of serving customers in the cable operator's own market(s), and thereby reduce the rival's competitive strength."[112]

Finally, DIRECTV notes that the Commission's ban on exclusive arrangements for cable-affiliated programming expires in 2012.[113] The back-stop of the program access rules was a significant factor in the Commission's conclusion that no conditions need be placed on national programming networks in both *News/Hughes* and *Adelphia/Comcast/TWC*.[114] At this point, there is no guarantee that this important safeguard will extend beyond the next two years.

Accordingly, the Commission should impose a condition with respect to national programming similar to that it has imposed in the past with respect to broadcast and RSN programming.

> ***When negotiations fail to produce a mutually acceptable set of price, terms and conditions for carriage of a national programming network that Comcast/NBCU owns, controls or manages, an MVPD may choose to submit a dispute to commercial arbitration and continue carriage of the network during the pendency of such arbitration.***

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112 *2007 Exclusivity Extension Order*, ¶ 72; *2002 Exclusivity Extension Order*, ¶ 37 n.108. This concern is well recognized and longstanding. For example, Congress was concerned about cable operators withholding programming outside their franchise areas. Accordingly, the 1992 Cable Act did not bar exclusive contracts only in areas served by the particular cable operator affiliated with a programming network, but instead barred exclusive contacts in areas served by *any* cable operator. *See* 47 U.S.C. § 548(c)(2)(D). Indeed, Congress was so concerned with cable operators' refusal to deal with MVPDs operating outside of their service areas that it prohibited cable operators and cable-affiliated programmers from entering into exclusive contracts for distribution in areas *not* served by *any* cable operator.

113 *See 2007 Exclusivity Extension Order*, ¶ 1.

114 *See Adelphia/Comcast/TWC*, ¶ 168; *News/Hughes*, ¶ 124.

Applying this condition will harmonize the treatment of Comcast-controlled linear programming and provide MVPDs with an effective safeguard against anticompetitive tactics.

D. The Commission Should Extend the Existing Conditions on Comcast's RSN Programming.

Comcast controls nine RSNs, and has been active in pursuing additional networks as they become available. In the *Adelphia/Comcast/TWC* proceeding, the Commission found that Comcast would have the incentive and ability to demand higher prices for that "must have" programming.[115] Accordingly, the Commission imposed an arbitration condition very similar to those DIRECTV has proposed for the additional programming Comcast will acquire through the proposed transaction. That condition is set to expire in 2012, though the Commission has announced that it will issue a report on RSN access issues six months prior to expiration and may determine that further action is warranted at that time.[116]

Comcast asserts that there is no reason to revisit the RSN condition because nothing about the proposed transaction would change its incentive and ability to foreclose rival MVPDs.[117] This is not so. The proposed transaction would give Comcast additional national networks that could be tied as a condition of gaining access to RSN programming if Comcast were not required to give stand-alone offers in arbitration. Moreover, the transaction would allow Comcast to repurpose some of the programming

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[115] *See Adelphia/Comcast/TWC*, ¶ 140.

[116] *Id.*, ¶¶ 157, 165.

[117] Application at 122.

currently controlled by NBC Sports to further enhance its RSN market power. Indeed, its own expert argues that such content sharing would be a potential synergy arising from the proposed transaction.[118] By giving Comcast control over both the RSN and one or more local broadcast stations in key markets nationwide – including Philadelphia – the proposed transaction would result in a concentration of programming never before seen, which would be essential for any MVPD service.

These enhanced capabilities will have an effect on the ways in which Comcast can use its RSN programming going forward, and thus necessitate further action to address the potential effects of the proposed transaction. Accordingly, the Commission should extend this condition until such time as Comcast/NBCU can show that changed market conditions make it no longer necessary. Such an extension would be consistent with the Commission's stated intention to review the condition prior to expiration to determine whether further action is warranted. It would also align the term for all of the conditions imposed in this proceeding, ensuring that safeguards applicable to some types of programming are not undermined by the lack of such safeguards on Comcast's RSNs.

The Commission should also, at long last, extend the RSN condition to include CSN-Philly. The Commission exempted CSN-Philly from the access and arbitration conditions imposed in the *Adelphia/Comcast/TWC* proceeding, on the grounds that it presented a "unique case" because terrestrial delivery was not chosen for the purpose of evading the Commission's rules.[119] But the Commission has since recognized that the

118 *See* Rosston Report at 39-40 (discussing "synergies between Comcast's RSNs and NBC's O&O stations").

119 *See Adelphia/Comcast/TWC*, ¶ 163.

congressionally-mandated program access regime prohibits acts that have the purpose *or effect* of significantly hindering or preventing competition.[120] In light of that conclusion, the Commission recently established a presumption that withholding terrestrially delivered, cable-affiliated RSN programming has just such an effect – based in part on evidence of the effect withholding of CSN-Philly has had on DBS rivals.[121]

This transaction would plainly increase Comcast's ability to disadvantage rivals in the Philadelphia market. It would add Philadelphia's only NBC station to Comcast's other Philadelphia assets. Having thwarted competition for nearly a decade by withholding local sports programming, Comcast could now withhold local sports *and* NBC programming from satellite carriers. Or it could engage in "program and resource sharing" among its assets that could further undermine a competitive marketplace – by, for example, moving programming from the local broadcast station (which is now carried by Comcast's rivals) to the RSN (which is not).

For over a decade, Comcast has held Philadelphia sports fans hostage, thereby reducing consumer choice and MVPD competition substantially. The time has come for the Commission to resolve this long-running issue by revoking the exemption that allows CSN-Philly to operate outside the competitive safeguards that govern all other RSNs owned, controlled, or managed by Comcast.

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[120] *See* 47 U.S.C. § 548(b).

[121] *See Terrestrial Loophole Order*, ¶ 52.

E. Existing Constraints Are Not Sufficient to Preclude Anticompetitive Conduct Arising From the Proposed Transaction.

Applicants also argue that the Commission need not be concerned about price increases and withholding because anticompetitive conduct is precluded by existing regulatory safeguards, fiduciary duties, and the minority protections GE enjoys under its contract with Comcast.[122] But the Commission has repeatedly determined that such constraints are not sufficient to prevent anticompetitive behavior. Moreover, many of the Commission's pro-competitive rules are set to expire over the next several years, while "the protections afforded by corporate law are neither absolute nor omniscient."[123]

The applicants in the *News/Hughes* transaction made essentially the same argument Comcast makes here, suggesting that regulatory obligations would prevent broadcast stations from withholding programming in order to gain an anticompetitive advantage. But the Commission rejected that argument. It found that, while the Communications Act and Commission rules require good faith negotiation with MVPDs and prohibit exclusive retransmission consent agreements, "these statutory and rule provisions do not prevent broadcasters from withholding their signals while retransmission consent negotiations are in progress, nor do they require that access be provided on non-discriminatory terms and conditions."[124]

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122 *See* Application at 15-16, 116-17; Israel/Katz Report at 8-9; Rosston Report at 34. Applicants even commit to bolster those constraints by applying unspecified "key components" of the Commission's program access rules to retransmission consent negotiations. *See* Application at 121.

123 *News/Hughes*, ¶ 83.

124 *Id.*, ¶ 211.

Reliance on existing regulatory obligations is even less plausible here. The program access rules' prohibition on exclusive contracts expires in less than two years,[125] and the good faith negotiation requirement for retransmission consent expires in less than four,[126] so neither Applicants nor the Commission can assume that these safeguards will remain in place beyond that limited period. Moreover, even if a non-discrimination requirement were imposed – as Comcast appears to invite – nothing would prevent Comcast from raising prices to all MVPDs, including itself[127] – a price increase that Comcast would partially recoup now and perhaps fully recoup in the future through its ownership of NBCU.

Nor would fiduciary duties imposed by contract and by state corporation law preclude Comcast's use of these assets for anticompetitive ends. The Commission has previously considered and rejected the argument that "corporate governance, corporate law or securities laws in general may be relied upon to adequately protect MVPD and video programming competitors from potential anti-competitive vertical foreclosure behavior on the part of Applicants."[128]

There is no reason to reach a different result here. For example, nothing about GE's minority rights would be implicated to the extent Comcast agreed to pay a *higher*

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[125] *See 2007 Exclusivity Extension Order*, ¶ 1 (expires October 5, 2012).

[126] *See* Pub. L. No. 111-175 § 107 (expires December 31, 2014.).

[127] *2007 Exclusivity Extension Order*, ¶ 1.

[128] *News/Hughes*, ¶ 100.

price for NBCU programming as part of a uniform price increase strategy.[129] Nor would those rights be triggered were Comcast to implement a strategy of threatening to withhold programming in order to demand *higher* rates from its MVPD rivals. Even if there were some class of activity that might implicate GE's contractual protections, Comcast could circumvent the problem by making "side payments" to NBCU as compensation that would allow GE to share in the incremental profits of Comcast's actions.[130] Moreover, because Comcast has a contractual glide path to acquiring 100% of the joint venture within the next several years, there is no reason to believe that any fiduciary constraints would even arguably apply in the near future.

As in prior vertical combinations, the Commission cannot rely solely upon existing regulatory and corporate constraints to prevent anticompetitive outcomes from the proposed transaction. Additional safeguards are clearly warranted.

F. The Commission Should Make Modest Revisions to Streamline Implementation of Its Arbitration Regime.

The conditions proposed herein would extend the arbitration regime established in prior transactions to some of the programming assets Comcast proposes to acquire in this transaction. That arbitration regime has proven a useful backstop to the Commission's other rules in several respects. Most importantly, it ensures continued carriage while disputes are under arbitration, prevents bundling of unpopular programming with "must

129 As the Commission has recognized, a vertically integrated entity can avoid running afoul of the non-discrimination requirements of the program access rules by charging itself the same inflated rate for carriage as it charges other distributors. *See, e.g., id.*, ¶¶ 82-84.

130 *Id.*, ¶ 83. *See also* Murphy Report at 31 ("It is in GE's interest to agree to foreclosure strategies that are jointly profitable for NBCU and Comcast, and then share in the incremental profits").

have" content, and provides a neutral third party to determine the fair market value of the programming at issue independent of the effects of vertical integration.

While these attributes of the arbitration regime are laudable, there remains room to improve the process to better conform to the Commission's vision of a rapid and affordable means of redress. The Commission originally envisioned a process that could be completed in 30 days under AAA's expedited procedures.[131] However, it also left open the possibility that the arbitrator could consider a wide-ranging list of evidence to determine fair market value.[132] Therein lies the problem. Wide-ranging discovery is both inconsistent with a rapid and streamlined arbitration proceeding and burdensome on the parties involved.

DIRECTV believes it is possible to reconcile the need for quick, affordable resolution with the need to permit reasonable discovery. Based on its recent experience with arbitrations involving Comcast, DIRECTV has found that some categories of evidence are extremely burdensome to collect and produce, but are of little (if any) probative value. By narrowing the categories of material subject to discovery and establishing the framework for exchanging those materials, the Commission could greatly increase the efficiency of arbitration with no detrimental effect on the availability of relevant evidence.

Accordingly, DIRECTV submits that the rules for arbitration should be revised in order to streamline the process by focusing on information that is most relevant to the fair

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[131] *See, e.g., News/Hughes*, Appendix F, Section IV; *Adelphia-Comcast-TWC*, Appendix B, Section B.3.a.

[132] *See, e.g., News/Hughes*, Appendix F, Section IV; *Adelphia-Comcast-TWC*, Appendix B, Section B.3.e.

market value inquiry and not unduly burdensome to produce. The four substantive modifications proposed by DIRECTV are explained below.

First, as the Commission has found, "the best and most persuasive evidence of fair market value is the objective price that [] programming yields in the marketplace."[133] Accordingly, the centerpiece of any such analysis must be the carriage contracts actually agreed to between programmers and MVPDs. Yet in prior orders establishing an arbitration remedy, the Commission has identified offers made in carriage negotiations as well as internal analyses of the value of the programming involved as relevant to the discussion. Once parties have reached an actual carriage agreement, negotiations and analyses that came before are no longer relevant to market value question as they are superseded by the objective evidence of the agreement itself. Conversely, having to search for internal e-mails, analyses, and multiple drafts of proposed agreements is highly burdensome in both time and expense. There is no reason to require parties to take on such a burden for information of little relevance to the fair market value inquiry.

Accordingly, DIRECTV submits that the Commission should establish a presumption that carriage agreements are relevant evidence of fair market value, and require any party seeking additional evidence from the other party to demonstrate that the likely probative value of such evidence clearly outweighs the burden of searching for and producing it.

Second, the Commission should ensure that discovery of such carriage agreements is tailored to the issue at hand. Specifically, national sports programming

[133] *TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, 23 FCC Rcd. 15783, ¶ 46 (M.B. 2008).

contracts are not relevant to determination of fair market value for regional sports networks, as confirmed by the ruling of at least one arbitrator.[134] Similarly, where the arbitration involves national programming, contracts for regional programming are not relevant. Comcast itself recognized this distinction in the ongoing program access proceeding initiated by The Tennis Channel.[135]

Third, the Commission should revise the rules for financial information in two respects.

- The Commission has forbidden arbitrators from selecting an MVPD's offer that does not allow the programmer to recover its costs. By setting this pricing floor, the rules remove important incentives for RSN cost containment. For example, if an RSN operator knows that it will at least recover its costs, it has less incentive to negotiate aggressively with team owners for sports rights and a greater incentive to build out expensive studios and other facilities where more modest ones would serve just as well.[136] Ultimately, the current rule ensures that all such costs can be passed along to MVPDs, which likely will pass them along in turn to consumers. The

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[134] *See National Cable Television Cooperative, Inc. v. The News Corp. c/o Fox Cable Networks Group,* AAA File No. 57 472 E 00011 07, Rulings on Discovery Issues, at 3 (May 23, 2007) (finding that "national sports network agreements are not relevant to the issue presented relating to a determination of fair market value of regional sports networks programming under FCC Order").

[135] *See The Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC,* Reply in Support of Comcast's Motion for Acceptance of Surreply, FCC File No. CSR-8258-P, at 2 n.3 (May 3, 2010) (countering the argument that Comcast's RSNs compete with a national sports programmer such as Tennis Channel).

[136] In this respect, it creates a system not unlike the outdated rate-of-return rules for the monopoly telephone network, which can result in the phenomenon of "gold plating." *See, e.g.,* H. Averch and L. Johnson, "Behavior of the Firm Under Regulatory Constraint," 52 AM. ECON. REV. 1052 (1962).

Commission's arbitration regime should not act as guarantor for RSN profitability.

- To the extent a programmer's cost structure may be relevant to the fair market value of its programming, it is only so for special circumstances unique to that programmer. Accordingly, evidence of programmer's costs and related financial information should be limited to such extraordinary items. In addition, the programmer should be required to announce in the early stages of the arbitration whether it intends to present such evidence. If so, discovery of financial information should be commensurate with the limited nature of the evidence. For example, the only financial information that is relevant is that of the programmer at issue,[137] not its affiliates (unless a showing can be made that costs are spread across affiliates) or other unaffiliated programmers. Such financial information is highly sensitive and therefore calls for targeted disclosure. Participating in arbitration should not be tantamount to obtaining a license for a financial fishing expedition.

Fourth, carriage agreements and other contracts often involve parties other than those participating in the arbitration. Given the nature of the competitive information contained in such agreements, they often contain provisions that give the parties contractual rights ensuring confidentiality. When third parties assert those rights, the discovery process can become bogged down pending resolution of a multi-party

[137] Such financial information would include the books and records of the programmer as well as its contracts with key suppliers (*e.g.*, affiliation and syndication contracts for a broadcaster, sports rights contracts for an RSN).

negotiation for some form of protective order. In order to facilitate this process, the Commission should adopt a default Confidentiality Agreement and Protective Order that would apply whenever the production of documents may involve the rights of third parties. Attached as Exhibit B hereto is a form of such an order, based upon the one negotiated among Comcast, DIRECTV, and eight RSN operators over the course of several months (and subsequently adopted by the arbitrator). The form can be modified to the extent a third party that seeks further enhanced protection of documents to be produced in the arbitration proceeding can demonstrate good cause why specific additional safeguards are warranted.

DIRECTV sbelieves the modifications discussed above will streamline the arbitration process and thereby make it a more efficient and cost-effective means of redress to offset the effects of Comcast/NBCU's vertical integration.

III. Comcast Does Not Offer Public Interest Benefits of Sufficient Magnitude to Overcome the Anticompetitive Effects of the Proposed Transaction.

Where a proposed transaction demonstrably raises concerns of competitive harm, the Commission must proceed to an analysis of asserted public interest benefits that the transaction would create in order to determine whether the Applicants have proven by a preponderance of the evidence that the probable benefits outweigh the potential harms.[138] Here, Comcast claims that the proposed transaction will create incentives that will result in a variety of benefits, from increasing the availability of specific types of programming

[138] *See, e.g., News/Hughes*, ¶ 23.

to accelerating the introduction of "new media" services, to cost savings and synergies.[139] Yet the benefits described in its Application are so uncertain and non-transaction-specific that they are not cognizable under the Commission's standard. Even Applicants' proffer of a series of commitments, including specified quotas for carriage of additional types of programming, and the submission of an economic analysis of these asserted benefits is insufficient to give them substance.

The asserted benefits of the proposed transaction cannot offset the likely public interest harms the transaction would generate. Accordingly, only by conditioning any approval in this proceeding as requested by DIRECTV can the Commission place the benefits and harms of the proposed transaction in the appropriate balance.

A. Comcast's Claimed Efficiencies Are Not Cognizable.

Applicants assert that the proposed transaction will increase consumer choice by expanding national and local programming across multiple platforms; accelerate the development of new media; and result in cost savings and synergies. Applicants have submitted an economic analysis of these claims by Gregory L. Rosston, whose principal findings are that: (1) Comcast's acquisition of a controlling interest in NBCU will facilitate and accelerate negotiations to make content available on a variety of different platforms and thereby lead to the development of new business models; (2) Comcast plans to make substantial investments in NBCU programming; and (3) the proposed transaction will result in additional efficiencies, such as the elimination of double

[139] Application at 36-71.

marginalization, that will benefit consumers.[140] We examine each of these claims in turn below, and demonstrate that none of them can withstand scrutiny.

Claim 1: The transaction will facilitate and accelerate negotiations and thereby lead to development of new business models. The Application and the Rosston Report discuss negotiating "friction" and other "challenges" faced by Comcast in its attempts to develop new products and services, and conclude that the proposed transaction would ameliorate those issues and pave the way for advancement. These purported efficiencies are speculative and/or not transaction specific, and therefore are non-cognizable.

For example, Comcast claims that the proposed transaction would overcome current difficulties in obtaining access to NBC and Universal Studios content for distribution on new platforms.[141] Yet in another portion of its application, Comcast essentially denies that such difficulties exist. It asserts that "[s]everal online video distributors have reached agreements to license broadcast programming content and library content for online distribution," and that there is no reason to believe that even Internet start-up companies would be unable to negotiate effectively for content.[142] If Comcast believes that even new entrants can gain access to programming for distribution on non-traditional platforms, it is hard to imagine how it could also believe that the country's largest MVPD and ISP cannot gain such access absent this transaction. Moreover, to the extent negotiations for new media content do present a challenge, one

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[140] *See* Rosston Report at 3-4.

[141] Application at 65-66.

[142] *Id.* at 98-99.

would expect that Comcast's MVPD rivals would have even more difficulties obtaining access to NBC and Universal Studios content if those programmers were affiliated with Comcast. In other words, Comcast's gain would be a loss for the rest of the industry, and for the broader public interest as well.

Professor Rosston asserts that it took Comcast several years to get sufficient quality and variety of content to achieve widespread adoption of VOD by consumers, as evidenced by the fact that VOD content choices and content views have grown significantly over the past several years after a slow start.[143] However, the facts do not support Rosston's thesis that lack of content delayed Comcast's roll-out of VOD service. For example, Rosston notes that in late 2004, Comcast "gained access to more than 35,000 television episodes from Sony and 10,000 television episodes from MGM."[144] Yet according to Exhibit 2 of his report, Comcast offered only 3,500 VOD content choices in 2005 and 9,000 in 2006 – far short of the 35,000 episodes available to Comcast from Sony and MGM alone. Clearly, something other than the availability of content – such as limitations in Comcast's own facilities – was responsible.

Moreover, the growth in VOD views presented in Exhibit 3 is also misleading. While the number of views per month has grown considerably, that growth largely reflects the growth in the number of Comcast digital subscribers (*i.e.*, the only ones who have access to VOD) from 7.7 million in December 2003 to 18.4 million in December

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[143] *See* Rosston Report at 13-16.

[144] *Id.* at 14-15.

2009.[145] Indeed, while Rosston touts the fact that there were "about 17 VOD views per home per month" in 2009,[146] Comcast reported that subscribers watched an average of 30 VOD programs per month in 2005.[147] In other words, although the growth in programs viewed per month looks impressive, each Comcast subscriber actually watched only about half as much VOD content in 2009 as in 2005 – despite having thousands more titles to choose from.

Citing another potential benefit, Comcast asserts that its affiliation with Universal Studios would facilitate its "pioneering" negotiation of "day-and-date release" of movies for MVPD carriage at the same time they become available on DVD.[148] Professor Rosston similarly speculates that common ownership may enable Comcast to "encourage" Universal to offer more day-and-date titles.[149] Yet over two years ago, the Motion Picture Association of America – on behalf of its members, specifically including Universal City Studios LLLP – filed a petition seeking Commission approval for a new business model under which the studios would partner with MVPDs "to provide high value, high definition content to consumers *prior to* the normal release date of

[145] *See* Comcast Corp. Form 10-K for the period ending 12/31/03, at 2 (available at http://files.shareholder.com/downloads/CMCSA/725460497x0xS950159-04-281/1166691/filing.pdf); Comcast 2009 10-K at 2.

[146] Rosston Report at 15.

[147] Comcast 2005 Annual Report at 11 (available at http://files.shareholder.com/downloads/CMCSA/725460497x0xS1193125-06-36698/1166691/filing.pdf).

[148] Application at 57-58.

[149] *See* Rosston Report at 22.

prerecorded media (*e.g.*, DVDs) for general in-home viewing."[150] The Commission granted that petition last month, setting the stage for ever-earlier release windows for VOD content.[151]

In addition, the nation's major studios (including Universal) and cable operators (including Comcast) recently launched a $30 million national campaign to promote movies on demand, including day-and-date releases.[152] Indeed, the announcement of that campaign included a statement by the President of Warner Bros Home Entertainment Group that its experience has been "so positive that nearly all of our titles will be Day-and-Date this year."[153] Not only are studios (including Universal) already intensely interested in and working toward early release windows with a variety of MVPDs, but such windows could come even earlier than the day-and-date release Comcast claims to be "pioneering." This purported efficiency will likely happen even if the proposed transaction is never consummated, and thus it is not the type of transaction specific benefit cognizable in the Commission's analysis.

Comcast and Professor Rosston similarly claim that Fancast Xfinity TV, Comcast's "TV Everywhere" platform, would make more content available online if it

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150 Motion Picture Association of America, Petition for Expedited Special Relief, MB Docket No. 08-82, at i (filed May 9, 2008) (emphasis added).

151 *See Motion Picture Association of America*, 25 FCC Rcd. 4799 (MB 2010).

152 *See* Press Release, "Major Hollywood Studios and Cable Companies Launch $30 Million National Campaign to Promote Movies on Demand," ENHANCED ONLINE NEWS (Mar. 17, 2010) (available at http://eon.businesswire.com/portal/site/eon/permalink/?ndmViewId=news_view&newsId=20100317005555&newsLang=en).

153 *Id.*

could obtain sufficient rights.[154] Yet it is not at all clear that the "friction" cited by Comcast in securing content is actually observed by its personnel in the field. Just recently, in announcing that online video publishing solutions now have the ability to preserve Nielsen's ratings capabilities, the CEO of Comcast's wholly-owned online media management and publishing company, thePlatform, said that "[m]edia companies are now wholeheartedly embracing multi-platform video distribution."[155] Such an embrace belies any "friction" Comcast may wish to claim.

Professor Rosston also discusses Comcast's efforts to implement advanced advertising services, which have "the potential to provide greater value – to consumers and advertisers – than traditional cable and broadcast advertising."[156] He posits that the proposed transaction will likely increase the participation of NBCU's networks in advanced advertising initiatives, including Project Canoe (the cable industry's advanced advertising vehicle).[157] Yet Canoe Ventures recently announced that four major programming partners – including NBCU – will begin rolling out its interactive advertising application before the end of the second quarter.[158] Accordingly, there is no reason to believe that vertical integration with Comcast would result in any greater level

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[154] *See* Application at 59-61; Rosston Report at 23.

[155] "Comcast Media Center and thePlatform Announce Validation of Their Online Video Publishing Capabilities in Preserving Nielsen's Audio Watermarks," THEPLATFORM (May 20, 2010) (available at http://theplatform.com/about/details/cmc_theplatform_nielsen_c3_announcement).

[156] Rosston Report at 25.

[157] *Id.* at 27.

[158] *See, e.g.,* A. 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/e3i7278144fcfbad6f7348e730121f9ffbf).

of participation by NBCU. In addition, other cable operators have not waited for Canoe to bear fruit. For example, Cablevision launched its Optimum Select advanced advertising initiative in October 2009, apparently with great success.[159] Nothing would prevent Comcast from pursuing a similar path in the absence of integration with NBCU. Here again, the efficiency claimed by the Applicants simply cannot withstand scrutiny.

Claim 2: Comcast will increase investment in NBCU programming. Professor Rosston documents Comcast's investment over the past several years in programming networks it currently owns, such as E!, Style, Versus, and Golf Channel, and from this he argues that Comcast will do the same with respect to NBCU programming.[160] But Professor Rosston nowhere attempts to demonstrate that the NBCU networks are at all similarly situated to these Comcast networks. Each of the Comcast networks had very modest programming budgets at the beginning of the period examined by Professor Rosston, which were reflected in their generally poor ratings performance.[161] Comcast had to increase their programming budgets to enable these underperforming assets to become more viable. The analysis does not show how such investments compared to the large increase in rights fees experienced industry-wide. More importantly, Professor Roston provides no evidence that the NBCU networks, which include some of the most highly rated cable programming available, have similarly been underperforming for lack

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[159] *See, e.g.*, T. Swedlow, "Cablevision Trumpets Success of First Batch of Optimum Select Interactive TV Advertising Campaigns," INTERACTIVETV TODAY (Jan. 13, 2010) (available at http://www.itvt.com/story/6355/cablevision-trumpets-success-first-batch-optimum-select-interactive-tv-advertising-campai).

[160] Rosston Report at 5-6.

[161] *See id.* (annual programming expense in initial year considered was ${{ }} for Style, ${{ }} for E!, ${{ }} for Versus, and ${{ }} for Golf Channel).

of investment. Nor does Rosston consider whether the additional $9.1 billion in debt that the proposed transaction would place on the joint venture to buy out GE would constrain investment in programming.[162] Applicants provide no basis upon which to conclude that Comcast would make the additional investments in NBCU programming that Rosston postulates.

Both the Applicants and Professor Rosston also contend that the proposed transaction will enable the new entity to increase programming quality by competing more effectively in purchasing rights for additional sports programming.[163] However, NBCU already has broadcast and cable properties to spread costs, and has used that strategy in its Olympics coverage. It is not clear how the addition of more cable properties will help in this regard. Even if this efficiency were real, there is every reason to believe it could be achieved by arrangements less potentially detrimental to the public interest. For example, CBS and Turner Broadcasting pooled their resources to secure the rights to carry the NCAA men's basketball tournament from 2011 to 2024, including "digital and other new media rights," for more than $11 billion.[164] NBCU could follow a similar strategy by partnering with other cable networks, including those owned by Comcast. For its part, Comcast could achieve similar results by partnering its cable networks with NBC or any other broadcaster to pursue sports programming *without*

[162] *See* Application at 12.

[163] *See id.* at 50; Rosston Report at 7.

[164] *See, e.g.*, S. Wieberg and M. Hiestand, "NCAA reaches 14-year deal with CBS/Turner for men's basketball tournament," USA TODAY (Apr. 22, 2010) (available at http://content.usatoday.com/communities/campusrivalry/post/2010/04/ncaa-reaches-14-year-deal-with-cbsturner/1).

taking a controlling stake in its partner. Accordingly, this asserted benefit is not transaction specific.

Claim 3: The transaction would lead to other efficiencies, such as the elimination of double marginalization. Double marginalization arises whenever there is a margin between price and marginal cost at both vertical levels prior to a merger. Elimination of double marginalization occurs when the upstream division of an integrated firm reduces the price that it charges its downstream affiliate and thus reduces one of the two markups in the vertical chain. Professor Rosston asserts that, by eliminating double marginalization, the transaction will enable Comcast to internalize some or all of the per-subscriber fees paid for NBCU programming, allowing Comcast to either pass through the savings to its cable subscribers or invest them in higher-quality packages.[165] Yet Professor Rosston fails to substantiate this theoretical possibility with real-world evidence. For example, although Comcast has acquired an interest in any number of programming entities over the years, Rosston does not present any evidence that Comcast passed along any savings from the elimination of double marginalization to consumers or invested to improve its service – which consumers have annually given poor ratings.[166]

In prior proceedings, the Commission has severely discounted the theoretical effect of a reduction in double marginalization. In particular, it found that the failure to

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[165] Rosston Report at 44-46.

[166] *See, e.g.*, Consumer Reports, 2010 TV Service Ratings (available at http://www.consumerreports.org/cro/magazine-archive/2010/february/electronics-and-computers/bundling/february-2010-ratings-tv/bundling-tv-ratings.htm); J.D. Power & Assocs., 2009 Residential Television Service Customer Satisfaction Study (available at http://businesscenter.jdpower.com/JDPAContent/CorpComm/News/content/Releases/pdf/2009219-retv.pdf); J.D. Power & Assocs., 2008 Residential Television Service Satisfaction Study (available at http://businesscenter.jdpower.com/JDPAContent/CorpComm/News/content/Releases/pdf/2008204.pdf.

present sufficient information concerning the marginal costs of producing various types of programming and the relevant demand elasticities for different types of programming made it impossible to develop a reliable estimate of the magnitude of this asserted benefit.[167] The Rosston Report suffers the same infirmities. Professor Rosston provides the affiliate fees for certain NBCU networks but not the marginal costs of production, and uses a single estimated pass-through rate for all four networks rather than determining the demand elasticities for each type of programming involved.[168] Moreover, as noted above, to the extent the elimination of double marginalization increases Comcast's profit margin on each additional subscriber, the incentives to engage in foreclosure would be enhanced, not reduced.[169] As the Commission previously concluded, "[i]n the absence of any estimates of the impact of the elimination of double marginalization on the prices of [integrated] programming to other MVPDs and how this interacts with the increased incentives to withhold when [the integrated MVPD's] profit margin increases due to lower programming costs, we can only conclude that the claimed economic efficiencies are insufficient to mitigate the harms we have identified."[170]

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167 *See News/Hughes*, ¶ 155.

168 *See* Rosston Report at 45-46.

169 *See News/Hughes*, ¶ 156.

170 *Id.*

B. Comcast's Voluntary Commitments Are Not Substantial.

The commitments Comcast sets forth in the Application similarly add little on the benefits side of the analysis.[171] Some of them are amorphous, such as commitments to "continue its cooperative dialogue" with affiliated broadcast stations and "work to creatively incorporate" Common Sense Media information in its emerging platforms.[172] Others seek credit for existing initiatives, such as Comcast "reaffirm[ing] its commitment" to provide on-screen TV ratings information.[173] Yet even where the Application provides greater specificity with respect to proposals for new undertakings, its commitments are not substantial. For example:

News and informational programming. Comcast promises to serve the public interest by increasing local news and informational programming on NBCU O&O's by 1000 hours per year.[174] This would not be a material addition to those stations' existing programming. According to a 2008 filing by NBCU, each of its O&O's on average "airs in excess of 90 hours per week of news and public affairs programming."[175] Annualizing that figure over all 26 O&O's yields a total of 121,680 hours per year of news and informational programming currently offered by those stations.[176] The additional 1000

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[171] Professor Rosston does not attempt to analyze these commitments or quantify their costs and benefits. *See* Rosston Report at 3.

[172] Application at 40, 46.

[173] *Id.* at 45.

[174] *Id.* at 42.

[175] *See* Comments of NBC Universal, Inc. and NBC Telemundo License Co., MB Docket No. 04-233, at 20 (filed Apr. 28, 2008).

[176] The calculation is 90 hours x 26 O&O's x 52 weeks = 121,680 hours per year.

hours promised by Comcast as a benefit of the proposed transaction would constitute an increase of just 0.8 percent per year. Moreover, that figure almost certainly overstates this claimed benefit, as Comcast retains the flexibility to relegate this programming to its VOD or online offerings rather than actually broadcasting it.

Non-affiliated programming carriage. Comcast promises to add two non-affiliated channels per year for three years (a total of six channels) once it has completed digital conversion of its cable systems, which it forecasts to occur in 2011.[177] In a different part of its Application, Comcast reveals that digital conversion will allow "the recapture of (typically) several hundred megahertz of bandwidth" in each system.[178] According to Comcast's web site, every 6 MHz of converted analog spectrum can deliver 10-15 digital channels[179] – meaning that each digital channel takes about 0.5 MHz of capacity. Obviously, if Comcast recaptures "several hundred megahertz of bandwidth" through digital conversion, that process would create capacity for several hundred new digital channels. Offering to allocate just six of those myriad channels to non-affiliated programming – approximately 1% of reclaimed analog capacity – is hardly the concession to the public interest that Comcast makes it out to be.

Moreover, according to Comcast's most recent earnings release presentation, the all-digital transition is already active in approximately 70% of its cable system

[177] Application at 112-13.

[178] *Id.* at 76 n.144.

[179] *See* D. Harrar, "Going 'All-Digital' – Tons More HD and Faster Internet," COMCASTVOICES (May 1, 2009) (available at blog.comcast.com/2009/05/going-all-digital-tons-more-hd-and-a-faster-internet.html).

footprint.[180] Comcast has not explained why it cannot roll out the new unaffiliated channels in the converted systems immediately, rather than waiting until at least 2011 and then taking three years to complete the process.

Spanish-language programming. Comcast promises to carry more programming of Telemundo and mun2, NBCU's two Spanish-language networks. Specifically, Comcast says that it will increase the number of Telemundo and mun2 VOD programming choices on its central VOD storage facilities to a total of 300 over the next three years, and will also make such programming available online to subscribers to the extent that it has the rights to do so.[181] In other words, Comcast commits to make available more of what would then be its own affiliated programming. If it really wanted to address a shortfall in Spanish-language programming, it could contract for the Telemundo and mun2 VOD rights today, without acquiring NBCU. Or if it wanted to do so in a less self-serving way after the transaction is consummated, there are certainly a number of other Spanish-language programming sources to choose from – including Univision, Galavisión, TV Azteca, Sur, and VME. Indeed, a Comcast subsidiary is currently managing distribution of the "Univision on Demand" service, an extensive library of Spanish-language content from its three linear networks (Univision, TeleFutura, and Galavision).[182] Promising to increase the amount of affiliated

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[180] *See* Comcast 1st Quarter 2010 Results, at 3 (Apr. 28, 2010) (available at http://files.shareholder.com/downloads/CMCSA/725460497x0x369473/9e41603b-149b-4c6b-b5d8-a83ea0b26fe1/Comcast_Q110Slides_4.27.10.pdf).

[181] Application at 49-50.

[182] *See* "Univision Selects Comcast Media Center for Distribution of its Univision on Demand VOD Service," COMCAST MEDIA CENTER (Oct. 13, 2009) (available at http://www.comcastmediacenter.com/media/news-releases-detail.html?content_item_id=160).