likely to contravene Commission policy goals by analyzing the potential effects the transactions may have on MVPD competition and on the flow of video programming to consumers."[61]

B. Promoting a Diversity of Viewpoints in Programming, Particularly in News Programming, is a Critical Element of Public Interest Analysis.

1. There is a long history of federal Policy favoring diverse sources of news and information

Public interest analysis includes "ensuring that a diversity of voices is made available to the public."[62] The Commission must preserve viewpoint diversity in news programming to ensure that the public interest is well served. To preserve that diversity in news programming, the Commission should be mindful of a transaction's impact on independence in news programming. The First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society."[63]

To promote competition and improve viewpoint diversity, the Commission's media ownership rules limit the number and types of same-market media outlets in which a company may hold an interest.[64] In adopting its ownership rules, the Commission concluded "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

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[61] Id. at 8234 ¶ 60 & n.220 (noting that "these goals are embodied in various statutory provisions, including § 613(f)... of the 1992 Act").

[62] News Corp at 483-84 ¶ 16.

[63] Associated Press v. United States, 326 U.S. 1, 20 (1945).

[64] 47 C.F.R. §73.3555(c), (d).

viewpoints.'"[65] Although the FCC eliminated the cross-ownership rules, it has retained its ability to review these public interest harms.[66] Thus, the Commission recognizes the significance of these harms and the need to address them in reviewing a merger.[67]

Here, Comcast will control two national news networks (NBC News and Telemundo), MSNBC and CNBC, the dominant business news channel, as well as news and information programs like the Weather Channel and regional news channels. Business news has become even more important during the recent U.S. and European financial crises. The adverse effect of the Merger is even more pronounced because only CNBC, Fox, and BTV provide such focused programming. If the Commission approves the Transaction, BTV will be the only such independently owned news outlet remaining.

2. Diversity of news sources requires a competitive playing field.

The migration of advertising revenue from traditional models to new distribution platforms has already strained independent news sources. The Commission must take steps to ensure that a diversity of voices will remain after the Transaction. It must address any potential harm to news programmers that might occur as a result of the Merger.

Financial difficulties are forcing independent news outlets of all types to reduce costs, resulting in less news being available to consumers. These financial difficulties impact

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[65] Nat'l Citizens, 436 U.S. at 784; 2006 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, Report and Order and Order on Reconsideration, 23 FCC Rcd 2010 ¶ 84 ("cross-ownership rules aim to maintain a vibrant marketplace of ideas to ensure a diversity of editorial content") ("Media Cross Ownership Order").

[66] Adelphia at 8234 ¶ 60.

[67] Id.

independent sources of business news. For example, newspapers have eliminated separate business sections and reduced resources devoted to coverage of economic and financial issues.[68] BTV submits that a continuation of this trend is not in the public interest; the Commission must ensure that independent news outlets survive and will not be further harmed by Commission action, including approval of the Transaction.

Approval of the Transaction will vertically integrate the largest MVPD with the major business news provider, CNBC. This combination will further reduce the shrinking number of independent news sources.[69] Moreover, the combination of distribution and content will endanger and possibly foreclose independent voices.

Given the difficulties experienced by independent news organizations, ensuring access to, and a level playing field for, independent news sources is increasingly important to the public

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[68] This has included prominent, national newspapers like The Washington Post. Eric Krangel, Washington Post Bids Goodbye to its Business Section, THE WASHINGTON POST, March 13, 2009, available at http://www.businessinsider.com/washington-post-bids-good-bye-to-its-business-section-2009-3 (last visited June 4, 2010); Marion Geiger, Downsizing: Washington Post Cuts Its Daily Business Section, THE WASHINGTON POST, March 16, 2009, available at http://www.editorsweblog.org/newspaper/2009/03/downsizing_the_washington_post_cuts_its.php (last visited June 4, 2010).

[69] "Even with all the promise of new media, we need to remember that without content, there is nothing to aggregate, and without intelligent debate on critical issues stemming from insightful journalism, the promise of a smart phone is short-circuited. So far, new media has not replaced what we've lost by way of traditional media's decline. Most indicators show three-quarters or more of the news, delivered to the public in all forms, originates from traditional media--newspapers and broadcast. So we confront a two-pronged challenge--ensuring that the broadband of the future can support the information infrastructure which democracy requires and, for the years immediately ahead, stemming the hemorrhage of contemporary journalism." Press Release, Commissioner Michael J. Copps on the FCC Launch of Initiative to Examine the Future of Media and Information Needs of Communities in A Digital Age, Jan. 21, 2010, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-295856A1.pdf.

interest. In evaluating this Merger, the Commission must consider whether its approval would reduce the availability of such independent sources of news.

Combinations like that proposed in the Merger not only combine two potential voices into one, but also have the effect of tilting that playing field against independent sources of news like BTV. Indeed, when faced with similar concerns, Congress has gone so far as to impose requirements on MVPDs to carry particular stations so as to "assure the widest possible diversity of information services to the public."[70]

C. Promoting Competition in Programming, Particularly in News Programming, is a Key Part of Public Interest Analysis

Competition in the provision of service to the public has long been a central goal of communications policy. Since its establishment in 1934, the FCC has been charged with guarding against anti-competitive practices.[71] In the Cable Communications Act of 1984,[72] Congress explicitly extended that concern to the cable industry, noting that one purpose of regulating the cable industry is to "promote competition in cable communications...."[73]

The Supreme Court has likewise acknowledged the integral nature of competition to the public interest under the Communications Act. "[T]he Court has repeatedly emphasized the Commission's duty and authority under the Communications Act to promote... competition

[70] Cable Television Consumer Protection and Competition Act of 1992 House Report, H.R. Rep. No. 102-628, LEXSEE 102 H RPT 628 at *35 (1992).

[71] 47 U.S.C. §§ 151, 201.

[72] Pub. L. No. 98-549, 98 Stat. 2780 (1984).

[73] Id. (codified as amended at 47 U.S.C. § 521(6)); see also News Corp at 483-84 ¶ 16 ("public interest evaluation... necessarily encompasses the broad aims of the Communications Act, which includes, among other things, preserving and enhancing competition in relevant markets") (internal quotations omitted).

among media voices[.]"[74] To that end, the Court has noted that "the Government's interest in eliminating restraints on fair competition is always substantial, even when the individuals or entities subject to particular regulations are engaged in expressive activity protected by the First Amendment."[75]

The Telecommunications Act of 1996 ("1996 Act") made enhancing competition a central goal of telecommunications regulation.[76] The Communications Act, the 1996 Act and Commission precedent require the Commission to consider the competitive impact of a transaction in its public interest analysis.[77] The "broad aims of the Communications Act" include "a deeply rooted preference for preserving and enhancing competition in relevant markets... [and] ensuring a diversity of information sources and services to the public[.]"[78] The Commission's competitive analysis, therefore, includes "traditional antitrust principles."[79] The Commission must also consider a variety of other factors, including:

- regulatory policies that govern interactions of industry players;

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[74] AOL at 6556 ¶ 23 (2001).

[75] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 664 (1994).

[76] Telecommunications Act of 1996 Preamble, Pub. L. No. 104-104, 110 Stat 56 (1996).

[77] Adelphia at 8218 ¶ 25; Application of AT&T Wireless Servs., Inc. and Cingular Wireless Corp. for Consent to Transfer Control of Licenses and Authorizations, et. al., Memorandum Opinion and Order, 19 FCC Rcd 21522, 21544 ¶ 41 (2004) ("Our public interest evaluation necessarily encompasses the 'broad aims of the Communications Act,' which include, among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private sector deployment of advanced services, ensuring a diversity of license holdings, and generally managing the spectrum in the public interest") (hereinafter "AT&T/Cingular").

[78] News Corp. at 3277-78 ¶ 23.

[79] Id. at 3278 ¶ 24.

- whether a transaction will reduce existing competition;
- whether the transaction will decrease the market power of dominant firms in the relevant communications market; and
- the transaction's effect on future competition.[80]

The Commission has, "[i]n setting its licensing policies... long acted on the theory that diversification of mass media ownership serves the public interest[.]"[81] To implement these policies, the Commission should "promote diversity of program and service viewpoints [and] prevent undue concentration of economic power."[82]

A merger must enhance competition in order to meet the public interest standard.[83] The Commission uses the Horizontal Merger Guidelines issued by the Department of Justice and the Federal Trade Commission as a starting point to analyze the potential competitive harms of the proposed transaction.[84]

> In general, competition depends on consumers having choices among products or services that are fairly good substitutes for each other. If consumers have such choices, a single provider cannot raise its prices above the 'competitive' level because consumers will switch to a substitute. The level of competition depends on what products or services are substitutes for each other (product market), where those products are available (geographic market), what firms produce them (market participants), and what other firms might be able to produce substitutes if the price were to rise (market entry). ...Mergers raise competitive concerns when they

80 Id. at 3278-79 ¶ 25.

81 Nat'l Citizens, 436 U.S. at 780.

82 Id.

83 News Corp 483-84 ¶ 16; Applications of NYNEX Corp., Transferor and Bell Atl. Corp., Transferee, Memorandum Opinion and Order, 12 FCC Rcd 19985, 20000-01¶ 29 (1997).

84 Id.; U.S. Dept. of Justice, Horizontal Merger Guidelines, available at, http://www.justice.gov/atr/public/guidelines/horiz_book/hmg1.html.

> reduce the availability of substitute choices (market concentration) to the point that the merged firm has a significant incentive and ability to engage in anticompetitive actions, such as raising prices or reducing output, either by itself or in coordination with other firms (market power.)[85]

As demonstrated in the "Economic Report on the Proposed Comcast NBC Universal Transaction," authored by Dr. Leslie Marx, former Chief Economist of the FCC (Exhibit << >>), the Transaction will result in significant competitive harms to independent news programming that raise substantial and material questions of fact as to whether the Transaction is in the public interest.

While the Applicants bear the burden of proof here, BTV, as set forth below, affirmatively demonstrates that the proposed transaction is not in the public interest.

IV. THE MERGER WILL RESULT IN SPECIFIC COMPETITIVE HARM BY PROVIDING COMCAST-NBCU THE INCENTIVE AND ABILITY TO HARM AND DISCRIMINATE AGAINST INDEPENDENT NEWS PROGRAMMERS

The proposed merger would harm the public interest by granting Comcast-NBCU the ability and incentive to harm and discriminate against independent programmers. This discrimination threatens imminent injury to independent programmers and will negatively affect the viewing public.

NBC Universal owns CNBC, the dominant business news network in the United States, in addition to NBC News, MSNBC, and regional sports networks. CNBC currently attracts more than 85% of the viewers and revenue in the business news programming market. CNBC is the

[85] AT&T/Cingular at 21552 ¶ 57.

only business news channel that registers on the Neilson ratings. Only two other business news networks exist—Fox and BTV – and of those, only BTV is independent. CNBC is a critical piece of the Transaction because its high advertising revenue makes it the second most profitable of NBC's cable networks, with an estimated profit of $333 million as of March, 2008.[86]

Comcast is the largest cable operator in the United States with close to 24 million subscribers, 15.7 million high-speed broadband customers, and 7.4 million voice customers.[87] Comcast already owns 18 cable channels[88] and has attributable interests in an additional 14 channels. [89]. After the Transaction, Comcast will own 10 regional sports networks, two broadcast networks, 25 owned and operated broadcast television stations, __ cable networks (__ owned and __ in which it holds attributable interests), 32 online video properties, Universal Studios, and Focus Features. It also controls iNDEMAND,[90] the dominant video on-demand/pay-per-view provider, which distributes content to cable and Internet protocol television operators nationwide.[91]

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[86] Jessi Hempel, CNBC Feels Your Pain, CNNMoney.com, Apr. 3, 2008, available at http://money.cnn.com/2008/03/31/news/companies/cnbc_pain.fortune/ (last viewed May 29, 2010) ("profits have increased 36% to $333 million since Hoffman joined, according to media research firm SNL Kagan"); Andrew Edgecliffe Johnson, CNBC Profits From A Crisis, FT.com, January 27, 2010, available at 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").

[87] Application at 17, 19.

[88] Application at 19-21.

[89] Id.

[90] Application at 20.

[91] See iN DEMAND, http://www.indemand.com/about/ (last visited June 21, 2010).

Moreover, Comcast has over 50% market share of cable distribution in the top ten major markets, where sophisticated business news consumers are most densely concentrated. The markets include Chicago, Philadelphia, San Francisco, Boston, Detroit, Seattle-Tacoma, Miami-Ft. Lauderdale, Denver, Pittsburgh, Baltimore, West Palm Beach, Harrisburg and Jacksonville.[92] Comcast holds a 45% market share in Washington, DC, and other significant markets.

The resulting combination will grant Comcast control over significant business news programming assets and distribution in key business news markets. As a merged entity, Comcast-NBCU will have both the power and a compelling incentive to favor CNBC and to deprive competing news programmers of the level playing field for viewers and advertisers. BTV is particularly concerned about Comcast-NBCU's ability and incentive to harm and discriminate against independent news operators because CNBC is the second most profitable network in the NBCU portfolio, and Comcast's CEO, Brian Roberts, has said that NBC News is the "single most awesome asset that comes from this deal," and that "NBC News will help define Comcast."[93]

[92] An Examination of the Proposed Combination of Comcast and NBC Universal before the House Energy and Commerce Subcommittee on Communications, Technology and the Internet, Feb. 4, 2010 (Mark Cooper - "In its cable franchise territories, the market share of Comcast in these two vital distribution platforms [video distribution and broadband Internet service provider] exceeds 50 percent, allowing it to acquire one of the nation's premiere video content producers will radically alter the structure of the video marketplace triggering a bevy of anti-competitive effects that will result in higher prices and fewer choices for consumers.")

[93] 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.

Comcast has a lengthy history of issues involving claims of discrimination against independent programmers and has been the subject of numerous program carriage complaints.[94] A recent complaint noted , "Comcast's president, Stephen Burke, says that Comcast views its own networks as 'siblings' but other networks as 'strangers' ..."[95] Comcast's incentive to harm and discriminate against programming rivals is particularly acute in the case of BTV, which is a disruptive challenger to CNBC's long-established dominant position.

In her report, Dr. Marx concludes that BTV and CNBC compete in business news market.[96] The Marx Report also establishes that the business news advertising market, which is predominantly affluent adult males, is a highly valued, hard-to-reach audience segment that advertisers value highly. Ultimately, the Marx Report finds that TV business news programming networks constitute a relevant antitrust product market. Combining CNBC's more than 85% market share with Comcast's 50% or greater MVPD market share in major U.S. cities where business news has a high concentration of viewers, the Transaction poses a significant downstream threat to BTV's existence.

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[94] See NFL Enters. LLC v. Comcast Cable Commc'ns, LLC, Program Carriage Complaint, File No. CSR-7876-P (May 6, 2008); TCR Sports Broad. Holding, L.L.P. v. Comcast Corp., Program Carriage Complaint, File No. 8001-P (Aug. 7, 2008); see also Dish Network L.L.C. v. Comcast Corporation, et al., Arbitration Demand (Am. Arbitration Ass'n Jan. 27, 2010).

[95] Justin Rohrlich, Cable Wars Get Litigious, MINYANVILLE, Jan. 8, 2010, available at http://www.minyanville.com/businessmarkets/articles/cable-cablevision-comcast-hulu-scripps-time/1/8/2010/id/26281 (last visited June 20, 2010).

[96] The Marx Report found that while carriage of general news channels had no significant negative effect on the carriage of BTV, the presence of CNBC on the basic or expanded basic tier had a significant negative effect on the carriage of BTV on that tier. Likewise, carriage of BTV significantly decreases the carriage of CNBC on the same tier. Marx Report at 22.

BTV submits that, absent an order to divest CNBC or adoption of stringent conditions, the Merger will result in discrimination against independent programmers in the following areas: channel placement discrimination, discrimination in payment terms, degradation or restriction of consumers' Internet access to independent programmers' content foreclosure in advertising, and foreclosure of carriage by other MVPDs. The Marx Report supports BTV's concerns by detailing significant economic harms that may result from the merger in all of these areas. An in-depth discussion of the harmful effects this transaction will have on the public interest and on BTV is set forth below.

A. Discriminatory Channel Placement

1. Neighborhooding

Channel placement on MVPD systems contributes significantly to maintaining and increasing viewership. "Neighborhooding," is the industry practice of placing channels of the same genre adjacent to one another in the system's channel line-up. Modern distribution systems such as DirecTV, Dish, FiOS, and U-Verse cluster together children's programs, shopping, cooking, and, most importantly, business news and 24-hour cable news channels in the same channel "neighborhood." Other MVPDs are expected to adopt neighborhooding as they transition to digital technology.[97] If the Transaction had not been proposed, BTV would have expected to be neighborhooded with other business news channels as Comcast neighborhooded

[97] For example, Time Warner has begun such transitions. For example, Time Warner has announced that in North and South Carolina it is rearranging its digital channels into categories by programming type, placing the general news and business news together. Time Warner Cable Press Release: "TV Made Easy: Time Warner Cable Launches New Theme-Based Channel Lineup," March 26, 2010. Time Warner is also doing so in various Wisconsin systems.

all of its systems. Absent this merger, it would have been in Comcast's financial interest to neighborhood BTV. Indeed, with Bloomberg's recent efforts to improve and differentiate BTV's business news product, it would have been in Comcast's own financial interest to offer its customers BTV on a channel position near CNBC. As a result of the Transaction, however, Comcast will have a new incentive not to implement this pro-consumer development on its systems in order to disadvantage networks like BTV that compete with Comcast-owned networks like CNBC.

The importance of channel position has been recognized not only by industry, but also by Congress. "A cable system has a direct financial interest in promoting those channels on which it sells advertising or owns programming... there is an economic incentive for cable systems to deny carriage to [competing] local broadcast signals, or to reposition broadcast signals to disadvantageous channel positions, or both."[98] This incentive is exacerbated by "[i]nterlocking ownership of cable operation and programming interests[.]"[99] "Other factors being neutral, cable operators prefer to carry the programming of affiliated programmers in whose advertising revenue they share . . ."[100]

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http://www.timewarnercable.com/wisconsin/learn/new_digital_lineup.html, accessed June 20, 2010.

[98] Cable Television Consumer Protection and Competition Act of 1992 , H.R. Rep. No. 102-628, LEXSEE 102 H RPT 628 at *93 (1992).

[99] Turner Broad., supra, 910 F. Supp. at 753.

[100] Id.

The 1992 Cable Act specifically recognized the importance of channel placement in a number of contexts.[101] For example, MVPDs are required to carry certain local broadcast stations at particular channel positions.[102]

As noted above, BTV's significant success on international cable systems is related to neighborhooding. The Marx Report also documents BTV's success when neighborhooded on U.S. satellite MVPDs. Absent the merger, BTV would have expected Comcast to neighborhood its channel line-up quickly to compete with other MVPDs, and that such a transition would be fostered by Comcast's conversion to digital cable. Now, however, Comcast will have a significant competitive reason to leave BTV in less favorable channel positions. Absent conditions to the Merger, Comcast will have the ability and incentive to permanently strand BTV at a competitively disadvantageous location in the channel line-up.

Control over the channel line-up is a powerful tool to unfairly favor affiliated channels and disadvantage competitors. Comcast-NBCU will be able to discriminate with respect to channel placement, thereby placing BTV at a significant competitive disadvantage. As demonstrated in the Marx Report, the effect of neighborhoods, and the exclusion from neighborhoods, is significant. The Marx Report finds proximity to CNBC increases the

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[101] Cable Television Consumer Protection and Competition Act of 1992, H.R. Rep. No. 102-628, LEXSEE 102 H RPT 628 at *47 (1992) ("systems will carry a reasonable complement of local stations on secure and predictable channel positions"); see also id. at *71.

[102] The Cable Act requires that "[e]ach signal carried in fulfillment of the carriage obligations... under this section shall be carried on the cable system channel number on which the local commercial television station is broadcast over the air" or on, inter alia, a mutually agreed upon channel. 47 U.S.C. § 534(b)(6).

probability that a viewer will watch BTV by [[[redacted]]]. Neighborhoods also increase the number of BTV hours watched by [[[redacted]]] relative to average hours watched.[103]

Moreover, CNBC's location in a neighborhood with BTV decreases the probability it will be watched by [[[redacted]]] and decreases its hours watched by [[[redacted]]].[104] With CNBC's viewership decreasing when placed near BTV, a combined Comcast-NBCU would have every incentive to place CNBC in more favorable channel position than BTV or retain favorable channel placement in lieu of moving toward the neighborhood channel placement model that is the industry trend.[105]

Comcast has recognized the importance of neighborhooding and used it against its competition, in other areas, such as sports programming. First it ensured that its own regional sports channel, Comcast Sports Channel, was placed beside ESPN. When Comcast added Versus, its own national sports programming channel, to the Washington, D.C. system, it located it at Channel 7, immediately adjacent to sports channels ESPN-2 (channel 8), ESPN (channel 9), and Comcast Sports (channel 10), while the main channel of its unaffiliated sports channel competitor, MASN, remained located at channel 42.

The Marx Report sets forth in detail the specific potential harms that a failure to neighborhood BTV will cause.[106] The Marx Report demonstrates that Comcast-NBCU would have the incentive and ability to perpetuate CNBC's channel placement advantages and implement neighborhooding (if at all) only in a manner that will continue to place BTV in a

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[103] Marx Report Appendix 23.

[104] Id.

[105] Id.

[106] Marx Report at 29-31.

position removed from CNBC and other general news and business news channels. Given the incentive to place BTV outside the "news neighborhood," away from CNBC, the Commission should deny the Merger or condition the merger to require neighborhooding. At the very least, the FCC should prevent Comcast from leaving BTV and other independent competing programmers in disadvantageous channel positions when Comcast's cable systems create genre-related neighborhoods.[107] Specifically, if the Commission does not deny the Application, the FCC should 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 news channels are adjacent and contiguous to CNBC and any similar Comcast business news channels at each position where such channel is carried.

2. Tier Placement

For many of the same reasons that neighborhooding is critical to maintaining robust competition in business news programming, so, too, is tier placement. Tier placement refers to offering a particular channel in a cable system's basic line up or in a special line-up which subscribers can add to a basic subscription. The Commission has previously addressed the issue of tier placement in several contexts. For example, in the context of commercial leased access, the Commission has acknowledged the importance of a channel's placement on tiers with broad subscriber bases. It required, therefore, that "[c]able operators shall place leased access programmers that request access to a tier actually used by most subscribers on any tier that has a

[107] Leased Commercial Access, Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 2909, 2917 ¶¶ 16-18 (2007).

subscriber penetration of more than 50 percent, unless there are technical or other compelling reasons for denying access to such tiers."[108]

The Commission has concluded that tier placement is significant enough that, for example, it required a cable system to provide a local broadcast station carriage at a time when the cable system was rebuilding its channel line-up. The Commission underscored the importance of placing channels on an accessible tier, holding that

> KRCA, as a must carry station in Garden Grove Westminster and Huntington Beach is not required to wait until Paragon completes its system rebuild in order to be made available to all subscribers in these communities. Thus, Paragon is required to carry KRCA on a mutually acceptable channel, on the basic tier, that is available to all subscribers in its system, which in this case is any channel between 2 and 46, pending the completion of rebuilding its systems. By doing so, KRCA will be provided to all of Paragon's subscribers on the same basis as other signals entitled to mandatory carriage on the basic tier.[109]

A merged Comcast-NBCU would have an incentive to place unaffiliated channels on tiers other than its expanded basic tier to reduce competition with channels in which it has a financial interest. Such concerns are not theoretical; multiple programmers have already alleged that Comcast engages in a pattern of discrimination against unaffiliated programmers, and it uses unfavorable tier placements as a means of the discrimination. NFL Enterprises LLC alleged, for example, that "Comcast carries the NFL Network on a premium digital sports tier for which subscribers must pay substantial extra fees while uniformly carrying sports channels that it owns

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[108] 47 C.F.R. § 76.971(a)(1).

[109] Fouce Amusement Enters., Inc. Licensee of Television Station KRCA, Riverside, California, For Carriage on Paragon Cable System Serving Garden Grove, Westminster, and Huntington Beach, California, and Paragon Cable, Modification of KRCA ADI Market for Must Carry Purposes, Memorandum Opinion and Order, 10 FCC Rcd 668, 673 ¶ 25 (1995).

on an analog basic tier that entails no extra cost for subscribers."[110] NFL Enterprises LLC alleged that Comcast had "Comcast exploited its bottleneck power by precipitously dropping the NFL Network from its highly-penetrated digital basic tier in the wake of a decision by the National Football League (the 'League') not to grant Comcast telecast rights – a financial interest – in a valuable program package of eight, live NFL football games… for Versus, a competing Comcast-owned sports channel."[111] This tactic impaired NFL Network's competitiveness while at the same time making Versus, the sports network affiliated with Comcast, more easily able to acquire sports programming.

More recently, the Tennis Channel made similar allegations against Comcast. The Tennis Channel alleges that Comcast is discriminating against it in favor of the Golf Channel and Versus (both affiliated with Comcast).[112] The Tennis Channel alleges that Comcast carried the Golf Channel and Versus on broadly penetrated tiers while refusing to carry the Tennis Channel on a similarly popular tier. It alleges that Comcast has "stranded Tennis Channel on a premium tier… [e]ven though those programming services are by all objective standards competitive with and comparable to Tennis Channel, they are carried on Comcast's most widely received

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[110] NFL Enterprises LLC v. Comcast Cable Commc'ns, LLC, Program Carriage Complaint ¶ 3, File No. CSR-7876-P (May 6, 2008).

[111] NFL Enterprises LLC v. Comcast Cable Commc'ns, LLC, Program Carriage Complaint, ¶ 4, File No. CSR-7876-P (May 6, 2008); see also TCR Sports Broadcasting Holding, L.L.P. v. Comcast Corp., Program Carriage Complaint, File No. 8001-P (Aug. 7, 2008).

[112] The Tennis Channel, Inc., Program Carriage Complaint, File No. CSR-8258-P (Jan. 5, 2010).

programming tiers[.]"[113] Indeed, the Tennis Channel notes that "Comcast relegates only unaffiliated services like Tennis Channel to its narrowly-penetrated premium sports tier."[114]

Thus, Comcast has demonstrated in the past that it favors channels with which it is affiliated by placing unaffiliated channels on more expensive or less viewed service tiers. BTV has no reason to believe that Comcast will discontinue its discriminatory practices when it has a plethora of new, affiliated programming to protect from independent competitors. Comcast's vertical integration with NBCU may, in fact, exacerbate the problems independent programmers have faced in their dealings with Comcast. Comcast could decrease viewership of BTV relative to CNBC by placing or keeping BTV on a more expensive, premium digital tier notwithstanding its increasing appeal, while keeping CNBC on the basic, non-premium tier. As Congress and the Commission have recognized, it is in the public interest to prevent this form of program carriage discrimination.

Since Comcast's current behavior evidences discrimination in tiering, and the Transaction will increase its incentive and ability to protect its affiliated networks, the Transaction raises a substantial and material question of fact as to whether grant of the Application is in the public interest, and the Application should be denied. In the alternative, the Commission should prohibit Comcast-NBCU from carrying any business news programming network on a different tier than CNBC or any similar Comcast business news programming network. Where a business news programming network is currently on a less-heavily subscribed

113 Id.

114 Id.

tier, it must be moved to the tier or tiers where CNBC is carried within six months of the DOJ consent decree or FCC decision, whichever is later.

3. Refusal of Carriage

For many of the same reasons that neighborhooding and tier placement are critical to maintenance of robust competition in business news programming, so, too, is carriage. Refusal of carriage is a long-recognized anticompetitive harm. Among other measures, Congress implemented so-called "must carry" rules to prevent MVPDs from refusing to carry competing local broadcast stations. "Congress emphasized that the must-carry and channel positioning provisions are meant to protect our system of television allocations and promote competition in local markets."[115]

The Marx Report establishes business news as an antitrust market and demonstrates that, contrary to the Application's assertion that the Transaction represents "no risk" of foreclosure, Comcast-NBCU would only need to foreclose one business news channel to achieve the benefits of foreclosure.[116] BTV reaches 23% of its viewers via Comcast's cable systems, so any reduction in carriage on Comcast's system would be detrimental to BTV.[117] In addition, as discussed below, through bundling of Comcast/NBC programming and advertising, Comcast can force other MVPDs to foreclose BTV.

[115] Implementation of the Cable Television Consumer Prot. and Competition Act of 1992 – Broad. Signal Carriage Issues; Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Serv. Rates; Request by TV 14, Inc. to Amend Section 76.51 of the Commission's Rules to Include Rome, Georgia, in the Atlanta, Georgia, Television Market, Report and Order, 8 FCC Rcd 2965, 2988 ¶ 91 (1993).

[116] Marx Report at 26-28.

[117] Marx Report Appendix at 25.

Comcast-NBCU will have two networks, CNBC and The Golf Channel, that attract the same demographic as BTV. That demographic, affluent adult males, is highly valued by advertisers. Comcast-NBCU would have every incentive to maximize its leverage over advertisers interested in that demographic by dropping BTV from its line-up.

Of course, the greatest harm that Comcast could cause to BTV would be complete refusal to carry it. If Comcast were to refuse BTV carriage, it would deprive BTV of the ability to reach Comcast's 24 million subscribers. Comcast's subscribers are located in most of the major business centers in the nation. These markets have the largest percentage and absolute number of BTV viewers.

The Marx Report documents both short- and long-term benefits of foreclosure. In the short term, Comcast NBCU will increase viewers and advertising revenue for CNBC without competition from BTV. Advertising rates for the Comcast-NBCU networks would increase. To the extent BTV's loss of carriage, and corresponding loss of advertising revenue, reduces its value to other MVPDs, Comcast-NBCU would be able to increase fees for CNBC. In the long-term, advertising revenue for CNBC would continue to grow across all cable systems as a result of foreclosure. The Marx Report concludes that both short- and long-term foreclosure would be profitable.

Comcast has a history of limiting the widest possible diversity of information sources to the public by denying independent programmers carriage, as evidenced by the situation of

MASN, when Comcast initially refused to carry MASN's regional sports programming.[118] Even after Commission Orders forced Comcast to negotiate with MASN, MASN was forced to file a program carriage complaint in 2009 for areas where Comcast continued to refuse to carry MASN, despite the strong demand for MASN in the areas where Comcast refused it carriage.[119] Indeed, as noted above, Comcast continues to favor its own sports programming channel, Versus, at the expense of MASN. Comcast placed Versus on a channel adjacent to the two principal ESPN channels, plus its own Comcast Sports Network, while leaving MASN's principal channel more than 30 channels away.

In particular, once Comcast owns NBC, it will have the economic incentive to deny access to its distribution system to CNBC's main competitor – BTV, as it did to local sports competitor MASN in the Washington, D.C. market. The Marx Report shows that such foreclosure would be profitable both in the short-term, and over time.

The Commission's program carriage rules and the difficulties encountered in enforcing them would provide BTV (and similarly situated independent programmers) with only limited and ineffective protection from such anticompetitive conduct. This point was recently underscored by Senator Kohl in his May 26, 2010 letter to Chairman Genachowski, where he noted that requiring Comcast not to discriminate in favor of its own programming "would be independent of the existing FCC program carriage rules, and apply regardless of whether or not

[118] See TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Comcast Corp., Proposed Findings of Fact and Conclusions of Law, MB Docket No. 08-214, June 26, 2009 (hereinafter, "MASN Proposed Findings of Fact and Conclusions of Law").

[119] MASN Proposed Findings of Fact and Conclusions of Law at 11.

those rules are in force" and should expressly apply to issues such as tiering or neighborhooding.[120]

The Commission should deny the Application because such incentive and ability to foreclose poses a substantial and material question of fact as to whether grant of the Application is in the public interest. In the alternative, the Commission should condition the grant of the Application on the requirement that existing business news networks must to carried on nondiscriminatory terms and conditions. If the Commission does not adopt these conditions, the Commission should require divestiture of CNBC.

The merged Comcast-NBCU will have both the power and incentive to harm and discriminate against BTV and other independent programmers in channel placement, carriage, and tiering. It will control the largest cable distribution system in the U.S., and will have the incentive to protect CNBC, its second most profitable affiliated cable network. As the Supreme Court noted fifteen years ago, "[b]esides the cable operators' incentives to wield their market power to the detriment of the broadcast industry, Congress also had evidence that cable operators had already dropped, refused to carry, or adversely repositioned significant numbers of local broadcasters."[121] The Supreme Court has also recognized the resulting harms that an MVPD's discrimination may cause. When a cable system denies a channel access to the cable network, a series of negative ramifications ensues:

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[120] Letter from Sen. Herbert Kohl to the Hon. Christine Varney, Assistant Attorney General Antitrust Division, and the Hon. Julius Genachowski, Chairman of the Federal Communications Commission at 5 (May 26, 2010).

[121] Turner Broad. v. FCC, 910 F. Supp 734, 742 (D.D.C. 1995), aff'd 520 U.S. 180 (1997).

> If a station is denied access to a cable network or is adversely repositioned, the size of the audience it can reach will be restricted. A reduced audience decreases a commercial station's attractiveness to advertisers, which causes advertising revenues to decline. ... When the revenue declines, the station's ability to provide quality programming is hampered, further decreasing the viewing audience and creating a vicious cycle of declining financial stability and health.[122]

In this case, all of the discriminatory conduct outlined above will reduce the public's access to critically important news content and unfairly weakens independent news programmers' competitive postures. Because the Transaction will hinder independent programmers from reaching or retaining fair channel carriage, the Transaction should be denied or appropriately conditioned to address these transaction-specific harms. Specifically, Comcast-NBCU should be required to carry, or continue to carry, on all of its content distribution platforms (cable, Internet, mobile devices) all business news channels currently carried by Comcast and must provide such business news channels with non-discriminatory terms of carriage, including the provision of subscription fees.

B. Restrictions on Internet Distribution of BTV

Internet access issues are especially important to a company like Bloomberg, which is highly dependent on the Internet to deliver content to its customers. Consumers are currently able to gain access to all BTV content over the Internet, including a live stream of the BTV service. BTV is concerned that a combined Comcast-NBCU will have an incentive to restrict the ability to access BTV over the Internet or degrade BTV's Internet signal.

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[122] Id. at 744.

1. Restricting Access to BTV over the Internet

As a news provider that simultaneously distributes all its content over the Internet, BTV is concerned that Comcast-NBCU could inhibit users' access to BTV video over the Internet. Comcast has launched "TV Everywhere," which limits access to programming to Internet users who can "authenticate" that they have purchased cable subscriptions. Comcast is enforcing this model through contracts that prevent cable programmers from distributing their content via the Internet other than through Comcast's preferred mechanisms. The Commission and Congress have recognized that competition from new technologies, providing alternatives to traditional means of accessing cable television, is in the public interest.[123] NBCU is very familiar with this tactic. During the last Winter Olympics, NBC only allowed viewers to watch full replays on the Internet if they could first demonstrate that they were subscribers to a cable system, or other MVPD.[124] Senator Kohl, at the time, expressed concern that such content restrictions may be a harbinger of competitive limitations "particularly in the context of the proposed Comcast-NBC Universal merger."[125]

BTV is concerned that Comcast-NBCU could pressure independent channels into removing or limiting content availability on the Internet. Comcast-NBCU could do so by offering independent channels discriminatory or unfavorable terms if they use other platforms

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[123] See, e.g., Cable Television Consumer Protection and Competition Act of 1992, H.R. Rep. No. 102-628 at 25 (1992) ("A principal goal of H.R. 4850 is to encourage competition from alternative and new technologies, including competing cable system, wireless cable, direct broadcast satellites, and satellite master antenna television services.")

[124] Letter from Sen. Herb Kohl to Jeff Zucker, President and CEO of NBC Universal (Feb. 26, 2010).

[125] Id.

like the Internet to distribute their content. Having the ability to restrict the platforms that independent channels may use to distribute their content is inherently anticompetitive. And such restrictions, as they relate to BTV, would prevent the public from accessing independent sources of news and information on-line altogether. Such restrictions on news cannot be in the public interest. Any artificial limits on the ability to access content on-line also devalues consumers' broadband subscriptions. It is yet another reason for the Commission to deny the Application. If the Commission does not deny the Application, it should impose a condition that Comcast-is 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.

2. Degrading Internet Access

Comcast is not only an MVPD, it is also among the Nation's largest Internet service providers. The proposed Comcast-NBCU merger therefore presents concerns regarding both degraded and restricted Internet access. Indeed, Comcast's history of interfering with certain kinds of content, such as peer-to-peer file transfer systems, has prominently been the subject of recent litigation. Such "network management" techniques pose a potential threat to other Internet content and service providers. This is the kind of public interest harm that the Commission should address through conditions to the proposed merger or through denial of the merger altogether. Especially in light of the D.C. Circuit's recent decision in Comcast,[126] which called into question the Commission's authority to regulate Comcast's Internet network management practices, it is critical that the Commission either deny or condition the Merger to