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

In the Matter of)
)
Applications for Consent to the)
Transfer of Control of Licenses)
)
General Electric Company,)
Transferor,)
)
To)
)
Comcast Corporation,)
Transferee)
To the Commission:)

Docket No. MB 10-56

FILED/ACCEPTED

JUN 21 2010

Federal Communications Commission
Office of the Secretary

PETITION TO DENY

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EXECUTIVE SUMMARY

Bloomberg L.P. (“Bloomberg”) submits that the Commission should deny the application for transfer of control of NBC Universal, Inc. (“NBCU”) from General Electric Company (“GE”) to Comcast Corporation (“Comcast”). GE and Comcast have not met their burden to demonstrate that the application serves the public interest.¹⁷⁸ For the reasons set forth herein, the Commission must deny the Application as filed. In the alternative, if the Commission determines to grant the application, it must require Comcast’s acceptance of the conditions set forth in Exhibit 1 to the Petition, specifically including but not limited to “neighborhooding” of all existing business news channels with CNBC, i.e., carriage of the business news channels on contiguous and adjacent channels wherever tier CNBC is carried. In the absence of the imposition of such conditions, the Commission would have to compel the divestiture of CNBC if it were to grant the Application.

The Merger, as filed with the Commission, will create a fully vertically and horizontally integrated communications behemoth that for the first time in the history of the regulation of the communications industry, will combine under the control of one entity – Comcast –the Nation’s largest multichannel video programming distributor (“MVPD”) with 24 million subscribers, two national television broadcast networks (NBC and the Telemundo Spanish-language network), the largest broadband service provider, 25 local broadcast stations, numerous cable television programming networks owned by Comcast (e.g., E! and the Golf Channel) with those of NBC Universal (e.g., CNBC and the Weather Channel), Universal movie studios and numerous on-line properties.

Bloomberg's television news service, Bloomberg TV[®], an internationally recognized provider of financial news and information, provides 24-hour business news programming delivered over MVPDs, but also available online. Bloomberg employs more than 2300 reporters and editors worldwide, making it among the largest newsgathering organizations in the world. BTV is the last major source of news independent of either MVPDs or integrated programmers.

The competitive threat posed by the combination of the Nation's largest MVPD with CNBC, BTV's principal competitor, and which currently has 85% of the business news market audience, could not be more apparent: Comcast will have every incentive available to harm and discriminate against BTV to protect CNBC, which is estimated to be the second most profitable of NBC's cable networks, with an estimated profit of \$333 million as of March, 2008.

The Commission has the authority and a duty under the public interest standard to preserve independent sources of news and information. Promoting diversity of voices in news is a critical element of the public interest analysis. The public interest objectives considered for cable systems in the context of a review of an application like this Merger specifically include (i) ensuring cable operators or group of operators do not impede the free flow of video programming to the consumer, including news programming, and (ii) cable operators affiliated with video programmers not favor such programmers in determining carriage on their cable systems. Such considerations merit special review of the Application because of the potential for Comcast to cause harm and discriminate against BTV.

As set forth in the Petition and the accompanying Economic Report of Dr. Leslie Marx, the transaction as proposed would adversely affect Bloomberg by giving Comcast the incentive

¹⁷⁸ 47 U.S.C. § 310(d).

and ability to prefer CNBC in channel position and to exclude unaffiliated programmers like BTV from channel positions close to CNBC. In addition, Comcast would have the incentive and ability to require competitors of CNBC to be carried on less widely subscribed tiers or to refuse to carry BTV and other competitors all together. Further, the Merger increases the ability and incentive of Comcast, a major Internet provider and one which has already demonstrated its ability to restrict or degrade service, to place restrictions on the online distribution of network programming as a condition of carriage. In addition, Bloomberg would also be harmed by Comcast's ability to bundle both programming in its negotiations with other MVPDs, which could result in decisions by other MVPDs not to carry BTV, as well as bundling of advertising that would harm BTV's ability to compete in the sale of advertising aimed at the audience shared with CNBC.

In the event that the Commission were to grant the Application, the harm can only be alleviated by the imposition of strict conditions on the merger:

1. Comcast must "neighborhood" all existing business news channels, i.e., placement of BTV and other business news channels on channel positions contiguous and adjacent to CNBC.
2. Comcast is required to carry all existing business news channels on all platforms on which it carries CNBC.
3. Comcast must carry BTV and other business news channels on the same tier of service as CNBC at each channel position where CNBC is carried.
4. Comcast would be prohibited from selling advertising on non-Comcast owned business news channels together with advertising on affiliated Comcast networks as part of a bundled sale of advertising by Comcast without the consent of the owner of the unaffiliated business news channel.
5. Comcast would be prohibited from offering any discount or other inducement to any MPVD or other distributor of news content by electronic means on condition

that such MVPD or distributor provide business news channels less favorable terms or conditions of carriage.

6. Comcast would be prohibited from imposing any restriction, limitation or disincentive on the ability of competing Business News Channels to offer their content on other platforms, including but not limited to the Internet.
7. Comcast would be prohibited from offering to any MVPD or requiring any MVPD to accept 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.
8. Comcast would be prohibited from diminishing or degrading the terms or level of service or quality of signal delivery of any business news channel on any of its content-distribution platforms (e.g. cable, Internet, mobile devices) without the consent of the owner of the competing business news channel.
9. Comcast must provide business news channels like BTV with non-discriminatory terms of carriage, including the provision of subscription fees.
10. There would be established an accelerated arbitration procedure to resolve such claims.

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To the Commission:

PETITION TO DENY

I. INTRODUCTION

Bloomberg L.P. (“Bloomberg”), pursuant to Section 309(d) of the Communications Act of 1934, as amended (the “Communications Act”),¹ and Section 73.3584² of the Commission’s Rules,³ hereby petitions to deny the above-captioned application for transfer of control of NBC Universal, Inc. (“NBCU”) from General Electric Company (“GE”) to Comcast Corporation (“Comcast”).⁴

¹ 47 U.S.C. § 309(d) (2006 & Supp. III).

² This Petition extends to all of the licenses and authorizations included in the Application.

³ 47 C.F.R. § 73.3584 (2009).

⁴ See Applications for Consent to the Transfer of Control of Licenses, General Electric Company, Transferor, to Comcast Corporation, Transferee, Public Notice, MB Docket No. 10-

There are substantial and material questions of fact as to whether grant of the Comcast-NBCU Transaction will serve the public interest, in particular by permitting one company to own the single largest video distribution platform in the U.S. and also control the editorial content of a substantial portion of the news programming available in the United States. The proposed combination will create a fully vertically and horizontally integrated communications behemoth that for the first time in the history of the regulation of the communications industry, will combine under the control of one entity – Comcast –the Nation’s largest multichannel video programming distributor (“MVPD”) with 24 million subscribers, two national television broadcast networks (NBC and the Telemundo Spanish-language network), the largest broadband service provider, 25 local broadcast stations, numerous cable television programming networks owned by Comcast (e.g., E! and the Golf Channel) with those of NBC Universal (e.g., CNBC and the Weather Channel), Universal movie studios and numerous on-line properties.

Specifically, the proposed merger would harm the public interest by granting Comcast-NBCU the ability and incentive to cause harm to, and discriminate against, independent programmers in order to restrain competition. This discrimination threatens imminent injury to independent programmers -- particularly independent news programmers -- and this will negatively affect the viewing public.

The Commission must deny the Application as currently proposed. In the alternative, if the Commission were to grant the Application, it must insist upon strict and enforceable conditions on the Merger – in addition to and independent of present mechanisms such as the

56, DA 10-457 (Mar 18, 2010) (hereinafter, the applications referred to therein, “Application” and the transaction referred to therein, the “Transaction” or the “Merger”).

program carriage rules – to prevent Comcast from acting in an anti-competitive manner to protect its substantial interest in NBC Universal’s programming. If the Commission does not adopt such conditions, the Commission should require divestiture of CNBC.

Of particular concern is the area of news and information programming. Following consummation of the Merger, one entity will control several major news outlets including NBC News, MSNBC, CNBC, the Spanish-language Telemundo news programming and the Weather Channel, as well as regional news channels such as New England Cable News. The news programming networks are critical to the Merger. Of these programming networks, CNBC is the second most profitable property in the Transaction.⁵ Indeed, Comcast CEO Brian Roberts has been recently quoted as saying that “NBC News is the “single most awesome asset that comes from this deal.”⁶

Bloomberg’s television news service, Bloomberg Television[®] (“BTV”), the only worldwide 24-hour business and financial television network, is a party “likely to be financially injured” by the proposed combination.⁷ Grant of the Application will provide Comcast the ability to, and create substantial incentives for, Comcast to acutely harm and discriminate against

⁵ Andrew Edgecliffe Johnson, CNBC Profits From A Crisis, <http://cachef.ft.com/cms/s/0/58992544-0b77-11df-8232-00144feabdc0,s01=1.html?SID=google> (last visited June 4, 2010) (“NBC Universal does not disclose such numbers, but CNBC is reputed to have become its second-most lucrative channel after USA Networks, with an operating profit of between \$300m and \$400m. As such, it serves as a microcosm of what Comcast sees in NBC Universal”).

⁶ Joe Flint, Comcast CEO Brian Roberts Says Cable Gets Bum Rap and he likes ‘Californication’, LA TIMES, May 11, 2010, available at <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2010/05/comcast-ceo-brian-roberts-says-cable-gets-bum-rap-and-he-likes-californication.html>.

⁷ See FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 477 (1940).

BTV. Specifically, Comcast will be able to maximize its subscriber and advertising revenue for CNBC at the expense of BTV without the threat of losing MVPD customers.

The creation of such a combination runs directly contrary to decades of communications law policy founded on the principle that the public interest is served by “the widest possible dissemination of information from diverse and antagonistic sources.”⁸ The Transaction not only merges two currently independent news voices, but also creates an entity that will have every incentive and ability to foreclose other independent sources of news and information. The Commission can only grant the Application with the imposition of substantial conditions to prevent anti-competitive practices and conduct by the entity controlled by Comcast. If the Commission does not adopt such conditions, it should require divestiture of CNBC. In the alternative to such a condition, it must designate specific operational conditions, as well as remedies to ensure the enforcement of the conditions, as set forth in Exhibit 2.

The proposed Merger will result in an unprecedented vertically integrated media venture, which will control a significant amount of programming content. The merged venture will also have the capacity to substantially harm competitors’ programming, particularly in the area of news. The vertical integration, complete with the incentive for Comcast to cause substantial harm to BTV, CNBC’s principal competitor, would threaten the elimination of the last independent news voice. The Merger, therefore, requires a concomitant, unprecedented level of

⁸ Associated Press v. United States, 326 U.S. 1, 20 (1945). The Commission has long held that the public interest standard obliges it to review the impact of mergers on competition, even those nominally complying with the various media ownership rules. See generally Applications of Great Scott Broadcasting, Assignor and Nassau Broadcasting II, L.L.C., Assignee, Memorandum Opinion and Order, 17 FCC Rcd 5397, 5398 ¶ 2 (2002).

scrutiny by the Commission. The Commission cannot approve the Merger in the form presently proposed by GE and Comcast.

A. Bloomberg History, Recent Investments and Hires

Bloomberg TV (“BTV”) is wholly owned by Bloomberg L.P., an internationally recognized provider of financial news and information. BTV provides 24-hour business news programming delivered over MVPDs, but also available online. Although Bloomberg TV was launched in 1994, it was initially targeted to serve the narrow market of professional investors who were already clients of Bloomberg’s terminal services. However, beginning about 18 months ago, Bloomberg TV was redesigned to appeal to a much wider audience. Under its new management, Bloomberg is taking steps to take full advantage of the company’s extensive resources as one of the world’s largest and most respected business news organizations. Bloomberg employs more than 2300 reporters and editors worldwide, making it among the largest newsgathering organizations in the world. BTV hired Andy Lack, former chairman and CEO of Sony Music Entertainment, President and COO of NBC, and President of NBC News to head its radio, television, and interactive divisions. BTV also hired Norman Pearlstein, former top editor of Time and The Wall Street Journal, to be its chief content officer. BTV also hired an entirely new management team. As a result, BTV is fast becoming a formidable competitor to CNBC, currently the dominant provider of televised business news, as well as Fox Business News. Where it has been able to compete on a level playing field with CNBC, Bloomberg TV has already shown the ability to threaten and in some cases in Europe surpass its longer-established rival. Indeed, abroad, BTV is already one of the world’s largest and most trusted information sources.

B. BTV is the Last Independent Source of News and Information

BTV is the principal U.S. news and information channel that is not affiliated with a multichannel network owner, multichannel video programming distributor (“MVPD”) or other national producer of video programming. BTV is the last source of independent news, analysis and information, unencumbered by editorial and content pressures from affiliated MVPDs or national programming networks. As discussed in greater detail below, the Commission has historically been very concerned about preserving and advancing independent sources of news and information. In an era of increased media consolidation, ensuring that the public maintains access to independent sources of news and information, such as BTV, is critically important to the public interest. Indeed, the opportunity to express diverse viewpoints lies at the heart of our democracy. As an independent news source, BTV contributes to a robust marketplace of ideas reflecting varied perspectives and viewpoints on business news and information. The recent financial crisis and its impact on the nation as a whole only underscores the need for objective business news and analysis.

C. BTV Success On Satellite and Abroad

Whenever BTV is placed near CNBC, and allowed to compete for viewers fairly, BTV’s viewership significantly increases. For example, in the U.S., BTV has significantly more viewers when carried on satellite systems, which have channel “neighborhoods” with BTV placed near CNBC than on cable systems, where BTV is not. Such placement of BTV on

channels near to CNBC increases viewership by [[REDACTED]].⁹ When neighborhooded with CNBC, hours BTV is watched per week increases [[REDACTED]], relative to average hours watched.¹⁰ In fact, when BTV was simulcast in the morning by the USA Network from 2001-2003, which was prior to NBC's acquisition of USA Network, at which time carriage of BTV was dropped, BTV occasionally outdrew CNBC during the critical early morning "prime time" hours.¹¹

Similarly, BTV has significantly higher viewership when it is carried on cable systems in non-U.S. markets where its channel is neighborhooded with CNBC and similar news programming. [[REDACTED]]
[[REDACTED]]¹² To support its wide international viewership, Bloomberg TV broadcasts through Bloomberg Asia, Bloomberg Europe, and Bloomberg USA.¹³ News bureaus in London, Hong Kong, and Beijing – to name only a few – broadcast internationally at varying times throughout the day. These international programs enjoy widespread success. Bloomberg has received numerous awards for BTVs.¹⁴

⁹ See Exhibit 3, Dr. Leslie M. Marx, Professor of Economics, Duke University and former Chief Economist, Federal Communications Commission, Economic Report on the Proposed Comcast-NBC Universal Transaction at Appendix at 23 ("Marx Report").

¹⁰ Marx Report Appendix at 23.

¹¹ USA Weekly Report Spreadsheet.

¹² [[REDACTED]]

¹³ Bloomberg Television, <http://www.bloomberg.com/media/tv/> (last visited June 4, 2010).

¹⁴ Bloomberg Television, About Bloomberg, News Awards, http://about.bloomberg.com/news_awards.html (last visited June 4, 2010).

II. BLOOMBERG HAS STANDING TO PETITION TO DENY THE APPLICATION

Bloomberg has standing to petition the Commission to deny the Application in the Comcast-NBCU merger as a party in interest¹⁵ in that it has both “competitor” standing¹⁶ and “listener” standing.¹⁷ As set forth below, BTV satisfies the constitutional threshold elements to establish standing, *viz.*, whether as a listener or competitor, Bloomberg will suffer an injury-in-fact that is traceable to the proposed merger/license transfer applications, and a grant of this Petition to Deny would likely redress BTV’s injury.¹⁸ BTV’s very existence as a viable independent television network is threatened by the harms that result from the merger. Since BTV’s injuries stem directly from the proposed merger, the resulting harms are neither hypothetical nor conjectural, but, in fact, concrete and particularized, imminent injuries.¹⁹

A. Bloomberg L.P. has Standing as a Competitor

Establishing competitor standing requires that “the party seeking to establish standing... must demonstrate that it is a direct and current competitor whose bottom line may be adversely

¹⁵ 47 U.S.C. § 309(d).

¹⁶ See FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 471-72 (1940).

¹⁷ See Office of Commc’n of United Church of Christ v. FCC, 359 F.2d 994, 1002 (D.C. Cir. 1966).

¹⁸ See New World Radio, Inc. v. FCC, 294 F.3d 164, 170 (D.C. Cir. 2002) (citing Jersey Shore Broad. Corp. v. FCC, 37 F.3d 1531, 1535 (D.C. Cir. 1994)); Liberty Prods., a Ltd. P’ship WOXL-FM, Biltmore Forest, NC, Letter, 20 FCC Rcd 11987, 11990 (July 7, 2005).

¹⁹ New World Radio, 294 F.3d at 170 (citing SunCom Mobile & Data Inc. v. FCC, 87 F.3d 1386, 1388 (D.C. Cir. 1996)).

affected by the challenged government action.”²⁰ A party has standing if its likely financial injury concretely results from the challenged action.²¹

1. Bloomberg L.P. is a Direct and Current Competitor to NBC Universal

Bloomberg video news service, BTV, is “a direct and current competitor” of the proposed Comcast-NBCU combination’s CNBC. That CNBC and BTV are direct and current competitors as is clear from their many common characteristics. The attached economic report by Dr. Leslie Marx, formerly Chief Economist at the Commission, concludes that CNBC and BTV are substitutes for one another. See Exhibit 2.²²

CNBC describes itself as “the recognized world leader in business news, providing real-time financial market coverage and business information to more than 340 million homes worldwide, including more than 95 million households in the United States and Canada.”²³ CNBC produces and distributes its “Business Day programming weekdays from 5:00 a.m.- 7:00 p.m. ET.”²⁴ BTV is the only worldwide 24-hour business and financial television network. Its programming is created exclusively by Bloomberg's own Bloomberg News® service.²⁵ As a result, the approval of the Application will have a direct and imminent effect on the financial performance of CNBC and BTV. The difference in the effect is critical: unless the conditions to

²⁰ Mobile Relay Assocs v. FCC, 457 F.3d 1, 13 (D.C. Cir. 2006) (quoting KERM, Inc. v. FCC, 353 F.3d 57, 60 (D.C. Cir. 2004)); New World Radio, 294 F.3d at 170.

²¹ New World Radio, 294 F.3d at 170 (citing FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 471-72, 477 (1940)).

²² Marx Report at 16.

²³ CNBC, About CNBC, <http://www.cnbc.com/id/15907487/> (last visited May 27, 2010).

²⁴ Id.

the Transaction outlined herein are imposed, once CNBC has become affiliated with the largest video programming distributor in the nation, BTV will immediately be placed at a competitive disadvantage, adversely affecting its bottom line, [REDACTED] [REDACTED]²⁶ Thus, the Merger will result in concrete injury to Bloomberg.²⁷

Upon the closing of the Merger, Comcast, the country's largest MVPD, which has nearly 24 million cable customers,²⁸ would control CNBC. In addition to its cable television content, CNBC provides online video content, CNBC Mobile content, direct broadcast satellite audio content, and other services.²⁹ CNBC and BTV are direct competitors in the provision of such business news and information programming. Like CNBC, BTV is a cable television business news channel serving audiences in the United States and abroad. Bloomberg provides online video content, mobile content, broadcast radio content, and direct broadcast satellite audio content, among other services.³⁰ Both BTV and CNBC provide financial news and analysis.

²⁵ Bloomberg, Bloomberg News, http://about.bloomberg.com/news_television.html (last visited May 27, 2010).

²⁶ New World Radio, Inc. v. F.C.C., 294 F.3d 164, 170 (D.C. Cir. 2002).

²⁷ As set forth in the attached Declaration of Andrew Lack, CEO of Multimedia of Bloomberg L.P. (Exhibit 1 hereto), he has personal knowledge of the facts described herein regarding Bloomberg's standing as a party in interest and the proposed transaction's inconsistency with the public interest. Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Commc'ns Corp., et al., Memorandum Opinion and Order, 21 FCC Rcd 8203, 8215-16 ¶¶ 18-20 (2006) ("Adelphia").

²⁸ Comcast, Comcast Corporate Overview, <http://www.comcast.com/corporate/about/pressroom/corporateoverview/corporateoverview.html> (last visited June 4).

²⁹ See generally, CNBC, <http://www.cnbc.com>.

³⁰ See generally, Bloomberg TV, <http://www.bloomberg.com>.

Both feature prominent economists and financial analysts. As such, BTV and CNBC compete intensely with each other for guest speakers and advertisers.

2. The Comcast-NBCU Merger will Directly Injure Bloomberg L.P.

The direct injury takes the form of a competitive disadvantage in terms of carriage on the Comcast systems, which would become affiliated with CNBC, including: (1) channel positioning (e.g., the ability to obtain “neighborhooding,”), (2) tiering, (3) termination of carriage, (4) limitations on distribution of Internet content, (5) anticompetitive practices involving bundling of rates to favor CNBC and other Comcast-affiliated cable channels, (6) anticompetitive practices involving bundling of advertising.

Congress and the Commission have previously recognized the harm that

increased horizontal concentration and vertical integration in the cable industry have created an imbalance of power between cable operators and program vendors[;]... vertically integrated cable operators have the incentive and ability to favor affiliated programmers over unaffiliated programmers with respect to granting carriage on their systems.³¹

Courts have recognized future competitive disadvantages resulting from governmental action as injuries-in-fact.³²

³¹ Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Second Report and Order, 9 FCC Rcd 2642, 2643 ¶ 2 (1993).

³² Adams v. Watson, 10 F.3d 915, 922 (1st Cir. 1993) (“future injury-in-fact is viewed as “obvious” since government action that removes or eases only the competitive burdens on the plaintiff’s “rivals” plainly disadvantages the plaintiff’s competitive position in the relevant marketplace” (emphasis added)); Baur v. Veneman, 352 F.3d 625, 633 (2d Cir. 2003) (“the courts of appeals have generally recognized that threatened harm in the form of an increased risk of future injury may serve as injury-in-fact for Article III standing purposes”) (citing Friends of the Earth, Inc. v. Gaston Copper Recycling, Corp., 204 F.3d 149, 160 (4th Cir. 2000)).

As the attached economic report makes clear, the competitive injury facing BTV from the Comcast-NBCU merger is not only a direct injury, but is also a concretely quantifiable and imminent one. Specifically, the failure to neighborhood BTV with CNBC reduces the probability of viewing BTV by [REDACTED].³³ BTV could lose its access to Comcast viewers entirely, or lose viewers due to an unfavorable channel position on a remote, less viewed cable tier. Comcast-NBCU's incentive and ability to bundle its programming could foreclose BTV's carriage on non-Comcast MVPD systems.³⁴ Comcast-NBCU's ability to bundle advertising may limit access to key advertisers. Comcast's ability to restrict online distribution of cable network content will significantly damage BTV's ability to serve existing customers and gain new customers.

3. Bloomberg's Injury is Fairly Traceable to the Application and Redressable by the Commission

The causal link between the Application and Bloomberg's injury-in-fact is clear. The proposed transfer of licenses is necessary to facilitate a merger of Comcast and NBCU. If the Commission grants the Application as proposed, the merger will proceed, leading to the vertical integration of CNBC into the largest MPVD, Comcast, which has the power to determine channel position for BTV – indeed, even whether BTV can survive as a competitor to CNBC. Bloomberg's injuries are redressable through denial of the Application. A denial of the Application would eliminate the imminent injury facing Bloomberg because the license transfer

³³ Marx Report Appendix at 23.

³⁴ See General Motors Corp. and Hughes Electronics Corp. and The News Corp., Memorandum Opinion and Order, 19 FCC Rcd 473, 478 ¶ 4 (2004) (internal citations omitted) (merger of content provider with MVPD threatens foreclosure bargaining strategies for programming by vertically integrated entity) (hereinafter, "News Corp.").

is a prerequisite to the Comcast-NBCU merger. Alternatively, the Commission could allay the harm through the imposition of the conditions proposed in Exhibit 1, specifically including restrictions on the ability of Comcast to place BTV on channel positions far from Comcast's own CNBC, restrictions on carriage termination, streamlined resolution of subscriber fee disputes, restrictions on anti-competitive practices involving sales of bundled programming and bundled advertising time, restrictions on degrading, impeding or discouraging content distribution via the Internet.

B. Bloomberg has Standing as a Listener

Aside from standing as a direct competitor to CNBC, Bloomberg also has standing to petition the Commission to deny the Application as a "listener" or member of the public viewing NBC broadcast stations.³⁵ Like competitor standing, a petitioner asserting listener standing must, in addition to being a listener, also meet the basic requirements for Article III standing.³⁶ The listener must allege an injury-in-fact, that the injury is remediable and fairly traceable to the agency action.³⁷

As a resident of a NBC broadcast station service area and a viewer, Bloomberg "can assert a possible injury to a legally protected interest... as 'spokesman' for a station's entire

³⁵ See United Church of Christ, 359 F.2d at 1002. See also the attached Declaration of Andrew Lack, who resides in Bronxville, New York, a regular viewer of NBC programming. As an Officer of Bloomberg, his individual listener standing may be imputed to Bloomberg, L.P. itself. See Application of WGSM Radio, Inc., Assignor, et al., Memorandum Opinion and Order, 2 FCC Red. 4565 ¶ 4 (1987).

³⁶ See supra note 18 and accompanying text.

³⁷ Id.

audience.”³⁸ The injury facing a viewer is not based on competitive disadvantages or adverse effects to the bottom line, but rather “material impairment of [a viewer’s] hopes or expectations.”³⁹ Further, such standing exists when faced with an injury caused by the grant of an application that seriously impacts the public interest. For example, the D.C. Circuit has affirmed the granting of standing to a listener on the basis that such listener is injured when grant of applications would contravene policies underlying the Communications Act and FCC rules and policies because “the FCC serves (at Congress’ behest) as the public’s proxy in assuring, through the apparatus of agency licensure, that media outlets in the same market do not fall into a small number of closely related hands.”⁴⁰

Here, the proposed merger threatens long established Commission policies favoring independent ownership of news providers.⁴¹ Grant of the Application would ultimately result in marginalizing or destroying BTV, and further reduce the number of independently owned news providers, which is contrary to the FCC’s long established policies of promoting independently owned news providers and not in the public interest.

³⁸ Huddy v. FCC, 236 F.3d 720, 722 (D.C. Cir. 2001) (citing United Church of Christ, 359 F.2d at 1002).

³⁹ Id. at 723 (citing Jaramillo v. FCC, 162 F.3d 675, 677 (D.C. Cir. 1998)).

⁴⁰ Llerandi v. FCC, 863 F.2d 79, 85 (D.C. Cir. 1988) (“The ultimate point of the duopoly rule is, after all, to assure (or at least enhance) diversification of viewpoints within the broadcast industry. That is, the FCC serves (at Congress’ behest) as the public’s proxy in assuring, through the apparatus of agency licensure, that media outlets in the same market do not fall into a small number of closely related hands. Listeners are, by definition, ‘injured’ when licenses are issued in contravention of the policies undergirding the duopoly rule.”) (emphasis added).

⁴¹ See, e.g., FCC v. Nat’l Citizens Comm. for Broad., 436 U.S. 775, 784 (1978) (“The Commission suggested that the proposed [cross-ownership] regulations would serve ‘the purpose of promoting competition among the mass media involved, and maximizing diversification of service sources and viewpoints’”).

III. THE PUBLIC INTEREST STANDARD AND RELATED OBJECTIVES OF THE ACT.

A. Standard of Review.

1. The Commission must review the merger to determine if it is in the public interest.

When the Commission considers applications to transfer licenses in a transaction like the proposed merger underlying the Applications here, it must “determine whether the transaction serves the broader public interest.”⁴² The rapidly developing telecommunications industry requires, and the law recognizes, that the “public interest, convenience and necessity”⁴³ standard develops with time.⁴⁴ Nonetheless, there are several overriding considerations which constitute the Commission’s public interest analysis.⁴⁵

In reviewing the Application, the Commission must determine first whether the transaction would result in a violation of the Communications Act or of the Commission’s rules; second, whether the transaction would “frustrate or impair” the implementation of the Communications Act, Commission rules, or the policy objectives thereof; and third, whether the

⁴² News Corp. at 484 ¶17.

⁴³ 47 U.S.C. § 310(d).

⁴⁴ Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970) (“an agency’s view of what is in the public interest may change” when the agency reasonably explains such changes).

⁴⁵ Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee, Memorandum Opinion and Order, 16 FCC Rcd 6547, 6555 ¶ 20 (Jan. 11, 2001) (“AOL”).

transaction “promises to yield affirmative public interest benefits.”⁴⁶ The Commission’s policy is shaped by Congress and deeply rooted in a preference for competitive processes and outcomes.”⁴⁷

Under this public interest standard, the Commission has the authority and duty to preserve independent sources of news and information. The “public interest evaluation under Section 310(d) necessarily encompasses the ‘broad aims of the Communications Act,’ which includes, among other things, preserving and enhancing competition in relevant markets, ensuring that a diversity of voices is made available to the public, and accelerating private sector deployment of advanced services.”⁴⁸

The Commission must consider whether the Transaction would “frustrate implementation or enforcement” of the federal communications policies. These policies and objectives include the preservation of robust and independent sources of news and information programming, prevention of anti-competitive behavior by MVPDs and preservation of competition in the programming markets affected by a proposed merger. In other words, the Commission considers whether the proposed merger “could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the [Communications] Act and related statutes.”⁴⁹

⁴⁶ Id.

⁴⁷ News Corp. at 484 ¶ 14.

⁴⁸ Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation, Transferors, and EchoStar Communications Corporation, Transferee, Hearing Designation Order, 17 FCC Rcd 20559, 20575 ¶ 26 (2002) (hereinafter “EchoStar”).

⁴⁹ Adelphia at 8217 ¶ 23.

This review does not occur in a vacuum. Broadly, the Commission considers developments of technology, changes in the communications marketplace, and future trends in the industry.⁵⁰ More narrowly, the Commission considers not only the specifics of the individual license transfer applications, but also “all relevant issues raised by the transactions that in [the Commission’s] judgment may significantly affect the public interest.”⁵¹

The Commission’s review is a balancing act. The Commission must “weigh the potential public interest harms of the proposed transaction against public interest benefits[.]”⁵² The Commission should not approve the merger unless it finds that the transaction, on balance, serves the public interest and convenience.⁵³

With respect to each element of the public interest review, the Applicants carry the burden of proof.⁵⁴ They must demonstrate by a preponderance of the evidence that the transaction will advance the public interest.⁵⁵ That is to say, the stronger weight of evidence before the Commission regarding the proposed transaction must demonstrate that it, on balance, serves the public interest.⁵⁶

⁵⁰ Id. at 8218 ¶ 24.

⁵¹ Id. at 8220 ¶ 28.

⁵² AOL at 6554 ¶ 19.

⁵³ Id., ¶22.

⁵⁴ Adelphia at 8218 ¶ 24; News Corp. at 483 ¶ 15; AOL at 6554 ¶ 19.

⁵⁵ 47 U.S.C. §§ 308, 310(d); Adelphia at 8218 ¶ 24; News Corp. at 483 ¶ 15; AOL at 6554 ¶ 19.

⁵⁶ See, e.g., 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, 3168-70 ¶¶ 11-15 (1999) (hereinafter “AT&T-TCI Order”).

The burden is on Comcast and GE to demonstrate that the merger would serve the Public Interest.⁵⁷ As set forth herein, the Applicants have not met that burden.

2. For cable mergers, the Commission should also consider whether the merger will impede the free flow of video programming.

The public interest objectives for cable systems include ensuring “that no cable operator or group of cable operators can unfairly impede... the flow of video programming from the video programmer to the consumer;” and that “cable operators affiliated with video programmers do not favor such programmers in determining carriage on their cable systems.”⁵⁸ Thus, when the Commission is undergoing its traditional public interest analysis it should consider these public interest objectives.

Indeed, Congress’ concern regarding unfairly impeding the flow of video programming to consumers stems, in part, from the increased vertical integration of cable operators and programmers.⁵⁹ The Commission has noted that increased vertical integration can lead “programmers to favor affiliated over non-affiliated operators in the distribution of video programming” and “unfairly impede the flow of video programming to consumers.”⁶⁰ Thus, “[i]n analyzing MVPD transactions, the Commission... examine[s] whether the transactions are

⁵⁷ 47 U.S.C. §§ 308, 310(d).

⁵⁸ 47 U.S.C. § 533(f)(2)(A), (B).

⁵⁹ Adelphia at 8224 ¶ 34.

⁶⁰ Id.