to over 400 women and their families every year . . . . In addition to providing financial support, Comcast has featured MSW regularly [on] the Comcast Newsmakers program. The exposure we have achieved through the Newsmakers program has made more women in Marin County aware of our organization and has helped us save and transform their lives."); Letter from Phyllis Y. Nichols, President & CEO, Knoxville Area Urban League, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 4, 2010) ("Comcast has provided essential grant funding for local initiatives aimed at increasing literacy and developing the self-sufficiency skills that Knoxville's at-risk-youth need in order to be successful . . . .").

899 Responses to Questions from Several Members of Congress, *supra* note 88, at 9.

900 These include the National Urban League (NUL), the National Association for the Advancement of Colored People (NAACP), the National Black Chamber of Commerce, National Council of La Raza (NCLR), League of United Latin American Citizens (LULAC), the U.S. Hispanic Chamber of Commerce, the Asian American Justice Center, and the Organization of Chinese Americans (OCA). *Id.*

901 These include United Way, Boys & Girls Clubs, Big Brothers Big Sisters, City Year, and many local community organizations. *Id.*

902 This program identifies talented young people in underserved communities (the majority of which are minorities), provides immersive technology training, and helps them build leadership and workplace skills. Waz July Testimony at 9.

community partners and public officials have volunteered approximately 1.4 million hours of service in support of community service projects around the country.[903]

C. Character Issues

In addition to the many benefits of the transaction and the history of compliance and public service that weigh in favor of approval, Applicants also possess the necessary character qualifications to hold broadcast licenses. Decades of Commission experience with Applicants convincingly demonstrate that the Commission can continue to trust Comcast and NBCU to comply with its rules. No commenter has raised any legitimate character issue to the contrary.[904] And, as explained in the Public Interest Statement, Comcast consistently has delivered the benefits it has promised to the Commission, and will do so here.[905]

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[903] Comcast, Comcast Community Investment, at 2 (2009), http://www.comcast.com/MediaLibrary/1/1/About/IntheCommunity/CommunityInvestment/Comcast_ComInvest_bro_120109.pdf.

[904] Several parties bandy about "character" allegations without even attempting to square their claims with the Commission's character policies. For example, the City of Seattle raises arguments about whether Comcast's "HD Technology Fee" and other fees violate, or constitute an "evasion" of, provisions of Title VI of the Communications Act. *See* City of Seattle *et al.* Comments. at 5-16; *infra* Section VI.E. It acknowledges that there is a process in place for FCC adjudication of such alleged evasions, but nonetheless seeks to inject them into this unrelated proceeding. Moreover, in its conclusion it makes the unsupported and unexplained allegation that Comcast lacks character qualifications, presumably based on its unadjudicated allegations. *Id.* at 19. The City of Detroit alleges that Comcast has failed to carry out its obligations under its franchise agreement, but does not claim that this is adjudicated misconduct – in fact, the City acknowledges that it has filed a lawsuit which is currently pending in federal court. *See* Comments of the City of Detroit, Michigan at i, Attachment A. *See infra* Section VI.F. Detroit's claims against Comcast involve the provisions of Title VI of the Communications Act, but also involve contractual claims concerning Comcast's franchise agreement, matters of state law, and questions of preemption. Because these claims are interrelated, and the litigation is underway, there is no adjudicated finding of a violation of the Communications Act. The Commission's policy is to consider violations of the Communications Act as FCC-related misconduct that relates to character. *See* 1986 Character Policy Statement ¶¶ 7 n.11, 23, 55-57. There has been no determination of any such violation with respect to either Seattle's or Detroit's claims, and even if these claims were true (which they are not), this proceeding is not the proper place to consider them because these claims are interrelated and the litigation is underway. In any event, these claims are addressed in more detail in Section VI below.

[905] *See* Public Interest Statement at 17 & n.16.

1. Candor

a. Network Management

Notwithstanding allegations to the contrary,[906] there is nothing in the Commission's network management proceeding that creates a candor issue relevant to the instant transaction. Intent to deceive is the central element of misrepresentation or lack of candor, and there is no basis for finding or inferring any such intent.[907] To the contrary, Comcast promptly provided a full explanation of the reasons for and specifics of its practices when the Commission inquired about them;[908] and demonstrated that it had no intent to deceive or misrepresent technical details by voluntarily providing additional details to clear up the apparent confusion over how its network management techniques were employed.[909] The fact that the description of particular

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[906] CFA *et al.* argue that Comcast's statement in the Application that it "has never blocked [Internet] subscribers' access to lawful content" and that it lacks the incentive to pursue an Internet foreclosure strategy are "false," based on the FCC's "determination" in the *Comcast Network Management Order* that Comcast had "blocked" such access. CFA *et al.* Petition to Deny at 28-29 (citing *In the Matters of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications*, Memorandum Opinion and Order, 23 FCC Rcd 13028 ¶ 44 (2008) ("*Comcast Network Management Order*"), *vacated sub nom. Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010) ("*Comcast v. FCC*"). They also argue that in that Order the Commission "censured Comcast for its repeated lack of candor about its network management practices." CFA *et al.* Petition to Deny at 29. *See also* Franken Comments at 9 (referring to Comcast's behavior during the network management proceeding as "dishonest" and citing language from the *Comcast Network Management Order*).

[907] *See In the Matter of Citadel Broadcasting Co. for the Renewal of Licenses*, 22 FCC Rcd 7083 ¶ 14 (2007); *In the Matter of William L. Zawila,* 18 FCC Rcd 14938 ¶ 96 (2003); *In the Matter of LUJ, Inc. and Long Nine, Inc. for Assignment of Licenses*, 17 FCC Rcd 16980 ¶ 5 (2002); *In the Matter of Liberty Productions*, 16 FCC Rcd 12061 ¶ 41 (2001); *In the Matter of Trinity Broadcasting of Florida, Inc. for Renewal of License of Station*, 10 FCC Rcd 12020 ¶ 336; *Georgia Public Telecommunications Commission*, 7 FCC Rcd 2942 (Rev. Bd. 1992), *review denied*, 7 FCC Rcd 7996 (1992); *see also David Ortiz Radio Corp. v. FCC,* 941 F.2d 1253, 1259-60 (D.C. Cir. 1991).

[908] Letter from Mary McManus, Senior Director, FCC and Regulatory Policy, Comcast Corp. and Gerard J. Lewis, Jr., Vice President, Deputy General Counsel & Chief Privacy Officer, Comcast Cable Communications, LLC to Kris A. Monteith, Chief, Enforcement Bureau, FCC (Jan. 25, 2008).

[909] *See* Letter from Kathryn A. Zachem, Vice President of Regulatory Affairs, Comcast Corporation, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-52, at 5 (July 10, 2008) ("Technical Detail Letter").

details regarding those techniques corrected misapprehensions and oversights in earlier versions is not evidence of a lack of candor.[910]

Even more importantly, it would be error to rely on purported findings and determinations in the *Comcast Network Management Order* because the D.C. Circuit vacated that decision in its entirety in *Comcast v. FCC*.[911] A vacated decision is void, treated as though it never existed, and has no precedential or preclusive effect.[912] Accordingly, lack of candor allegations based on the *Comcast Network Management Order* should be ignored.

Claims that Comcast was "censured" for "repeated lack of candor" in the vacated decision also are incorrect. While the *Order*, in *dicta,* said that there were "troubling questions about Comcast's candor,"[913] the vacated decision made no findings or conclusions regarding Comcast's candor, and the snippets relied on by CFA *et al.* are taken out of context.[914] A reference to dicta in an order that is a legal nullity does not raise any cognizable candor issues.

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910 *In the Matter of Applications for Station WKVE, Semora, North Carolina*, Memorandum Opinion and Order and Notice of Apparent Liability, 18 FCC Rcd 23411 ¶ 12 (2003) ("Piedmont's suggestion that amendments always indicate known falsehoods is incorrect. Our acceptance of that argument would discourage correction of legitimate mistakes or misunderstandings.").

911 *Comcast Corp. v. FCC,* 600 F.3d 642 (D.C. Cir. 2010).

912 *See Clerke v. Harwood,* 3 U.S. (3 Dall.) 342, 343 (1797); *Butler v. Eaton,* 141 U.S. 240, 243-44 (1891); *United States v. Williams,* 904 F.2d 7, 8 (7th Cir. 1990); *Simpson v. Motorists Mut. Ins. Co.,* 494 F.2d 850, 854-55 (7th Cir. 1974); Rushton Mining Co. v. Morton, 520 F.2d 716, 719 (3d Cir. 1975); *Stone v. Williams,* 970 F.2d 1043, 1054-55 (2d Cir. 1992).

913 *Comcast Network Management Order*, 23 FCC Rcd at 13032 n.31.

914 For example, CFA *et al.* say the order found that "Comcast *misleadingly* disclaimed any responsibility," CFA *et al.* Petition to Deny at 29 n.56 (*quoting Comcast Network Management Order* ¶ 6 (emphasis supplied by CFA *et al.*)), without acknowledging that the reference was not to any Comcast representations to the Commission, but rather referred to statements by a Comcast spokesperson to a blogger at a very early stage, *before* the controversy reached the Commission; *see Comcast Network Management Order* ¶ 6 & nn.15-16. They also cite the Commission's statement that "Comcast changed its account," CFA *et al.* Petition to Deny at 29 n.56 (*quoting Comcast Network Management Order* ¶ 9), without noting that this "change" was from a casual response to a blogger's question to a formal Comcast response to the complaint at the request of the Enforcement Bureau and Comcast's subsequent Comments. *See Comcast Network Management Order* ¶ 9 & nn. 25, 27, 28. It is not surprising that formal filings at the FCC after an enforcement proceeding has begun are more detailed and

Finally, concerns regarding Comcast's use of the term "delaying" rather than "blocking" are a non-issue. Comcast has good reasons for using the language that it did,[915] and even the vacated *Comcast Network Management Order* said that "the semantic dispute of 'delaying vs. blocking' is not outcome determinative here."[916]

b. Fin/Syn

Claims of "broken promises"[917] regarding repeal of the Fin/Syn rules similarly do not give rise to any cognizable candor issue. If NBC executives "asserted [in the 1990s] that [Fin/Syn] repeal would not adversely affect the ability of independent producers to place their programming on NBC or cause it to favor its own programming"[918] or even "provided assurances that independent producers would continue to be a prominent part of primetime programming,"[919]

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considered than casual remarks to a blogger. The FCC's reference to Comcast "changing its story yet again," CFA *et al.* Petition to Deny at 29 n.56 (*quoting Comcast Network Management Order* ¶ 9), referred to Comcast's clarification that it slowed customer upstream-only P2P traffic whenever it reached a certain threshold "at any time when P2P traffic levels threaten to degrade customers' Internet experiences," and not only at specified times of day when traffic congestion is expected. Technical Detail Letter at 5.

915 Even when Comcast was using P2P-focused network management techniques, it carried 9 billion P2P flows per day, over 90 percent of those flows were unaffected by Comcast's management techniques, and, when a P2P upload was interrupted from a computer, a successful P2P upload was effectuated from that computer within one minute over 80 percent of the time. *See* Technical Detail Letter at 3.

916 *Comcast Network Management Order* ¶ 44. Similarly, the claim by Elan Feldman that Comcast lacked candor due to Congressional testimony by its Executive Vice President, David L. Cohen that Comcast did not "block" P2P traffic lacks merit. Feldman Petition to Deny at 11-12. Feldman does not provide the date or citation for the testimony quoted in the petition, but the excerpt appears to be similar to testimony given by Mr. Cohen several years before the FCC proceeding. *See Reconsidering Our Communications Laws: Ensuring Competition and Innovation, Hearing before the S. Comm. on the Judiciary*, 109th cong. (June 14, 2006) (testimony of David L. Cohen, Executive Vice President, Comcast Corp.), *available at* http://judiciary.senate.gov/hearings/hearing.cfm?id=1937. If this is the testimony to which Feldman refers, it obviously was not an attempt to contradict the facts elicited in an FCC proceeding that had not yet been held. Moreover, it bears noting that Mr. Cohen also testified that Comcast uses a variety of network management techniques to address the fact that "one bandwidth intensive application used by one group of users can have substantial adverse effects on the network's ability to deliver other applications to all users." *Id.* at 13; *see also infra* Section VI.I (addressing Feldman's other arguments).

917 Cooper/Lynn Decl. at 62.

918 Franken Comments at 5-6

919 Cooper/Lynn Decl. at 62.

these statements are not inconsistent with the fact that programming on the NBC Television Network continues to include independently-produced content today. As noted above, approximately 30 percent of NBC's Spring 2010 post-Olympics prime time schedule was occupied by independently produced programming,[920] a figure that will rise to 33 percent in the fall. The allegations here are not based on evidence that NBC engaged in knowing misrepresentations or lacked candor before the Commission; instead, the Fin-Syn "promises" are used as a way to illustrate some parties' general opposition to vertical integration and support for independently-produced programming.[921]

In any event, to the extent NBC airs less independent programming today than it did when the Fin/Syn rules were repealed (based on a variety of factors), this reduction does not represent a "broken promise." The executives made their predictions in good faith, and there is no evidence to the contrary.[922]

c. Adult Programming

As a cable operator, Comcast fully empowers subscribers to control what is viewed in their homes. Comcast Digital Cable service includes parental control features that allow parents to decide the programming that is appropriate for their families. These features provide customers with choice and control – maximizing the programming options available to all Comcast customers, while also providing easy-to-use technology to let customers decide what their family may see. Despite the availability of these tools, the Parents Television Council

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920 Responses to Questions from Several Members of Congress, *supra* note 88, at 36-41.

921 *Id.*; Franken Comments at 6.

922 Moreover, predictions about the implications of the repeal of the Fin/Syn rules nearly two decades ago cannot be the basis of a candor or misrepresentation charge today. The Commission's policy is generally not to consider matters prior to the current license term, but to apply a ten-year limit even as to conduct reflecting a "flagrant disregard" of Commission rules, which is clearly not present here. 1986 Character Policy Statement ¶ 105.

("PTC") and a few co-commenters raise issues pertaining to adult programming. These issues do not provide any basis for the Commission to condition or deny the proposed transaction.[923] PTC accurately notes that "[t]here is no content regulation of cable-distributed programming" and, commendably, states that the group does "not propose such regulation."[924] PTC questions, however, whether Comcast has the character qualifications to be a licensee based on the fact that it carries on cable legal adult programming that PTC considers to be "pornographic," and it asks for a condition requiring Comcast to disclose the amount of revenue it derives from distribution of adult programming.[925] There is no need for such a condition.

PTC does not even attempt to identify how Comcast's program distribution activities violate the Commission's character policies – rather, it acknowledges that those policies "do not speak directly to the distribution of pornographic material."[926] Nevertheless, PTC incorrectly concludes that the Commission's policy is focused on "the moral decisions made by licensees and applicants" and therefore should take adult program distribution into account.[927] In fact, the Commission has specifically rejected attempts to assess applicants' and licensees' "moral

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923 Morality in Media also provides an analysis of obscenity law without any indication of how it is relevant in this proceeding. In fact, its comments do not even reference Comcast, except in the caption and a heading. There is not even a request for relief. *See* Morality in Media Comments at 1-6. Morality in Media's allegations are far less specific than those the Commission rejected as not relevant in the AT&T/Comcast proceeding: "Clancy does not offer any evidence that a court has adjudged the programming distributed by AT&T is or was obscene, nor any other evidence to support his allegations. To the extent that the petition describes programming that might be considered indecent, we note that the services provided by AT&T are not broadcast services, but subscription-based services, which do not call into play the issue of indecency. Clancy's allegations to not justify action on the petition in the context of this proceeding." *AT&T-Comcast Order* ¶ 213. The Commission should reach the same result here.

924 Joint Comments of the Parents Television Council, American Family Association, Focus on the Family, Citizens for Community Values, Reclaim Our Culture Kentuckiana & the Coalition for Marriage and Family ("PTC") at 2.

925 *Id.* at 2-3.

926 *Id.* at 2.

927 *Id.*

character"[928] and instead focus on "the likelihood that an applicant will deal truthfully with the Commission and comply with the Communications Act and [FCC] rules and policies."[929] Any change to this approach would require an industry-wide proceeding by the Commission and would be inappropriate in the instant transaction. Moreover, PTC does not identify any specific activities that are alleged to evince a lack of character qualifications.

Comcast has every intention of respecting the special legal obligations and the special public interest responsibilities that attach to television broadcasting, and PTC has furnished no credible argument to the contrary. Comcast follows Commission rules with respect to adult programming as a cable operator, and it will follow Commission rules with respect to adult programming when it becomes a broadcast licensee post-transaction. The new NBCU, like NBCU today, will be fully subject to the Commission's powers with respect to indecency, and it will have its fitness as a broadcast licensee evaluated whenever a broadcast license comes up for renewal. Nothing more is required.

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In sum, Applicants have fully demonstrated the qualifications necessary for approval of the proposed transfer of control of broadcast licenses.

VI. OTHER ISSUES

Despite longstanding Commission policy not to consider issues raised during a transaction review that are unrelated to the transaction, many parties have asked the Commission to do exactly that. As demonstrated in Section II, a license transfer proceeding is not the

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928 1986 Character Policy Statement, 102 FCC 2d at 1181-82, 1185, 1190.

929 *Id.* at 1183.

appropriate forum for the Commission to consider pre-existing grievances, industry-wide issues, or other matters unrelated to the proposed transaction.[930]

Nevertheless, to dispense with any notion that the Commission should give any weight to these issues, Applicants briefly address below the following issues: (i) the suggestion that Comcast should divest Comcast Media Center and iN DEMAND; (ii) assertions of unfair labor practices; (iii) a request for specific disability-related conditions; (iv) complaints about the price of cable; (v) complaints raised regarding HD technology; (vi) complaints raised regarding PEG programming; (vii) concerns about piracy and the enforcement of copyrights; (viii) concerns raised by the Portland Trailblazers with regard to cable distribution of their basketball games; and (ix) an allegation of property damage.

A. Claims Regarding iN DEMAND and Comcast Media Center Are Without Merit and Not Transaction Related, and Proposed Conditions with Respect to These Entities Should Be Rejected.

Avail-TVN and a handful of other commenters allege that, post-transaction, Comcast will leverage its ownership interest in NBCU to harm competition in the marketplace for video transport, VOD, and PPV services. To address such alleged harms, these parties urge the Commission to require Comcast to divest its ownership interests in iN DEMAND and Comcast

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[930] As the Institute for Policy Innovation noted, "[W]e are troubled by the tendency to make policy through the merger review process – in other words, to extract policy commitments from companies while they are at the mercy of a regulatory agency during a merger review or license transfer review. Special interest groups and supposed 'consumer' groups have become adept at using such reviews as opportunities to further *their* agendas and achieve *their* policy goals through the unique and exceptional processes available to them during a review. Some, in fact, seemingly spring to life only to shake down those in a vulnerable position. This is policy making under duress, and these policy concessions inevitably obtain the power of precedent, even though they were obtained without anything resembling a deliberative policy process." Comments of Institute for Policy Innovation, MB Docket No. 10-56, at 1-2 (June 21, 2010) (emphasis in original).

Media Center ("CMC").[931] In the alternative, Avail-TVN urges the Commission to impose "behavioral remedies" on Comcast, CMC, and iN DEMAND.[932] There is no merit to these claims, and the proposed conditions should be rejected.

Applicants note that it appears that Avail-TVN is seeking to use this proceeding as leverage to advance its individual business interests, rather than the public interest. To cite one example, Avail-TVN made a bid earlier this year to buy CMC's Headend-in-the-Sky ("HITS") service. Comcast declined the offer. Now, Avail-TVN is asking the Commission to require divestiture of CMC, presumably in an effort to obtain control of CMC at a bargain-basement price via a forced sale. The Commission should reject such regulatory gamesmanship.

1. CMC Does Not Exercise Bottleneck Control Over Video Transport Services in the MVPD Marketplace.

Avail-TVN asserts that Comcast "already dominates the market" for video transport services and that the joint venture will give CMC the ability to harm competitors.[933] NTCA claims that the joint venture will use its control of CMC to create "sweetheart" deals at the expense of smaller MVPDs.[934] These claims fundamentally mischaracterize the video transport business and CMC's role in it.

CMC is a wholly-owned subsidiary of Comcast. CMC's HITS service aggregates and transmits digital video programming via satellite to cable operators and other MVPDs, which in turn transmit that content to their subscribers. In order to provide these services, CMC obtains

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931 *See* Avail-TVN Comments at 3 (urging divestiture of iN DEMAND and CMC): NTCA Comments at 10 (urging divestiture of CMC); FACT Coalition Comments at 22-23 (urging divestiture of iN DEMAND and CMC); WealthTV Comments at 13 (contending that CMC is a programming "choke point").

932 *See* Avail-TVN Comments at 15.

933 *See id.* at 9.

934 *See* NTCA Comments at 10.

non-exclusive rights from programming networks to multiplex and uplink their content to leased satellite transponders for transmission to the headends of MVPDs that purchase this CMC service.[935] The overwhelming majority of networks with which CMC deals are unaffiliated with Comcast or NBCU. Importantly, MVPDs that utilize CMC must separately contract with each of the networks for rights to distribute the programming to their customers; the networks, not CMC, control contractual access to their programming.

CMC's transport service is *not* a bottleneck; to the contrary, it is a facilitator. As Avail-TVN notes, HITS serves 10 million MVPD subscribers, which represents only about 10 percent of all MVPD subscribers.[936] Further, the use of third-party transport services is diminishing as MVPDs increasingly obtain their video programming directly from programmers (via so-called "direct feeds") or self-provide by distributing linear feeds to their systems over their own fiber networks. Moreover, to the extent that MVPDs want to use a transport service, they can use Avail-TVN or EchoStar VIP, and are not limited to using HITS.[937]

NTCA claims that the joint venture would "have the incentive to create favorable pricing arrangements for itself and any partners" and that these "sweetheart deals would occur at the expense and to the detriment of competing companies, especially rural MVPDs."[938] These claims are unfounded. In fact, CMC helps small operators by providing cost-effective solutions like

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935 CMC has no exclusive agreements with respect to either linear or VOD content.

936 Avail-TVN Comments at 9. Presently, HITS serves approximately three million non-Comcast subscribers, or about three percent of the MVPD marketplace.

937 Consequently, FACT Coalition cannot credibly argue that the HITS service "is an essential facility." FACT Coalition Comments at 23. Comcast has made all of its national linear programming networks available to Avail-TVN for transport and has made all of its national linear programming networks except PBS KIDS Sprout available to EchoStar VIP for transport.

938 NTCA Comments at 10.

HITS Quick Take Plus, which enables capacity-constrained systems to deliver dozens of digital programming services, including HD programming, to their customers without having to invest in expensive plant upgrades.[939]

Applicants note that similar HITS-related concerns were raised in the context of the Comcast-AT&T transaction in 2002. There, the Commission found that "there are several alternative sources of digital programming, including direct feed options from the programmers themselves" and that the applicants "would not have the ability to prevent competing MVPDs from gaining access to other digital programming packages."[940] In light of these marketplace facts, the Commission rejected proposed HITS-related conditions in its approval order.[941] The Commission should reach the same conclusion here.

2. Commenters Mischaracterize the Nature of Comcast's Ownership Interest in iN DEMAND, and Ignore the Competitive Marketplace for VOD Services.

Avail-TVN and certain other commenters assert that Comcast is using its ownership interest in iN DEMAND to harm competition in the VOD marketplace, and will continue to do

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939 *See* http://www.comcastmediacenter.com/hits-quantum/hits-quicktakeplus.html (last visited July 20, 2010). CMC is making every effort to meet the specialized needs of its Quick Take Plus customers. For example, in 2009, CMC made infrastructure investments that enabled approximately 50 small cable operators to provide HD channels to their subscribers for the first time. Likewise, the HITS VOD In a Box solution allows smaller operators to offer thousands of hours of SD and HD VOD content to customers, while avoiding the significant capital and operational expenses typically associated with traditional VOD service delivery. *See* http://www.comcastmediacenter.com/hits-quantum/vod-in-a-box.html. This service is offered to any entity that holds a cable franchise, including telco video providers. We also note that Avail-TVN offers a competing service. Lastly, CMC recently announced that it is offering a discount on its HITS Quantum Services, which provide a cost-effective way for operators to add HD channels. *See* Mike Reynolds, *CMC Dangles Digital Carrots Offers Discounts on HITS Quantum Services Through End of 2010*, Multichannel News, July 6, 2010, *available at* http://www.multichannel.com/article/454486-CMC_Dangles_Digital_Carrots.php.

940 *AT&T-Comcast Order* ¶ 116.

941 *See id.*

so post-transaction.[942] These commenters misunderstand Comcast's relationship with iN DEMAND and ignore the intense competition in the marketplace for VOD services. Their recommended conditions should be rejected.

These comments are predicated on the assumption that Comcast can dictate unilaterally the decision-making processes at iN DEMAND. That is *not* the case. While Comcast owns a 53.7 percent economic interest in iN DEMAND, it does *not* exercise control over the company. Under the In Demand LLC Agreement, there is a Management Committee with a member from each of iN DEMAND's owners – Comcast, Cox, and the Time Warner Cable/Bright House partnership. Voting on the Management Committee tracks each member's ownership percentage, which is revised annually based on relative number of subscribers. [[

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Avail-TVN's claim that Comcast "already engages in anti-competitive conduct in the VOD market"[943] is false. The marketplace for VOD services is intensely competitive. Avail-TVN concedes that it – not iN DEMAND – is currently the largest aggregator of VOD services,[944] and it competes vigorously with iN DEMAND and CMC, among others, to obtain

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942 *See, e.g.*, Avail-TVN Comments at 8-9; FACT Coalition Comments at 23.

943 Avail-TVN Comments at 8.

944 *See id.* ("Avail-TVN today currently has more total subscribers than Comcast").

VOD content from programmers and to sell VOD packages to MVPDs.[945] In fact, Comcast's cable systems today receive VOD content from Avail-TVN, iN DEMAND, and CMC. And PBS KIDS Sprout, a Comcast-affiliated network, pays Avail-TVN to distribute its VOD assets.[946] Furthermore, Comcast and other MVPDs can acquire VOD content directly from programmers, as Comcast does in the case of HBO and Showtime, rather than using third-party aggregators. The reality is that no VOD aggregator can be a gatekeeper in this environment.

Avail-TVN errs in stating that Comcast "engages in anti-competitive bundling of its various video delivery services to reduce competition."[947] MVPDs are free to purchase VOD or PPV services from iN DEMAND and transport services from CMC, but they are never required to take these services together. Importantly, even if Comcast wanted to do so, CMC and iN DEMAND lack the ability to force other MVPDs to agree to such deals.[948] An MVPD can use CMC to transport iN DEMAND content, or it can use some other method.[949]

In addition, Avail-TVN alleges that iN DEMAND and CMC engage in predatory pricing by "increasingly offering low-cost/no-cost deals to both content owners and MVPDs[.]"[950] Here

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945 For example, Avail-TVN has certain VOD rights to distribute HBO and Showtime content that neither CMC or iN DEMAND possess.

946 Contrary to Avail-TVN's claim, *see id.* at 9, CMC does not have an exclusive arrangement to distribute VOD content from PBS Sprout and FEARNet.

947 *Id.* at 10.

948 For similar reasons, there is no basis to Avail-TVN's suggestion that, post-transaction, Comcast "could require that MVPDs use iN DEMAND, CMC, or other delivery services in order to receive NBCU content." *Id.* at 11.

949 Avail-TVN also asserts that, post-transaction, "Comcast could make NBCU content available to MVPDs only if the MVPDs purchase Comcast's integrated TV/PC service – a tactic that is already in progress with Fancast Xfinity TV." *Id.* at 12. This completely misapprehends the notion of TV Everywhere, which allows Comcast – or any other MVPD – to make content from its MVPD service available online *to its own MVPD subscribers*, and Comcast does so at *no additional charge*. Comcast does not sell the service to other MVPDs. Rather, other MVPDs have developed their own TV Everywhere services, to provide similar capabilities to their own customers.

950 *Id.* at 9.

again, Avail-TVN provides no evidence in support of its claims. In any event, it would not be economically rational for iN DEMAND and CMC to price their services in this way.[951] Further there is no merit to Avail-TVN's claim, nor is it supported by any evidence. Like the service providers they must compete with every day, iN DEMAND and CMC price their services to content providers and MVPDs in response to the demands of the marketplace.[952]

3. There Is No Basis for Avail-TVN's Claim That In DEMAND Acts Anti-Competitively in the Marketplace for PPV Programming.

Avail-TVN asserts that "Comcast is able to use its large market share at iN DEMAND to limit the competitive delivery of PPV content."[953] Essentially, Avail-TVN argues that it cannot compete in the PPV marketplace unless it is able to obtain exclusive rights to PPV content.[954] That may be Avail-TVN's business model, but Comcast does not believe that PPV content is

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951 As the Supreme Court has noted, "predatory pricing schemes are rarely tried, and even more rarely successful." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986). Allegations of excessively low prices should be discounted because "cutting prices in order to increase business often is the very essence of competition." *Id.* at 594.

952 DirecTV and WealthTV also make unfounded claims about Comcast and iN DEMAND. DirecTV charges that Comcast attempted to use iN DEMAND's INHD services to extract from satellite competitors higher fees than Comcast itself paid for the same programming. *See* DirecTV Comments at 10 n.23. DirecTV made this claim in a 2005 program access complaint against iN DEMAND, and iN DEMAND demonstrated why the claim was false in its answer in that proceeding. *See In the Matter of DirecTV, Inc. v. iN DEMAND L.L.C.*, Answer of iN DEMAND L.L.C., CSR-6901-P (July 19, 2005). DirecTV subsequently withdrew its complaint, and the case was dismissed. *See In the Matter of DirecTV, Inc. v. iN DEMAND L.L.C.*, Order, 21 FCC Rcd. 3878 (2006). Likewise, there is no merit to WealthTV's claim that iN DEMAND ties its less successful MOJO programming service to its PPV and VOD services. *See* WealthTV Comment at 15. MOJO discontinued service in 2008, but while it was in existence, iN DEMAND offered MOJO on a standalone basis to MVPDs and did not require MVPDs to take the service in a bundle with other iN DEMAND services.

953 Avail-TVN Comments at 7. Although PPV often describes the particular pricing arrangement between an MVPD and its customers for specific content (such as a live boxing match or music concert), in its pleading Avail-TVN defines PPV to mean a mode of content distribution and consumption where the consumer elects to view the content during a regularly scheduled time and is charged a fee for such viewing. *See id.* at 6. Under this definitional framework, VOD is distinct from PPV in that VOD involves a mode of content distribution and consumption where the consumer views the content at a time of the consumer's choosing. *See id.* at 8. For the purposes of this discussion, Applicants follow Avail-TVN's nomenclature, but for the sake of clarity note that VOD includes much content that is offered on a transactional (or PPV) basis.

954 *Id.* at 7.

generally provided on an exclusive basis. In the case of live sports programming, for example, the professional sports leagues generally license their out-of-market packages on a non-exclusive basis to PPV aggregators like iN DEMAND or directly to MVPDs. In instances where some degree of exclusivity is provided, it is not always the case that the holder of the exclusive rights actually enforces those rights. For example, in the limited cases where iN DEMAND has exclusive rights, such as to Howard TV and NHL Center Ice, it elects not to enforce those rights. Rather, as Avail-TVN concedes, "iN DEMAND will license PPV programming to Avail-TVN," which Avail-TVN can then sell to other MVPDs.[955]

In contrast, Comcast's experience has been that Avail-TVN *does* exercise exclusive control over certain VOD content, and *does* leverage that exclusive control to ensure that MVPDs that want certain content must use Avail-TVN's services to deliver that content. Comcast today uses Avail-TVN services to obtain delivery from 48 programmers, including some of the largest programmers (*e.g.*, Viacom, Fox, and NBC). In a number of cases, Comcast *must* obtain delivery from Avail-TVN if it wants to receive certain content from a particular programmer because Avail-TVN is performing the VOD content delivery on behalf of the programmer and, where available, *vigorously enforces its own exclusivity rights*.[956]

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955 *Id.*

956 Avail-TVN states that "Comcast's iN DEMAND refuses to license PPV programming from Avail-TVN, which effectively 'blocks' any content owner from offering exclusive rights to Avail-TVN." *Id.* at 9. Comcast is not privy to the discussions that may have taken place between Avail-TVN and iN DEMAND on this subject, but the logic of Avail-TVN's argument is not apparent. There is nothing to prevent Avail-TVN from seeking exclusives (it has built its business model around them), nor is it apparent why iN DEMAND should be forced to license content from Avail-TVN.

B. Claims that the Proposed Transaction Should Be Denied or Conditioned Based on Allegations Regarding Labor Issues Should Be Rejected Both Because They Are Not Transaction-Specific and Because They Are Without Merit.

Both Comcast and NBCU understand from decades of experience that successful communications, information, and entertainment businesses rely on trained, talented, and motivated employees.[957] Through the joint venture, Applicants will create an innovative media and entertainment company that increases its talented employee base over time. Comcast recognizes and respects the relationship that NBCU has with its current employees, and it is Comcast's desire to embrace, not disrupt, this relationship in creating the new NBCU. As a result, Applicants do not anticipate that any fundamental changes will be made to the manner in which NBCU conducts labor relations. To the contrary, Applicants have voluntarily committed to honor all of NBCU's collective bargaining agreements,[958] and both the Directors Guild of America and Joint Council 42 of the International Brotherhood of Teamsters (parent body to 23 Teamster Local Unions in Southern California, Southern Nevada, Hawaii, Guam, and Saipan)

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[957] Comcast's cable, Internet, and digital voice businesses employ and depend on tens of thousands of workers who, among other responsibilities, install advanced services in customers' homes, split fiber nodes, and improve Internet safety. Similarly, NBCU's successful broadcast and cable programming and successful movies are built from the labors of reporters, actors, writers, camera operators, stagehands, and other skilled workers and guild members.

[958] *See* Memorandum from David L. Cohen, Executive Vice President, Comcast Corporation, *Comcast/GE Announcement Regarding NBC Universal* (Dec. 3, 2009), *available at* http://www.comcast.com/nbcutransaction/pdfs/PublicInterestCommitments.pdf. Comcast has committed that, where bargaining unit employees have chosen to be represented by a union, Comcast will not delay good-faith negotiations with the bargaining unit representative. In fact, senior representatives of Comcast and NBCU already have begun to correspond and meet with representatives of guilds and unions in the businesses that would be directly affected by the transaction, and representatives of the new NBCU look forward to working constructively with union leaders. Since filing their applications, Applicants have made a number of additional employment-related commitments. *See, e.g.*, Rush Letter, *supra* note 99 (outlining numerous workforce recruitment and career development initiatives the new NBCU will undertake to enhance workforce diversity); Hispanic MOU, *supra* note 120 (outlining Applicants' agreement to increase Latino representation at all levels of employment following the joint venture); Responses to Questions from Several Members of Congress, *supra* note 88, at 21 (discussing Comcast's commitment to developing Diversity Management Plans that will enhance workplace diversity by focusing on "four key areas: (1) recruitment and selection; (2) development, advancement, and retention; (3) communication and education; and (4) accountability and management practices").

and International Brotherhood of Teamsters, Studio Transportation Drivers Local #399 (Hollywood, California) have filed comments supportive of the transaction.99[959]

CWA and a small number of other parties nonetheless have filed petitions or comments challenging the proposed transaction on the basis of various labor and employment-related claims, and urging the Commission either to deny the Applications or to impose onerous conditions on the joint venture.[960] CWA has made similar arguments in *at least six* prior license transfer proceedings, including proceedings in which it has asserted almost identical claims against Comcast, and in each of these proceedings the Commission has rejected its arguments.[961] The Commission should reject these arguments once again.

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[959] *See* Letter from Leo T. Reed, Division Director, International Brotherhood of Teamsters, Studio Transportation Drivers Local 399, to Julius Genachowski, Chairman, FCC (June 9, 2010,) (representing Hollywood, California); Letter from Randy Cammack, Vice President-at-Large, Joint Council 42 of the International Brotherhood of Teamsters, to Julius Genachowski, Chairman, FCC (June 10, 2010) (Joint Council 42 is the parent body to 23 Teamster Local Unions in Southern California, Southern Nevada, Hawaii, Guam, and Saipan.); Letter from Jay D. Roth, National Executive Director, Directors Guild of America, to Marlene H. Dortch, Secretary, FCC (June 21, 2010).

[960] CWA Petition to Deny at 8-12, 50-51; CWA Local 7037 Comments (representing Sante Fe, New Mexico); CWA Local 7201 Comments (representing St. Paul, Minnesota); CWA Local 7901 Comments (representing Portland, Oregon); CWA Local 9333 Comments (representing Modesto, California); CWA Local 9408 Comments (representing Fresno, California); CWA Local 9421 Comments (representing Sacramento, California); CWA Local 9423 Comments (representing San Jose, CA).

[961] *See, e.g.*, *In the Matter of Applications Filed for the Transfer of Certain Spectrum Licenses and Section 214 Authorizations in the States of Maine, New Hampshire, and Vermont from Verizon Communications Inc. and Its Subsidiaries to Fairpoint Communications, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 514, ¶ 38 (2008) ("reject[ing] arguments that the transaction is likely to result in the loss of experienced employees" and finding that CWA offered "only speculative concerns . . . not supported by the record"); *Adelphia Order* ¶¶ 232-240 (based on CWA's claims, the FCC "see[s] no reason to impose specific conditions regarding bargaining unit employees"); *In the Matter of Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation*, Hearing Designation Order, 17 FCC Rcd 20559 ¶¶ 31-33 (2002) (finding that "un-adjudicated non-FCC violations, like those alleged by CWA, should be resolved by the governmental agency with proper jurisdiction") ("*Echostar-Hughes Order*"); *In the Matter of Joint Applications of Global Crossing Ltd., and Citizens Communications Company*, Memorandum Opinion and Order, 16 FCC Rcd 8507 ¶ 13 (2001) (rejecting CWA's request "that the Commission condition approval for the transfer of control on the transfer of all the assets and liabilities of the Frontier employee pension plans to Citizens" and noting that "employees who are entitled to benefits have remedies under contract law"); *AT&T-TCI Order* ¶¶ 140-41 (declining to consider CWA's speculative, non-merger-specific employment-related claims); *MCI-WorldCom Order* ¶ 213 (rejecting CWA's employment-related objections to the transaction and concluding that the union's prediction that the merger would have an adverse impact on telecommunications employees was "speculative" and "not . . . credible").

As a threshold matter, the labor and employment issues raised by these parties are not transaction specific and are beyond the scope of the Commission's jurisdiction. The Commission's examination of the potential harms of a particular transaction must be specific to that transaction, and, as described in Section II, the Commission's review process should not serve as an open forum for airing extraneous disputes, including "disputes with one or the other of the applicants that have little if any relationship to the transaction or to the policies and objectives of the Communications Act."[962] The Commission has made clear that labor relations and employment disputes are not within the Commission's jurisdiction, stating that the National Labor Relations Board ("NLRB") is "the more appropriate forum" for addressing "labor-oriented concerns,"[963] and that "[i]t is long-standing Commission policy not to involve itself with private contract disputes."[964] Moreover, allegations of labor and employment law violations are not among the categories of misconduct relevant in assessing a transferee's character qualifications.[965] In rejecting the almost identical claims made by CWA in the *Adelphia* proceeding, the Commission found that the "character qualifications allegations raised by commenters do not raise a substantial and material question of fact warranting designation for hearing" and that the commenters have not "justified imposition of labor-oriented conditions"

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962 *AOL-Time Warner Order* ¶ 6; *see supra* Section II.

963 *Adelphia Order* ¶ 240 n.739.

964 *Actions Taken Under Cable Landing License Act*, Public Notice, 20 FCC Rcd 8557, DA 05-1268 at 4 n.12 (2005).

965 *See, e.g.*, *In the Matter of Application of WPIX, Inc. for Renewal of the License of Commercial TV Station WPIX (TV) New York, New York*, Memorandum Opinion and Order, 5 FCC Rcd 7469 ¶¶ 2, 15 (1990) (finding "that WPIX's adjudicated [NLRA] violations constitute non-FCC misconduct and . . . do not fall within the ambit of relevant, non-FCC misconduct contemplated by the Commission" because such violations do not "suggest any lack of truthfulness or candor in its dealings with [the Commission] or any other regulatory body"); *see also Policy Regarding Character Qualifications*, Policy Statement and Order, 5 FCC Rcd 3252 ¶ 7 (1990) (noting that the Commission continues "to believe that it is appropriate to refrain from making licensing decisions based on mere allegations of relevant non-FCC misconduct") ("*Character Policy Statement*").

because they "have not raised issues concerning Commission-related conduct or the types of adjudicated non-Commission misconduct relevant under the *Character Policy Statement*."[966] The labor-related claims by CWA and certain other commenters consequently have no place in this proceeding and should be dismissed.

Not only are these claims beyond the scope of this proceeding, they completely mischaracterize Applicants' approach to labor relations issues. For example, CWA's assertion that the structure of the joint venture "will lead the new entity to cut costs and jobs" simply is incorrect.[967] As Comcast's Chairman and Chief Executive Officer recently testified, "[t]he fact is [that] Comcast doesn't own a theme park, doesn't own a news channel, doesn't own a broadcast [network], 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."[968]

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966 *Adelphia Order* ¶ 238; *see also Echostar-Hughes Order* ¶ 33; *MCI-WorldCom Order* ¶ 213; *In the Matter of Qwest Communications International Inc. and U S WEST, Inc., Applications for Transfer of Control*, Memorandum Opinion and Order, 15 FCC Rcd 5376, ¶ 63 n.178 (2000) (declining to review the labor concerns made against Qwest); *Bell Atlantic-NYNEX Order* ¶ 244 (noting that "[n]one of [the labor-related] allegations involve the kinds of non-FCC misconduct deemed relevant to an applicant's character qualifications, let alone an adjudication of such misconduct.").

967 *See* CWA Petition to Deny at 8. CWA also erroneously claims that Comcast has shifted work to non-union contractors in San Francisco and in Michigan in an effort to deprive unionized workers of employment opportunities. *Id.* at 10. In fact, these decisions to shift work to contractors were based not on union affiliation but on legitimate business needs. Moreover, these decisions were designed to provide Comcast employees, including unionized employees represented by CWA, the opportunity to perform as much as of the advanced, high-paying workload as possible. By shifting a portion of the company's basic residential installation work to contractors, Comcast allowed its existing employees to perform more skilled labor tasks such as maintenance of its fiber optic cable network. Comcast does not make any hiring decisions based on whether or not a facility is unionized. This fact is borne out by recent events. Comcast recently completed the construction of a new corporate headquarters building in Philadelphia. This project, which is the largest private sector development in the history of the Commonwealth of Pennsylvania, was completed using solely unionized labor sources.

968 Testimony of Brian L. Roberts, Chairman and CEO, Comcast Corporation, *Consumers, Competition, and Consolidation in the Video Broadband Market*, Hearing Before the Subcomm. on Commc'ns, Tech., and the Internet, Senate Comm. on Commerce, Sci., and Transp., Transcript at 119 (Mar. 11, 2010).

Applicants have a consistent track record of creating jobs in America, and the proposed transaction will stimulate investment and innovation, which in turn will promote job preservation and creation.[969] Many participants in this proceeding, including the governors of several large states, have recognized the companies' leadership in this area.[970] In addition to job creation, Applicants have a long history as pro-employee companies that offer their workers competitive wages, progressive benefits packages, comprehensive training, and job enrichment programs.[971]

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[969] Comcast has expanded from 12 employees in 1963 to over 100,000 today, and NBCU currently has over 33,000 employees. Because the proposed combination between Comcast and NBCU largely is a vertical combination, Applicants do not expect that the proposed synergies of this combination will include job losses. Following the transaction, the new NBCU is expected to hold an investment grade credit rating. This level of debt will not affect Applicants' ability to maintain current employment levels. *See generally* Public Interest Statement (describing the ways in which the joint venture will yield public interest benefits and advance the Commission's public policy goals of diversity, localism, competition, and innovation); *see also* Testimony of Brian L. Roberts, Chairman and Chief Executive Officer, Comcast Corporation, *The Comcast/NBC Universal Merger: What Does the Future Hold for Competition and Consumers? Hearing Before the Subcomm. on Antitrust, Competition Policy, and Consumer Rights of the S. Comm. on the Judiciary*, Transcript at 59 (Feb. 4, 2010) ("I think that is one of the best parts of this [joint venture's] story, is that it is not based on the backs of eliminating jobs. It is a risk and a bet that America's economy is turning around, advertising is going to come back, that content is going to be copy protected, and that business models will be found that are successful in the future and make this a good investment.").

[970] *See, e.g.*, Letter from California Governor Arnold Schwarzenegger, New York Governor David Paterson, and Pennsylvania Governor Ed Rendell to Julius Genachowski, Chairman, FCC (May 25, 2010) ("Between them, Comcast and NBCU account for almost 130,000 jobs . . . [and] Comcast has made clear that this venture is not about cutting jobs . . . [Applicants] have also made commitments to grow their new media business.").

[971] *See, e.g.*, Letter from Mark Wilson, President & CEO, Florida Chamber of Commerce, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 11, 2010) ("Comcast and NBC Universal are two of Florida's strongest employers and revenue generators . . . . Comcast and NBC Universal are already two very important members of our state's business community and will most certainly maintain and grow that trend should their transaction be approved."); Letter from Matt Smith, Pennsylvania State Representative, to Julius Genachowski, Chairman, FCC, *et al.*, MB Docket No. 10-56, at 1 (June 21, 2010) ("Comcast employees have consistently evaluated the company as a fair employer that is invested in its workforce."); Letter from Tyrone Ellis, Mississippi State Representative, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Mar. 26, 2010) ("Comcast invests heavily in continuing education, providing the opportunity to rise through the ranks and turn a job into a career. It is no wonder that Comcast has been ranked among the 'Most Admired Employers for Minority Professionals' by US Black Engineer and Women of Color magazines."); Letter from Clay Ford, Florida State Representative, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 14, 2010) ("I believe that the combination of an iconic company like NBC Universal with a business that has become one of America's leading innovators – Comcast – can only benefit our broader economy and create new jobs for Floridians and Americans."); Letter from Ronald S. Calderon, California State Senator, to Julius Genachowski, Chairman, FCC, *et al.*, MB Docket No. (June 18, 2010) ("I'm well aware of the critical economic role played by our entertainment industry and . . . believe the proposed transaction between Comcast and NBC Universal has the unique potential to simultaneously bolster the entertainment sector's technical capacity and strengthen its creative vitality.").

This pro-employee history and the positive impact the proposed transaction will have on the companies' employees have been explicitly recognized by a number of key Hollywood unions and the Directors Guild of America.[972]

Claims that Comcast has engaged in "anti-union" activities or other practices harmful to employees are baseless.[973] Contrary to the impression that CWA and certain CWA locals seek to create in this proceeding, Comcast respects its employees' right to choose union representation and does not attempt to stifle worker organizational efforts or union activity.[974] Comcast employees can – and do – freely choose whether to be represented by a union, using secret

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[972] *See* Letter from Leo T. Reed, Division Director, International Brotherhood of Teamsters, Studio Transportation Drivers Local 399, to Julius Genachowski, Chairman, FCC (June 9, 2010) ("We believe that the Comcast-NBCU transaction is strongly in the interests of the workers we represent . . . and our economy as a whole."); Letter from Randy Cammack, Vice President-at-Large, Joint Council 42 of the International Brotherhood of Teamsters, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 10, 2010) ("The Comcast-GE joint venture is very much in the interests of our members, including the nearly 5,000 Teamsters whose work is closely tied to the entertainment industry. We strongly believe that marrying two American entertainment companies – in this case Comcast and NBC Universal – will strengthen the economic future of our members."); Letter from Jay D. Roth, National Executive Director, Directors Guild of America, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56 (June 21, 2010) ("In a time when the industry is facing financial pressures from all sides, we expect that Comcast's commitment to grow the industry, infuse new capital into the entertainment business and invest additional resources into programming will represent a change from the uncertainty caused by many of the current owner's past decisions concerning commitment to our industry, programming and jobs.").

[973] Four individuals have filed comments and complaints setting forth various unsupported claims regarding employment conditions at GE and/or NBCU. *See* Nick Balsamo Comments; Harold Barber Comments; Charles Giles Complaint; Neil Winikoff Comments. The Commission should dismiss these comments and complaints without further consideration. These filings raise extraneous issues beyond the Commission's jurisdiction, focus on isolated unadjudicated complaints (some of which have never even been filed with the appropriate adjudicatory body), and are unsubstantiated and without merit. Moreover, two of the four involve complaints about the treatment of daily hires under the prevailing collective bargaining agreement. NBCU's treatment of daily hires is entirely consistent with the agreement the union has negotiated on their behalf.

[974] For example, there is no basis for CWA's claim that Comcast "sought to eliminate the existing unions" following the AT&T Broadband/Comcast transaction. CWA Petition to Deny at 9. After that transaction closed, and consistent with its labor policies, Comcast at all times adhered to fair labor-management practices. In the Chicago area, for example, Comcast actively attempted to negotiate a union contract because the pre-existing union contracts had expired three years before Comcast acquired AT&T Broadband. Comcast acted in good faith throughout this negotiation process while the union engaged in delay tactics, continually altering its request for separate or joint negotiations with the employment units and failing to present its demands to Comcast in a timely manner.

ballots.[975] CWA loosely claims that the NLRB "has repeatedly cited Comcast for violations of labor law,"[976] but its only support for this allegation are vague assertions related to three NLRB proceedings arising out of events that took place seven or more years ago and that were resolved through those proceedings.[977] A few CWA union locals raise similarly unsubstantiated assertions regarding alleged labor law violations.[978] These claims, like those discussed above, provide no basis for denying or imposing conditions on the proposed transaction.

It is not uncommon for large employers to be subject to employment or labor law claims. Indeed, CWA itself has been the subject of such claims.[979] The dated, isolated matters cited by CWA and other parties fall far short of establishing any pattern of labor law violations by Comcast. To the contrary, Comcast's active participation in the NLRB process demonstrates that Comcast is committed to addressing any complaints by adhering to the procedures established by the applicable CWA collective bargaining agreement.

The Public Interest Statement, as well as Applicants' track record, demonstrates that the proposed transaction will benefit not only consumers, but also employees, of the new joint venture. Moreover, numerous commenters have attested to Applicants' status as "excellent"

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975 There are currently multiple bargaining units representing employees across Comcast's business. In locations that are represented by a union, Comcast bargains in good faith to reach a fair labor contract and generally enjoys a favorable relationship with union locals.

976 CWA Petition to Deny at 10.

977 One alleged incident, which occurred in Hialeah, Florida, arose out of events that occurred prior to Comcast's 2002 acquisition of AT&T Broadband, and that matter was settled without any finding of fault on the part of Comcast. Comcast's actions in all of these cases were based on good-faith business decisions. Comcast has never fired or disciplined employees for participating in union organizing activities.

978 *See* CWA Local 7037 Comments; CWA Local 7201 Comments; CWA Local 7901 Comments; CWA Local 9333 Comments; CWA Local 9408 Comments; CWA Local 9421 Comments; CWA Local 9423 Comments.

979 *See, e.g.*, *Catania v. Local 4250/505 of the Commc'ns Workers of Am.*, 834 N.E.2d 966 (Ill. App. Ct. 2005) (decision on appeal arising out of claim filed by former office manager against CWA local for retaliatory discharge, tortious interference with contract, and violations of Illinois Wage Payment and Collection Act).

employers that provide employees with "competitive wages and quality benefits."[980] Neither CWA nor any other party provides any credible evidence to the contrary. Accordingly, the Commission should dismiss the labor-related claims set forth in the CWA petition and opposing comments.

C. Coalition of Organizations for Accessible Technology Comments

The Coalition of Organizations for Accessible Technology ("COAT") requests that the Commission impose several conditions relating to closed captioning, video description, and other disabilities-related matters.[981] COAT's proposed conditions are not transaction-specific and are unnecessary in light of Applicants' records regarding disabilities access and current Congressional efforts to address disabilities access issues on an industry-wide basis. Accordingly, the Commission should deny COAT's request.

Applicants appreciate COAT's comment that individuals at Comcast and NBCU "have done much to promote accessibility and usability of products and services to people with disabilities."[982] Comcast, for example, works closely with its equipment suppliers, programmers, and others to ensure that captioning services work properly;[983] includes on its website detailed information on the various captioning options for customers, as well as instructions as to how the

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980 *See, e.g.,* Letter from Beth Kirkland, Executive Director, Economic Development Council of Tallahassee/Leon County, Inc., to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 21, 2010) (asserting that Comcast "is an excellent employer, providing competitive wages and quality benefits, including health care, to its employees").

981 *See* COAT Comments (July 7, 2010). The COAT comments were filed more than two weeks after the comment deadline had passed. Because of Applicants' continuing interest in serving people with disabilities, and despite the non-transaction-specific nature of the concerns raised, Applicants will respond to those comments here.

982 *Id.* at 8.

983 All of the models of set-top boxes that Comcast makes available to its customers include built-in caption decoding capability and/or have the ability to pass through caption data to TV sets connected via NTSC ports.

subscriber can activate the closed captioning features in his or her set-top box;[984] and constantly strives to improve its customer service outreach to customers with disabilities.[985] Likewise, with respect to Comcast Digital Voice service, Comcast already provides access to Telecommunication Relay Services; complies with the requirements of Section 255 of the Act; and supports Hearing Aid Compatibility in the only phone it distributes, among other things.[986]

NBCU has an equally strong commitment to serving individuals with disabilities. For instance, NBC is actively participating in the FCC's new Technical Working Group that is studying digital closed captioning and video description.[987] In addition, NBC.com was one of the first broadcast network websites to provide closed captioning of its online programs, beginning in the fall of 2007.[988] As of the first quarter of 2010, about 90 percent of the programming offered on NBC.com was provided with closed captioning.[989]

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984 *See* Comcast Customer Central, Closed Captioning, http://customer.comcast.com/Pages/FAQListViewer.aspx?topic=Cable&folder=f601e707-c196-4ef2-87b3-9be44fce7af6 (last visited July 13, 2010).

985 Comcast also is working on solutions to enable closed captioning that is included in long-form video content provided on Fancast, and aims to make such solutions available to customers later this year.

986 Comcast also makes billing statements available, upon request, in Braille or large-print format for its visually-impaired customers, and this option is available to Comcast's cable, voice, and HSI customers, as well.

987 FCC Public Notice, FCC Announces Establishment of Technical Working Group to Study Digital Closed Captioning and Video Description Issues, Appointment of Members, Agenda for First Meeting, DA 09-995 (May 1, 2009) (identifying NBC representative, Greg DePriest, as a member of the working group).

988 *See* James Hibberd, *Closed out; The Digital Revolution Has Made TV More Ubiquitous Than Ever-Except for Viewers Who Need Captioning*, Television Week, June 18, 2007 (discussing the 2007 launch of NBC's web player that included closed captioning capabilities); *see also NBC Gets with the Program and Offers Captioned Online Video, TV Jots*, *available at* http://tvjots.com/nbc-gets-with-program-and-offers/ (last visited July 20, 2010).

989 In addition to serving those with disabilities, NBCU works to educate its audience about disabilities and helps recognize significant achievements in the disabilities community. For example, NBCU's local and national news coverage has highlighted issues affecting those with disabilities. *See, e.g.*, Meredith Vieira, *Disability Awareness*, NBC.com, http://www.themoreyouknow.com/disability-awareness/ (last visited July 16, 2010) (explaining disability rights, discrimination, how to overcome attitudinal barriers and what people can do to empower those with disabilities); *Investigation: Protecting disabled adults* (NBC Philadelphia television broadcast Oct. 23, 2009) (explaining endemic problems in Pennsylvania's disability care laws and encouraging viewers to contact state legislators); *Disabled riders facing devastating MTA cuts* (NBC New York television broadcast May

Applicants are committed to improving, wherever feasible, the accessibility of their services to people with disabilities. On July 6, 2010, Applicants announced that Comcast will be establishing a Diversity Advisory Council that will include representatives of diversity communities, including the disabilities community.[990] The Council will facilitate open communication regarding the development, monitoring, and evaluation of initiatives relating to customers with disabilities. The Council also will provide advice to the senior executive teams at Comcast and NBCU regarding the companies' development and implementation of a strategic plan to improve their practices in this area post-transaction. Applicants would welcome COAT's involvement in these efforts.

Applicants further note that Congress is actively considering bills that would address, on an industry-wide basis, most of the issues discussed in COAT's comments, such as new requirements relating to video description and Internet-based services and equipment.[991] COAT, the cable and content industries, and numerous other stakeholders have been participating in these legislative efforts, with constructive results.[992] Applicants welcome the opportunity to work with COAT and others as the legislative process continues to move forward this year, and believe that COAT's proposals should be considered in that context, involving all stakeholders, rather than a Commission transaction review proceeding involving just Applicants.

14, 2010) (reporting about transportation cuts that would leave those with disabilities with little or no access to key bus lines).

990 *See* Hispanic MOU at 3-4, *supra* note 120.

991 H.R. 3101, the Twenty-First Century Communications and Video Accessibility Act of 2010, was approved by the House Subcommittee on Communications, Technology and the Internet on June 30, 2010, and the House Energy and Commerce Committee is expected to consider the measure on the day of this filing. Likewise, the Senate Commerce Committee approved companion legislation, S. 3304, the Equal Access to 21st Century Communications Act, on July 15, 2010.

992 *See, e.g.*, http://www.coataccess.org/ (detailing COAT's advocacy on the House and Senate legislation).

D. Cable Prices

Since the announcement of the deal, Applicants have stressed that this transaction should not affect cable pricing to consumers. A few commenters and petitioners made generalized attacks on cable prices that are not even specifically levied against Comcast.[993] Because these attacks are meritless, inaccurate, and not related to the transaction, the Commission should not consider them in its review.

Nevertheless, Applicants believe it is important to correct some of the inaccurate statements made by parties regarding pricing and the marketplace. A multitude of factors go into Comcast's decisions regarding the packaging and pricing of the services it offers, and Comcast believes that its offerings strike the appropriate balance by offering both high-value and high-quality service. One of the most prominent factors is the competition Comcast faces in the video distribution marketplace. Comcast competes against DirecTV and Dish nationally in every market in which it provides service. In many of those markets, Comcast also faces competition from telephone companies like AT&T and Verizon, as well as overbuilders like RCN, WOW!, Knology, and SureWest. And these competitors are fierce. In about 15 years, DirecTV and Dish have become the second and third largest MVPDs, respectively.[994] And Verizon and AT&T are now both top ten MVPDs and continue to grow every quarter.[995]

Along the way, Comcast – like its rivals – has continuously improved the value proposition for customers. Prices may have increased, but quality and choice have increased far

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993 *See* Cooper/Lynn Decl. at 33-34; Sen. Franken Comments at 2.

994 *See* NCTA, Top 25 Multichannel Video Programming Distributors as of Mar. 2010, *available at* http://www.ncta.com/Stats/TopMSOs.aspx (last visited July 16, 2010).

995 *Id.*

more. Abundance and diversity of programming have never been greater, and cable is a better value proposition than ever.

There is little doubt that consumers are getting more for their money than they did in the past. Indeed, at a little over $2 a day, cable is about the price of a morning cup of coffee. On a monthly basis, standard cable is less expensive than taking a family of four to the movies once and a fraction of the price of taking the family to a single sporting event. The average cable household viewing time is 310.5 hours per month; compare that to one three-hour ballgame or a couple of hours at a movie theater. When adjusted for inflation, the "price per viewing hour" of cable service has decreased 26 percent over the last 10 years.[996] Plus, the quality of the programs Comcast delivers has increased, as has the versatility of the service (*e.g.*, VOD, which offers thousands of choices, most at no additional charge).

In addition, many of Comcast's customers take advantage of promotional or multi-product discounts. Comcast offers HSI and digital voice services in addition to video, and consumers who buy two- or three-product packages enjoy significant savings as compared to the prices of the services when purchased separately. Other customers receive promotional price discounts, *e.g.*, when they first sign up for service or when they agree to a service-level upgrade. The growing use of such discounts is often omitted from cable price surveys, and that has the effect of skewing the results.

Comcast is focused on controlling costs, which ultimately benefits its customers. Like all of its competitors, however, Comcast must adjust prices to account for the increased costs of

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[996] *See* The Proper Measure of Cable's Value, National Cable & Telecommunications Association, *available at* http://www.ncta.com/PublicationType/MiscellaneousPublication/The-Proper-Measure-of-Cables-Value.aspx (last visited July 14, 2010).

doing business. It's a fact of life – separate and apart from the proposed transaction – that programming costs have risen and will likely continue to rise.[997] Notably, many of our competitors, including AT&T, Dish Network, DirecTV, and Verizon, have increased their prices by as much or more than Comcast, reflecting the continuing cost pressures of the business.[998]

E. City of Seattle *et al.* Comments

The City of Seattle and several other local franchise authorities ("LFAs") seek to use this proceeding as a forum to raise various issues pertaining to rate regulation of Comcast's cable systems. That strategy is inconsistent with longstanding Commission precedent, and, in any event, the arguments presented by Seattle *et al.* are clearly at odds with the regime of cable rate regulation established by Congress and the Commission.[999]

1. Bona Fide Rate Disputes Should Be Addressed Through the Established Rate Review Process.

If the LFAs have any *bona fide* grievances with Comcast's rates, those grievances should be resolved through the local rate regulation process. The LFAs do not deny that the Commission's rate regulation framework leaves them with initial responsibility for basic service and equipment regulation.[1000] Yet, none of the LFAs has taken any action with regard to the

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997 *See, e.g.*, Mike Farrell, *Tapped Out: How Much Will Consumers Pay for TV?*, Multichannel News, Apr. 19, 2010, *available at* http://www.multichannel.com/article/451629-Tapped_Out.php; Roger Cheng, *DirecTV CEO: Programming Costs Will Continue To Be a Challenge*, Wall St. J., May 26, 2010, *available at* http://online.wsj.com/article/BT-CO-20100526-711803.html.

998 *See, e.g.*, Todd Wallack, *Cable TV, Satellite Prices Rise, Boston Globe*, Jan. 22, 2008, *available at* http://www.boston.com/business/technology/articles/2008/01/22/cable_tv_satellite_prices_rise/.

999 The following discussion addresses the overarching jurisdictional issues raised by Seattle *et al.* without burdening the Commission or this proceeding with a comprehensive discussion of every particular rate regulation matter raised by the LFAs.

1000 Indeed, as their comments acknowledge, "many of the LFAs are empowered to regulate basic service, equipment and installation rates in accordance with FCC regulations and local rules, and are certified rate regulation authorities that regularly monitor and review Comcast's rate making practices and calculations." City of Seattle *et al.* Comments at 3. Pursuant to the 1992 Cable Act, the Commission has given local franchising authorities initial

various rate allegations advanced in their comments. It appears the LFAs are seeking to extract concessions in the context of this proceeding that are not merited under applicable rate regulations. Comcast respectfully submits that any *bona fide* rate issues should be addressed by the LFAs through the established rate regulation framework, rather than in the context of a transactional review that has no bearing on the LFAs' rate allegations.[1001]

2. The LFAs Seek Rate Regulation of Deregulated Systems and Services.

The LFAs seek to impose comprehensive rate restraints through this proceeding without acknowledging that Comcast is no longer subject to rate regulation in significant portions of the country, including several of the participating LFA communities.[1002] Even for those Comcast communities still subject to local rate regulation, the LFAs' comments are jurisdictionally flawed. The LFAs repeatedly ask the Commission to regulate *non*-basic rates, despite the fact that Congress deliberately limited the permissible scope of cable rate regulation to basic service and associated equipment. Moreover, if the LFAs were to prevail in this proceeding, the perverse result in many instances would be an increase in the rates charged to Comcast's basic-

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responsibility for administering the rate regulation of basic service and equipment. In order to regulate basic service and equipment rates, a franchising authority must certify to the Commission that it "will adopt and administer regulations with respect to the rates for the basic service tier that are consistent with the regulations prescribed by the Commission for regulation of the basic service tier." 47 C.F.R. § 76.910(b)(1).

[1001] The problem with addressing community-specific rate issues in this proceeding is well illustrated by the suggestion at the conclusion of the LFAs' comments that there *may* have been a deficiency in the written notices Comcast submitted to certain Washington State LFAs in March 2010. City of Seattle *et al.* Comments at 18. No Washington State LFA has complained to Comcast about that notice, and Comcast cannot discern from the comments the precise nature of the purported deficiency. Comcast is, of course, prepared to work with the affected LFAs to address any legitimate notice concerns. Comcast submits, however, that any notice deficiencies should have been identified in a timely manner at the local level, where such notice issues are typically addressed. This proceeding is not the appropriate forum to resolve factual questions about community-specific notices wholly unrelated to the NBCU Transaction.

[1002] The LFAs' repeated claims that Comcast is trying to evade applicable rate regulations are irrelevant to the vast majority of Comcast's communities, in which Comcast is not currently subject to rate regulation due to a combination of "effective competition" determinations by the Commission and various deregulatory determinations by state and local authorities.

only subscribers. Even a cursory review of a few of the issues raised in the comments reveals the factual and legal flaws undermining the LFAs' attack.

HD Technology Fee. Comcast's introduction of an HD Technology Fee is consistent with Commission regulations, closely matches the HD offerings of Comcast's competitors,[1003] and ultimately benefits consumers.[1004] The LFAs ignore the critical fact that basic-only subscribers do not pay the HD Technology Fee because they do not utilize the full range of advanced network technologies used by customers of unregulated services – instead, they will pay only for the set-top box equipment they need at rates at or below the maximum permitted rate. In short, the LFAs are complaining about a charge that applies only to services (like most cable offerings today) that Congress has expressly placed outside the permissible scope of cable rate regulation. In addition, the LFAs contend that the HD Technology Fee evades the rate rules, and that Comcast should be required to file an FCC Form 1235 with local regulators before imposing *any* charge related to network upgrade costs.[1005] Comcast agrees that a new Form 1235 filing would be appropriate if the Company were seeking to further increase basic service rates to

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[1003] AT&T U-verse charges a $10 HD Technology Fee. DirecTV charges a $10 HD Access Fee. Dish charges a $10 HD Enabling Fee. DirecTV and Dish recently announced promotional offers of "Free HD for Life." However, these offers are short-term promotions, and include significant restrictions such as term commitments with early termination fees, requirements for automatic bill pay, and restrictions on levels of service eligible for the promotion.

[1004] In the past, Comcast typically charged customers for each HD set-top box they leased based on the higher cost of HD-capable set top boxes. In contrast, when the HD Technology Fee is fully implemented, an HD customer will pay for HD on a whole-home basis (through the HD Technology Fee) regardless of the number of the customer's HD connections and, as a result, will generally see a savings on his or her monthly bill. Moreover, the HD Technology Fee better reflects the substantial investments in network capacity and equipment that allow Comcast to deliver more HD programming, such as expanded HD VOD libraries.

[1005] City of Seattle *et al.* Comments at 7-9.

recover additional upgrade costs.[1006] That is not the case here. The HD Technology Fee is an unregulated rate imposed on customers subscribing to unregulated levels of service. A new Form 1235 is not required where, as here, the cable operator is not trying to recover new upgrade costs by increasing regulated basic service rates.[1007]

DVR Service Fee. The LFAs' claims regarding Comcast's DVR service fee is similarly misguided.[1008] Contrary to the LFAs' assertion, there is nothing wrong with imposing an unregulated DVR service fee in addition to a regulated equipment fee. In fact, Comcast's DVR service fee has been in existence for many years, and none of the LFAs, in their administration of cable regulation, has ever denied Comcast's right to impose an unregulated DVR service fee.[1009] The DVR cable box provided by Comcast is simply a converter with storage. It is Comcast's DVR *service* that organizes the programming through a guide, organizes the recorded content,

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[1006] In fact, the Commission created Form 1235 in 1995 so that cable operators (struggling under the burdens of the new "benchmark" rate regime) could more easily recover the cost of significant network upgrades through their *regulated* service rates.

[1007] It is noteworthy that the LFAs' own expert witness – Richard Treich – is on record at the FCC stating that Form 1235 is unnecessary in light of current marketplace incentives. In particular, Mr. Treich said that: "In the current cable marketplace, there is no need for the Form 1235. . . . [I]t is clear that a cable operator has every incentive to upgrade its plant, and can easily recover all the costs of the upgrade, based on the new, high-value, unregulated service the upgraded plant can provide. . . . The FCC could eliminate this Form almost entirely." Letter from Libby Beaty, Executive Director, NATOA to Marlene H. Dortch, Secretary, FCC,, MB Docket No. 02-144, at 8-9 (Oct. 7, 2004) (attaching white paper), *available at* http://fjallfoss.fcc.gov/ecfs/document/view?id=6516492810. Ironically, in arguing for a Form 1235 filing, the LFAs are effectively advocating an increase in the basic service rate. As just explained, the only reason to file a Form 1235 would be to justify an increase in the basic service rate to a local rate regulator. As Comcast is not seeking to impose those costs on basic-only customers, the LFAs' demand for the filing of Form 1235s is misguided and must be rejected.

[1008] *See* City of Seattle *et al.* Comments at 13-14.

[1009] Comcast's competitors, unencumbered by any rate regulation, charge their customers in the same way. A TiVo customer, for example, typically buys the TiVo DVR (box), then pays TiVo a monthly fee (for DVR *service*).

allows for customized recording settings, and – a most recent enhancement – provides the ability to program the DVR over the Internet when away from home.[1010]

HD Additional Outlet Service Fee. The LFAs argue that Comcast's "High Definition Additional Outlet Charge" in Washington State should be subject to local rate regulation.[1011] However, as they acknowledge, the Commission addressed the issue of "additional outlet" charges a half dozen years ago and concluded that additional outlet fees are beyond the scope of basic regulation, provided such fees are assessed only on the delivery of non-basic services.[1012] Contrary to the LFAs' suggestion, [1013] the contested Additional Outlet fees are unregulated under this Commission precedent because they are imposed by Comcast on the delivery of non-basic service. Basic-only customers are not assessed any Additional Outlet fees. Any of the equipment they use to receive basic service (including basic service offered in HD) at additional outlets is made available by Comcast at rates fully justified using the FCC Form 1205 without the imposition of a supplementary Additional Outlet service charge.[1014]

Basic-Only HD Equipment Fee. The LFAs also are mistaken in arguing that Comcast must charge all basic-only customers a $1.00 receiver charge, regardless of whether the basic-

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[1010] DVR service requires ongoing, two-way communication between the Comcast headend and the customer premises equipment to operate.

[1011] *Id.* at 14-16.

[1012] *Id.* at 15 & Ex. 1 (Declaration of Richard D. Treich at 5).

[1013] *Id.* at 15 (claiming that the Commission precedent on additional outlets is "inapposite and distinguishable" because "[h]ere, the additional HD outlets at issue can be used to receive only the basic service tier, so the issue of additional outlets used to receive only non-regulated services is not raised.").

[1014] The fact that Basic Service may include HD channels that are available on additional outlets is legally irrelevant because Comcast makes these Basic HD channels available on additional outlets without imposing any Additional Outlet charge.

only customer selects a standard-definition ("SD") receiver or an HD receiver.[1015] The Commission never intended to deny cable operators the ability to charge basic-only customers the cost of advanced equipment that they actually use. As certain basic channels are now offered in HD, it follows that some basic-only customers may want Comcast to provide an HD-capable receiver. For that reason, Comcast is establishing different rates for SD basic-only receivers and HD basic-only receivers. LFAs with the requisite regulatory authority will have the opportunity to review the cost justification of each charge through their annual rate review.[1016]

Impact on Retail Equipment. The LFAs' argument that Comcast's HD Technology Fee is "anti-competitive and runs afoul" of Section 629 of the Act and the FCC's rules is wrong due to an apparent misunderstanding of the facts. The LFAs contend that the fee "deters consumers from purchasing third-party receivers and manufacturers from designing and constructing them because it is highly unlikely that most subscribers would choose to pay for receivers twice – once at retail and again in the HD Technology Fee."[1017] As explained above, the HD Technology Fee will be implemented as a fee covering the whole home, regardless of the number of HD devices in the home.[1018] It is not a fee for individual HD devices, nor does it provide a "subsidy" for

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1015 As shown in Comcast's Form 1205, Comcast's $1.00 Basic-Only receiver charge was calculated based on Comcast's SD receivers. This approach produces a very modest equipment rate that benefits basic-only customers. It is also consistent with Commission policy (established long before the roll-out of HD receivers) to avoid having basic-only customers subsidize advanced equipment that they do not use. *Implementation of Section 301 (j) of the Telecommunications Act of 1996; Aggregation of Equipment Costs by Cable Operators*, 11 FCC Rcd 6778 ¶ 23 (1996) ("We conclude that Congress intended to ensure that basic-only subscribers not bear the costs of equipment used by subscribers taking services in addition to basic.").

1016 If Comcast were forced to combine SD and HD equipment costs in a single, hybrid basic-only receiver rate, based on the equipment basic-only customers actually use, the hybrid price for basic-only customers would increase from the low $1.00 rate charged for SD equipment.

1017 Seattle Comments at 16-17.

1018 The HD Technology Fee is currently being applied on a whole-home basis in some markets, and that policy will be extended across the rest of Comcast's footprint over the next several months.

leased devices.[1019] In any event, customers who use Unidirectional Digital Cable Ready Products ("UDCPs") purchased at retail, such as DVRs manufactured by TiVo and Moxi, and do not lease set-top box equipment from Comcast, are not subject to the HD Technology Fee.[1020]

F. City of Detroit Comments

The City of Detroit's comments provide no basis for the Commission to deny or condition the proposed transaction. The City's sole grievance concerns a state-wide franchising statute enacted by the Michigan Legislature in 2006 – a grievance which the City belatedly took to federal court on the same day it filed its comments in this proceeding.[1021] As such, the issues raised by the City will be resolved in the federal court case and need not be addressed by the Commission in this proceeding.

Comcast operates in Detroit pursuant to a state Uniform Franchise granted under the Uniform Video Services Local Franchise Act, P.A. 480, passed by the Michigan Legislature in 2006 and effective January 1, 2007. Consistent with the Commission's holdings in the First Report and Order on Section 621,[1022] the Michigan Act streamlined the franchising process in Michigan and limited the scope of franchise obligations a local franchise authority could

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[1019] Comcast acknowledges that a local government relations employee sent an e-mail response to a single local regulator's inquiry, which response included the incorrect statement that the HD Technology Fee was "inclusive of the use of an HD cable box." This may be the source of the LFAs' misunderstanding of the facts.

[1020] The HD Technology Fee reflects Comcast's investment in the infrastructure necessary to deliver HD VOD content to Comcast customers, among other things, and UDCPs cannot access such interactive content. Consequently, a customer who uses a UDCP and does not lease a set-top box, is not charged the Fee. Moreover, contrary to the implication in the LFAs' comments, Comcast strongly supports efforts to promote a retail marketplace for navigation devices, consistent with the goals of Section 629 and the Commission's implementing rules. *See* Comments of Comcast Corporation, CS Docket No. 97-80, PP Docket No. 00-67 (June 14, 2010); Reply Comments of Comcast Corporation, CS Docket No. 97-80, PP Docket No. 00-67 (June 28, 2010).

[1021] *City of Detroit v. Comcast of Detroit, Inc.*, Case No. 2:10-cv-12427 (E.D. Mich., filed June 21, 2010). The "Claim of Unconstitutionality" is an exhibit to the City's Comment.

[1022] *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101 (2007).

demand. In compliance with the state law, Comcast submitted a Uniform Franchise to the City and is operating pursuant to that franchise.[1023] The City's numerous allegations of noncompliance and malfeasance are all predicated on the baseless notion that Comcast remains bound by a franchise agreement that was entered into in 1985 and that expired on February 28, 2007. In fact, Comcast's operations in the City are governed by the new state Uniform Franchise, and Comcast is in full compliance with the franchise.

Previously, the City and Comcast had a dispute over an attempt by the City to make an unauthorized modification to the Uniform Franchise in order to impose a new two percent PEG fee on City residents. On June 19, 2007, the City filed a complaint with the Michigan Public Service Commission ("MPSC") regarding this dispute.[1024] The City refused to participate in an informal mediation proposed by the MPSC.[1025] When the MPSC subsequently sought to commence a proceeding on the City's complaint, the City refused to participate.[1026] On July 1, 2009, the MPSC dismissed the City's complaint without prejudice due to its failure to prosecute the matter.[1027] To the extent the City's comments are an attempt to resurrect this three-year-old grievance over the Uniform Franchise, the appropriate forum for resolving its complaint is at the state level or in the federal court lawsuit, not as part of this proceeding.

1023 The City's web page shows that both Comcast and AT&T are operating in the City pursuant to Uniform Franchises under the State statute. *See* www.detroitmi.gov/DepartmentsandAgencies/CableCommission/CableVideoServices.aspx (last visited July 16, 2010). Therefore, the City's claim that Comcast "is currently operating as a holdover tenant under its expired 1985 franchise," City of Detroit Comments at 3 n.1, is false.

1024 *In the Matter of the Verified Complaint of City of Detroit for Resolution of a Dispute with Comcast of Michigan under the Uniform Video Services Local Franchise Act*, Case No. U-15329, Order (July 1, 2009). The parties had a dispute over what the Michigan Act allows the City to demand in the way of PEG fees.

1025 *Id.* at 1.

1026 *Id.* at 2.

1027 *Id.*

The City's reliance on two prior lawsuits in Michigan as evidence of Comcast's alleged malfeasance fails because the City's portrayals of both cases are inaccurate. The *City of Dearborn*[1028] case is well known to the Commission – the federal court referred to the Commission several questions regarding the carriage of PEG channels in digital format. As the Commission is also aware, the parties (which did not include the City of Detroit) reached a settlement fully resolving the proceeding.[1029] Similarly, the City's statement that Comcast settled the *City of Flint* case "so no court order binding on Comcast that would affect other communities resulted"[1030] is untrue. The case never went beyond the filing of a complaint and was amicably settled between the parties with no indication from the Court as to the merits of the case.[1031]

The City's overheated rhetoric regarding Comcast's character fails to provide any basis for denying the transaction. Whatever the reason for Detroit making these statements now, the City is on record with statements that are decidedly to the contrary. As recently as April 24, 2010, in declaring that day "Comcast Cares Day," the City issued a Testimonial Resolution stating that Comcast "not only provides quality communications products and services but enriches the communities it serves." In fact, the day after the City filed its comments impugning Comcast's character, the City Council hosted Comcast and a group of local high school students

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1028 *City of Dearborn v. Comcast of Mich. III, Inc.*, No. 08-10156, 2008 WL 4534167 (E.D. Mich. Nov. 25) ("*City of Dearborn*").

1029 Letter from Wesley Heppler, Davis Wright Tremaine LLP, Counsel for Comcast, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 09-13, CSR-8128 (Dec. 23, 2009). The City relies on an unpublished ruling (earlier in the Dearborn litigation) on a motion to dismiss, but fails to disclose that the ruling was expressly limited in its effect: "The Court's ruling that the Local Franchise Act is preempted by federal law simply means the Court concludes that Plaintiffs state a cause of action under their various franchise agreements." *City of Dearborn*, 2008 WL 4534167 at *6. The Court never ruled on the merits of the plaintiffs' claims nor was the preemption issue further litigated or subject to appeal.

1030 City of Detroit Comments at 10 n.5.

1031 *City of Flint v. Comcast of Flint, Inc.*, Case No. 2:08-cv-14871 (E.D. Mich. 2008). Flint was represented by the same counsel as represents Detroit in this matter.

at a Council meeting to recognize the award of 15 $1,000 scholarships to the students under Comcast's Leaders & Achievers scholarship program. Finally, the City's attempt to portray itself as a representative of grievances shared across Michigan is belied by the dozens of favorable comments filed by local and state officials, community organizations, and businesses in Michigan.[1032]

[1032] *See, e.g.*, Letter from Gerald Brown, Mayor, City of Trenton, Michigan to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 7, 2010); Letter from Gary Burtka, Mayor, City of Allen Park, Michigan, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Apr. 22, 2010); Letter from Victor W. Loomis, Jr., Mayor, City of East Lansing, Michigan, Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 7, 2010); Letter from Karen F. Dunigan, Mayor, City of Jackson, Michigan, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 15, 2010); Letter from Robert A. Ficano, County Executive, Wayne County, Michigan, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 4, 2010); Letter from Ahmad Chebbani, Chairman and Co-Founder, American Arab Chamber of Commerce (Dearborn, Michigan), to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 21, 2010); Letter from Jennifer Giering, President, Dearborn Chamber of Commerce (Michigan), to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 4, 2010); Letter from Hassan Jaber, Executive Director, Arab Community Center for Economic and Social Services (Michigan), to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56 (Mar. 29, 2010); Letter from David Palsrok, Vice President, Government Relations, Small Business Association of Michigan, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 17, 2010); Letter from Kristin Beltzer, Senior Vice President, Government Relations, Lansing Regional Chamber of Commerce (Michigan), to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Apr. 29, 2010); Letter from Barbara Pyle, Executive Director, MacMedia (Michigan), to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Apr. 16, 2010). *See also* letters from 25 State Senators, Representatives, and government officials, including, *inter alia*, Letter from Terri Lynn Land, Secretary of State, Michigan, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 18, 2010); Letter from Bruce Patterson, Michigan State Senator, 7th District, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 16, 2010); Letter from Ron Jelinek, Michigan State Senator, 21st District, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 10, 2010); Letter from Mike Nofs, Michigan State Senator, 19th District, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 8, 2010); Letter from John J. Gleason, Michigan State Senator, 27th District, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 11, 2010); Letter from Gerald Von Woerkom, Michigan State Senator, 34th District, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 9, 2010); Letter from Roger Kahn, M.D., Michigan State Senator, 32nd District, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 9, 2010); Letter from Fred Durhal, Jr., Michigan State Representative, 6th District, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 10, 2010); Letter from Richard LeBlanc, Michigan State Representative, 18th District, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56 (June 10, 2010); Letter from Lee Gonzalez, Michigan State Representative, 49th District, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Mar. 26, 2010). Favorable comments also were filed by numerous Detroit community organizations and officials, *see, e.g.*, Letter from Gil Hill, Former President of the Detroit City Council, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 11, 2010); Letter from Paul Bridgewater, President and CEO, Detroit Area Agency on Aging, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Apr. 26, 2010); Letter from Rev. Horace J. Sheffield, President, Detroit Association of Black Organizations, to Julius Genachowski, Chairman, FCC, *et al.*, MB Docket No. 10-56 (Mar. 29, 2010); Letter from John George, Founder and President, Motor City Blight Busters, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 7, 2010); Letter from Kenneth Harris, President and CEO, International Detroit Black Expo, Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56 (Apr. 6, 2010).

G. Public, Educational, and Governmental Programming

The National Association of Telecommunications Officers and Advisors ("NATOA"), the Alliance for Communications Democracy ("ACD"), and the Greater Metro Telecommunications Consortium ("GMTC") (collectively, "PEG Commenters"), in largely duplicative comments, have raised questions and proposed new requirements regarding PEG channels. Applicants are pleased to provide certain requested clarifications regarding the voluntary PEG commitments set forth in their Public Interest Statement, but there is no basis for the additional requirements the PEG Commenters seek to impose.

The PEG Commenters fail to offer any evidence that the proposed transaction will have any harmful effect on PEG programming, which is already covered by Section 611 of the Act, state franchising laws, and the terms of local cable franchise agreements.[1033] They fail to provide any reason why the Commission should allow this transaction review to be used to rewrite Section 611 and to unilaterally modify the PEG provisions of existing franchise agreements and state franchising statutes. And they fail to demonstrate that the proposals they make are in the public interest, or that there is any reason for applying them to Comcast but not to other cable operators.

1. Digital Carriage and Channel Placement

The PEG Commenters focus primarily upon Applicants' Commitment # 11.[1034] The PEG Commenters complain that this commitment is inadequate and propose that several additional PEG-related conditions be added. There is no basis for these suggestions.

[1033] The PEG Commenters scarcely attempt to demonstrate that their concerns are transaction-specific. These conclusory statements are devoid of any meaningful analysis that justifies raising these issues in this proceeding.

[1034] *See* Public Interest Statement at 68. Commitment # 11 provides: "With respect to PEG channels, Comcast will not migrate PEG channels to digital delivery on any Comcast cable system until the system has converted to all-

NATOA makes the startling suggestion that Comcast should be required to move all digital PEG channels *back to analog carriage*.[1035] Despite the fact that these PEG channels have already been transitioned to digital carriage in a manner consistent with local franchise agreements or specific state laws or by agreement of PEG programmers, NATOA would force PEG programmers to abandon the advantages of digital signal carriage to return to the lower quality analog delivery even as the world moves inexorably to digital transmission technologies.[1036] The PEG Commenters offer no evidence of their authority to speak for the numerous communities and states[1037] in which these digital transitions have been lawfully and willingly implemented.

The PEG Commenters request that Comcast be required to carry all PEG channels on the Basic Service Tier after the digital transition is complete.[1038] The national commitment that the PEG Commenters seek would conflict with those franchise agreements and state franchising

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digital distribution (*i.e.*, until all analog channels have been eliminated), or until a community otherwise agrees to digital PEG channels, whichever comes first."

[1035] NATOA Comments at 5 ("We request that the Commission require Comcast to agree to move PEG channels *currently* being provided in a digital format back to an analog format.") (emphasis in original).

[1036] Full-power TV broadcasters ended all analog transmissions more than a year ago. As discussed in the Public Interest Statement, Comcast is rapidly migrating expanded basic channels to digital-only delivery via the "Project Cavalry" initiative, which will be complete across approximately 80 percent of Comcast's footprint by the end of this year. *See* Public Interest Statement at 18 n.19.

[1037] The overreaching nature of the PEG Commenters' arguments is starkly illustrated by the following incorrect assertion: "Comcast does not promise to restore to analog the PEG channels that is has already digitized – the PEG channels, for example, that were converted to digital format in the state of Nevada." Comments of Alliance for Communications Democracy at 9. Comcast, however, has no cable systems in the state of Nevada.

[1038] The PEG Commenters note that Comcast agreed to such a provision in the Consent Order resolving litigation in the State of Michigan. However, the Consent Order provision mandating continued carriage of digital PEG channels on the Basic Service Tier was entered into in the specific context of the Michigan state franchising law as well as applicable local franchise agreements. *See City of Dearborn*, 2008 WL 4534167.

laws that specifically allow for a greater flexibility in the placement of PEG channels.[1039] The Commission should decline the proposed national mandate to forever carry digital PEG channels on the Basic Service Tier (even if the cable system is rate-deregulated), as it would change applicable federal law and conflict with such state legislation and negotiated local agreements.

Next, PEG Commenters ask the Commission to confer on PEG channels special privileges regarding channel placement that Congress expressly conferred on broadcast channels but not on PEG channels.[1040] It has been and remains Comcast's position that it will comply with all applicable federal, state, and local requirements pertaining to PEG channel placement.[1041] The Communications Act clearly does not provide for any such PEG channel placement obligations (as it specifically does so provide for broadcast channels). Approval of this transaction is not the appropriate forum to enact the very channel placement obligations that Congress chose not to apply to PEG.[1042]

1039 *See, e.g.*, Ariz. Rev. Stat. § 9-506(D)(1); Fla. Stat. § 610.109(6); La. Rev. Stat. § 1369(B)(3); Mo. Rev. Stat. § 67.2703(1)-(3); Nev. Rev. Stat. § 711.800(1); Ohio Rev. Code § 1332.30(A), (B); Tenn. Code Ann. § 7-59-309(h); Tex. Util. Code § 66.009(d); Va. Code Ann. § 15.2-2108.19; W. Va. Code R. § 150-26-1, Form No. 2 (PSC Franchise Agreement § 4(f)); Wis. Stat. § 66.0420(5)(a)(3)-(4).

1040 *See* Section 614 of the Communications Act.

1041 The PEG Commenters point to the inclusion of a "placement" provision in the Michigan Consent Order. However, the Consent Order provision requires *only* that Comcast comply with PEG channel placement obligations as they appear in its Michigan local franchise agreements. Likewise, PEG Commenters give the impression that a separate "Settlement Agreement" in that same proceeding requires Comcast to maintain the current channel placement of all PEG channels on Comcast systems throughout Michigan for a two year period. However, that Settlement Agreement provision applies to only three of the plaintiff communities in the proceeding and does not apply to any other Comcast system community in the State of Michigan.

1042 The Alliance for Communications Democracy also seeks a condition that would require Comcast to provide PEG channels in the same "format" and with the same "features and functionality" as provided in the carriage of local television broadcast stations. Once again, the Communications Act provides for no such PEG carriage requirements. Further, there are significant legal and technical distinctions between broadcast stations and PEG channels (*e.g.*, multicast rights and capabilities, HD transmissions, sub-carrier content, etc.) that could impose substantial cost, capacity, and technology burdens upon a cable operator if such a national carriage requirement were to be enacted as a condition to approval of this transaction.

2. Trials to Develop New Platforms for PEG Distribution

Two of the PEG Commenters also raise questions and concerns regarding Applicants' Commitment # 12 to develop prospective new distribution platforms for PEG programming.[1043] These commenters take Comcast's offer to work with a specific number of communities on innovative new distribution models for PEG (using VOD and the Internet in addition to linear channels) and propose to turn this positive initiative into massive and unjustified burdens: requiring "VOD for PEG programming [in] all Comcast communities significantly sooner than three years" and substituting franchising authority fiat for a cooperative and constructive discussion in determining what PEG content is made available on VOD.[1044] Bearing in mind that the PEG Commenters have made no showing of transaction-specificity for any requirements in this area, and that Comcast's two largest competitors have no local PEG obligations whatsoever, the Commission should decline this invitation to subject Applicants' voluntary offer to significant regulatory burdens.

One of the primary goals in conducting tests is to determine not just that a technology works – of course PEG content can be carried on VOD – but to determine whether there are more technologically efficient and cost efficient means for PEG programmers to reach more residents of the local community.[1045] Simply putting PEG programming on VOD does not

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[1043] *See* Public Interest Statement at 69 ("To enhance localism and strengthen educational and governmental access programming, Comcast will also develop a platform to host PEG content On Demand and On Demand Online within three years of closing.").

[1044] GMTC Comments at 7-8; *see also* NATOA Comments at 9-10.

[1045] For example, when a program is placed on VOD today, that program is available to all VOD subscribers served off of the system headend. A headend can and often does serve multiple communities, and the VOD program cannot be directed at a single community served from that headend. Given the inherently local nature of PEG programming, testing for potential solutions that would allow targeting PEG VOD programming to specific communities is one worthwhile goal of a trial.

accomplish that goal. The proposed trials will help determine which programming receives a significant VOD response, which programming is accessed most frequently by those online, which programming is most effectively communicated on a traditional linear PEG channel, and what mix and interplay of these platforms is most effective in reaching residents.

While PEG Commenters argue that all PEG content should be available on all Comcast distribution platforms, this demand has no basis in federal law and wholly ignores the implications for capacity, cost, and effectiveness. The objective of Comcast volunteering to perform these trials is to find out what works best – from a technology perspective, from a cost perspective, and, perhaps most importantly, from a subscriber interest perspective – that will allow PEG providers to strengthen PEG programming. Comcast believes that a three-year period to evaluate such tests in five different communities is the appropriate process to find these answers.[1046]

H. Piracy and the Enforcement of Copyrights

Some petitioners imply that the combination of Comcast and NBCU may create an incentive to more strictly enforce copyrights online and that this would somehow harm consumers and violate the process set forth in the Digital Millennium Copyright Act ("DMCA").[1047] Such assertions are without merit.

Both Comcast and NBCU understand the importance of protecting intellectual property, which is the foundation of U.S. creative industries. Copyright infringement, including online

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[1046] The PEG Commenters seek assurances that Comcast will reach out to local governments and the PEG community in conducting the proposed trials. Comcast believes that the only way such trials will be effective is through extensive collaboration with local community partners. Similarly, while Comcast has no interest in selecting the PEG content that is distributed in these trials, it is essential that Comcast work with local community partners to determine what programming they believe is more effectively distributed over a particular platform.

[1047] *See, e.g.*, Cooper/Lynn Decl. at 57-64.

piracy, hurts content owners and, ultimately, consumers, because it undermines the ability of content owners to earn the necessary return on their investment in developing high-value content and makes them less likely to put such content online. Comcast will continue to support content owners, including by forwarding to its ISP customers the notices of alleged copyright infringement that it receives from content owners.[1048] In 2009, Comcast received over one million emails into its DMCA notification inbox and forwarded valid notification to its customers so that they could understand the basis for the notifications Comcast received from copyright owners.

At the same time, Comcast has a well-established policy and history of compliance with the DMCA that fairly balances the interests of consumers and content owners, and the proposed transaction will not change that. Comcast also supports better consumer education about copyright as well as effective efforts to encourage consumers to use legitimate sources of content instead of pirate sources. For instance, Comcast has developed and launched Fancast Xfinity TV in an effort to bring more content online in a legitimate way that is easy for consumers to access and use.

Comcast is clear and transparent regarding its copyright enforcement policy and compliance with the DMCA.[1049] It is Comcast's policy, in accordance with the DMCA, to reserve the right to terminate the HSI service provided to any customer or user who is either

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[1048] Pursuant to its Terms of Service, when Comcast receives a "satisfactory notice of claimed infringement," it notifies the customer, who then has the opportunity to counter. Comcast, Acceptable Use Policy for High Speed Internet Services, Section V, http://www.comcast.net/terms/use/#dmca (last visited July 16, 2010) (detailing Comcast's DMCA compliance procedures).

[1049] Comcast, Acceptable Use Policy for High Speed Internet Services, Section V, http://www.comcast.net/terms/use/#dmca (last visited July 1, 2010) (detailing Comcast's DMCA policy, including how copyright owners should report alleged infringements to Comcast and how a customer can submit a counter notification).

found to infringe a content owner's copyright or other intellectual property rights, including repeat infringers.[1050] Comcast is open to considering a voluntary "graduated response" policy with the right balancing of interests, because ISPs should have a role in helping to educate users about copyright infringement and legitimate sources of content. But Comcast does not support termination of any customer's Internet service based on mere allegations of copyright infringement or without meaningful due process protections.

It is in the best interests of customers, ISPs, and content owners that any graduated response or similar process be clearly designed and communicated, be based on reliable, accurate information, and have a straightforward mechanism for customers to seek more information about – or to challenge – copyright infringement notifications regarding their accounts. Contrary to commenters' assertions, the proposed transaction does nothing to change the current need for Comcast to apply fair and workable solutions for customers, ISPs, and content owners alike with respect to online copyright infringement.

I. Trail Blazers Comments

The criticism leveled by the Portland Trail Blazers ("Trail Blazers")[1051] that Comcast has limited consumers' access to Trail Blazers games is misplaced and inaccurate.

Comcast SportsNet-Northwest ("CSN-NW") launched in the fall of 2007. In the season before CSN-NW launched, 21 Trail Blazers games were not televised anywhere on any outlet. Upon launch, CSN-NW significantly increased the amount of Trail Blazers-related content,

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[1050] 17 U.S.C. § 512(i)(1)(A); Comcast, Acceptable Use Policy for High Speed Internet Services, Section V, http://www.comcast.net/terms/use/#dmca (last visited July 1, 2010) ("It is Comcast's policy in accordance with the DMCA and other applicable laws to reserve the right to terminate the Service provided to any customer or user who is either found to infringe third party copyright or other intellectual property rights, including repeat infringers, or who Comcast, in its sole discretion, believes is infringing these rights.").

[1051] Letter from Larry Miller, President, Portland Trail Blazers, Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56 (June 21, 2010).

including live games, available to local fans. Now, between the Trail Blazers' over-the-air partner (which telecast 15 Trail Blazers games during the 2009-10 NBA season), the package of games made available on CSN-NW, and games carried on nationally distributed networks (which telecast seven Trail Blazers games during the 2009-10 NBA season), *all* of the team's regular season games are televised. In addition, prior to the advent of CSN-NW, only about 10 Trail Blazers games were available in HD. Now, all 60 games shown on CSN-NW are available in HD.

During the 2009-10 season, in addition to 60 Trail Blazers games that CSN-NW telecast, CSN also telecast other valuable programming of local interest such as Trail Blazers pre- and post-game shows and game replays for every game telecast, summer-league games, live games of the Vancouver Canucks,[1052] and coverage of the Oregon Ducks and other college sports.

CSN-NW has every business incentive to seek more, not less, distribution for its network. The network's revenues derive primarily from per-subscriber affiliate fees and advertising revenue, both of which grow with increased distribution. CSN-NW has invested substantial capital and assumed the risk associated with launching a new television network, and the path to recovering its investment lies in maximizing distribution at fair terms.

To that end, since its launch, CSN-NW (with its full slate of Trail Blazers programming) has been, and continues to be, made available to every MVPD serving the Trail Blazers' market, including all of Comcast Cable's direct competitors. CSN-NW has worked diligently to secure distribution of CSN-NW and its Trail Blazers games to every local cable, satellite, and telco provider in its footprint, including running costly marketing campaigns to raise consumer

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[1052] The three-year Canucks deal expired with the 2009-2010 season. CSN-NW is in discussions with the Canucks about a potential renewal.

awareness of CSN-NW. Beyond Comcast Cable, 11 other providers, including direct competitors of Comcast Cable, currently carry CSN-NW – the best proof that the network is fairly priced and being made available on fair and reasonable terms. CSN-NW is carried by the following cable and telco companies: Ashland TV, Beaver Creek Telephone, BendBroadband, Canby Telcom, Comcast Cable, Country Cablevision, Frontier Communications,[1053] MINET Fiber, Monroe Telephone, Oregon Cable Group, Scio Cablevision, and Wave Broadband.

The distributors who are not carrying CSN-NW and the Trail Blazers games, including Charter, Dish Network, and DirecTV, have made the decision not to carry the network notwithstanding the fact that it is available to them on the same terms agreed to by other distributors. CSN-NW cannot force these distributors to carry the network. The main reasons proffered by these distributors for their lack of interest are the cost of the network; the breadth of the network's geographic footprint;[1054] sufficient availability of other sports programming of local interest via other means, including the Blazers' over-the-air telecasts on KGW and telecasts of other local sports programming, including Seattle Mariners games, on FSN Northwest;[1055] and, in the case of Charter, the lack of bandwidth to accommodate another analog channel.

The Trail Blazers ask that the Commission require Comcast to "authorize distribution of Trail Blazers games" by competing MVPDs. In fact, this request mischaracterizes the issue –

1053 Until about July 1, 2010, Frontier's systems were owned and operated by Verizon.

1054 As an example of the misplaced blame in Mr. Miller's letter, the letter omits the fact that CSN-NW worked diligently with the NBA – subsequent to the launch of the network in 2007 – to expand the Trail Blazers' television territory into additional areas in Oregon and Washington and, with the move of the Seattle SuperSonics to Oklahoma City in 2008, to expand distribution into the greater Seattle DMA. CSN-NW then secured distribution with the major cable distributors in the Seattle area. It is puzzling that Mr. Miller does not properly assign blame for the limitations on CSN-NW's distribution to those MVPDs that have rejected carriage of the network to underserved fans.

1055 FSN Northwest is owned by a controlled subsidiary of DirecTV, Inc.

Comcast already licenses CSN-NW and its Trail Blazers games for distribution by competing MVPDs and remains ready and willing, as it has been since CSN-NW's launch, to license CSN-NW and its Trail Blazers games to DirecTV, Dish Network, and Charter. But, as explained above, each of these distributors has chosen not to carry the network, even though they are being offered the same price that others in the market are willing to pay.

Moreover, there are already remedies available to distributors that believe that they are being treated unfairly (via a program access claim with the FCC) or that the price and terms being offered do not reflect the fair market value of CSN-NW's programming (via baseball-style arbitration under the *Adelphia Order*). Because none of these distributors has elected to avail itself of these remedies, it would appear that they simply are not interested in paying fair market value for carriage of the network.[1056]

CSN-NW shares the frustration of the Trail Blazers and local fans who cannot follow all of the team's game on TV because certain MVPDs have elected not to carry the network. This, however, has nothing to do with the transaction pending before the Commission.

J. Property Damage Allegation

Elan Feldman has filed an Opposition[1057] and Petition to Deny[1058] in this proceeding, but his concerns are not properly cognizable here. Because Mr. Feldman's grievance with Comcast

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[1056] Claims that the baseball-style arbitration process is too costly for distributors such as DirecTV or Dish Network fall flat, given that both of those MVPDs have not been shy about utilizing that process in recent years to challenge the terms and conditions of carriage offered by other Comcast-affiliated RSNs based on allegations that the terms and conditions offered by such RSNs did not reflect the fair market value of such RSNs' programming.

[1057] *See* Elan Feldman, Opposition to Comcast Acquisition of NBC Universal Due to Comcast's Failure to Serve the Public Interest, Convenience and Necessity, MB Docket No. 10-56 (Apr. 19, 2010).

[1058] *See* Elan Feldman, Petition to Deny Comcast Acquisition of NBC Universal Due to Comcast's Failure to Serve the Public Interest, Convenience and Necessity, MB Docket No. 10-56 (June 16, 2010).

is long-standing and entirely unrelated to the proposed transaction,[1059] it cannot properly bear on the issues before the Commission and should be ignored. Mr. Feldman's complaint stems from a 2005 claim for alleged trespass and property damage which Comcast has tried in good faith to resolve, including by offering to engage in binding arbitration pursuant to Fla. Stat. § 44.104. Mr. Feldman instead filed a lawsuit in May 2009 that is still pending in the Florida courts. To the extent that Mr. Feldman suggests that Comcast lacks the requisite character qualifications to support approval of the proposed transaction due to the existence of this unresolved dispute, it strains credulity to suggest that a single alleged episode of trespass or property damage could bear on the question of fitness to hold a Commission license.[1060] In any event, to accord any weight to allegations in a pending lawsuit would be inconsistent with longstanding Commission precedent.[1061]

VII. CONCLUSION

The public interest benefits of this transaction have been demonstrated, and opponents' theories of competitive harm have been refuted. The proposed joint venture will serve the public

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[1059] Indeed, in response to a formal complaint Mr. Feldman filed in February 2009, the Commission previously informed Mr. Feldman that his claims "are not matters that are within the jurisdiction of the Commission." *See* Letter from Steven A. Broeckaert, Senior Deputy Chief, Policy Division, Media Bureau, to Elan Feldman (Mar. 10, 2009).

[1060] *See, e.g.*, *In the Matter of Policy Regarding Character Qualifications in Broadcast Licensing; Amendment of Rules of Broadcast Practice and Procedure Relating to Written Responses to Commission Inquiries and the Making of Misrepresentations to the Commission by Permittees and Licensees*, Report, Order and Policy Statement, 102 FCC 2d 1179 ¶ 23 (1986) ("*Policy Regarding Character Qualifications*") ("We will be concerned with misconduct which violates the Communications Act or a Commission rule or policy, and with certain specified non-FCC misconduct which demonstrate the proclivity of an applicant to deal truthfully with the Commission and to comply with our rules and policies."); *In the Matter of Application of Texas RSA 1 Limited Partnership For Facilities in the Domestic Cellular Telecommunications Service on Frequency Block B in Market No. 652, Texas 1 – Dallam RSA*, Memorandum Opinion and Order, 7 FCC Rcd 6584 ¶ 8 (1992) (holding that "isolated violations . . . would simply not raise character qualifications questions").

[1061] *See, e.g.*, *In the Matter of Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, Order on Reconsideration, 25 FCC Rcd 3492 ¶ 8 n.24 ("The Commission's longstanding policy is that '[w]e will not take cognizance of non-FCC misconduct . . . unless it is adjudicated.'") (quoting *Policy Regarding Character Qualifications* ¶ 48).

interest, convenience, and necessity. Applicants therefore respectfully request that the Commission expeditiously complete its review and grant the Applications.

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