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MB DOCKET NO. 10-56

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

FILED/ACCEPTED

JUL 21 2010

Federal Communications Commission
Office of the Secretary

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

OPPOSITION TO PETITIONS TO DENY AND RESPONSE TO COMMENTS

COMCAST CORPORATION
2001 Pennsylvania Ave, NW
Suite 500
Washington, D.C. 20006

GENERAL ELECTRIC COMPANY
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July 21, 2010

EXECUTIVE SUMMARY

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

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

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

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

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

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

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

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

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

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

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

For decades, the Commission has stated that pre-existing disputes and issues of industry-wide significance should not be considered in license transfer proceedings. Indeed, the Commission "will not consider arguments in [license transfer] proceeding[s] that are better addressed in other Commission proceedings, or other legal fora, including the [courts] and the Congress." Despite this clear precedent, some opponents have succumbed to the temptation to exploit this proceeding to address pre-existing, industry-wide, or other extraneous issues. For example, some parties raise so-called "net neutrality" issues. But these issues are already pending in at least two active rulemakings and should be addressed there. The same is true of concerns about the operation of the current program access or program carriage rules – each is already the subject of an open rulemaking. Still other parties complain about media consolidation and ownership diversity, but these issues too are already the subject of ongoing industry-wide proceedings precisely because they affect numerous stakeholders. To the extent commenters allege that Comcast or NBCU has violated any rule, the Commission's existing complaint processes are the proper place for such allegations to be considered. In any event, any allegations of rule violations in the instant record are without merit or immaterial.

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

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

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I. INTRODUCTION AND OVERVIEW

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

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

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

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

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

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

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

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

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

Community organizations: National community organizations that have filed letters in support include One Economy Corporation, Common Sense Media ("Common Sense"), Big Brothers Big Sisters, City Year, Boys & Girls Clubs of America, and the Partnership for a Drug Free America. Numerous local chapters of these and other charitable, educational, and community service organizations also expressed their support, as have almost 40 local Chambers of Commerce, all attesting to the meaningful contributions of time, talent, and other resources that Comcast and NBCU make in their communities. These organizations, and others like local libraries and public television stations, have seen first-hand the sustained commitment Applicants have to the local communities they serve.

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

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

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

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

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

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

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

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

Many of the objections articulated by opponents of the transaction already have been addressed in the Public Interest Statement and the three economic reports Applicants subsequently submitted at the request of Commission staff. In the sections that follow, Applicants answer them at greater length. But one thing that should be noted at the outset is how many of Applicants' key points are not even disputed by the transaction's critics:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18 City of Detroit Comments at 2.

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

20 Morality in Media Comments at 2.

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

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

23 Elan Feldman Petition to Deny at 3-4.

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

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

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

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

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

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

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

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

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

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

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28 *Frontier-Verizon Order* ¶¶ 9-12.

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

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

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

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30 47 U.S.C. § 309.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

41 Public Interest Statement at 42.

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

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

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

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

44 Public Interest Statement at 40.

45 DirecTV Comments at 62.

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

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

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

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

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

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

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

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

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

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

- Ensure that decisions involving exclusivity issues will continue to be made by the Network and solely on the basis of Network considerations; and
- Refrain from using its control of the NBC Television Network to transmit a same-day linear feed of Network programming on a Comcast cable system in the television market of an NBC local affiliate in the event that the NBC local affiliate withdraws its consent in the course of a retransmission dispute with the Comcast cable system.

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

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

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

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48 NBC Television Affiliates Association Comments at App. A.

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

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

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

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

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

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

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

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

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

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

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

1. National Programming

a. Benefits of the Transaction

A central public interest benefit of the proposed transaction is that Comcast will have powerful incentives to invest in the programming assets of the joint venture, resulting in greater programming output and quality to the benefit of all consumers. As Dr. Rosston observed, "The new entity's content business is likely to reflect Comcast's management strategy of increasing experimentation and content availability once Comcast takes control of NBCU."[51] This greater downstream flexibility, in turn, will make it more profitable for Comcast and NBCU to invest in more and higher value programming: "The new entity would be more likely to acquire broader rights to content because it would have more confidence it would come to an agreement with distributors for its content on multiple platforms, raising the profitability from acquiring

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[51] Rosston Benefits Report ¶ 59.

additional upstream rights."[52] As Dr. Rosston explained, "[t]he better alignment of incentives made possible by this transaction will also encourage NBCU to invest in new and innovative programming suited to these multiple platforms."[53]

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

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52 *Id.* ¶ 64; *see also id.* ¶ 14 ("Because the new entity will enter into distribution contracts more efficiently, the returns to content will be higher and therefore Comcast will have a stronger incentive to invest in content.").

53 *Id.* ¶ 65.

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

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

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

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

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

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

58 Rosston Benefits Report ¶ 8.

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

60 *Id.* ¶ 15 & Ex. 2.

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

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

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

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

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

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

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63 DirecTV Comments at 58-59.

64 *Id.* at 59.

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

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

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

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

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67 *See supra* note 37.

68 DirecTV Comments at 58.

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

70 DirecTV Comments at 58.

71 Rosston Benefits Report ¶ 20.

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

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

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

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

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

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

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

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

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

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77 Rosston Benefits Report ¶ 12.

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

79 *Id.* ¶¶ 21-22.

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

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

b. Voluntary Programming Commitments

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

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80 *Id.* ¶ 22.

81 "Having more cable and over-the-air networks available to carry sports programming will also enable the joint venture to make real-time programming changes more easily such as carrying sports content that has been bumped from one network on another network (*e.g.*, a golf tournament that runs over into primetime). Similar real-time synergies likely could not easily be achieved between unaffiliated companies on a contractual basis." Rosston Benefits Report ¶ 12. For example, during the time when News Corp. controlled DirecTV, Fox Entertainment Group and DirecTV announced an "industry first" initiative whereby DirecTV provided its subscribers (for a nominal fee) a "'first look' at prime time hits from FX a full 24-48 hours prior to their initial broadcasts" as well as "post-air access to Fox Broadcasting's hottest series . . . for six to seven days following their national broadcast." See Press Release, DirecTV, Fox Entertainment Group and DirecTV Launch Partnership to Offer Best of Fox and FX Network Programming On Demand; Groundbreaking Deal Includes Pre-Air Broadcasts of FX Series, Post-Air Broadcasts of FOX Programs Plus One Hour Weekly Showcase of Fox Entertainment Highlights, (Jan. 5, 2006), *available at* http://investor.directv.com/releasedetail.cfm?ReleaseID=286409.

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

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

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

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

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

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

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

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

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

87 Common Sense Media Comments at 3.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The key provisions of the IFTA agreement are as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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116 Rush Letter at 2.

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

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

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

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

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

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

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

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

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

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

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

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121 Hispanic MOU at 8.

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

123 Hispanic MOU at 8.

124 *See* Rush Letter at 2.

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

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

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

126 *See* Rush Letter at 2.

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

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

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

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

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128 Rush Letter at 2.

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

2. Local Programming

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

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

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

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

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

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

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

133 *Id.*

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

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

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

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

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

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

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

137 Greenlining Institute Petition to Deny at 45.

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

139 NBC Television Affiliates Association Comments at 4.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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144 Public Interest Statement at 69.

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

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

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

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

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

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

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

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

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

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

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

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

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149 Cisco Comments at 1-2.

150 Public Interest Statement at 53.

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

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

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

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

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

153 Public Interest Statement at 57-61.

154 Rosston Benefits Report ¶ 69.

155 *Id.*

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

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

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

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

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

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

158 Public Interest Statement at 54-55.

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

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[159] One commenter incorrectly stated that Dr. Rosston's claim that Comcast will access content on arm's-length terms was not actually guaranteed by Comcast. *See* Writers Guild of America, West Comments at 13. But as Dr. Rosston detailed in his report, the LLC Agreement (Public Interest Statement, App. 4) between the Comcast, GE, and NBCU expressly states that agreements between NBCU and Comcast must be entered into on "arm's-length terms," defined as "terms that are no less favorable to the Company [the joint venture] or such Subsidiary than those that would have been obtained in a comparable transaction by the Company or such Subsidiary with an unrelated Person." Rosston Benefits Report ¶ 61 n.91. This would apply to carriage and affiliation agreements. *See also* Rosston/Topper Reply Report ¶¶ 26-29 (refuting assertions in the Writers Guild, West Comments regarding the prices that Comcast will pay for NBCU's content and reiterating the effect of arm's length dealing between related parties as required by the LLC Agreement).

[160] Rosston Benefits Report ¶ 50.

[161] DirecTV Comments at 52-58.

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

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

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

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163 DirecTV Comments at 53-58.

164 AAI Comments at 22.

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

166 Rosston/Topper Reply Report ¶ 8.

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

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

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

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

169 Rosston Benefits Report ¶ 8.

170 Rosston/Topper Reply Report ¶ 8.

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

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

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171 Public Interest Statement at 57.

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

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

174 Klein & Murphy at 419.

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

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

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

176 DirecTV Comments at 53.

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

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

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

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

> content and distribution platforms thus may allow for faster time to market, benefiting consumers and the marketplace generally."
>
> Cisco Comments at 8.

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

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

181 Rosston Benefits Report ¶ 58.

182 Cisco Comments at 8 (emphasis added).

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

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

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

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183 Rosston Benefits Report ¶ 55.

184 *Id.* ¶ 55.

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

consumers in as many ways and at as many times as possible.[186] Commenters critical of the transaction's benefits have ignored how the change in corporate control will better align incentives. Dr. Rosston concludes that one important outcome of shifting control of NBCU is that "Comcast's vision of maximizing the return to content through deployment on a wide array of platforms will lead to increased content availability from other content providers and availability on other platforms."[187] No party in this proceeding challenges this conclusion.

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

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

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

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

187 Rosston Benefits Report ¶ 66

188 According to the Rosston Benefits Report, the analysis of double marginalization in this transaction is straightforward. Despite the fact that the marginal cost to NBCU when MVPDs distribute NBCU programming to an additional subscriber is typically near zero, NBCU charges Comcast (and other MVPDs) a per-subscriber price that is above zero for most of its content. As a separate firm, Comcast then uses the price it pays to NBCU for content (rather than the true, near-zero marginal cost of that content) as a component of its marginal cost per subscriber, to determine the packages that it offers consumers. In contrast, following the acquisition of NBCU, although Comcast would pay the same price to NBCU for its content, it would obtain 51% of the margin on NBCU's sale of that content to Comcast, changing the ultimate *effective* cost to Comcast of that content. After internalizing the NBCU margin, Comcast would use the lower marginal cost of NBCU content in determining its offerings to consumers. When presented with the ability to internalize the profits from a portion of the payments it makes to NBCU for content (and thus having a lower marginal cost for content), Comcast may choose to attract additional subscribers through greater investments in service, expanded program offerings, or other non-price alternatives. *Id.* ¶ 80 (internal citations omitted).

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

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

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

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189 *News Corp.-Hughes Order* ¶ 155.

190 DirecTV 2003 Reply Comments at 34.

191 *News Corp.-Hughes Order* ¶ 155.

192 DirecTV Comments at 60-61.

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

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

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193 Rosston Benefits Report ¶¶ 80-90.

194 *Id.* ¶ 84.

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

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

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

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

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196 *Id.* ¶ 87.

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

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

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

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

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199 *Id.* ¶ 39.

200 *Id.*

201 *See id.*

202 DirecTV Comments at 60.

203 *See* George Ford and John Jackson (1997), "Horizontal Concentration and Vertical Integration in the Cable Television Industry," Review of Industrial Organization, Vol. 12, No. 4, pp. 501-518 at pp. 513-514.

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

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

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

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205 *See id.* ¶ 30.

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

207 Rosston Benefits Report ¶ 83.

208 DirecTV Comments at 60.

209 Rosston Benefits Report ¶ 11.

210 *Id.*

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

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

2. Sharing Advertising Resources

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

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

212 *Id.* ¶ 15 & Ex. 2.

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

214 Rosston Benefits Report ¶ 76.

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

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

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215 *Id.* ¶ 76, n.113.

216 *Id.* ¶ 76, n.113.

217 *Id.* ¶¶ 44-47.

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

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

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

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

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

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

222 *Id.*

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

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

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

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

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

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

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

new entity's increased investment in national and local programming should stimulate competitive programmers and MVPDs to follow suit. "In response to changes and increased output by the new entity, competitive forces will likely encourage content and distribution competitors to increase the quantity and quality of their services, enhancing competition and further increasing the benefits to consumers."[227] Stakeholders such as Cisco recognize that this phenomenon is real: "Moreover, and as recent experience has shown, the combined entity may prompt other service providers and content developers and distributors to innovate, thereby creating a more competitive marketplace."[228]

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

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

227 Rosston Benefits Report ¶ 8.

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

229 Public Interest Statement at 6-7. As stated by Dr. Rosston, "One of the important outcomes from the change in control of NBCU is that Comcast's vision of maximizing the return to content through deployment on a wide array of platforms will lead to increased content availability from other content providers and availability on other platforms. If a firm increases the availability of its content through one distribution mechanism or provider, competitive forces will encourage other content companies to make their content more available as well. At the same time, competitive forces will encourage other distributors to make deals for additional content to compete with the new distribution methods of the first distributor. These reactions by other companies will increase content

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

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

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

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

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

231 Public Interest Statement at 112.

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

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

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

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

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

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

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

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

235 As stated by Dr. Rosston, "the successful rollout of new platforms and services will encourage other content suppliers and distributors to emulate Comcast and the joint venture. Successes by the combined entity will provide valuable information to competitors and will give competitors an incentive to develop and provide innovative new video options of their own. For example, because data on DVD sales and show ratings are available to them, other content suppliers and distributors will be able to analyze the impact of Comcast's day-and-date release of movies on DVD sales even if they do not participate themselves." Rosston Benefits Report ¶ 69.

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

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

A. Relevant Markets

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

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

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

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

1. MVPD Services

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

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

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

240 *Id.* at 88-89.

241 *Id.* at 88.

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

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

2. Video Programming

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

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

243 *News Corp.-Hughes Order* ¶ 62.

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

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

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

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

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

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

248 *Adelphia Order* ¶ 67.

249 Bloomberg Petition to Deny at 28.

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

251 *Id.*

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

3. High-Speed Internet Services

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

4. Internet Content and Distribution

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

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

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

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

[255] *AT&T-Comcast Order* ¶ 128.

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

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

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

5. Online Video Distribution and MVPD Services Are Distinct.

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

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

257 Public Interest Statement at 88–89.

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

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

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

a. MVPD Services and Online Video Distribution Are Complementary.

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

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

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

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

263 Israel/Katz Online Video Report ¶ 37.

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

265 Israel/Katz Online Video Report ¶ 37.

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

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

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

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

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

269 Israel/Katz Online Video Report ¶ 37.

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

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

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

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

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

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

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

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

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

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

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

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

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

278 Israel/Katz Reply Report ¶ 203.

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

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

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

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280 Israel/Katz Reply Report ¶ 224.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

295 *Id.*

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

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

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

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296 *See id.* ¶ 13.

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

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

299 *Id.* ¶ 46 n.68.

300 *See generally id.* ¶ 46.

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

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

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

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

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

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

302 Israel/Katz Online Video Report ¶ 46.

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

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

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303 Israel/Katz Reply Report ¶ 210.

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

305 Israel/Katz Online Video Report ¶ 19.

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

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

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

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

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

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

309 Israel/Katz Online Video Report ¶ 11.

310 *Id.*

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

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

}} that it licenses from third-party studios for

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[311] *Id.*

[312] *Id.*

[313] *Id.* ¶ 12.

[314] *Id.*

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

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

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Even for programs produced by NBCU studios, {{

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[316] {{ }} *See id.*

[317] *Id.* ¶ 13.

[318] *Id.*

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

B. The Transaction Will Not Reduce Horizontal Competition.

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

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

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

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

1. Any Cable Network Overlap Is Very Limited.

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

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

323 *Draft Revised Horizontal Merger Guidelines* § 5.3.

324 *Id.*

325 *Id.*

326 *Id.*