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 at 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

[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

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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 prevent Comcast-NBCU from restricting BTV from delivering its programming content over the Internet. If the Commission does not deny the Transaction, it should condition the Merger so that Comcast-NBCU is prohibited from diminishing or degrading the terms or level of service or quality of signal delivery of any business news channel on any of its content-distribution platforms (cable, Internet, mobile devices) without the consent of the owner of said business news channel.

C. Discriminatory Payment Terms

The transaction provides Comcast the incentive and power to employ other discriminatory practices in terms of the compensation it provides to independent programmers. It will have an incentive to offer below-market compensation to independent programmers who compete with channels affiliated with Comcast. The Tennis Channel's pending program carriage complaint against Comcast provides a prime example. Even after the Tennis Channel made significant investments, improved and expanded its program content, and expanded its audience share, Comcast would only "carry Tennis Channel on significantly less favorable terms than [Comcast's] affiliated sports networks – even though Tennis Channel compares favorably to Comcast's similarly situated affiliates[.]"[127]

Notwithstanding that BTV is currently on a positive trajectory to increase its audience in the U.S. and abroad at a rapid pace, Comcast does not currently provide BTV compensation for carriage. Even as BTV's viewership increases, however, Comcast will have an incentive to

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126 Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010).

127 The Tennis Channel, Inc., Program Carriage Complaint ¶ 52, File No. CSR-8258-P (Jan 5, 2010).

compensate it at rates below those that would be afforded in the market. Once Comcast owns CNBC, BTV's main competitor, absent strong restrictions and prohibitions against such conduct, Comcast will have the incentive and opportunity to provide CNBC competitive advantages through discriminatory terms of carriage for BTV. This result is directly contrary to the Commission's duty to promote competition and to protect the public interest.

D. Disadvantaging BTV's Ability to Obtain Advertisers

Once Comcast acquires CNBC, it will have a compelling incentive to favor companies that it controls, including CNBC. BTV targets advertisers interested in reaching BTV's primary audience, affluent adult males, which is a highly sought-after demographic to advertisers. Several other channels that a combined Comcast-NBCU would own target the same audience and attract similar advertisers. Solely through ownership of a major distribution platform, Comcast-NBCU can bundle its advertising in a manner that makes BTV less attractive, or even redundant, to advertisers. Comcast's cable carriage agreements require programmers like BTV to provide Comcast with a certain amount of free advertising time on BTV's network. As a result, Comcast could bundle advertising time on BTV with advertising on its own programming networks with similar demographic appeal, such as the CNBC, The Golf Channel, or regional sports networks. The Marx Report demonstrates that Comcast-NBCU would have the clear incentive and ability to bundle advertising in such an anticompetitive manner.[128] Comcast-NBCU could do so at heavily discounted prices in order to deprive BTV of a fair opportunity to sell its own advertising to advertisers who prefer the BTV network.

[128] Marx Report at 8.

If the Commission permits the merger to proceed, Comcast-NBCU will have the incentive and ability to bundle advertising time on CNBC with other affiliated programming with similar demographic appeal. For example, Comcast may bundle advertising on CNBC with advertising on regional sports networks and the Golf Channel. As an independent programmer, BTV would not be able to offer advertisers similar packages. Comcast-NBCU's market power would foreclose competitors like BTV from access to advertisers by eliminating BTV's ability to compete on a level playing field for advertising revenue based on the quality and value of its programming.

In order to avoid this result, the Commission should adopt remedies that 1) prohibit Comcast-NBCU from selling advertising on non-Comcast-owned business news channels together with advertising on Comcast networks as part of a bundled sale of advertising by Comcast; 2) prohibit Comcast-NBCU from offering discounts or other inducements to advertisers that are tied directly or indirectly to reducing or refraining from advertising purchases on any business news channel other than CNBC or any other similar Comcast-NBCU-owned business news channel; and 3) prohibit Comcast-NBCU from offering discounts or other inducements for bundled advertising purchases that include advertising on CNBC or other Comcast-NBCU-owned business news channel.

E. Foreclosing Carriage by Other MVPDs

With the combination of NBC-owned channels and Comcast-owned channels, Comcast-NBCU will be able to bundle channels strategically in a way that could disadvantage BTV. Specifically, Comcast-NBCU could crowd out the number of channels available on other cable systems for independent news. Comcast could also threaten to withhold the most popular

Comcast-NBCU channels, or offer them on less advantageous terms, unless an MVPD agreed not to carry BTV (or other independent programming), or to only carry BTV on a less popular tier or in a more remote neighborhood than CNBC.

Such bundling, or "tying arrangements" leave MVPDs with a dilemma: they must either refuse the tied programming package and potentially go without must-have programming, or they can agree to the tying arrangement and purchase programming that neither they nor their customers want.[129] The Commission has recognized and addressed the harms that "tying" practices cause in past mergers.[130] When the Commission considered the DirecTV/News Corp merger, it agreed that the "transaction [could] enhance News Corp.'s incentive and ability to persuade competitors to carry its affiliated programming."[131] Only by imposing conditions on the merger did the Commission find that it remedied this potential harm.[132]

After the merger, Comcast could require an MVPD to carry the full suite of Comcast-NBCU programming in order to be able to carry must-have channels. Comcast-NBCU could also require it to carry CNBC in order to get access to must-have programming, such as a regional sports channel. The FCC describes the concern with bundling for carriage as follows:

> When programming is available for purchase only through programmer-controlled packages that include both desired and undesired programming, MVPDs face two choices. First, the MVPD can refuse the tying arrangement, thereby potentially depriving itself of desired, and often economically vital, programming that subscribers demand and which may be essential

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[129] Tying Order at 17862 ¶120.

[130] News Corp. at 593 ¶271.

[131] Id.

[132] Adelphia at 8220 ¶ 28.

> to attracting and retaining subscribers. Second, the MVPD can agree to the tying arrangement, thereby incurring costs for programming that its subscribers do not demand and may not want, with such costs being passed onto subscribers in the form of higher rates, and also forcing the MVPD to allocate channel capacity for the unwanted programming in place of programming that its subscribers prefer.[133]

The Commission found that concern well-founded when it reviewed the News Corp. transaction. Specifically, it concluded that

> we agree with Commenters who contend that the transaction can enhance News Corp.'s incentive and ability to persuade competitors to carry its affiliated programming. Specifically, as we held above, the transaction may enhance News Corp.'s incentive and ability to extract higher compensation from competing MVPDs in exchange for carriage of its most popular programming—RSN and broadcast programming. Such compensation may include monetary compensation, but also carriage of News Corp. affiliated networks. To obtain RSN or broadcast programming from News Corp., an MVPD may accede to News Corp.'s demands to carry its affiliated cable networks, or to pay excessive rates for News Corp. programming. Absent these demands and higher costs, the MVPD might have elected to carry an independent rival network that would have expanded the sources of programming available to its subscribers.[134]

[133] Tying Order at 17862 ¶120. The Commission also notes that "small cable operators and MVPDs are particularly vulnerable to such tying arrangements because they do not have leverage in negotiations for programming due to their smaller subscriber bases." Id. It further noted that "OPASTCO/ITAA, representing small and rural MVPDs, cites the practice of programmers to require carriage of less popular programming in specified (usually basic) tiers in return for the right to carry popular programming as an onerous and unreasonable condition that denies consumers choice and impedes entry into the MVPD market." Id.

[134] News Corp. at 593 ¶ 271. ("[V]ertical transactions also have the potential for anticompetitive effects. In particular, a vertically integrated firm that competes both in an upstream imput market and a downstream output market, such as post-transaction News Corp., may have the incentive and ability to: (1) discriminate against particular rivals in either the upstream or downstream markets (e.g., by foreclosing rivals from inputs or customers); or (2) raise the costs to rivals generally in either of the markets.") Such concerns prompted the Commission to impose, both in News Corp. and the Adelphia decision remedies, such as arbitration, outside the normal FCC procedures for resolution of complaints. Accordingly, Bloomberg has proposed

Such forced bundling harms independent networks' ability to compete for limited shelf space. In such circumstances the public interest is harmed regardless of the MVPD's resolution of the carriage issue. If the MVPD refuses such bundled programming, it deprives itself of economically significant programming. If the MVPD agrees to carry a bundle with programming that subscribers do not want, the costs are passed on to subscribers in the form of higher rates. In such circumstances, "the MVPD and its subscribers are harmed by the refusal of the programmer to offer each of its programming services on a stand-alone basis."[135] This effectively reduces the limited number of channels on an MVPD's system available to independent programmers.

After the merger, Comcast-NBCU will own or have an attributable interest in 54 cable networks.[136] An MVPD with limited capacity (as is the case for numerous rural carriers) may not be able to carry BTV.[137] As demonstrated in the Marx Report, the transaction increases the incentive and ability to bundle channels and the overall impact will harm other networks, particularly those such as BTV that offer substitutes to the Comcast-NBCU networks.[138] Absent bundling, however, such an MVPD with limited capacity may have chosen to carry BTV over one of the Comcast-NBCU channels if those channels were offered on the same terms

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similar kinds of remedies outside existing procedures to address the harm from this even more dangerously integrated Merger.

[135] Tying Order at 17862 ¶ 119 (2007).

[136] News Corp. at 508 ¶ 71.

[137] Marx Report at 39 and Marx Report Appendix at 34.

[138] See Id. ("The cable industry has become more vertically integrated into programming, which may harm competing programmers").

individually. In order to avoid this harm, the Commission should prohibit Comcast from offering to any MVPD or requiring any MVPD to accept any combination of NBCU and Comcast's network programming as a condition of receiving more favorable licensing terms than Comcast offers on an "a la carte" basis. The Commission should also prohibit Comcast from offering any discount or other inducement to any MVPD or other distributor of news content by electronic means on condition that said MVPD or distributor provide competitive business news channels on less favorable terms or conditions of carriage.

V. THE COMMISSION MUST DENY THE MERGER BECAUSE THE APPLICANTS HAVE NOT DEMONSTRATED THAT THE PROPOSED TRANSACTION SERVES THE PUBLIC INTEREST AND THE HARMS OUTWEIGH THE BENEFITS

The Commission must deny the Application because the Transaction will result in specific competitive harms that, when balanced against the potential public interest benefits, do not serve the public interest. Further, the Transaction results in public interest harms that "would otherwise frustrate implementation or enforcement of the Communications Act and federal communication policy."[139]

The vertical combination of NBC Universal's range of programming content – CNBC in particular – with the nation's single largest MVPD will lead to anti-competitive effects that the Commission has long sought to mitigate. If the Transaction is granted, it will result in further concentration of mass media ownership that will reduce the diversity of program and service viewpoints. Grant of the Application will further concentrate Comcast-NBCU's editorial power over the content of affiliated channels. It will significantly increase Comcast-NBCU's incentive

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[139] News Corp. at 483-84 ¶ 16.

and ability to harm and discriminate against unaffiliated channels in terms of carriage and advertising.

Indeed, "[t]he weighing of policies under the public-interest standard is a task that Congress has delegated to the Commission in the first instance[.]"[140] The Commission must, as it did in the Adelphia proceeding, "analyze all relevant issues raised by the transactions that ... significantly affect the public interest."[141]

A. The Transaction Would Reduce the Number of Independent News Sources, thereby Reducing Viewpoint Diversity, and May Impede the Free Flow of Video Programming

Diversity of ownership helps ensure that the public receives unbiased information in order to participate in the democratic process. Independent news outlets, such as BTV, provide the type of unbiased reporting needed by the public to make informed decisions.

The Transaction will result in Comcast, the country's largest cable company, holding a controlling interest in NBC Universal. NBC Universal, in turn, indirectly holds licenses for 25 over-the-air broadcast stations; NBC News, which broadcasts over those over-the-air stations, and news and information networks including MSNBC, the Weather Channel, CNBC World, and CNBC, the dominant business news network in the United States. The number of independent voices will be reduced when CNBC and other news channels become affiliated with Comcast and as a result, decrease viewpoint diversity. More importantly, as a direct result of the

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[140] Natl' Citizens, 436 U.S. at 810 (emphasis added).

[141] Applications for Consent to the Assignment and/or Transfer of Control of Licenses: Adelphia Commc'ns Corp., Assignors, to Time Warner Cable, Inc., Assignees, Adelphia Commc'ns Corp., Assignors and Transferors, to Comcast Corp., Assignees and Transferees, Comcast Corp., Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corp., Transferee, Memorandum Opinion and Order, 21 FCC Rcd 8203 ¶ 28 (2006) (emphasis added).

Transaction, Comcast-NBCU would have the ability and incentive to harm and discriminate against independent programmers and independent news programming in particular. Such potential harm to the number of independent voices and the commensurate decrease in viewpoint diversity is clearly contrary to the public interest.

The public interest requires a variety of viewpoints so citizens may make informed decisions. News and information providers like BTV serve "one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible."[142] Allowing private business interests to restrain the free flow of news and information to the public is not in the public interest.

The public benefits from the free flow of information.

> "The interest of the public is to have the flow of news not trammeled by the combined self-interest of those who enjoy a unique constitutional position precisely because of the public dependence on a free press. A public interest so essential to the vitality of our democratic government may be defeated by private restraints no less than by public censorship."[143]

The public interest requires news and information from a variety of independent news outlets to ensure that the public has the unbiased information needed to make informed decisions.

Comcast's defense of the Transaction essentially argues that because no Commission rule is violated, no diversity concerns are present. Assessing the Transaction for any rule violations is only part of the Commission's analysis – more importantly, it must affirmatively

[142] Associated Press v. United States, 326 U.S. 1, 28 (1945).

[143] Associated Press, 326 U.S. at 28-29.

determine if the Transaction is in the public interest.[144] In addition, Comcast argues that because the Transaction involves a vertical, rather than horizontal, merger, no diversity concerns are present. However, the Commission has recognized that "vertical transactions also have the potential for anticompetitive effects"[145] and this transaction has significant anticompetitive effects on their major competitors. Comcast ignores the significant horizontal impacts, such as control of channel lineups and neighborhooding decisions favoring their own programming that are created by the Merger.

B. The Transaction Would Reduce Diversity in Ownership and Their Commitment to Independence Does Not Mitigate That Concern

Comcast's commitment to "independence" using an ombudsman does not address the harm to ownership diversity that results from Comcast acquiring a controlling interest in NBCU programming, particularly in the area of NBC News and related cable news networks MSNBC and CNBC, where diverse ownership and viewpoint is critical. Nor does it guarantee NBC News' independence. Moreover, such an ombudsman arrangement does nothing to ameliorate Comcast's potential anticompetitive actions, as a distribution platform owner, which will result from ownership of a controlling interest in NBCU and its programming.

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[144] 47 U.S.C. § 310(d).

[145] DirectTV ¶ 71.

C. The Transaction Results in Significant Competitive Harms and Would Impair, Rather than Promote, Competition

As Congress has recognized, "concerns… regarding increased vertical and horizontal integration in the cable industry are serious and substantial."[146] The combination of Comcast, the Nation's largest MVPD, with NBCU will inevitably lead to competitive injury, barriers to entry, reduced media diversity and other harms described herein.

In recent years, Bloomberg has invested substantially to enhance BTV's ability to be a stronger independent source of news and information. The efforts of independent news outlets to succeed need to be encouraged and supported by the Commission.

If the Commission approves the Transaction, the little remaining competition between independent and MVPD-owned programmers will diminish further. Concurrently, the Commission will essentially approve an increase in Comcast-NBCU's market power to harm and discriminate against independent programmers. Approval in these circumstances runs counter to the public interest and the express will of Congress.

When considering the 1992 Cable Act, Congress recognized that vertical integration of the cable industry had already begun harming independent programmers competing with programmers affiliated with MVPDs.[147] It noted that "vertically integrated companies reduce

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[146] Cable Television Consumer Protection and Competition Act of 1992, H.R. Rep. No. 102-628 at 34 (1992).

[147] See Cable Television Consumer Protection and Competition Act of 1992 Conference Report, H.R. Rep. No. 102-862 at 34 (1992) ("The cable industry has become more vertically integrated into programming, which may harm competing programmers").

diversity in programming by threatening the viability of rival cable programming services."[148] It further noted the various forms of harm that may stem from discrimination against unaffiliated, competitor programmers, including denying access to programmers affiliated with rival multi-system operators, price discrimination, channel placement discrimination, and an offer of carriage only in exchange for a financial interest in the programmer.[149]

Courts, too, have recognized the harms that vertically integrated MVPDs and content providers can cause. "[T]he cable industry has become increasingly horizontally concentrated and vertically integrated. Power has been concentrated in the hands of fewer and fewer operators (horizontal concentration), which has led to increased vertical integration as the largest operators have begun to demand ownership interests in cable programming networks."[150]

The Commission has recognized that "vertical transactions also have the potential for anticompetitive effects. ...[A] vertically integrated firm that competes both in an upstream input market and a downstream output market, such as post-transaction News Corp., may have the incentive and ability to: (1) discriminate against particular rivals in either the upstream or

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[148] Id. at 33. The cable industry has become vertically integrated; cable operators and cable programmers often have common ownership. As a result, cable operators have the incentive and ability to favor their affiliated programmers. This could make it more difficult for noncable-affiliated programmers to secure carriage on cable systems. Vertically integrated program suppliers also have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies. See also, Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 § 2(a)(5) (1992).

[149] Id. The House Committee on Energy and Commerce "received testimony that vertically integrated operators have impeded the creation of new programming services by refusing or threatening to refuse carriage to such services that would compete with their existing programming services. Cable Television Consumer Protection and Competition Act of 1992, H.R. Rep. No. 102-628 at 33 (1992).

downstream markets (e.g., by foreclosing rivals from inputs or customers); or (2) raise the costs to rivals generally in either of the markets."[151]

1. The Commission may condition its consent to a transaction in order to address competition-related concerns.

Congress mandated, and the Commission ultimately adopted, program access and program carriage rules to attempt to ameliorate concerns about vertically integrated cable companies. These rules, however, do not specifically address issues such as neighborhooding. Moreover, the complaint process has proven lengthy and expensive, and is not an adequate

[150] Turner, 910 F. Supp. at 740 .

[151] News Corp. at 508 ¶ 71.