

products in separate and distinct product markets; and (iv) the effect of the tying arrangement is to foreclose competition in the tied product market.<sup>724</sup> NBCU’s conduct meets none of these requirements.

First, NBCU has demonstrated that it does not possess market power in any relevant programming market.<sup>725</sup> As demonstrated in Section IV.B.1, this will remain true following the proposed transaction.

Second, NBCU does not “coerce” or “force” MVPDs to select any particular combination or bundle of channels.<sup>726</sup> To the contrary, upon an MVPD’s request NBCU will offer any of its non-broadcast networks on a standalone basis (except with respect to the HD simulcast versions of NBCU’s SD networks) and will negotiate a rate that reflects the value of any such networks on a standalone basis. This approach is reflected in the fact that most MVPDs choose to carry

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<sup>724</sup> See, e.g., *Jefferson Parish*, 466 U.S. at 12-18; *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5-6 (1958).

<sup>725</sup> See NBCU 07-198 Initial Comments at 42-45.

<sup>726</sup> FACT’s comments are barren of any credible showing to the contrary. For example, FACT alleges that “NRTC found that it was frequently compelled by the multichannel programmers, including NBCU, to carry all channels offered by the programmers and to carry them on the most widely distributed tier of service.” FACT Comments at 15. Yet nowhere does FACT specify exactly what programming NBCU allegedly “forced” NRTC to carry, nor does it explain exactly how NBCU “forced” NRTC to carry unwanted channels. Likewise, FACT offers no specific evidence (or even a sworn statement from any of the supposedly affected parties) to support its broad allegation that “NBCU has required many of FACT’s members to carry as many as 10 channels on the most widely distributed tier of programming even if neither the telcos nor their subscribers desire those channels. . . . NBCU has even mandated that telco distributors reserve space on their expanded basic tier for a yet-to-be-launched, yet-to-be-named channel.” *Id.* at 26.

only a subset of NBCU networks.<sup>727</sup> Ironically, this is also true of the smaller MVPDs who claim the greatest “harm” from wholesale bundling.<sup>728</sup>

Third, commenters have never attempted to establish which products are the tying products and which are the tied products or to show that these products are in separate and distinct markets. As noted, the Commission has generally declined to define narrow product markets within the broader video programming business, so there is no reason to believe that the alleged tying and tied products (whatever they may be) are in separate product markets.

Finally, commenters have not demonstrated that NBCU’s alleged conduct has foreclosed (*i.e.*, excluded) competition in the tied product market.<sup>729</sup> To the contrary, there is no evidence of tied market foreclosure – as demonstrated above, the video programming business is vibrant, dynamic, and highly competitive.<sup>730</sup>

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<sup>727</sup> See NBCU 07-198 Initial Comments at 35 (“Dr. Owen examined the carriage patterns among 1,402 MVPD operators and/or systems for six non-broadcast networks owned by NBCU: Bravo, CNBC, CNBC World, MSNBC, Sci Fi and USA (the “NBCU Networks”). His analysis revealed that 18 percent of the MVPDs taking *any* NBCU network take only a *single* NBCU network. Only *two percent* of the MVPDs took all six of the networks.”) (emphasis in original).

<sup>728</sup> Compare *id.* (“Dr. Owen also examined a subset of the NBCU data, focusing only on the carriage patterns of small MVPDs that carry at least one NBCU network, but that do not contract for any NBCU networks through the National Cable Television Cooperative (“NCTC”). Based on this examination, Dr. Owen concludes that it is unusual for any of these small operators to take more than one or two of the six NBCU networks studied. Almost 50 percent take only one network, and an additional 35 percent take only two networks.”) (footnotes omitted) and NBCU 07-198 Reply Comments at 7 (“Dr. Owen analyzed the carriage patterns of 271 cable operators with fewer than 400,000 subscribers that carry at least one NBCU network but that do not contract for any NBCU networks through NCTC. Of the 161 operators in this group carrying USA Network, only – approximately nine percent – carry a package of channels consisting of USA, MSNBC, CNBC, Sci Fi and Bravo. In fact, more than half the operators in this group carrying USA Network do not carry any of the other NBCU networks in this alleged ‘bundle.’”) (footnotes omitted) with CWA Petition to Deny at 15 (“Tying arrangements are particularly problematic for small rural operators and new video competitors with a smaller subscriber base.”).

<sup>729</sup> As the Supreme Court explained, plaintiffs must show that the challenged restraint “foreclosed so much of the market from penetration by [the defendants’] competitors as to unreasonably restrain competition in the affected market.” *Jefferson Parish*, 466 U.S. at 31 n.51.

<sup>730</sup> Note that “[T]here can be no adverse impact on competition” “when a purchaser is ‘forced’ to buy a product he would not have otherwise bought even from another seller in the tied product market.” *Id.* at 16.

It should be noted that the Commission has explicitly declined to condemn the practice of offering carriage of a broadcast signal in conjunction with one or more non-broadcast channels. The Commission has stated that examples of bargaining proposals “presumptively . . . consistent with competitive marketplace considerations and the good faith negotiation requirement” include “*proposals for carriage conditioned on carriage of any other programming, such as a broadcaster’s digital signals, an affiliated cable programming service, or another broadcast station either in the same or a different market.*”<sup>731</sup> The Commission also has held that such a proposal contains “presumptively legitimate terms and conditions or forms of consideration” and found nothing to suggest that such a request is “impermissible” or anything “other than a competitive marketplace consideration.”<sup>732</sup>

**b. Package or Bundled Discounts Are Generally Pro-Competitive.**

While NBCU does not engage in tying, it does often offer MVPDs discounted prices if they purchase a larger package of NBCU programming networks. Such packages or bundled discounts are as ubiquitous in the U.S. economy as volume discounts and are generally pro-competitive. As the Ninth Circuit recently found, “[s]eason tickets, fast food value meals, all-in-one home theater systems – all are bundled discounts. Like individual consumers, institutional purchasers seek and obtain bundled discounts, too.”<sup>733</sup> The pervasive use of bundled discounts

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<sup>731</sup> *Implementation of the Satellite Home View Improvement Act of 1999; Retransmission Consent Issues, Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445 ¶ 56 (2000) (emphasis supplied).

<sup>732</sup> *Id.* The Commission has also considered, but refused to adopt rules specifically prohibiting channel-bundling arrangements. *Carriage of Digital Television Broadcast Signals; Amendments to Part 76 of the Commission’s Rules, Implementation of the Satellite Home View Improvement Act of 1999*, First Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 2598 ¶ 35 (2001).

<sup>733</sup> *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 894 (9th Cir. 2008).

throughout American industries shows that they are an essential, arm's-length bargaining tool for both buyers and sellers.<sup>734</sup>

Programming is no different from other aspects of telecommunications, where bundling has proved beneficial to customers.<sup>735</sup> Congress expressly endorsed the right of broadcasters to bargain for carriage of an affiliated non-broadcast programming service in exchange for retransmission consent.<sup>736</sup> Cable operators also made clear to broadcasters that they strongly preferred to provide in-kind consideration (such as carriage of additional content) rather than cash in exchange for the right to retransmit broadcast signals. As a result, a negotiated combination of in-kind consideration, cash subscriber fees, and other elements tailored to the preferences of MVPD purchasers evolved as the form of transaction generally preferred by parties in the wholesale video programming marketplace.<sup>737</sup>

Bloomberg and others argue that, by increasing the portfolio of networks that Comcast-NBCU can include in a “bundle” for carriage, the transaction potentially excludes carriage of networks that are substitutes for Comcast-NBCU networks, such as unaffiliated business news networks.<sup>738</sup> Bloomberg asks the Commission to prohibit Comcast from offering to any MVPD

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<sup>734</sup> *Id.*

<sup>735</sup> It is common for telecommunications firms to offer phone service, Internet service, and television service with bundled discounts for customers who purchase a package. See Ken Belson, *Dial M for Merger*, N.Y. Times, Jan. 28, 2005, at C1; Ken Belson, *Cable's Rivals Lure Customers with Packages*, N.Y. Times, Nov. 22, 2004, at C1. Similarly, consumers receiving video programming by cable typically subscribe to a “tier” of service that allows them to access a bundle of channels and pay a monthly subscription fee for that service.

<sup>736</sup> See NBCU 07-198 Initial Comments at 9-10.

<sup>737</sup> *Id.* at 13.

<sup>738</sup> Marx Report ¶ 13. Bloomberg asserts that the transaction “will provide Comcast with the incentive to discriminate against [Bloomberg TV] by offering programming bundling opportunities involving CNBC.” Bloomberg Petition to Deny at 70. HDNet also identified as a potential carriage obstacle the bundling of “must have” programming by some large programming providers with networks of little interest to consumers that are under the same ownership. HDNet described the practice of bundling as common and taking up “valuable channel

any combination of NBCU's and Comcast's network programming as a condition of receiving more favorable licensing terms than Comcast offers on an "a la carte" basis.<sup>739</sup>

At bottom, Bloomberg is seeking to use this proceeding to deprive the combined entity of any opportunity to reduce prices and benefit consumers through discounts for the acquisition of multiple programming networks. But reducing prices to increase business – whether by bundling, volume, or package discounts – promotes competition and benefits consumers.<sup>740</sup> Bundled discounts in particular benefit buyers because the discounts allow the buyer to get more for less and increase overall output.<sup>741</sup> Bloomberg ignores evidence that bundled discounts reflect the efficiencies of a multi-programming firm exhibiting economies of scope. Such economies of scope in producing or distributing a bundle of programming typically result in lower costs than could be achieved by a firm that sells only a single item from the bundle.

Programmers also can use bundled discounts in lieu of advertising or other forms of promotion to increase demand for or to expose customers to a new product.<sup>742</sup> This can be especially important in introducing viewers to new media programming. Bundling thus helps drive the abundance, quality, and diversity of programming. The prevalence of bundled

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space which could be used by other more popular networks, including independent programmers." Letter from David S. Turetsky, Dewey & LeBoeuf LLP, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 07-42, 07-198, 10-71, 10-56 (June 16, 2010). Importantly, HDNet explicitly noted that it has general industry-wide concerns on this issue and that its experience in negotiating with Comcast has been unusually favorable. *Id.*

<sup>739</sup> Bloomberg Petition to Deny at 70.

<sup>740</sup> See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) ("[C]utting prices in order to increase business often is the very essence of competition.").

<sup>741</sup> Cf. *Jefferson Parish*, 466 U.S. at 12 ("Buyers often find package sales attractive; a seller's decision to offer such packages can merely be an attempt to compete effectively – conduct that is entirely consistent with the Sherman Act.").

<sup>742</sup> See, e.g., Antitrust Modernization Comm'n, *Report and Recommendations* 95 (2007), available at [http://govinfo.library.unt.edu/amc/report\\_recommendation/toc.htm](http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm).

discounts in both programming and non-programming telecommunications sectors suggests that such discounts are generally beneficial to both consumers and distributors.

Finally, wholesale packaging of programming networks allows programmers to realize economies of scale and scope that reduce the costs of producing, marketing, and distributing their programming.<sup>743</sup> These cost savings, in turn, allow programmers to offer a price for a program package that is lower than the aggregate price if each channel were purchased separately. Offering wholesale packages also helps programmers to launch and distribute new programming services, not by “coercing” MVPDs into carrying the new services, but by offering discounts on popular, established networks in exchange for distribution of new channels. This in turn promotes greater competition among programmers and substantially increases programming choices for consumers.

Comcast and NBCU have offered and will continue to offer their networks for sale on an individual basis; no MVPD is required to carry any one channel to obtain another. Comcast and NBCU have each negotiated at arm’s-length and in good faith with MVPDs for all program contracts, and will continue to provide full and non-discriminatory access to their programming services. The pending transaction is not the place to address any industry-wide concerns about the wholesale bundling of video content. It is clear that no specific harms can be attached to the practices of NBCU or Comcast in licensing their content to MVPDs, and therefore no “bundling” condition to regulatory approval is warranted.

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<sup>743</sup> See NBCU 07-198 Initial Comments at 7, 50-51.

**4. Alleged NBCU Withholding of Programming from Boxee, Sling, and Kylo**

Some commenters have suggested that NBCU has improperly withheld programming from Boxee, Sling, and Kylo.<sup>744</sup> These allegations are obviously not transaction-specific. They are also not true.

With respect to Boxee, NBCU could not legally provide to Boxee the distribution rights to the type of content Boxee sought – ad-supported, FOD video – as Hulu had the exclusive contractual rights to this content. NBCU informed Boxee that it would need to talk with Hulu if it wanted to explore embedding Hulu content in its browser. Instead Boxee decided to circumvent Hulu’s terms-of-use restrictions by streaming through Boxee’s interface (which disables significant, commercially important functionalities of Hulu’s site, to Boxee’s commercial benefit, in addition to disabling access to closed captioning provided by Hulu) without an agreement with Hulu for distribution. As a result, Hulu halted Boxee’s unauthorized access to that content.

Kylo is an interface that makes itself available on Internet-ready television sets. With Kylo, it is possible to load the Hulu player on the television. Hulu took steps to halt Kylo’s unauthorized access to its content, and Kylo has attempted to circumvent these restrictions. Hulu’s business model is to make content available on the Internet for viewing on personal computers. Kylo took Hulu’s content in an unauthorized fashion to make it available through the television without payment.<sup>745</sup> Such “withholding” – if one were to call it that – was entirely appropriate and a unilateral decision made by Hulu, and therefore is not a basis for concern in

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<sup>744</sup> See Writers Guild of America, West Comments at 18-19; Greenlining Institute Petition to Deny at 39-40.

<sup>745</sup> In fact, Hulu had reserved the viewing of its content on television as a premium service that Hulu is now planning to make a feature on a new subscription service called Hulu Plus.

this transaction. It also bears noting that, unlike Hulu, NBCU has not taken any steps to halt Kylo's access to content from NBCU websites.

Dish Network has complained that NBCU has taken steps to restrict its ability to put content online by interfering with the operation of Sling.<sup>746</sup> This complaint is both false and, by definition, not transaction specific, since it is based upon conduct that allegedly occurred prior to the transaction. The technology offered by Sling allows a user of an MVPD's set-top box user to attach the Slingbox, using an Internet connection, to that set-top box and then forward whatever content can be accessed through the set-top box to other remote devices anywhere in the world, regardless of the MVPD provider's licensed area of service.<sup>747</sup> The Slingbox uses the Internet to deliver the content from an attached set-top box to any Internet-connected screen anywhere in the world. NBCU licenses its programs for in-home residential viewing in particular geographic areas. Sling circumvents those licensing terms and has declined to negotiate for a license to exhibit NBCU content worldwide over the Internet (again, to the extent NBCU has those rights). Dish Network contends that its Sling-related activities do not violate any of NBCU's copyright or contractual protections. NBCU has made clear in its content licensing agreement with Dish Network that it is not providing Dish Network with the rights to distribute NBCU content online (to the extent NBCU has those rights). Dish Network has not yet attempted to negotiate for these

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<sup>746</sup> See Dish Network Petition to Deny at 21-22.

<sup>747</sup> The additional viewing screen has typically been a computer screen or a mobile device. For example, Sling offers an iPhone application that allows an individual to virtually view content available on a home set-top box from anywhere in the world. The user interface looks identical to what the customer would see if watching the set-top box at home on a connected television. The Slingbox uses a 1:1 ratio, which means that the set-top box can only be manipulated to a single interface, *i.e.* an individual at home cannot view one program on the set-top box and allow a person utilizing Sling to view something else from that same set-top box. However, if the set-top box at home is not in use, a person utilizing the Slingbox can watch any programming that can be accessed via the set-top box, including any content stored on a connected DVR. It is possible for an individual to add a set-top box to an existing MVPD subscription for the sole purpose of connecting to a Slingbox in order to have the linear and/or recorded MVPD content available for viewing on a remote device.

rights. While it has reserved all of its rights, NBCU has not made any attempts to block Sling from operating. Further, NBCU did enter into a transaction with Echostar (a sister company of Dish Network) that permitted Echostar to provide certain “clip” capabilities for some NBCU programs that allows viewers to take small excerpts of designated programs and post or email them via Sling. That agreement expired, and Echostar did not seek to have it renewed. In sum, there has been no conduct by NBCU to restrict Dish Network’s use of Sling, nor is there any basis to believe the transaction will change that.

Similarly, allegations by Public Knowledge<sup>748</sup> that Universal’s decision on how to license its movies to Netflix shows a fundamental lack of understanding of the content business. Universal negotiated with Netflix to license its movies on a basis that provides for a 28-day delay between the time that a movie is made available for sale to the public on DVD and the time Netflix can make the DVD of that movie available by mail to its subscribers. This step by Universal is simply part of a well-recognized industry practice of “windowing” content. Just as Universal made an economic decision to release its motion pictures to movie theatres for a period of time before making them available for DVD or VOD distribution, it has also determined to make them available for sale or rent on DVD before making them available by mail to Netflix subscribers. NBCU uses release windows to manage the distribution of its content and generate sufficient revenues to sustain the production of that content. The production of content is expensive and windowing has been widely accepted in the industry for decades as a means of providing distributors with attractive distribution rights while creating opportunities for content creators to profitably create and sell their programming. NBCU’s use

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<sup>748</sup> Public Knowledge Petition to Deny at 11.

of windowing in licensing its DVDs to Netflix is similar to the approach taken by a number of other content owners.

**V. CONTRARY TO PETITIONERS’ AND COMMENTERS’ CLAIMS, APPLICANTS POSSESS THE QUALIFICATIONS FOR APPROVAL OF THE TRANSACTION.**

In addition to considering the numerous benefits of the transaction discussed in Section III above, the Commission also must determine that Applicants possess the basic qualifications necessary to hold or obtain broadcast station licenses.<sup>749</sup> The record in this proceeding and the lengthy history of Applicants’ behavior as Commission licensees show unequivocally that Applicants “will comply with the Communications Act and [the FCC’s] rules and policies” and will “deal truthfully with the Commission,” as the FCC’s *Character Policy Statement* requires.<sup>750</sup> All of this evidence is underscored by the numerous letters filed in support of Applicants by community groups, state and local government officials, and others with extensive experience interacting with Applicants; no petitioner or commenter has offered credible evidence to the contrary.<sup>751</sup> Specifically, and contrary to arguments made by opponents; (1) Applicants comply

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<sup>749</sup> See 47 U.S.C. § 309.

<sup>750</sup> *In the Matter of Policy Regarding Character Qualifications in Broadcast Licensing*, Report, Order, and Policy Statement, 102 FCC 2d 1179 ¶ 7 (1986) (“1986 Character Policy Statement”), *recon.*, Memorandum Opinion and Order, 1 FCC Rcd 421 (1986). The Commission’s character inquiry involves separate analyses for FCC-related and non-FCC related conduct, with a significantly narrower range of relevant conduct for the latter. In any analysis of non-FCC misconduct, the Commission limits its consideration to factors that, in its view, bear on a licensee’s truthfulness and reliability in its dealings with the FCC. *Id.* ¶ 34. There are no arguments in the record that Applicants have engaged in adjudicated fraudulent statements or misrepresentations before another government agency, have been convicted of a felony, have been adjudicated to have engaged in broadcast-related antitrust or anti-competitive misconduct, or have been adjudicated to have engaged in discrimination, the classes of relevant non-FCC misconduct.

<sup>751</sup> As a threshold matter, pursuant to Section 309(d) of the Act, petitioners must submit “specific allegations of fact sufficient to show . . . that a grant of the application would be prima facie inconsistent with [the public interest, convenience, and necessity].” 47 U.S.C. § 309(d)(1); see also *Astroline Commc’ns Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988) (noting that “[p]arties challenging an application by means of a petition to deny and who seek a hearing thereon must satisfy a two-step test established in 47 U.S.C. § 309(d)(1) & (2). At the threshold, the protesting party must submit a petition containing specific allegations of fact sufficient to show . . . that a grant

with the Commission’s broadcast ownership rules and will be in full compliance with the television duopoly rule at closing; (2) the NBCU O&O stations and Comcast local cable systems serve the public interest and the goals of localism and diversity (including programming, employment, and procurement diversity); and (3) Applicants have dealt truthfully with the Commission, fully demonstrating that they can be trusted to meet the Commission’s regulatory obligations. Accordingly, the Commission should dismiss or deny the petitions to deny discussed below and find that Applicants possess the basic qualifications necessary for approval of the transaction.<sup>752</sup>

**A. Applicants Comply With the Commission’s Ownership Rules and Will Be in Compliance with the Commission’s Television Duopoly Rule at Closing.**

Both Comcast and NBCU currently comply with the broadcast ownership restrictions in Section 73.3555 of the Commission’s rules.<sup>753</sup> NBCU does, however, hold three television stations in the Los Angeles, California Designated Market Area (“DMA”), pursuant to a temporary waiver of Section 73.3555(b):<sup>754</sup> (1) KNBC (a station airing NBC programming,

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of the application would be prima facie inconsistent with [the public interest, convenience, and necessity].”) (internal quotations and citations omitted). Here, no party has presented facts or submitted evidence with respect to Comcast, GE, or NBCU to establish a prima facie case, and there certainly are no substantial and material questions of fact regarding any such matters. 47 U.S.C. § 309(d)(2).

<sup>752</sup> As fully addressed above in Section III, Applicants have offered a series of voluntary commitments regarding diversity, localism, and other issues, which go well beyond any legal requirement and promise to create a combined entity with diversity and localism efforts greater than the sum of its parts.

<sup>753</sup> See Public Interest Statement at 73. Comcast, of course, currently owns no TV or radio broadcast stations. *Id.* at 72.

<sup>754</sup> See *In the Matter of Telemundo Communications Group, Inc. (Transferor) and TN Acquisition Corp. (Transferee)*, Memorandum Opinion and Order, 17 FCC Rcd 6958 ¶ 46 (2002) (granting a conditional waiver of 47 C.F.R. § 73.3555(b)) (“*Telemundo Order*”). In addition, as explained in the Applications and Public Interest Statement, General Electric Capital Corporation (“GECC”), an indirect, wholly owned subsidiary of GE, currently holds debt and non-voting equity constituting 36.41 percent of the total asset value of American Community Newspapers (“ACN”), following ACN’s emergence from a bankruptcy proceeding in which a portion of GECC’s debt was converted to non-voting equity. These interests are now attributable to GE and GECC under the equity-debt-plus attribution rule due to the decline in the value of ACN assets and the conversion of a portion of GECC’s loans to equity. In these circumstances, the Commission affords parties a reasonable time to come into compliance

licensed to Los Angeles, California); (2) KVEA (a Spanish-language station airing Telemundo programming, licensed to Corona, California); and (3) KWHY-TV (an independent Spanish-language station, licensed to Los Angeles, California). In order to come into compliance with Section 73.3555(b) without a waiver, NBCU has committed either to divest one of its three television stations in the Los Angeles DMA to a third party prior to the consummation of the proposed joint venture transaction, or place one of the stations in a divestiture trust at closing, in either case pursuant to prior Commission consent.<sup>755</sup> Under either circumstance, NBCU's television ownership interests in Los Angeles will be in compliance with Section 73.3555(b) at the closing of the proposed transaction.

Any concerns regarding NBCU's current ownership of three television stations in Los Angeles<sup>756</sup> or suggestions that the Commission should take enforcement action with regard to

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with any ownership restrictions made applicable as a result of a change in attributable status. GECC will bring its interest in ACN into compliance with section 73.3555(b) of the Commission's rules prior to closing of the instant transaction. See NBCU Response to the Commission's May 21, 2010 Information and Discovery Request, Narrative Response to Request 59, at 38 (resubmitted July 6, 2010).

<sup>755</sup> See Letter from Michael H. Hammer, Willkie Farr & Gallagher LLP, Counsel for Comcast Corporation, A. Richard Metzger, Jr., Lawler, Metzger, Keeney & Logan, LLC, Counsel for General Electric Company, and Kenneth E. Satten, Wilkinson Barker Knauer, LLP, Counsel for NBC Universal, Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56, at 1 (May 4, 2010); see also FCC Form 315 Lead Application File Nos. BTCCDT-20100128AAG, BTCCDT-20100128ABL, BTCCDT-20100128ABN, and BTCCDT-20100128ABR; *In the Matter of Applications of Shareholders of AMFM, Inc. (Transferor) and Clear Channel Communications, Inc. (Transferee)*, Memorandum Opinion and Order, 15 FCC Rcd 16062 ¶ 24 (2000) ("The Commission previously has approved the use of properly insulated trust arrangements as a legitimate means to avoid attribution of a broadcast interest under the Commission's multiple ownership rules.") (citing *Attribution of Ownership Interests*, Report and Order, 97 FCC 2d 997 ¶¶ 54-56 (1984)).

<sup>756</sup> See CFA *et al.* Petition to Deny at 59-61; Lepicier Petition to Deny at 6-10; Greenlining Institute Petition to Deny at 43. To the extent that parties are concerned about the ownership of multiple television stations in a given market more generally (see Franken Comments at 4-7; Cooper/Lynn Decl. at 69-72), these issues are not transaction specific and should be addressed by the Commission in broader, industry-wide, media ownership rulemakings. See *supra* Section II. In addition to expressing concerns regarding NBCU's ownership in the Los Angeles market, Ms. Rita Guajardo Lepicier has asked the Commission to deny the application to assign Station KWHY-TV to a divestiture trust. See Lepicier Petition to Deny at 1.

these matters<sup>757</sup> are fundamentally immaterial to the Commission’s evaluation of the instant transaction. The simple fact is that NBCU will be in full compliance with Section 73.3555(b) when the transaction closes.

**1. Los Angeles DMA**

NBCU is moving aggressively to divest Station KWHY-TV prior to closing. NBC Telemundo License, LLC, the licensee of Station KWHY-TV, Los Angeles, California, filed an application on May 17, 2010, to assign the license to a divestiture trust, with Bahia Honda, LLC as trustee (“Bahia Honda” or the “Trustee”).<sup>758</sup> That application has been accepted for filing and is pending before the Commission.<sup>759</sup> NBCU also has engaged Moelis & Company LLC (“Moelis”), an investment banking firm, to solicit proposals to purchase the station. Moelis has contacted potential purchasers, executed confidentiality agreements with interested parties, and sent a confidential information memorandum (“CIM”) and a bid letter to those parties.

Moreover, recognizing that its divestiture of Station KWHY-TV represents an important opportunity to promote ownership diversity, NBCU also is making significant efforts to sell the station to a minority-owned entity. In this connection, NBCU has entered into an agreement with the Minority Media and Telecommunications Council (“MMTC”) to assist in identifying prospective qualified buyers for the station, particularly minorities.<sup>760</sup> More than a dozen

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<sup>757</sup> See CFA *et al.* Petition to Deny at 61 & n.124.

<sup>758</sup> See FCC File No. BALCT-20100517ADJ.

<sup>759</sup> See Public Notice, Report No. 27240 (rel. May 20, 2010).

<sup>760</sup> See, e.g., Letter from Antonio R. Villaraigosa, Mayor, Los Angeles, CA. to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56, at 1 (June 18, 2010) Villaraigosa Letter (“[NBCU] has announced it intends to divest KWHY-TV, and is making a good faith effort to help secure a minority owner to acquire the station.”).

potential purchasers have been identified through the arrangement with MMTc, many of whom have signed confidentiality agreements and received the CIM.

In short, NBCU's ownership interests in Los Angeles will be in full compliance with Section 73.3555(b) when the proposed transaction closes, and any concerns regarding NBCU's common ownership of three television stations in the Los Angeles DMA are immaterial to consideration of the instant transaction. Indeed, should NBCU's efforts in conjunction with MMTc bear fruit, NBCU's divestiture of Station KWHY-TV will benefit the public by promoting ownership diversity in the Los Angeles DMA. Similarly, there is no basis for any enforcement action with regard to NBCU's ownership of Station KWHY-TV.<sup>761</sup> The Commission approved NBCU's ownership of three Los Angeles stations in the *Telemundo Order*, and NBCU remains in compliance with that order.<sup>762</sup>

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<sup>761</sup> See CFA *et al.* Petition to Deny at 61.

<sup>762</sup> See generally *Telemundo Order*. Although the *Telemundo Order* granted a temporary waiver of Section 73.3555(b), NBCU filed a request to extend that temporary waiver before it expired. See Letter from F. William LeBeau, Sr. Regulatory Counsel and Assistant Secretary, Telemundo of Los Angeles License Corp., to Marlene H. Dortch, Secretary, FCC, BTCCT-20011101ACN, *et seq.* (Mar. 14, 2003). Consequently, under Commission precedent, the temporary waiver remains in force until such time as the Commission acts on the pending extension request. See Letter from W. Kenneth Ferree, Chief, Media Bureau, to Tribune Television Co. (Sept. 5, 2003) cited in *In the Matter of Counterpoint Communications, Inc. and Tribune Television Co.*, Memorandum Opinion and Order, 20 FCC Rcd 8582 ¶ 21 (2005). NBCU also has submitted periodic reports outlining its efforts to divest one of the television stations in the Los Angeles DMA. See, e.g., Letter from Margaret L. Tobey, Assistant Secretary, NBC Telemundo License Co., to Marlene H. Dortch, Secretary, FCC (July 12, 2010).

Even assuming *arguendo* that there were some basis upon which the Commission could initiate an enforcement action, this would have no bearing on whether the Commission should approve the NBCU transaction. The Commission will decline to approve a license transfer or assignment based on prior rule violations by the transferee or assignees unless "the number, nature and extent" of the violations indicate that the licensee "cannot be relied upon to operate [the station] in the future in accordance with the requirements of its licenses and the Commission's Rules." See *In the Matter of Eli and Harry Daniels, D.B.A. The Heart of the Black Hills Stations*, Decision, 32 FCC 2d 196 ¶¶ 10-11 (1971) (recon. denied, 36 FCC 2d 568 (1972)). Isolated instances of potential rule violations, by contrast, do not justify denial of an assignment or transfer of control application. See *In the Matter of Application of James K. Sharp*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 2267 (MB 2010) (renewal granted despite failure to file timely renewal, dismissal of late renewal because of delinquent debt, and operating without a license or an STA); *In the Matter of Application of Louisiana State University*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 24 FCC Rcd 10173 (MB 2009) (renewal granted despite public file violations); *In the Matter of Application of Urban*

## **2. Station KWHY-TV Divestiture Trust Application**

In addition to challenging the Comcast-NBCU transaction, Ms. Lepicier’s Petition also urges the Commission to deny the application to assign Station KWHY-TV to Bahia Honda.<sup>763</sup> Ms. Lepicier alleges that NBCU has not been a good steward of Station KWHY-TV based on her allegations that the station has not complied with certain Commission regulations.<sup>764</sup> Ms. Lepicier argues, therefore, that the Commission should not permit NBCU to place the station in trust, but should deny the assignment application and defer consideration of the proposed Comcast-NBCU transaction until after NBCU has divested Station KWHY-TV to an independent (and, in Ms. Lepicier’s preference, Hispanic) owner.<sup>765</sup>

NBC Telemundo License, LLC, the licensee for Station KWHY-TV, and Bahia Honda demonstrate in their separately filed Joint Opposition to Ms. Lepicier’s Petition to Deny that Ms. Lepicier’s Petition lacks merit.<sup>766</sup> In any event, even if true, Ms. Lepicier’s allegations of rule violations on the part of WKHY-TV represent isolated incidents that (standing alone or taken together) do not raise basic qualification issues sufficient to justify the Commission denying the

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*Radio I, LLC*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 18453 (2008) (“*Urban Radio*”) (renewal granted despite EEO violations).

<sup>763</sup> See Lepicier Petition to Deny at 1.

<sup>764</sup> *Id.* at 9-10.

<sup>765</sup> *Id.* at 2, 7.

<sup>766</sup> NBC Telemundo License, LLC and Bahia Honda, LLC are filing a Joint Opposition to Ms. Lepicier’s Petition to Deny under separate cover. See FCC File No. BALCDT – 20100517ADJ, Joint Opposition to Petition to Deny of NBC Telemundo License, LLC and Bahia Honda, LLC (July 21, 2010). The Joint Opposition is hereby incorporated herein by reference.

assignment application.<sup>767</sup> Thus, the Commission should reject Ms. Lepicier’s request to deny the assignment application and should not defer action on the Comcast-NBCU transaction.

In sum, the Commission should reject the petitions to deny discussed in this Section V.A and find that Applicants possess the basic qualifications necessary for approval of the transaction.

**B. The NBCU O&O Stations and Comcast Local Cable Systems Serve the Public Interest and the Goals of Diversity and Localism.**

The record in this proceeding and NBCU’s long history as a broadcast pioneer leave no question that the company is committed to serving the public interest and the local communities in which its O&O stations operate. NBCU has recognized the critical role that broadcasters play as trustees of the public airwaves and consistently has gone beyond threshold regulatory requirements to meet community needs. Although Comcast, as a cable operator, currently is not subject to the requirements for broadcast licensees, its behavior demonstrates that the Commission also can trust Comcast to comply with all applicable rules once it holds broadcast licenses.

**1. Programming, Employment, and Procurement Diversity**

Applicants conduct their businesses in a manner that is consistent with the Commission’s diversity-related rules and promotes the Commission’s goal of fostering diversity. This record is

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<sup>767</sup> See *supra* note 762. “It is well settled that the Commission may grant an assignment application despite the potential for subsequent enforcement action, if it can make the necessary qualifications findings.” *FM Broadcasters of Douglas County*, Memorandum Opinion and Order, 10 FCC Rcd 10429, 10430 (1995). See also *Rockland Public Schools*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 21691 (MB 2007) (renewal application granted despite 21 public file violations and two ownership report violations); *In the Matter of Application of Access.1 New York License Company LLC*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 15205 (MB 2007) (false certification of compliance with the public inspection file rule did not rise to such a level or pattern of misconduct so as to warrant designation for evidentiary hearing); *In Re Applications Cumulus Licensing LLC*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 13711 (MB 2007) (same).

supported by an overwhelming number of commenters who have affirmed Applicants’ commitment to diversity. Indeed, contrary to the assertions of four allied California organizations that act effectively as a single petitioner – the Greenlining Institute, Mabuhay Alliance, Latino Business Chamber of Greater Los Angeles, and the Black Economic Council (collectively, the “Greenlining Parties”)<sup>768</sup> – Comcast and NBCU have strong, positive diversity records in all facets of their operations. Both companies are, and always have been, committed to diversity because it is the right thing to do and because it is good business. Specifically, as discussed in more detail below, NBCU and Comcast provide niche and multicultural programming responsive to the demands of all their viewers, maintain hiring practices consistent with Commission rules, demonstrate a commitment to a diverse workforce, and seek to obtain products and services from a diverse range of suppliers. The Greenlining Parties’ allegations are factually incorrect and largely unconnected to the Commission’s rules or policies – or to any legal requirement.

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<sup>768</sup> The Greenlining Coalition includes the Black Economic Council, the Latino Business Chamber of Commerce of Greater Los Angeles and the Mabuhay Alliance. See Greenlining Coalition, <http://www.greenlining.org/about/coalition.php> (last visited July 20, 2010). These four organizations are often aligned and joined in their advocacy. See Reply of the Black Economic Council, the Latino Business Chamber of Greater Los Angeles and the Mabuhay Alliance to Comments on Workshop Two Utility Response, *Order Instituting Rulemaking to Review and Potentially Amend General Order 156, To Consider Other Measures to Promote the Economic Efficiencies of an Expanded Supplier Base, and to Examine the Composition of the Utilities’ Workforce*, R. 09-07-027, at 1 (Cal. PUC, July 30, 2009); Letter to President Barack Obama & U.S. Treasury Secretary Timothy Geithner, *Mortgage Modifications Must Come from Grass Roots, Not Trickle Down*, <http://www.greenlining.org/publications/pdf/474> (last visited July 20, 2010); Greenlining Inst. Comments, *In the Matter of Pfizer Pharmaceuticals, Inc., for the Authority to Acquire Wyeth*, FTC File No. 091-0053, at 1 (Oct. 23, 2009) (filing comments signed by the Black Economic Council, Latino Business Chamber of Greater Los Angeles, Mabuhay Alliance and Greenlining Institute on Greenlining Institute letterhead). The Greenlining Institute’s Board of Directors includes Jorge Corralejo, the chair and founder of the Latino Chamber of Greater Los Angeles, and Ortensia Lopez, listed as an “officer, director, trustee, or key employee” for the Black Economic Council. See Greenlining’s Board of Directors, <http://www.greenlining.org/about/board.php> (last visited July 12, 2010); Black Economic Council, 2008 Internal Revenue Service 990 Short Form Return of Organization Exempt from Income Tax at 2, available at <http://www.guidestar.org/FinDocuments/2008/061/749/2008-061749466-05b921ee-Z.pdf>.

As outlined in Section III above, Applicants have made a number of unprecedented voluntary commitments, and entered into additional consensual agreements, designed to ensure that the joint venture responds to the needs and interests of diverse communities. Even without taking into account these forward-looking transaction-related benefits, however, the record in this proceeding confirms that Comcast's and NBCU's existing diversity efforts make them outstanding corporate citizens *today*. The very few comments to the contrary have been overwhelmed by a chorus of affirmation of Applicants' commitment to diversity. The organizations that have filed letters in support of Applicants' diversity records are both large and small, span the entire country, and represent people from all walks of life. The letters are from respected individuals and organizations that interact with Comcast and NBCU frequently and have seen first-hand the companies' longstanding commitment to diversity. Representative quotes from some of the scores of supporters that submitted letters praising Comcast's and/or NBCU's diversity records include:

- *National Urban League*: “[O]ur experience with Comcast and [NBCU] is this: both Comcast and [NBCU] have had a positive record in promoting diversity and the other important interests of our constituents. First, Comcast and [NBCU] have been committed to supplier diversity in a way that provides opportunities to minority-owned suppliers. Second, Comcast and [NBCU] have made significant philanthropic investments in the community, supporting the work of institutions that serve the needs of communities of color. Third, Comcast and [NBCU] have taken steps to increase the diversity of their workforce at all levels through recruitment and mentoring programs, and best practices in hiring. Fourth, Comcast and [NBCU] have strongly indicated their support for the goal of closing the digital divide, a critical barrier to education, career and entrepreneurship opportunities for people of color.”<sup>769</sup>
- *Reverend Al Sharpton (National Action Network)*: “Comcast has been an industry leader on diversity when it comes to their core business operations as evidenced

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<sup>769</sup> Letter from Marc H. Morial, President & CEO, National Urban League, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56, at 1 (June 21, 2010).

by the leadership positions held by several African Americans in cable and programming operations and elsewhere.”<sup>770</sup>

- *National Black Chamber of Commerce*: “It is our view that Comcast’s long and distinguished record in promoting diversity – through its hiring and promotion practices, programming choices, and support for African American charities and community groups – has provided ample evidence of this company’s good works and the positive impact it will have on diversity and equality at [NBCU].”<sup>771</sup>
- *National Black Caucus of State Legislators*: “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-[NBCU] will promote the important value of diversity, a critical element of the FCC’s review.”<sup>772</sup>
- *National Association of Black County Officials*: “Comcast supports the economic advancement of African Americans. The company has demonstrated a commitment to supporting minority-owned businesses . . . . Comcast is also a positive force in African American communities across the country through its support for charitable organizations.”<sup>773</sup>
- *National Organization of Black Elected Legislative Women*: “It is without question that Comcast stands as a leader in the world of corporate social responsibility and because of this leadership and continued support for policies endorsed by NOBEL Women we believe this important transaction merits timely approval.”<sup>774</sup>
- *National Conference of Black Mayors*: “We strongly believe that Comcast’s exemplary record in creating sustainable urban jobs, as well as the company’s support for the economic advancement of people of color throughout our diverse communities, provides ample evidence that the new Comcast-NBC Universal will continue to promote diversity and urban economic expansion – principles which

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<sup>770</sup> Letter from Rev. Al Sharpton, President & Founder, National Action Network to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56, at 2 (May 24, 2010).

<sup>771</sup> Letter from Harry C. Alford, President & CEO, National Black Chamber of Commerce, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56, at 1 (May 24, 2010).

<sup>772</sup> Letter from Rep. Calvin Smyre, NBCSL President, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56, at 1 (June 3, 2010).

<sup>773</sup> Letter from Robert Steele, President, NABCO, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56, at 1 (May 5, 2010).

<sup>774</sup> Letter from Sharon Weston Broome, National President, NOBEL Women, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56, at 2 (May 11, 2010).

you have identified as critical measures in your review of the two companies' proposed transaction."<sup>775</sup>

- *U.S. Hispanic Chamber of Commerce*: "I am pleased to report that Comcast has demonstrated its commitment to working with the USHCC to identify Hispanic-owned businesses as potential vendors and partners. While Comcast has been successful in working with Hispanic owned businesses, it is always interested in new ways to increase the diversity of its suppliers."<sup>776</sup>
- *National Hispanic Caucus of State Legislators*: "In working with the company, it is clear that Comcast shares our values with respect towards intellectually engaging and strengthening the communal interests of Hispanic Americans."<sup>777</sup>
- *California Asian Pacific Chamber of Commerce*: "Comcast has been a long standing partner of the Chamber supporting many of our programs that fulfill our mission, from our educational program for youth (JumpStart21) that trains and places area youth into internships to our procurement activities like the website that matches ethnic business owners to contract opportunities."<sup>778</sup>

Scores of other local officials,<sup>779</sup> independent programmers,<sup>780</sup> business groups,<sup>781</sup> and community organizations,<sup>782</sup> among others, similarly praised Applicants' diversity efforts. These

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<sup>775</sup> Letter from Vanessa R. Williams, Executive Director, National Conference of Black Mayors, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56, at 1 (May 19, 2010).

<sup>776</sup> Letter from Javier Palomarez, President & CEO, U.S. Hispanic Chamber of Commerce, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (May 19, 2010).

<sup>777</sup> Letter from Rep. David Casas, National Chairman, National Conference of Hispanic Legislators, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 2, 2010).

<sup>778</sup> Letter from Pat Fong-Kushida, President & CEO, California Asian Pacific Chamber of Commerce, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 21, 2010).

<sup>779</sup> See, e.g., Letter from Rep. Tyrone Ellis, Majority Leader, Mississippi House of Representatives, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Mar. 26, 2010); Letter from Rep. Sylvester Turner, Texas House of Representatives, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Mar. 29, 2010).

<sup>780</sup> See, e.g., Letter from Collie Burnett, President, Atlanta Interfaith Broadcasters, Inc., to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (July 1, 2010); Letter from Daija Arias, Senior Vice President, NTN24 USA, Inc., to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 24, 2010); Letter from Luis Torres-Bohl, President, Castalia Communications Corporation, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Apr. 22, 2010); Letter from William Airy, Chief Strategy Officer, Inspiration Networks, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 18, 2010); Letter from Tracy Jenkins Winchester, President & CEO, CoLours TV, to Rick Boucher, Chairman, Subcommittee on Communications, Technology, and the Internet, U.S. House of Representatives (July 6, 2010) available at <http://www.comcast.com/nbcutransaction//pdfs/Programmers/Chairman%20Boucher%20July%202010.pdf>.

efforts with respect to programming diversity, employment diversity, and procurement and supplier diversity are discussed in more detail below.

**a. Programming Diversity**

Contrary to claims by some commenters<sup>783</sup> (in particular, the Greenlining Parties), Applicants have demonstrated that they produce, air, and carry programming that is diverse by any metric. Even if commenters' allegations were true, they do not demonstrate violation of any Commission rule, nor may the Commission interfere with programming decisions within the editorial discretion of licensees. In any event, as addressed in the Public Interest Statement and in Section III, the new venture will expand the amount, quality, variety, and availability of content better than either company could on its own, including extraordinary commitments to promote source diversity and independent programming.

**i. NBCU**

Licensees are entitled to broad discretion in their selection of community-responsive programming, and the Commission "will not interfere with the broadcaster's judgment without a

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<sup>781</sup> See, e.g., Letter from Lilian Lopez, President, South Florida Hispanic Chamber of Commerce, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (May 18, 2010); Letter from Pat Fong-Kushida, President/CEO, California Asian Pacific Chamber of Commerce, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 21, 2010).

<sup>782</sup> See, e.g., Letter from Sol Flores, Executive Director, La Casa Norte, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 10, 2010); Letter from Steve Bruntos, Executive Director, Chinese Mutual Aid Association, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Apr. 23, 2010); Letter from Christine Miller-Betts, Director, The Lucy Craft Laney Museum of Black History, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 16, 2010).

<sup>783</sup> See, e.g., Greenlining Institute Petition to Deny, MB Docket No. 10-56, at 7-8, 44; Latino Business Chamber of Greater Los Angeles Comments, at 2 (Mar. 26, 2010); Letter from Samuel Kang, Managing Attorney, The Greenlining Institute, to Mignon Clyburn, Commissioner, FCC, MB Docket No. 10-56 (May 11, 2010); Letter from Hyepin Im, President & CEO, Korean Churches for Community Development, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Apr. 14, 2010) ("Korean Churches for Community Development Comments"); Letter from Faith Bautista, President & CEO, Mabuhay Alliance, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Apr. 6, 2010) ("Apr. 6 Mabuhay Letter"); Black Economic Council Opposition, at 3 (Mar. 29, 2010) ("Black Economic Council Opposition").

showing that the broadcaster was unreasonable or discriminatory in its selection of issues or that the licensee has offered such nominal levels of responsive programming as to have effectively defaulted on its obligation to contribute to the discussion of issues facing its community.”<sup>784</sup>

Here, commenters have failed to provide any evidence that NBCU or its stations have “defaulted” in their selection of programming. To the contrary, the record illustrates the many benefits of NBCU’s multicultural and community-oriented programming.<sup>785</sup> For example, Oscar Goodman, Mayor of Las Vegas, Nevada, commends the local Telemundo O&O station for a “commitment to Spanish-language local news [that] is unparalleled” and states that the recent addition of public affairs programming “is not only important, but is essential” in Las Vegas,

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<sup>784</sup> *In the Matter of License Renewal Applications of Certain Commercial Television Stations Serving Philadelphia, Pennsylvania*, Memorandum Opinion and Order, 5 FCC Rcd 3847 ¶ 8 (1990) (citations omitted). Section 326 of the Act and the First Amendment “prohibit any Commission action which would improperly interfere with the programming decisions of licensees.” *In the Matter of Application of National Broadcasting Co, Inc*, Memorandum Opinion and Order and Notice of Apparent Liability, 14 FCC Rcd 9026 ¶ 18 (MB 1999) (“WNBC Renewal”); *see also Adelpia Order* ¶ 204, n.636 (“The no-censorship provision of the Communications Act of 1934, as amended, which embodies First Amendment free speech principles, prohibits the Commission from involving itself in the content of specific programs or otherwise engaging in activities that might be regarded as program censorship. The Commission can neither prevent licensees from airing a particular program, nor require that particular speech contained within specific programming be balanced.”); 47 U.S.C. § 326.

Accordingly, “[a] broadcaster is afforded a great deal of discretion in the scheduling, selection and presentation of programming responsive to issues of concern to its community,” and a licensee is permitted to address such issues, in good faith, “by whatever program mix it believes appropriate in order to decide which programming responds to the needs of its community.” *In the Matter of KGAN Licensee, LLC*, Memorandum Opinion and Order, 25 FCC Rcd 2549 ¶ 21 (MB 2010) (“*KGAN Order*”) (citation omitted); *see also WNBC Renewal* ¶ 18 (“With certain limited exceptions, such as the broadcast of obscene or indecent programming, licensees are accorded a great deal of discretion in the scheduling, selection and presentation of programs and announcements to be aired by their stations.”).

<sup>785</sup> *See, e.g.*, Letter from Marc H. Morial, President & CEO, National Urban League to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56, at 2 (June 21, 2010) (“[NBCU has] taken steps towards increasing the availability of minority-focused content within their programming line-ups.”); Letter from Kathy A. Johnson, President, National Association for Multi-ethnicity in Communications to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 16, 2010) (“NAMIC (National Association for Multi-ethnicity in Communications) is pleased to attest that . . . NBC Universal [has] demonstrated strong leadership in . . . programming . . . diversity.”); Letter from Alfonso Barrera, Founder, HispanicPro – The Hispanic Professional Network to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 21, 2010) (“I am a first-hand witness of . . . [NBCU’s] commitment to serve the Spanish speaking television viewing market with quality programming.”); Letter from Aida Alvarez, Chair, Latino Community Foundation to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (May 28, 2010) (“NBC Universal’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.”).

which has the fastest growing Hispanic population in America.<sup>786</sup> As another example, the San Francisco AIDS Foundation, Silicon Valley Faces, and the Fremont Chamber of Commerce have all recognized that KNTV (an NBCU O&O television station in the Bay area affiliated with the NBC Television Network) devotes significant resources to public service and has the ability to inform large numbers of viewers.<sup>787</sup> In light of the facts, as underscored by Applicants' numerous supporters, the Commission should give no weight to petitioners' unsupported assertions and should reject them as it has in prior cases.<sup>788</sup>

*Telemundo.* NBCU's history with Telemundo is an instructive example of NBCU's commitment to multicultural programming. GE/NBCU acquired Telemundo for \$2.7 billion in 2002, and subsequently invested an additional \$900 million to acquire stations and create Telemundo Studios and Telemundo International to develop and produce original programming. Under NBCU's ownership, Telemundo has become the nation's second-largest Spanish language content provider, with substantial Spanish-language production facilities located in the United States.<sup>789</sup> Today, Telemundo produces more than 3,000 hours of original content a year,

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<sup>786</sup> Letter from Oscar B. Goodman, Mayor, Las Vegas, NV, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56, at 1 (May 27, 2010).

<sup>787</sup> See Letter from Debra Holtz, Media Relations Manager, San Francisco AIDS Foundation, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Apr. 30, 2010); Letter from Pat Mitchell, Executive Director, Silicon Valley Faces, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (May 3, 2010); Letter from Cindy Bonior, Chief Executive Officer, Fremont Chamber of Commerce, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Apr. 30, 2010).

<sup>788</sup> See, e.g., *Telemundo Order* ¶ 15 (“[The Hispanic Groups] suggest [] that we should withhold a grant on the transfer applications because NBC has failed to demonstrate how the Telemundo Stations will continue to meet the needs of the Hispanic community when NBC takes over operation of the stations. We see no basis in the record here to do so. Moreover, we note that NBC has pledged to continue the Spanish-language programming at the Telemundo Stations.”).

<sup>789</sup> See Written Testimony of Paula Madison, Executive Vice President, Diversity, NBCU, Vice President, GE, to the H. Comm. on Energy and Commerce, Subcomm. on Comm'ns, Tech. and the Internet, at 5 (July 8, 2010) (“Madison July Testimony”).

including *Enfoque*, a recently-launched Sunday morning public affairs shows that focuses on key issues facing Hispanics.<sup>790</sup> Furthering its commitment to the Hispanic community, Telemundo owns and operates mun2, the bilingual lifestyle cable network for Hispanics aged 18-34. As the fastest growing cable network targeted to young Hispanic Americans, mun2 reaches more than 34 million U.S. households and is the only national bilingual cable network measured by Nielsen ITI.<sup>791</sup> mun2 is proof positive that NBCU and Telemundo recognize the importance of the bicultural Hispanic audience and want to serve these viewers with quality content.

*NBC Programming.* NBCU has been and remains firmly committed to diversity in programming, as evidenced by the shows that it has selected for NBC's fall lineup and its summer reality shows. Three of the most widely anticipated pilots scheduled to air in the fall feature diverse actors in significant roles: *Undercovers*, *Outlaw*, and *The Event*.<sup>792</sup> In addition, all of NBC's seven summer reality shows this year feature diverse contestants, and three will have diverse hosts.<sup>793</sup> NBCU continues to increase diversity in front of and behind the camera. Over the past year, NBC increased its use of minority actors (31 to 33 percent), writers/producers (12 to 14 percent), and directors (9 to 11 percent).<sup>794</sup>

*Positive Depictions.* NBCU strives to depict minorities in positive and leading roles.<sup>795</sup> Further, Telemundo incorporates positive social and public interest themes into its originally

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<sup>790</sup> *Id.*; Amy Chozick & Susan Davis, *Politics Show in Spanish Set to Debut*, Wall St. J., Apr. 15, 2010, available at <http://online.wsj.com/article/SB10001424052702304159304575184200297666836.html>.

<sup>791</sup> Written Testimony of Paula Madison, Executive Vice President, Diversity, NBCU, Vice President, GE, to the H. Judiciary Comm., Field Hearing in Los Angeles, Cal., at 6 (June 7, 2010) ("Madison June Testimony").

<sup>792</sup> *Id.* at 8.

<sup>793</sup> *Id.*

<sup>794</sup> Madison July Testimony at 8.

<sup>795</sup> *See, e.g.*, *Undercovers*, <http://www.nbc.com/undercovers/> (last visited July 15, 2010).

produced programming. These themes have recently included, for example, the significance of Latino participation in the 2010 U.S. Census and the importance of enhanced Latina self-esteem. Also, NBCU's Program Standards Department carefully reviews all entertainment program material – from concept through final production – to ensure that all network program content comports with NBCU's high standards for programming.<sup>796</sup>

*Independently Produced Programming and Source Diversity.* NBCU has a long-established history of airing programming that is diverse in its viewpoints, its target audiences, and its sources. For example, during the week of March 1-7, 2010, approximately 30 percent of prime time programs on the NBC Television Network came from independent producers.<sup>797</sup> That figure will increase to 33 percent for NBC's fall 2010 schedule. With respect to source diversity, the Commission has considered the availability of content to consumers from a variety of producers in its industry-wide ownership reviews.<sup>798</sup> Any demand for a primetime "set-aside" for programming from diverse or independent sources<sup>799</sup> thus is inappropriate here. Mandating

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<sup>796</sup> Any allegation of stereotyping (*see* Apr. 6 Mabuhay Letter ; Mabuhay Alliance Opposition, at 2 (Mar. 15, 2010)) cannot be sustained as a factual or legal matter. *See In the Matter of Applications of Citicasters Licenses, L.P. and AMFM Broadcasting Licenses, LLC*, Memorandum Opinion and Order and Notice of Apparent Liability, 22 FCC Rcd 19324 ¶ 19 (MB 2007) (rejecting programming-related petitions alleging licensee's content contains offensive stereotyping because "[l]icensees have broad discretion – based on their right to free speech – to choose, in good faith, the programming they believe serves the needs and interests of their communities. This holds true even if the material broadcast is insulting to a particular minority or ethnic group in a station's community. Indeed, as we have held in earlier decisions, if there is to be free speech, it must be free for speech that we abhor and hate as well as for speech that we find tolerable and congenial.") (internal quotations and citations omitted).

<sup>797</sup> Responses to Questions from Several Members of Congress, *supra* note 88, at 36-41.

<sup>798</sup> *See, e.g., 2002 Biennial 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 Proposed Rulemaking, 17 FCC Rcd 18503 ¶ 37 (2002).

<sup>799</sup> *See* Entertainment Studios, Inc. Comments at 17 (June 21, 2010) ("The only way to promote diversity and protect African American owned programming networks and the viewing public is to require . . . NBC prime time programming to be programmed by wholly-owned African American media companies."); Caucus for Producers, Writers & Directors Comments at 1 (June 17, 2010) ("The Caucus urges a 25% 'carve out' of the prime time schedule of the domestic cable and free broadcast networks of Comcast/NBC Universal for the protection of the independent producer of creative program content as a condition of approval by the FCC of this Comcast/NBC-

source diversity quotas in the instant transaction not only would infringe upon the companies' First Amendment rights, but also would be unwarranted in light of NBCU's dedication to diverse programming, Applicants' past performance with respect to diversity in general, and the forward-looking commitments discussed in Section III.

It should be emphasized that no Commission rule requires that any broadcast outlet carry any specified amount of independently-produced programming.<sup>800</sup> The former financial interest and syndication ("Fin/Syn") rules<sup>801</sup> were denounced by academic experts from the outset, by the Commission's staff in the late 1970s, by the Commission itself as early as the 1980s, by the U.S. Court of Appeals for the Seventh Circuit in 1992, and, finally and definitively, by the

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Universal filing."); *see also* Cooper/Lynn Decl. at 6 ("the repeal of the Fin-Syn rules . . . led to a tight oligopoly that pushed independent content producers out of the prime time and most lucrative distribution channels, and that quality suffered severely as a result"); Writers Guild of America, West Comments at 3-7 (raising concerns regarding the lack of independent programming in the wake of the repeal of Fin-Syn regulations.).

<sup>800</sup> As the Commission explained in the 2002 Quadrennial Review Order, there is no basis to conclude that independently-produced programming necessarily is superior to network programming: "It is up to consumers and viewers to determine what programming they want to watch, and networks, as they compete for viewers, must be responsive to those demands. It is not for this agency to intervene in the decisions that determine the content of programming (absent obscenity or indecency concerns)." *In the Matter of 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620 ¶ 655 (2003) ("2002 Quadrennial Review Order").

<sup>801</sup> The Fin/Syn rules were adopted in 1970 to address the Commission's perception that the (then three) major broadcast networks held excessive market power. *Amendment of Part 73 of the Commission's Rules and Regulations With Respect to Competition and Responsibility in Network Television Broadcasting*, 23 FCC 2d 382 ¶¶ 36-37 (1970), *aff'd sub nom. Mt. Mansfield Television v. FCC*, 442 F.2d 470 (2d Cir. 1971). At that time, the three networks collectively captured 90 percent of the nation's viewing audience each night. James L. Gattuso, *et al.*, *Adjusting the Picture: Media Concentration or Diversity?*, Heritage Foundation Lecture #798, Oct. 6, 2003. The rules prohibited a broadcast network from (i) syndicating programs for rebroadcast by independent television stations; (ii) purchasing syndication rights to programs it obtained from outside producers; or (iii) obtaining any other financial stake in such programs. *See In the Matter of Evaluation of the Syndication and Financial Interest Rules*, 6 FCC Rcd 3094 ¶ 3 (1991). In 1990, the Commission reviewed the Fin/Syn rules and concluded that the networks still exerted some level of market dominance. *In the Matter of Evaluation of the Syndication and Financial Interest Rules*, 5 FCC Rcd 6463 (1990). The Commission then modified the Fin/Syn rules to require networks to purchase at least 40 percent of primetime programming from independent producers. *In the Matter of Evaluation of the Syndication and Financial Interest Rules*, 6 FCC Rcd 3094 ¶ 2. This outcome, which had been opposed by the U.S. Department of Justice, ultimately was vacated by the U.S. Court of Appeals for the Seventh Circuit. *Schurz Commc'ns, Inc. v. FCC*, 982 F.2d 1043 (7th Cir. 1992).

Commission more than a decade ago. As evidenced in this transaction and throughout many pending Commission proceedings, today’s media marketplace is fiercely competitive with more programming networks, more MVPDs, and thus more source, outlet, and content diversity than ever before. The key to success – and the challenge that all programmers face – is to offer content that consumers want to watch, on any of the many and growing numbers of platforms: whether on broadcast networks, cable networks, On Demand, or on the Internet, and regardless of the source. It is against this background that any call for a return to 1970s-style regulation of programming networks must be measured and soundly rejected.<sup>802</sup> There is no conceivable justification to consider re-imposing such requirements.<sup>803</sup> In any event, if the Commission does choose to consider requirements regarding independently-produced programming, this should only be done in an industry-wide rulemaking, not applied to a single company as a result of a specific transaction.

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<sup>802</sup> See NBCU Reply Comments, MB Docket No. 07-269 (Aug. 28, 2009). Today, viewers and advertisers “have more choices, not fewer, and the shares of the broadcast networks have declined, not increased. This reality leaves the Commission with no sound basis to insert itself into the business decisions of individual distributors, at the risk of raising costs and prices in the market, when neither horizontal concentration nor diversity concerns remotely raise issues requiring such a risk.” See Bruce Owen, *Protecting Inefficient Producers Harms Consumers: Preliminary Comments on IFTA’s Proposal and Dr. Mark Cooper’s Supporting Paper* at 6, attached to Reply Comments of CBS Corp., Fox Entertainment Grp., Inc. and Fox Television Stations, Inc, NBC Universal, Inc. and NBC Telemundo License Co., and The Walt Disney Company, MB Docket Nos. 06-121, 02-277, MM Docket Nos. 01-235, 01-317, 02-44 (filed Jan. 16, 2007).

<sup>803</sup> As Commissioner McDowell explained in a 2008 speech regarding Fin/Syn, “[p]rofound changes have occurred since 1992. Today, the average consumer has a choice of at least three subscription video providers, and sometimes five. Cable companies pass over 92 percent and serve approximately 60 percent of households. DirecTV and EchoStar . . . serve over 30 million consumers and have grown to a 30 percent market share among MVPDs. Now phone companies are in the video business too . . . . The reach of the broadcast networks has fallen far below the 62 percent of the prime-time audience cited by the court in 1992. During the current season, the combination of 77 ad-supported cable networks posted higher ratings among the key 18 to 49 demographic than the broadcast networks . . . . In 1992, there was no public Internet, let alone Internet video.” Robert McDowell, Commissioner, FCC, Keynote Address 2008 Quello Communications Law and Policy Symposium, at 7 (Apr. 23, 2008) available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-281772A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-281772A1.pdf).

Irrespective of petitioners' demands, however, Applicants consistently have recognized and continue to value the benefits of a diversity of programming sources for their audiences. In this connection, Applicants have entered into an agreement intended to facilitate independent producers' opportunities to reach viewers on the joint venture's platforms. This agreement and the associated obligations on the part of Comcast and NBCU are discussed above in Section III.

**ii. Comcast**

*Minority Programming.* As both a cable and content provider, Comcast is committed to providing programming that meets the needs of minority audiences. There is no substance whatsoever to the handful of allegations<sup>804</sup> that Comcast has been unwilling to provide programming targeted to multicultural audiences or that the transaction poses a threat to the interest of minority viewers. As a legal matter, it would be inappropriate for the Commission to intervene in the programming decisions of Comcast in the context of this transaction,<sup>805</sup> and, in any event, such intervention is unwarranted in light of Comcast's strong record of diverse programming and its forward-looking commitments.

Comcast provides a wide array of programming appealing to minority and niche audiences. Comcast is keenly aware of the importance of providing programming that serves

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<sup>804</sup> See, e.g., Greenlining Institute Petition to Deny at 10; National Coalition of African American Owned Media Petition to Deny at 24-25.

<sup>805</sup> The U.S. Constitution and Supreme Court precedent generally restrict the Commission from involving itself in the content of cable television programs or otherwise engaging in activities that could be regarded as censorship of programming. See U.S. Const. amend. I; *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813-15 (2000). Cable providers have "wide discretion in choosing the programming that is available on a cable system." *In the Matter of Emergency Complaint of Dennis J. Kucinich v. Cable News Network*, Memorandum Opinion and Order, 23 FCC Rcd 482 ¶ 2 (MB 2008); see also *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 636 (1994) ("There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment. Through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, cable programmers and operators seek to communicate messages on a wide variety of topics and in a wide variety of formats.") (internal quotations and citations omitted).

diverse audiences, and it has worked hard to increase the diverse programming options available to its subscribers. Comcast licenses a significant amount of content for diverse audiences, and in the past eight years has expanded from 20 to 130 the number of carriage agreements it has with broadcast and cable networks that serve minority communities.<sup>806</sup> As Comcast transitions from delivering channels in an analog format to the more efficient digital format across its systems, it has been able to increase further the delivery of diverse and multicultural programming networks.<sup>807</sup> Additionally, Comcast regularly cooperates with broadcast stations to add independently- and minority-owned multicast streams to its systems. For Hispanic audiences, for example, Comcast has added multicasts of V-Me, Estrella TV, and LATV in several markets, and Comcast also carries several Asian multicasts in Northern California from independent Asian channels.<sup>808</sup>

As illustrated below, Comcast is focused on providing pertinent and entertaining content to minority audiences. There is no requirement that any MVPD carry a specified number of networks that are 100 percent minority-owned on widely available tiers.<sup>809</sup> The allegation that Comcast does not carry “enough” minority-owned networks on widely-available tiers thus is not a basis for denial of the transaction. Moreover, such a claim simply ignores Comcast’s many efforts to facilitate minority programming opportunities. For example:

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<sup>806</sup> Responses to Questions from Several Members of Congress, *supra* note 88, at 4.

<sup>807</sup> *Id.* at 8.

<sup>808</sup> *Id.* at 6.

<sup>809</sup> See National Coalition of African American Owned Media Petition to Deny at 11-12. However, other than certain carriage restrictions surrounding local broadcasting and PEG channels, cable operators are entitled to discretion in the selection of their video services.

*African American Programming.* Comcast carries 11 cable networks that specifically target the African American community.<sup>810</sup> Comcast also features On Demand programming that delivers a variety of TV entertainment and music choices from various networks and programs that target African American audiences, including BET, TV One, and H2O (Hip Hop On Demand).<sup>811</sup> Comcast recently launched Black Cinema on Demand, a celebration of black films, filmmakers, and actors past, present, and future focusing on the wide range of experiences, accomplishments, and points-of-view of black people, as expressed through the artistic medium of film. Black Cinema provides 20 hours per month of content and offers a forum for diverse independent programmers and frequently showcases the works of both famous and relatively unknown African American actors, directors, and producers.<sup>812</sup>

*Hispanic Programming.* In 2009, Comcast launched a program package that currently delivers more than 58 Hispanic cable networks on Comcast Cable systems representing a majority of Comcast's subscribers.<sup>813</sup> This package of Hispanic cable programming, when coupled with Comcast's carriage of local Hispanic broadcast stations, exceeds 60 channels in major Hispanic markets. It is by far the largest Hispanic programming offering from any MVPD in America and includes a diverse mix of general entertainment, kids, news, sports, and movie networks as well as geographic-specific content from Argentina, Colombia, the Dominican

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<sup>810</sup> Responses to Questions from Several Members of Congress, *supra* note 88, at 4.

<sup>811</sup> *Id.*

<sup>812</sup> *Id.*

<sup>813</sup> Comcast systems in Boston, Chicago, Detroit, Seattle, Portland, and all of Northern California offer this expanded Hispanic package. Additional systems are offering this expanded package as more bandwidth is made available throughout the Comcast Cable footprint.

Republic, Ecuador, Mexico, Venezuela, and other countries, as well as significant U.S.-produced content.<sup>814</sup>

*Asian American Programming.* Comcast carries a variety of Asian content from a number of providers including SET Asia (SONY), STAR India PLUS, Zee TV, Bollywood Hits On Demand, STAR One, STAR India GOLD, VIJAY, tvK24, GMA Pinoy TV, GMA Life, The Filipino Channel, Phoenix Info News, Phoenix North American, CTI-Zhong Tian, SBN, and others.<sup>815</sup> In all, Comcast carries 25 cable networks geared toward the Asian American community. In addition, Comcast offers two subscription VOD services: Filipino On Demand, with up to 40 choices of movies and celebrity concerts from the Philippines, and Bollywood Hits on Demand, featuring 100 choices of movies and music comprising 40 hours per month of content from India. Comcast also launched MYX, an Asian-owned network that delivers programming targeted at young Asian Americans. Comcast currently is an investor in two Asian-focused channels – Saigon Broadcasting Network (SBN) for Vietnamese Americans and tvK24 for Korean Americans.<sup>816</sup> Comcast also has partnered with the Center for Asian American Media (CAAM) for the creation of new On Demand programming focusing on culture, arts and education.<sup>817</sup>

*Innovations in Programming Diversity.* In addition to carrying diverse programming, Comcast also has a history of proactively identifying and closing the gaps in multicultural

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<sup>814</sup> Responses to Questions from Several Members of Congress, *supra* note 88, at 5.

<sup>815</sup> *Id.* at 5.

<sup>816</sup> *Id.* at 5.

<sup>817</sup> *Id.* at 5-6.

programming.<sup>818</sup> For instance, in 2003, Comcast recognized there was a need for another entertainment quality channel targeting the African American community as an alternative to BET, so it partnered with an experienced African American radio programmer to create TV One, an alternative to BET, which is now available to over 50 million subscribers.<sup>819</sup>

Comcast also created On Demand, which has expanded its ability to offer more programming that speaks to more diverse and niche audiences. Comcast continues to experiment with innovative ways to use the On Demand platform to deliver new content for multicultural audiences. Although business models are still evolving, these platforms present substantial new ownership opportunities for independent, minority, and female owners, and Comcast is proud to be a trailblazer in this area. On Demand affords independent and minority owners of content an unparalleled opportunity to reach niche audiences in a direct way and scheduling directed by the viewer's time preference. Several examples are cited above.

*Independent Programming.* Comcast's goal is to obtain and distribute on its cable systems the widest possible array of content from myriad sources, and petitioners' and commenters' allegations<sup>820</sup> that Comcast does not provide "enough" opportunities for

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<sup>818</sup> Not all of Comcast's efforts to expand the diversity of its program offerings have been successful. Several years ago, for example, Comcast operated a network called AZN, which offered a diverse array of programming for Asian communities. AZN offered opportunities for owners of the U.S. distribution rights of Indian, Chinese, Korean, and Japanese programming, many of whom were minorities, to license foreign language content to Comcast. Comcast operated AZN for almost four years and invested approximately \$25 million in the channel. Unfortunately, AZN was unsustainable for three significant reasons: it was never meaningfully distributed by MVPDs other than Comcast; it did not attract the targeted audiences in substantial numbers; and advertisers did not support AZN as a means of reaching the pan-Asian audience in America. *Id.* at 2-3.

<sup>819</sup> *Id.* at 2.

<sup>820</sup> *See, e.g.,* WealthTV Petition to Deny at 4; Tennis Channel Comments at 3; FACT Coalition Comments at 27. Further, any allegations that Comcast gives preferential treatment to its affiliated channels are without merit and have never been successfully adjudicated. *See, e.g.,* WealthTV Petition to Deny at 16-19. In fact, affiliation is no guarantee of continued carriage: two Comcast-affiliated networks have been shuttered in recent years because they did not offer what Comcast, other MVPDs, and their customers wanted.

independent network carriage are unfounded. As a preliminary matter, such allegations are immaterial to the Commission’s review of the proposed transaction, especially in light of Applicants’ unprecedented commitments to further expand opportunities for independent programming. Moreover, it is a competitive imperative for Comcast to provide its customers with programming that they find attractive and desirable (irrespective of affiliation), and the Commission’s program carriage rules provide safeguards for independent programmers.

Independent programmers have been very successful at gaining carriage on Comcast’s cable systems. In recent years, Comcast has launched or expanded carriage of unaffiliated channels including The Africa Channel, Altitude, Bloomberg TV, Gospel Music Channel, Hallmark Movie Channel, HDNet, ION Life, Jewelry TV, NESN, The Outdoor Channel, Ovation, qubo, ReelzChannel, RFD-TV, SiTV, Sportsman Channel, TeleFormula, VeneMovies, WAPA America, WFN, YES, and many others. This successful history of affording carriage to unaffiliated, independent networks has been recognized by many commenters in the proceeding.<sup>821</sup> One commenter noted that “Comcast has worked . . . to expand the number of independent, Spanish-language networks available to the market” and that “[o]ther pay TV

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<sup>821</sup> See, e.g., Letter from Phil Blazer, President & CEO, Jewish Life Television, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56, 1-2 (May 25, 2010) (“JLTV is an independent full-time, national programming network, unaffiliated with Comcast, NBCU or any of the top 15 owners of networks . . . . [O]ur network has enjoyed support from Comcast . . . all of the way to the top of its organization and is very appreciative.”); Letter from Jane Rosenthal, Co-Founder, Tribeca Enterprises, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56, at 1 (June 2, 2010) (“Launched earlier this year, the objective of Tribeca Film is to provide independent filmmakers with an integrated national marketing and distribution platform to reach new and expanded audiences. As video-on-demand is a critical component of Tribeca Film’s distribution strategy, Comcast was a natural partner, and one that we determined early on would play a significant role in our success . . . . [W]e’ve found Comcast to be committed, generous and collaborative.”); Letter from Collie Burnett, President, Atlanta Interfaith Broadcasters, Inc., to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56, at 1-2 (July 1, 2010) (“with Comcast and other carrying AIB without charge, we have grown into a full-time cable channel that is shared by all faiths in Atlanta and carried to an estimated 1.2 million cable households . . . . All of this is made possible in part by Comcast’s long and steady willingness to carry an innovative, experimental, diverse, and sometimes-impoverished local programmer like AIB. We think it demonstrates Comcast’s historical commitment to the community and to the public interest.”).

providers such as AT&T, Verizon, DirecTV, Time Warner Cable and others have also expanded their business with independent channels as a result of Comcast's support of these same channels."<sup>822</sup> The independent cable network ReelzChannel praised Comcast for its "advice and support," stating that "Comcast personnel are consistently accessible, openly communicative . . . and organized in a way that provides guidance, creative suggestions and committed follow-up to help our business grow with them. We truly feel there is a commitment to our growth and economic well-being that is built on a sense of overall fairness and continuing mutual respect."<sup>823</sup> Similarly, HDNet characterized Comcast as "a strong supporter of independent programming."<sup>824</sup>

Notably, post-transaction, nearly six out of every seven channels carried by Comcast will remain unaffiliated with Comcast.<sup>825</sup> And, as outlined above in Section III, Comcast has made unprecedented diversity and independent programming commitments, including a commitment to add at least ten new independently-owned and -operated programming services (most of which will be minority-owned) over the next eight years following closing of the transaction.

In addition to linear carriage, Comcast offers independent programmers and networks the opportunity to distribute their video content through its On Demand platform. For independent programmers who may not have the library to fill the 24/7 slots of a linear channel, VOD is an excellent way to reach viewers. Comcast's On Demand lineup currently provides consumers

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<sup>822</sup> Letter from Burke Berendes, Partner, Condista, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56, at 1-2 (May 3, 2010).

<sup>823</sup> Letter from Stanley E. Hubbard, President & CEO, ReelzChannel, to Julius Genachowski, Chairman, FCC, *et al.*, MB Docket No. 10-56, at 3-4 (Mar. 10, 2010).

<sup>824</sup> Letter from Stanley E. Hubbard, President & CEO, ReelzChannel, to Julius Genachowski, Chairman, FCC, *et al.*, MB Docket No. 10-56, at 3-4 (Mar. 10, 2010).

<sup>825</sup> See Public Interest Statement at 8.

with access to independent content from IFC, Tribeca Enterprises, Concert TV, Havoc, Here Networks, RHI Entertainment, Shalom TV, and others.

Beyond Comcast's demonstrated commitment to work with independent programmers, the FCC's program carriage rules provide further safeguards against any potential harms to independent programmers on Comcast or other cable systems.<sup>826</sup> Comcast has always conducted its business in full accordance with these rules. Nevertheless, parties who believe that they have been treated unfairly have available a complaint process at the FCC through which claims of violations can be adjudicated. In nearly 20 years, only a handful of cases have been brought against Comcast, none of which has ever resulted in a finding that Comcast engaged in unlawful or anti-competitive discrimination against independent programmers.<sup>827</sup>

Applicants produce, air, and carry diverse programming today, and the new venture will expand the amount, quality, variety, and availability of content better than either company could on its own. No party has demonstrated that Applicants fail to comply with any Commission rule in this regard. Accordingly, the Commission should deny petitions that allege a lack of programming diversity as a basis for conditioning or denying the transaction.

**b. Employment Diversity**

Contrary to some allegations,<sup>828</sup> Applicants' employment structures reflect a dedication to diversity fully consistent with the Commission rules. Indeed, Comcast and NBCU's

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<sup>826</sup> 47 U.S.C. § 536. Suggested conditions or changes to the Commission's program carriage regime are not part of this transaction and are not properly addressed here. *See* Bloomberg Petition to Deny at 39, 56-57; WealthTV Petition to Deny at 7-8, 33-36; Tennis Channel Comments at 14-18; FACT Coalition Comments at 28-32.

<sup>827</sup> *See* Section IV.D.3 above.

<sup>828</sup> *See, e.g.,* Letter from Faith Bautista, President & CEO, Mabuhay Alliance, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 1, 2010).

commitments to employment diversity have been widely recognized, and each has a history of compliance with FCC Equal Employment Opportunity (“EEO”) rules.<sup>829</sup>

**i. NBCU**

At the outset, no party claims that NBCU has failed to comply with FCC EEO obligations.<sup>830</sup> In fact, since 2007, the Commission has conducted routine random audits of three NBCU O&O station employment units (Philadelphia, Chicago and Las Vegas), and in each case, the stations were found to have been in compliance with the EEO rules. Moreover, no party has brought a successful challenge to any NBCU station’s EEO compliance during either renewal or transaction-related review.

Beyond compliance with the Commission’s recruiting requirements, NBCU has a solid record in minority hiring and professional development that has been recognized positively by numerous commenters.<sup>831</sup> Parties ranging from the Governors of California, Pennsylvania, and

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<sup>829</sup> As prior transactions demonstrate, there is no basis to deny or impose employment-related conditions on the grant of the Applications. *See, e.g., Adelpia Order* ¶ 231 (dismissing petition to deny because “[petitioner] fail[ed] to raise a substantial and material question of fact regarding Comcast’s compliance with the Commission’s cable EEO outreach rules.”); *Telemundo Order* ¶ 16 (“we do not find that the Hispanic Groups have raised a substantial and material question of fact with respect to the employment matters contained in their petition to deny. The Hispanic Groups have provided no evidence, other than their own opinion, that Hispanic employment will suffer if NBC is permitted to own Telemundo Stations . . . . Therefore, we conclude that the Hispanic Groups have not met the standard under Section 310(d) of the Act and we deny their petition to deny.”); *In the Matter of Applications of Heritage-Wisconsin Broadcasting Corp. For Transfer of Control of Licenses of Stations WEMP/WMYX-FM Milwaukee, Wisconsin from James M. Hoak, Jr. to Shareholders of Heritage Media Corporation*, Memorandum Opinion and Order and Notice of Apparent Liability, 8 FCC Rcd 5607 ¶ 16 (1993) (dismissing NAACP petition to deny because “NAACP has presented no evidence that the licensee is not engaging in EEO efforts . . . [and] NAACP has not established a prima facie case demonstrating that unconditional grant of stations [] transfer of control applications would be inconsistent with the public interest.”).

<sup>830</sup> Some parties, including the Greenlining Parties, raise claims surrounding alleged deficiencies in GE-NBCU employment diversity that are unsubstantiated or generalized. *See, e.g.,* Letter from Lynn Dangtu, Founder, President and CEO, Economic Business Development, Inc., to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Mar. 29, 2010); Mabuhay Alliance Comments at 2 (June 17, 2010); Black Economic Council Opposition at 3 (Mar. 29, 2010); Korean Churches for Community Development Comments at 1 (Apr. 14, 2010); Greenlining Institute Petition to Deny at 11.

<sup>831</sup> *See, e.g.,* Letter from Maria Eugenia Ayala, President Mas Enterprises and Marketing, Inc., to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 7, 2010) (“I believe the pending acquisition will

New York to the Mayors of Allen Park, Michigan; Orlando, Florida; Las Vegas, Nevada; Meggett, South Carolina; and others have acknowledged the important employment role that NBCU, as well as Comcast (discussed below), plays in their communities.<sup>832</sup> The National Urban League has acknowledged that NBCU, as well as Comcast, has “taken steps to increase

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provide . . . the men and women of Telemundo with broader career opportunities. I also believe Telemundo will benefit with more investment in content and better distribution. This will help secure and generate more professional jobs for hundreds of Hispanics and provide the Hispanic community with high quality, relevant original content.”).

<sup>832</sup> See Letter from CA Governor Arnold Schwarzenegger, NY Governor David Paterson, PA Governor Edward G. Rendell, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56, at 1 (May 25, 2010) (“Between them, Comcast and NBCU account for almost 130,000 jobs in 40 states and the District of Columbia. Comcast has made clear that this venture is not about cutting jobs, but about growing NBCU’s businesses.”); Letter from Gary Burtka, Mayor, Allen Park, MI, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Apr. 23, 2010) (“As of last December the State of Michigan suffered from an unemployment rate of 14.6%. In times like these, we must support businesses that are growing and dedicated to keeping jobs. Comcast and NBCU are leading examples of these types of businesses.”); Letter from Buddy Dyer, Mayor, Orlando, FL, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (May 6, 2010) (“It is no secret that NBC Universal is Orlando’s largest employer, providing over 13,500 jobs; or one of its most important business operators, investing over \$4 billion to develop 850 acres of land within our city limits . . . . NBC Universal has not only invested significantly in Orlando, but done so in a way that supports our community . . . .”); Letter from Oscar Goodman, Mayor, Las Vegas, NV, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (May 27, 2010) (“Las Vegas also greatly values Telemundo’s decision to locate its studio in the heart of downtown. In doing so, it brought jobs to and created a cultural and economic center for Hispanic content and culture in our city. 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.”); Letter from Maria Eugenia Ayala, President, Mas Enterprises and Marketing, Inc., to Julius Genachowski, Chairman, FCC, *et al.*, MB Docket No. 10-56 (June 7, 2010) (“Over the past six years I have worked closely with Telemundo [Chicago] and have become exceptional business partners. Telemundo Chicago is constantly and consistently in support of the Hispanic community, this has helped business owners such as myself grow. I believe the pending acquisition will provide . . . the men and women of Telemundo Chicago with broader career opportunities.”); Letter from Stephen Precourt, Representative, Florida House District 41, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (May 28, 2010) (“Universal is very important to our local economy, generating jobs and revenue and attracting tourists to the area.”); Letter from Grange S. Coffin, Jr., Mayor, Meggett, SC, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 9, 2010) (“Comcast has become one of this region’s finest corporate citizens and a significant provider of jobs, economic stability and tax revenue. . . . I firmly believe that Comcast’s commitment to event the smallest of the communities it serves will be strengthened by the success it can realize through partnering with NBC.”); Letter from Alexander R. Bennett, Jr., Mayor, Borough of Baldwin, PA, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (May 21, 2010) (“Comcast has had a strong presence in our borough for over 35 years now, bringing jobs, and innovation to our neighborhoods and diverse communities.”); Letter from Stephanie Rawlings-Blake, Mayor, Baltimore, MD, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 21, 2010) (“Comcast is an essential source of employment in the Greater Baltimore area, supporting jobs for over 1,800 workers and providing a significant boost to the local economy through its work with local suppliers, many of which are small businesses and minority-owned firms.”).

the diversity of their workforce at all levels through recruitment and mentoring programs and best practices in hiring.”<sup>833</sup>

*Organization and Vision.* NBCU has a strong track record of dedication to the principles of diversity and will be able to do even more in combination with Comcast. Attracting and retaining the best and most diverse talent provides a secure, powerful and competitive advantage in the media and entertainment industry. To that end, in April 2007, Jeffrey Zucker, NBCU President and CEO, identified diversity as one of NBCU’s five key business imperatives.<sup>834</sup> This move not only further strengthened NBCU’s institutional commitment to diversity, but also infused diversity into all aspects of NBCU’s vision for the future. As further described below, NBCU, in partnership with Comcast, has made this vision a centerpiece of the proposed transaction.

In conjunction with NBCU’s identification of diversity as a key business imperative, Paula Madison was named Executive Vice President responsible for Diversity and Chief Diversity Officer in 2007.<sup>835</sup> Ms. Madison’s appointment marked the first time in the company’s history that a senior executive was charged with diversity as his or her sole responsibility.<sup>836</sup> In addition, NBCU has established a corporate Diversity Council, which is made up of the heads of each division within NBCU and reports directly to the CEO. Each of NBCU’s business divisions

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<sup>833</sup> Letter from Marc H. Morial, President & CEO, National Urban League, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 21, 2010).

<sup>834</sup> See NBC Universal, NBC Universal’s Inclusive Culture, [http://www.nbcuni.com/About\\_NBC\\_Universal/Diversity/](http://www.nbcuni.com/About_NBC_Universal/Diversity/) (last visited July 15, 2010).

<sup>835</sup> Madison June Testimony at 1. Ms. Madison has worked as a reporter, professional journalist, and news executive for more than 30 years and was recently honored with the 2010 Whitney M. Young Jr. award from the Los Angeles Urban League in recognition of her leadership. See Los Angeles Urban League, Whitney M. Young, Jr. Awards Dinner, <http://www.laul.org/whitney-m-young-jr-awards-dinner> (last visited July 15, 2010).

<sup>836</sup> See NBC Universal, NBC Universal’s Inclusive Culture, [http://www.nbcuni.com/About\\_NBC\\_Universal/Diversity/](http://www.nbcuni.com/About_NBC_Universal/Diversity/) (last visited July 15, 2010).

has an individual business Diversity Council that sets goals at the division level and reports directly to each division head.<sup>837</sup>

*Advancement.* NBCU gives motivated employees the resources and opportunities to develop and succeed, including support for training opportunities aimed at its diverse workforce.<sup>838</sup> NBCU also develops diverse talent through its Directors Fellowship Program, Diverse Writers Program, and other professional development programs.<sup>839</sup>

*Newsgathering Opportunities.* NBCU has made diversity in newsgathering operations a priority, engaging in both recruitment outreach to minority journalists and a professional development program.<sup>840</sup>

*Diversity Successes.* NBCU is extremely pleased that the company's recruitment and development efforts have led to concrete results in the form of significant diversity employment

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<sup>837</sup> Madison June Testimony at 8.

<sup>838</sup> Among NBCU's inclusive strategies are: internships, early career pipeline programs (Page Program, Associates Program, GE Leadership Programs), Taller Telemundo, Directors In Training, Writers on the Verge, Emma Bowen Foundation, Talent Diversity Initiative, Diversity Initiative for Writers, Supplier Diversity, and Affinity/Networking Groups (African American Forum, Asian Pacific American Forum, Women's Network, Hispanic Forum, OUT@NBCU), among others. See NBC Universal, NBC Universal's Inclusive Culture, [http://www.nbcuni.com/About\\_NBC\\_Universal/Diversity/](http://www.nbcuni.com/About_NBC_Universal/Diversity/) (last visited July 15, 2010).

<sup>839</sup> Madison June Testimony at 10-11. Through the Directors Fellowship Program, NBCU offers diverse participants opportunities to shadow a Directors Guild of America (DGA) director, as well as gain exposure to other aspects of NBCU Television Studios productions. Through the Diverse Writers Program, NBCU has funded a writer from a minority group for three years for each scripted series on the NBC broadcast network and for NBC's three late-night programs. NBCU's professional development and pipeline programs, including the Entertainment Associates program and the Universal Pictures Leadership Program, offer hands-on experience in programming development and management, and other areas of NBCU's business.

<sup>840</sup> *Id.* at 11. For example, NBC's Diversity Leadership Program for mid-career diverse producers and associate producers is an 18-month program designed to train and develop producers for executive producer roles. The NBC News Summer Fellowship Program sponsors paid internships every summer for diverse candidates selected jointly with trade associations representing diverse journalists, and the News Associate Program identifies aspiring journalists who bring diverse backgrounds to news production and news coverage. Finally, NBC recruits every year at the annual conventions of trade associations representing diverse journalists and participates in career fairs, networking events, and other outreach to minority journalists.

gains.<sup>841</sup> Since 2007, the diversity of the NBCU full-time employee population has increased from 24 percent to nearly 30 percent (excluding Telemundo).<sup>842</sup> Including Telemundo, NBCU's diverse full-time employees constitute more than 35 percent of the staff population.<sup>843</sup> Women and minorities combined represent over 60 percent of the full-time workforce, and women and minority executives constitute nearly 40 percent of the NBCU executive ranks.<sup>844</sup> NBC's two largest O&O television stations – in New York and Los Angeles – have African American general managers. Three of these stations have African American news directors/news leaders, two of whom are women. A fourth station has an interim news leader who is Hispanic/Latino.<sup>845</sup>

Of the 11 general managers responsible for the 16 NBCU-owned Telemundo and independent Spanish-language stations, four are Hispanic/Latino women and six are Hispanic/Latino men.<sup>846</sup> Telemundo Studios provides hundreds of creative and production jobs to talented Hispanics, and today Telemundo has more Hispanic executives in its senior executive leadership than at any other time in the history of the company. In 2002, when NBCU bought

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<sup>841</sup> NBCU has previously submitted diversity employment information to the Commission. *See Responses to Questions from Several Members of Congress, supra* note 88, at 41-43. Further, NBCU is proud to recently have been recognized as a leader in newsroom management diversity. NBCU was the only company among the major media entities surveyed to have increased its percentage of minority managers in 2009. *See National Association of Black Journalists, "NBC News and NBC O&O Local TV Stations to Receive Best Practices Honor, NBCU Executive Paula Madison to Receive Legacy Award from Black Journalists Group,"* [http://www.nabj.org/newsroom/news\\_releases/2010/newsrel042810legacy.php](http://www.nabj.org/newsroom/news_releases/2010/newsrel042810legacy.php); Richard Prince, NBC Stations Lead in Management Diversity (Aug. 6, 2009), <http://www.mije.org/richardprince/nbc-stations-lead-management-diversity> (noting that NBC was only company of those studied to increase its minority management).

<sup>842</sup> Madison June Testimony at 8.

<sup>843</sup> *Id.* at 8.

<sup>844</sup> *Id.* at 9.

<sup>845</sup> Responses to Questions from Several Members of Congress, *supra* note 88, at 42.

<sup>846</sup> *Id.*

Telemundo, 33 percent of Telemundo’s leadership team was Hispanic; today, Hispanics constitute more than 80 percent of the network’s senior executive leadership.<sup>847</sup>

Employment-related claims raised by a few commenters fail to establish that grant of the transaction would not be in the public interest,<sup>848</sup> and, in any event, this transaction is not the appropriate venue for such claims. Moreover, as explored above, NBCU remains dedicated to improving both its diversity employment and advancement opportunities.

**ii. Comcast**

Comcast provides equal opportunities in employment and is proud of its diverse workforce. Currently over 60 percent of Comcast employees are women or people of color; and nearly 40 percent are people of color.<sup>849</sup> Comcast has a comprehensive series of initiatives to continually improve diversity at all levels.

Comcast complies with all applicable EEO reporting requirements, including, but not limited to, the Commission’s MVPD EEO rules. In fact, over the last six years, the Commission has conducted more than 75 EEO routine random audits on Comcast employment units. No adverse findings have been issued on Comcast’s compliance with the rules.

*Organization and Vision.* Comcast is committed to developing a workforce where leadership diversity is reflective of Comcast’s employee base and customer demographics. Indeed, Comcast’s business success hinges on preserving its connections with the diverse

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<sup>847</sup> Madison June Testimony at 5.

<sup>848</sup> Other parties raise specific *non-adjudicated* grievances within the context of their employment situations. See Letter from Charles Giles, to Congresswoman Maxine Waters, MB Docket No. 10-56 (June 17, 2010) (alleging racial discrimination and retaliation claims as well as workplace safety and Americans with Disabilities Act claims); Letter from Harold Barber, to Congresswoman Maxine Waters, MB Docket No. 10-56 (June 15, 2010) (alleging age discrimination); Winnikoff Comments (alleging poor track record for employee satisfaction); Balsamo Comments (alleging dissatisfaction with daily hire practices).

<sup>849</sup> Responses to Questions from Several Members of Congress, *supra* note 88, at 16.

communities it serves. Since the company's inception, Comcast founder Ralph Roberts and his son Brian have emphasized the importance of diversity.<sup>850</sup> After acquiring AT&T Broadband, Comcast set a top-down priority of diversity hiring. In 2002, Comcast Executive Vice President David L. Cohen and Comcast Chief Operating Officer Stephen B. Burke created the company's Diversity Council, which set out to "implement, promote and sustain diversity" throughout the company.<sup>851</sup> In 2007, Comcast created its Director of Diversity and Inclusion position to work closely with Human Resources and senior leaders to identify opportunities to increase leadership diversity and develop workforce practices that foster a culture of inclusion. In 2009, Comcast talent acquisition, talent management, and leadership diversity initiatives were combined into a single unit.<sup>852</sup> Increasing diversity at Comcast is driven by its national talent management and succession planning process and led by the Senior Vice President of Talent. Meanwhile, Mr. Cohen, one of the top four executives at Comcast Corporation, serves as Comcast's Chief Diversity Officer. In this role, he is responsible for ensuring that diversity of employment, suppliers, programming and community investment is treated as a company-wide

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<sup>850</sup> Comcast, *Diversity: Everyone's Invited*, <http://www.comcast.com/Corporate/About/Diversity/Diversity.html> (last visited July 15, 2010). Ralph Roberts earned the Urban League of Philadelphia's Whitney M. Young Jr. Award for Leadership, Diversity and Excellence. Comcast.com, *Biography, Ralph J. Roberts*, <http://www.comcast.com/corporate/about/pressroom/corporateoverview/corporateexecutives/ralphroberts.html> (last visited July 15, 2010).

<sup>851</sup> See Kathy Haley, 'E' for Really Big Effort: Brian Roberts Honored for His Diligent Diversity Agenda, Multichannel News, Nov. 27, 2005, [http://www.multichannel.com/article/102235-\\_E\\_for\\_Really\\_Big\\_Effort.php](http://www.multichannel.com/article/102235-_E_for_Really_Big_Effort.php); see also Comment, <http://www.comcast.com/corporate/about/diversity/executive/council.html> (last visited July 15, 2010) (explaining "When it comes to diversity, it's not enough to 'talk the talk.' At Comcast, to make sure the message is put into practice, we've brought together a management team that represents the various departments within our business.").

<sup>852</sup> Responses to Questions from Several Members of Congress, *supra* note 88, at 18.

priority.<sup>853</sup> As a result of these efforts, an internal focus on diversity exists at all levels of the company.

Contrary to the claims of the Greenlining Parties, Comcast also is focused on the diversity profile of its corporate governance team.<sup>854</sup> The Board currently includes an African American director and a female director and has identified diversity as a key criterion for future appointments.<sup>855</sup> In fact, the appointment of a Hispanic director has been a priority for the Governance and Directors Nominating Committee for over a year,<sup>856</sup> By July 2012, Comcast will appoint and/or elect to its board a U.S.-based Hispanic director with a demonstrated track record of commitment to the Hispanic community.<sup>857</sup>

*Recruitment.* To enhance its diversity recruiting, Comcast has partnered with a number of organizations<sup>858</sup> and has developed entry-level internship programs. Comcast is the premier sponsor of the Emma Bowen Foundation, which creates opportunities for students in the fields of communications, journalism, broadcasting, and media and entertainment.<sup>859</sup> (Coincidentally,

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<sup>853</sup> *Id.*

<sup>854</sup> Greenlining Institute Petition to Deny at 10. The Commission has explicitly refused to condition approval of a transaction based on concerns regarding inadequate minority board representation where commenters failed to make a *prima facie* showing that applicants “engage in discriminatory conduct in the selection of the board of directors . . . .” *MCI-WorldCom Order* ¶ 212.

<sup>855</sup> See 2010 Comcast Proxy Statement at 15 (2010), available at [http://files.shareholder.com/downloads/CMCSA/906984883x0x363666/c20f707b-7e19-40b8-8c84-ddc1795f2742/cmcsa\\_proxy2010.pdf](http://files.shareholder.com/downloads/CMCSA/906984883x0x363666/c20f707b-7e19-40b8-8c84-ddc1795f2742/cmcsa_proxy2010.pdf).

<sup>856</sup> Comcast has a relatively small Board of Directors with limited opportunity to add directors. Nominees to Comcast’s Board are determined by the Board’s Governance and Directors Nominating Committee, which consists entirely of independent directors. *See id.*

<sup>857</sup> See Hispanic MOU at 3.

<sup>858</sup> Comcast’s partner organizations include the Hispanic Association on Corporate Responsibility, National Society of Black Engineers, the National Black MBA Association, National Association of Asian American Professionals, National Society of Hispanic MBAs, National Association for Multi-Ethnicity in Communications, Association of Latino Professionals in Finance and Accounting, and Women in Cable Telecommunications.

<sup>859</sup> The Emma Bowen Foundation five-year internship program provides minority students with the opportunity to work for partner companies, such as Comcast, during summers and school breaks following their

NBCU has for many years also provided office space and support to the Foundation on a *pro bono* basis).<sup>860</sup> Finally, Comcast sponsors conferences and career events that its representatives attend to provide career information and networking opportunities.

*Advancement.* Comcast employs over 100 executives of color and over 1,350 managers of color, almost half of whom have been promoted through the ranks. Comcast strives to improve the diversity of its leadership and has specifically established a goal of increasing its leadership diversity by 10 percent in 2010 at the vice-president level and above.<sup>861</sup>

*Diversity Successes.* Like NBCU, Comcast is proud of the results of its diversity efforts. Seven of Comcast Cable's 21 regions are led by women or persons of color, and the top two largest systems (each with approximately two million subscribers), are run by diverse leaders. Steve White is the first African American to become a Comcast division president, and is responsible for nine billion dollars of revenue and 22,000 employees. Comcast's Corporate Senior Vice President of Investor Relations and the Regional Senior Vice President for the South Florida Region are Hispanics.<sup>862</sup> Comcast's Senior Vice President of Finance and Accounting

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junior year in high school until they graduate from college. See Written Statement of Joseph W. Waz, Jr. Senior Vice President, External Affairs and Public Policy Counsel, Comcast Corp., and President, Comcast Foundation, to the H. Comm. on Energy and Commerce, Subcomm. on Commc'ns, Tech. and the Internet, at 11 (July 8, 2010).

<sup>860</sup> See <http://www.emmabowenfoundation.com>; see also NBC Universal Careers, Internships, Emma Bowen Foundation, <http://www.nbcunicareers.com/internships/emmabowen.shtml> (last visited July 15, 2010); Comcast, The Emma L. Bowen Foundation, <http://www.comcast.com/Corporate/About/InTheCommunity/Partners/EmmaBowenFoundation.html> (last visited July 15, 2010).

<sup>861</sup> To help achieve this goal, Comcast University offers premier leadership training and development for all levels of the workforce. Comcast also has an array of other internal leadership development programs, including: CommTech Program for Field Technicians and the CommCare program for Customer Account Executives, Fundamentals of Leadership Program, Executive Leadership Forum, and Emerging Leaders Program. See Comcast Diversity, Diversity in Recruitment, <http://www.comcast.com/corporate/about/diversity/recruitment.html> (last visited July 15, 2010).

<sup>862</sup> Contrary to the claims of the Latino Business Chamber of Greater Los Angeles, Comcast does not lack Latinos in key positions. Latino Business Chamber of Greater Los Angeles Comments at 1 (Mar. 26, 2010). Moreover, outreach to the Hispanic community is embedded in Comcast's recruitment processes. Comcast's online

and Chief Software Architect are Asian Americans. And Comcast has senior women leading Comcast Interactive Media, Investor Relations, Corporate Communications, Comcast University, Community Investment, and one of Comcast’s programming networks.<sup>863</sup>

Comcast’s efforts in workforce diversity have been widely recognized. In 2009, Comcast ranked #6 (up from #13 in 2008) in *Diversity MBA* magazine’s “50 Out Front for Diversity Leadership: Best Places for Diverse Managers to Work” (and it was the fourth year in a row that Comcast was included on the list).<sup>864</sup> Comcast was also selected for *Diversity Edge* magazine’s “Best Companies for Diverse Graduates 2009.” For the third year in a row, Comcast was named one of *LatinaStyle* magazine’s “50 Best Companies for Latinas.” For the fifth year in a row, Comcast was named one of the Hispanic Business “Diversity Elite 60: Top 60 Companies for Hispanics.”<sup>865</sup> And, in 2009, Comcast was selected as one of the Most Admired Employers for Minority Professionals by the readers of *US Black Engineer*, *Hispanic Engineer*, and *Women of Color* magazines.<sup>866</sup>

The record is replete with praise for Comcast’s efforts to promote employment opportunities in its communities.<sup>867</sup> For example, the Centro de la Familia de Utah has

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presence in the Hispanic community includes job postings with diversityinc.com, monster.com/diversity (formerly iHispano.com) and social networking site babalu.com. Comcast also seeks to source diverse talent through partnerships with multicultural associations including the National Society for Hispanic MBAs, Association of Latino Professionals in Finance and Accounting and the Consortium for Graduate Studies in Management.

<sup>863</sup> See Waz July Testimony at 10.

<sup>864</sup> See Responses to Questions from Several Members of Congress, *supra* note 88, at 16.

<sup>865</sup> See *id.*

<sup>866</sup> See *id.*

<sup>867</sup> See, e.g., Letter from Elizabeth A. Murray, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 18, 2010) (“I ask that in your deliberations you give consideration to the commitment Comcast has made to diversity in the workplace and to ensuring that all members of the Comcast ‘family’ really do feel at home. From the day I walked through the door at Comcast seven years ago, my partner and I have been accepted and included in

applauded “Comcast’s dedication to promoting diversity both in its corporate culture and in the communities it serves.”<sup>868</sup> The Chinese Mutual Aid Association highlighted Comcast’s “work with our employment program to develop jobs for our community members at Comcast.”<sup>869</sup>

And Mississippi State Representative Tyrone Ellis explained, “[w]hile our nation’s education system often fails the African American community, Comcast has sought to promote education and economic opportunities for its minority employees. Comcast invests heavily in continuing education, providing the opportunity to rise through the ranks and turn a job into a

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everything from company benefits to small talk around the water cooler. When we needed domestic partner benefits, we had them – health insurance, life insurance, AD&D insurance – everything Comcast offers has been available to both of us.”); Letter from Calvin Smyre, President, National Black Caucus of State Legislatures, to Julius Genachowski, Chairman, FCC, MB Docket 10-56 (June 2, 2010) (“Within its own business, Comcast has also supported the economic advancement of African Americans.”); Letter from John DeBerry, Representative, Tennessee General Assembly, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 7, 2010) (“As a past member of the Governor’s Minority Business Development Advisory Committee, I worked to address the needs of minority-owned businesses. I’ve been pleased to see Comcast similarly encourage diversity. The company attends minority recruiting events regularly, and has a formal program to promote diversity among its suppliers and vendors.”); Letter from Patrick Demmer, Reverend, Graham Memorial Community Church of God in Christ, to Julius Genachowski, Chairman, FCC, MB Docket No. (Apr. 16, 2010) (“I have been most impressed with Comcast’s commitment to promoting diversity in its programming and providing economic opportunities for minorities in our community. Comcast has shown great dedication to people of color.”); Letter from Vanessa Williams, Executive Director, National Conference of Black Mayors, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (May 19, 2010) (“Comcast is also a major jobs provider in our communities. Throughout its ranks, Comcast’s workforce reflects the diversity of our community. More importantly, Comcast provides jobs that grow along with their employees and as such they invest in the continuing education of their employees. The importance of Comcast’s investment in its employees cannot be overstated. It not only allows employees to advance within Comcast’s corporate ranks, but imparts knowledge and skills that strengthen our community. In addition, the company participates in more than 100 diversity recruiting events each year . . . Comcast is among a select group of companies that play a key role in revitalizing our nation’s urban centers.”).

<sup>868</sup> See Letter from Gonzalo Palza, CEO, Centro de la Familia de Utah, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Apr. 7, 2010) (also noting that “[i]n its recruitment and career development efforts, Comcast partners with such professional and community based Hispanic organizations as the U.S. Hispanic Chamber of Commerce, the National Society of Hispanic MBAs and the League of the United Latin American Citizens.”).

<sup>869</sup> See Letter from Steve Brunton, Executive Director, Chinese Mutual Aid Association, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Apr. 23, 2010).

career. It is no wonder that Comcast has been ranked among the ‘Most Admired Employers for Minority Professionals’ by US Black Engineer and Women of Color Magazines.”<sup>870</sup>

**c. Procurement Diversity**

Comcast and NBCU are and will continue to be committed to doing business with a diverse group of suppliers. This approach is bolstered by Applicants’ voluntary commitments, discussed below, and the numerous letters of support submitted to the Commission.<sup>871</sup> With

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<sup>870</sup> See Letter from Tyrone Ellis, Majority Leader, Mississippi House of Representatives, to Julius Genachowski, Chairman, FCC MB Docket No. 10-56 (Mar. 26, 2010).

<sup>871</sup> See Letter from Marc H. Morial, President & CEO, National Urban League to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56, at 1 (June 21, 2010) (Comcast and NBCU “have been committed to supplier diversity in a way that provides opportunities to minority-owned suppliers.”); Letter from Jaime Lucero, President, Casa Puebla New York, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56, at 2 (June 15, 2010) (finding the proposed transaction in the public interest based on potential opportunities for greater supplier diversity); Letter from Antonio R. Villaraigosa, Mayor, Los Angeles, CA, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56, at 1-2 (June 18, 2010) (discussing Comcast’s long-standing commitment to diversity and specifically, the additional opportunities for supplier diversity provided by the proposed transaction); Letter from Congressmen Lo Biondo, Sires, Adler, Andrews, Rothman, Smith, & Lance to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56, at 1-2 (June 21, 2010) (finding that the proposed transaction will promote additional opportunities for greater supplier diversity); see also National Coalition of African American Owned Media Petition to Deny at 7 (stating that the NAACP 2008 Consumer Choice Guide scored Comcast with “3.00 [out of 5] or B for Supplier Diversity”) Letter from Javier Palomarez, President & CEO, U.S. Hispanic Chamber of Commerce, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (May 19, 2010) (“I am please to report that Comcast has demonstrated its commitment to working with the USHCC to identify Hispanic-owned businesses as potential vendors and partners.”); Letter from Harry C. Alford, President & CEO, National Black Chamber of Commerce to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56, at 1 (May 24, 2010) (“In 2009, Comcast drove \$84 million of its business to African American vendors. It is clear that Comcast operates as part of, and values, a diverse community and as such its growth creates a place where African American entrepreneurship, which is our organization’s primary concern, can grow and thrive. It is in recognition of this that for the fifth consecutive year, DiversityBusiness.com named Comcast as one of ‘America’s Top 50 Corporations for Multicultural Business Opportunities’ due to their record of seeking out Black-owned businesses as suppliers.”); Letter from Della Clark, President, The Enterprise Center, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 2, 2010) (“I can attest to Comcast’s commitment to providing minority entrepreneurs with opportunities to generate and sustain businesses in the Philadelphia region.”); Letter from Garry L. Maddox, Principal & CEO, Pomerantz Acquisition Corp., to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 7, 2010) (“[Comcast’s] support of Diversity is unmatched in this country as the owner of a minority owned company doing business nationally, I can attest to it firsthand.”); Letter from Jon J. Fernandez, President & CEO, Trinet Communications, Inc. to Julius Genachowski, Chairman, FCC, MB Docket 10-56 (June 11, 2010) (“[O]ur success would not have been possible without the ongoing support from customers like Comcast. Through their Minority Business initiatives, they have proactively brought us into their supply chain process that has allowed us to offer a wide variety of products for their network.”). Even those opposing this transaction admit that Comcast has a solid record of supplier diversity. See National Coalition of African American Owned Media Petition to Deny at 7 (citing the NAACP 2008 Consumer Choice Guide).

respect to Applicants' qualifications and compliance with the rules, however, there are no FCC rules requiring a particular level of procurement diversity or spending on female and minority-owned businesses.<sup>872</sup> Thus, as it has done in past transactions, the Commission should deny petitions to deny, such as those here, that are based on set-aside requests.<sup>873</sup> The Commission should find that the transaction review context is "not the appropriate forum for determining whether . . . a merged entity should allocate a certain portion of its contracts to small and minority businesses."<sup>874</sup>

No Commission rule is necessary to encourage Comcast and NBCU to work with diverse suppliers. For instance, in 2009, NBCU spent \$100 million with female-owned businesses and \$140 million with minority-owned suppliers.<sup>875</sup> In 2003, Comcast began a formal supplier diversity program. From 2003 through 2009, the percentage of spending attributed to diverse suppliers grew from 7.4 percent to 11.9 percent and in actual dollars, from \$322 million to \$627

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<sup>872</sup> No party has alleged that Comcast or NBCU currently is in violation of any Commission rule relating to procurement or supplier diversity, or that the proposed transaction will cause a violation of any such rule. Of course, no such rule exists. The cable EEO rules do require that a cable operator "[e]ncourage minority and female entrepreneurs to conduct business with all parts of [the organization]." 47 C.F.R. § 76.75(e). Comcast is in compliance with this rule and no one has alleged otherwise. (NBCU is not subject to Section 76.75(e), and the broadcast EEO rules do not contain any similar requirement). 47 C.F.R. § 73.2080. Even if Section 76.75(e) were applicable to the proposed joint venture based on Comcast's controlling interest, NBCU's existing efforts, as well as the voluntary commitments, readily meet the requirement of this rule.

<sup>873</sup> See, e.g., Latino Business Chamber of Greater Los Angeles Comments at 3 (Mar. 26, 2010); Black Economic Council Opposition at 3 (Mar. 29, 2010); Economic Business Development Comments, at 1-2 (Mar. 29, 2010); Korean Churches for Community Development Comments at 1 (Apr. 14, 2010); Mabuhay Alliance Comments at 2 (June 17, 2010); Greenlining Institute Petition to Deny at 10.

<sup>874</sup> *Bell Atlantic-NYNEX Order* ¶ 226. Nor is the transaction the appropriate venue for unadjudicated claims that Comcast's reporting on its supplier diversity violates California law. See Greenlining Institute Petition to Deny at 14-15 ("Comcast's filing with [California PUC] did not follow the designated reporting structure, consisting only of four pages of narrative, with only two actual data points provided and absolutely no data specific to minority business enterprises."). In any event, Comcast is not in violation. Even the petitioner who raised this concern admits that Comcast and other cable companies are not required to file diversity reports with the CPUC. Greenlining Institute Petition to Deny at 14 n.79 (admitting that "Comcast is not required to file supplier diversity reports"). Although not required to do so, Comcast is currently developing the needed internal processes to capture and voluntarily report the data as set forth in General Order 156.

<sup>875</sup> Madison June Testimony at 9.

million, an increase of 94.7 percent. While Comcast's total procurement-related spending has decreased in recent years, it continues to successfully increase the amount spent with diverse suppliers continues to increase.<sup>876</sup> In addition, Comcast made diversity a priority in the construction of its new building, Comcast Center, which officially opened in 2008.<sup>877</sup> As part of the proposed transaction, Comcast and NBCU have also voluntarily committed to further increase their supplier diversity as detailed below.

**d. Corporate Governance, Employment, Procurement, and  
Philanthropic Diversity Commitments**

The transaction has presented unique opportunities for the companies to assess their performance in key areas, engage in constructive dialogue with other responsible stakeholders, and develop concrete plans to enhance their diversity efforts in the following areas.<sup>878</sup>

- *Corporate Governance.* Comcast and NBCU will establish four external Diversity Advisory Councils representative of African American, Hispanic, Asian Pacific American, and other diverse communities to facilitate open communications on the development, monitoring, and evaluation of the companies' diversity initiatives. Comcast will also appoint and/or elect to its Board of Directors a U.S.-based Hispanic member with a demonstrated track record of commitment to the Hispanic community within two years.
- *Employment/Workforce Recruitment and Retention.* Comcast and NBCU will increase minority representation at all levels of their respective organizations and will recruit and retain more minorities so that their workforces more accurately reflect the communities they serve. Specifically, Comcast has agreed to implement the following: career path and mentoring programs; minority internship and scholarship programs; diversity forums to increase director-level representation of minorities; focus groups to help create more opportunities for

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<sup>876</sup> Responses to Questions from Several Members of Congress, *supra* note 88, at 16-17.

<sup>877</sup> The company exceeded its goal of 25 percent inclusion for construction and 50 percent inclusion for design, furniture, fixtures and equipment, ultimately awarding to minority and women-owned firms 30 percent of qualified construction contracts, 40 percent of design work, and 60 percent of furniture, fixtures and equipment contracts. *See* Athena D. Merritt, Comcast Made Diversity Key, *Phila. Bus. J.* (June 13, 2008).

<sup>878</sup> These plans are reflected in the Summary of Diversity Commitments and in the Hispanic MOU. *See supra* notes 99 and 120, respectively.

minority employees and identify high potential employees; a boot camp program for mid-level vice president candidates comprised of at least 80 percent diverse candidates; the use of search firms with track records of successfully recruiting diverse pools of talent; and mandatory inclusion of at least one person of color in each pool of candidates for vice president level positions and above.

- *Supplier Diversity.* Applicants have agreed to do the following with respect to supplier diversity: increase spending on diverse business partners; strive to increase the percentage of business conducted with minority-owned vendors to be on par with the percentage of minority-owned businesses in the communities they serve; partner with diverse organizations, such as minority-led chambers of commerce, to enhance the utilization of minority-owned enterprises; expand “second tier” procurement programs that encourage top suppliers to purchase goods and services from minority-owned vendors; develop and expand relationships with minority investment and banking firms; increase spending on advertising with minority-owned media by at least \$7 million; expand business with minority-owned law firms; and provide annual procurement-related data to the Diversity Advisory Councils.
- *Philanthropy and Community Investment.* Comcast and NBCU have determined to increase by their philanthropic efforts to support minority-led and minority-serving institutions by 10 percent per year for each of the next three years. Comcast will enhance its community outreach programs, including Comcast Cares Day, Digital Connectors, and Leaders and Achievers Scholarships, by increasing outreach to diverse participants.

As detailed above, Applicants’ long-standing commitments to diversity are demonstrated throughout the record of this proceeding and bolstered by specific voluntary commitments that will further promote diversity.

## **2. Localism**

In addition to the diversity efforts described above, both NBCU and Comcast have proven track records demonstrating their commitment to the local communities they serve. A few parties, including the Greenlining Parties, have questioned the companies’ commitment to local news, local public affairs and information programming,<sup>879</sup> as well as local community

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<sup>879</sup> See, e.g., CFA *et al.* Petition to Deny at 56-57 & App. C – Stan Santos Decl.; Latino Business Chamber of Greater Los Angeles Comments at 2-3 (Mar. 26, 2010); Greenlining Institute Petition to Deny at 20-21 & 26-27;

investment and philanthropy.<sup>880</sup> These commenters assert no specific rule violations and provide no evidence in support of their claims. Moreover, as described above in Section III, the proposed transaction will increase local programming, and Applicants have made additional voluntary commitments that will ensure that result.

**a. Local News, Public Affairs and Information Programming**

NBCU has a well-established and widely recognized commitment to local news, public affairs, and information programming.<sup>881</sup> For instance, in 2009, the NBC O&O stations produced over 15,000 hours of local news, averaging approximately 30 hours per week per station of first-run, locally produced news programs. Each O&O station also produces public affairs, informational and special programs in addition to regularly scheduled newscasts.<sup>882</sup>

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CWA Petition to Deny at 31-32. Although one petitioner implies that NBCU improperly airs English-only emergency warnings or disaster coverage on its Telemundo stations (Greenlining Institute Petition to Deny at 25), the FCC's rules do not require otherwise. *See* 47 C.F.R. §§ 11.54(b)(8) & 11.55(c)(4). Accordingly, there is no legal basis for such a claim. Nevertheless, NBCU-owned Telemundo stations strive to air (aurally and/or via crawls) emergency alerts and disaster coverage in Spanish. In addition, contrary to allegations that “[t]he proposed transaction may result in less effective disaster and emergency warnings,” (Greenlining Institute Petition to Deny at 25) the transaction will not impact EAS service in any way.

<sup>880</sup> *See* Black Economic Council Comments at 2 (Mar. 29, 2010), Economic Business Development Comments at 1 (Mar. 29, 2010); Korean Churches for Community Development Comments at 1 (Apr. 14, 2010); Mabuhay Alliance Comments at 2 (June 17, 2010); Greenlining Institute Petition to Deny at 10.

<sup>881</sup> *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) (“Local NBC broadcast stations have been supporters of public service programs on health care, youth and the homeless.”); Letter from Sonya Galvan, President & CEO, Child Advocates, Inc. to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 16, 2010) (“NBC has a strong history of local programming . . . .”); Letter from Monty Trainer, President, Coconut Grove Arts Festival to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 3, 2010) (“WSCV Telemundo 51 and WTVJ NBC Miami have hosted 30-minute feature shows to promote the arts and, in particular, our annual Arts Festival. Members of our board of directors routinely appear on both stations to highlight the event. The on-going support of these stations helps to remind our community of just how significant a role culture and the arts play in enhancing ones quality of life.”); Letter from Jill Michal, President & CEO, United Way of Southeastern Pennsylvania to Julius Genachowski, Chairman, FCC, MB Docket 10-56 (May 5, 2010) (“As part of NBC10’s continued efforts to strengthen our local community, the station helps United Way produce and air a discussion segment in which we discuss the major issues facing our community with other local leaders.”); *see also* CFA *et al.* Petition to Deny at 20 (“NBC is similarly strong in the provision of local news . . . .”).

<sup>882</sup> The Commission should not be misled by the claim of a single petitioner that NBC failed to adhere to a 2000 election political programming pledge. *See* Greenlining Institute Petition to Deny at 41-42. Greenlining’s

NBCU-owned stations have also made local news, public affairs and information content available online, providing this information to the local community on demand, anytime and anywhere.<sup>883</sup> Local NBC O&O stations have won numerous journalism awards and have been recognized repeatedly for outstanding service to their local communities.<sup>884</sup>

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claim is baseless, and a full and fair analysis of the Lear Study confirms that NBC exceeded its political programming commitment at the two stations studied. The Greenlining Institute points to one study to suggest that “NBC owned and operated stations averaged just over two and a half minutes of candidate centered discourse per night.” *Id.* (citing Martin Kaplan & Matthew Hale, Local TV Coverage of the 2000 General Election, available at <http://www.learcenter.org/pdf/campaignnews.PDF> (“Lear Study”)). However, Greenlining selectively reads the data and overlooks several critical facts. In the month leading up to the 2000 election, NBC committed that, between 4 p.m. and the conclusion of the late news on its owned and operated stations, these stations would air five minutes of “comprehensive coverage of national and local campaigns, including candidate-centered discourse, in-depth newscast segments covering the national and local candidates’ policy positions, debates between local candidates and live interviews with local candidates running for various positions.” *See* Press Release, NBC, NBC Commits to In-Depth Coverage of Candidate Centered Discourse on Its Owned and Operated Stations for the 2000 Election (Oct. 4, 2000). NBC has fulfilled this commitment in its entirety. Greenlining’s claim misleadingly relies on a single finding in the Lear Study, which was derived from measuring just one of the political programming areas covered by NBC’s pledge – candidate-centered discourse – with respect to two NBC O&O stations. *See* Lear Study at 8. It also bears noting that the Lear Study compiled statistics only with respect to programming between 5:00 p.m. to 11:35 p.m., a time period different from the “4 p.m. to conclusion of the late news” window applicable to NBC 2000 commitment. Importantly, Greenlining fails to mention more significant data from the Lear Study that actually confirms NBC’s fulfillment of its commitment. Indeed, summary data for the two NBC O&O stations that were included in the study shows that, when accounting for “political stories of all kinds,” the nightly average for these two stations (WTVJ (Miami) and WJAR (Providence)) was 10 minutes and 56 seconds and 7 minutes and 27 seconds, respectively. *See* Lear Study at 21. WTVJ was one of only seven television stations to rank in the top 20 for each type of measurement conducted. *See* Lear Study at 22.

<sup>883</sup> The websites of the NBCU-owned stations provide constantly updated national, local and even hyper-local news, weather, traffic, sports and other information of interest to their viewing audiences. *See, e.g.*, NBC Los Angeles, <http://www.nbclosangeles.com/> (last visited July 20, 2010).

<sup>884</sup> For example, KXAS, Fort Worth, Texas, received a 2009 American Women in Radio and Television (“AWRT”) award for outstanding feature/hard news program, as well as several awards from the National Association of Black Journalists. KNBC in Los Angeles, California, was nominated for more 2010 local Emmys than any other station in the market. KNBC previously has won Radio Television Digital News Association (“RTDNA”) awards for best documentary, best investigative reporting, and best light feature reporting. The station also is a winner of the APTRA Mark Twain award for best investigative reporting.

Recently, WVIT, Hartford, Connecticut, received a first place Connecticut Broadcast Associated Press award for best enterprise reporting in a large market, as well as an Agriculture Journalism Award from the governor of Connecticut and the Connecticut Agriculture Information Council for Best TV Feature. WVIT also received a national “Excellence in Journalism” award from the American College of Emergency Physicians (“ACEP”) for an investigative piece on hospital emergency rooms. The ACEP recognizes significant contributions made by members of the news media to cover emergency medicine issues and to educate the public about them.

WNBC-TV in New York received seven New York Emmy Awards this year, including Outstanding Morning Newscast and two Outstanding On-Camera Talent awards for reporters. The station also was recognized

Furthermore, although economic pressures previously caused Telemundo to scale back some news operations,<sup>885</sup> NBCU is taking steps to reverse this trend,<sup>886</sup> and these efforts have been recognized.<sup>887</sup> Just last year, Telemundo introduced a comprehensive news strategy to enhance and expand its news content across key dayparts and multiple platforms, including increasing investment in local newscasts at the Telemundo stations and strengthening multimedia news strategies across all of the Telemundo platforms. As Las Vegas Mayor Goodman states, in the last year, the local Telemundo station has “tackled such topics as the 2010 Census, immigration, low self-esteem of Hispanic women, literacy, domestic violence and health – actions which carry great impact both locally and nationally.”<sup>888</sup> In this connection, as discussed

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last month by the New York State Broadcasters Association in four categories, among them Outstanding Public Affairs Program or Series, Outstanding Hard News Story, and Outstanding Locally Produced TV Show.

In Washington, D.C., WRC has won local Emmy awards for its morning news program and 11 p.m. newscast. Groups such as the American Diabetes Association, Salvation Army, Animal Welfare League, Epilepsy Foundation, and others have recognized the station’s service to the local community. In addition, NBC’s Chicago O&O station, WMAQ has won the 2010 Associated Press (Illinois) awards for best reporter and second place for best newscast and best hard news story. It also has been recognized by the Illinois Broadcaster Association for best website, best PSA, and best reporter.

<sup>885</sup> CFA *et al.* Petition to Deny at 57.

<sup>886</sup> See Letter from Jeffrey Zucker, President & CEO, NBC Universal, Inc., to Luis Gutierrez, U.S. House of Representatives (Apr. 9, 2010).

<sup>887</sup> See, e.g., Letter from Sol Flores, Executive Director, La Casa Norte to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 10, 2010) (“Telemundo Chicago has been a great advocate for the Hispanic community and a highly-valued resource for news and information important to us. Telemundo Chicago’s community service efforts are extraordinary. They are the only local Spanish TV station that really gets out into the community to report on stories and news as well as provide support that makes a difference.”); Letter from Eligio W. Goodwin, President, Cowtown Events Inc., to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 17, 2010) (“We have had the privilege of working with NBC Universal/Telemundo’s television station, NBC5/KXAS-TV and Telemundo Dallas/KXTX-TV for 11 years. Telemundo Dallas identifies with the people of the community which has enhanced the relationship with the Hispanic viewers. They are an exceptional television station in delivering the news whether it is national or local.”); Letter from Alejandro Ramos, Executive Director, United States-Mexico Chamber of Commerce, Northeast Chapter, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 15, 2010), at 2 (“[W]hen deemed appropriate according to the USMCOC-NE policies and nature of the events, Telemundo New York has provided coverage contributing to the communication and strengthening of the relations between the USMCOC-NE members and the Latino community.”).

<sup>888</sup> Letter from Oscar B. Goodman, Mayor of Las Vegas, NV, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56, at 1 (May 27, 2010) (discussing NBCU-owned Telemundo station, KBLR).

in Section III above, Applicants have committed not to reduce the number of current local Telemundo newscasts and to consider expanding these newscasts, as well as expanding the local content included in station newscasts.<sup>889</sup>

Notwithstanding NBCU's strong record with respect to local news and public affairs programming, a few petitioners express concerns regarding shared service agreements and news-sharing agreements.<sup>890</sup> These concerns are both overstated and immaterial to the proposed transaction. These types of agreements and arrangements are commonly used throughout the industry, and no petitioner has alleged that any such arrangement is contrary to the Commission's rules. The instant transaction is not an appropriate venue for concerns regarding industry-wide issues, particularly where there are open proceedings considering these issues.<sup>891</sup> Even more importantly, the Commission has recognized that broadcasters' use of news-sharing arrangements for events such as press conferences or other sharing agreements can create efficiencies and cost savings, enabling those broadcasters to provide more entrepreneurial and investigative local news and public affairs programming than they would otherwise be able to provide.<sup>892</sup> This Commission finding is consistent with NBCU's experience – indeed, the NBCU

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<sup>889</sup> Hispanic MOU at 9.

<sup>890</sup> CWA Petition to Deny at 31-32; Greenlining Institute Petition to Deny at 26-27.

<sup>891</sup> See, e.g., *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, FCC 10-92, MB Docket No. 09-182, ¶ 99 (May 25, 2010) (seeking comment on the treatment and permissibility of shared news arrangements); *In the Matter of Rules and Policies Concerning Attribution of Joint Sales Agreements In Local Television Markets*, Notice of Proposed Rulemaking, 19 FCC Rcd 15238 ¶ 12 (2004) (seeking “comment on whether or not to attribute TV JSAs”).

<sup>892</sup> See, e.g., *In the Matter of Rules and Policies Concerning Attribution of Joint Sales Agreements In Local Television Markets*, Notice of Proposed Rulemaking, 19 FCC Rcd 15238 ¶ 17 (2004) (“We have seen TV JSA agreements that are accompanied by non-attributable TV LMAs, sometimes involving a situation where a stronger station provides local news programming to a weaker station in the market as part of the agreements. This may enable such stations to provide news that they were not able to provide previously.”).

O&O stations engage in news-sharing arrangements precisely because it allows them to better serve their local communities.

Finally, it should be noted that broadcast licensees have significant discretion with respect to programming decisions,<sup>893</sup> and “in the absence of extrinsic evidence that a licensee has falsified, distorted or suppressed news, the agency will not substitute its judgment for that of a licensee in determining news issues of interest to its listening or viewing audience and the manner in which it should be presented.”<sup>894</sup> There is no such evidence here.

**b. Local Community Investment and Philanthropy**

Comcast and NBCU share a strong history of local community investment and philanthropy, including contributions to minority-focused community organizations.<sup>895</sup> The strong support for the companies’ record that is evidenced in numerous filings in this proceeding overwhelms the allegations of a few petitioners and commenters to the contrary.<sup>896</sup> NBCU-owned stations provide important support to non-profit community organizations in the form of

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<sup>893</sup> The Commission has recognized that “in accordance with the First Amendment to the Constitution and the non-censorship provisions of the Act, each broadcast licensee retains broad discretion to make programming decisions.” *In the Matter of Existing Shareholders of Clear Channel Communications, Inc. (Transfers) and Shareholders of Thomas H. Lee Equity Fund VI, L.P., Bain Capital (CC) IX, L.P., and BT Triple Crown Capital Holdings III, Inc. (Transferees)*, Memorandum Opinion and Order, 23 FCC Rcd 1421 ¶¶ 18, 20 (2008) (internal citations omitted).

<sup>894</sup> *Id.*; see also *Dr. Paul Klite et al.*, Letter, 12 Com. Reg. (P&F) 79, 81-82 (MMB 1998) (“Because journalistic or editorial discretion in the presentation of news and public information is the core concept of the First Amendment’s Free Press guarantee, licensees are entitled to the widest latitude of journalistic discretion in this regard. Thus, with regard to news programming in particular, the Commission has repeatedly recognized that the choice of what is or is not to be covered in the presentation of broadcast news is a matter committed to the licensee’s good faith discretion, and that, the Commission will not review the licensee’s news judgments.”) (internal citations and quotations omitted).

<sup>895</sup> “Public Interest Petitioners commend Comcast and NBCU for their involvement with, and monetary contributions to, [charitable organizations].” *CFA et al. Petition to Deny* at 63.

<sup>896</sup> See Black Economic Council Comments at 2 (Mar. 29, 2010), Economic Business Development Comments at 1 (Mar. 29, 2010); Korean Churches for Community Development Comments at 1 (Apr. 14, 2010); Mabuhay Alliance Comments at 2 (June 17, 2010); Greenlining Institute Petition to Deny at 10.

donated air time for public service announcements, fundraising assistance, logistical support, direct financial contributions, board service and other involvement by station personnel and coverage of events in news and public affairs programming.<sup>897</sup>

Comcast has an equally strong record of supporting local community organizations, including minority-focused organizations.<sup>898</sup> Through in-kind and cash contributions from

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<sup>897</sup> The record contains dozens letters of support from various community organizations, detailing the support they receive from NBCU and its local broadcast stations. *See, e.g.*, Letter from Robert Federico, Executive Director, Repertorio Espanol, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 14, 2010) (“NBCU and its subsidiary Telemundo WNJU 47 have been instrumental partners in our mission of making Spanish-language theatre accessible to seniors, students and Hispanics of all national backgrounds.”); Letter from Keri Proconier McLain, Ph.D., CEO, YWCA of Silicon Valley, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Apr. 28, 2010) (“[KNTV] devotes significant resources to public service and therefore has the ability to inform large numbers of viewers about important community events . . . and increases awareness of issues such as sexual assault and domestic violence facing local residents within our community.”); Letter from Stephen Becker, EdD, President & CEO, HARC, Inc., to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Apr. 30, 2010) (“HARC, Inc. is proud of the long standing partnership it has had with NBC CT. . . . NBC CT has been involved with HARC’s mission on many levels including serving on our board of director’s development committee; providing many opportunities over the years for HARC to bring its message and mission to the broader community, and most recently hosting an art show for our ArtSparks program. Our participation in events such as the NBC CT Health Expo and most recently New England’s largest Latino Expo would not have been possible without the support of NBC CT.”); Letter from Ed Spitzberg, Executive Director, Sitar Arts Center, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (May 3, 2010) (“NBC Universal and NBC4 have been essential supporters of Sitar Arts Center’s Teen Initiative for the past two consecutive years through generous grants totaling \$40,000.”).

<sup>898</sup> The docket contains hundreds of letters of support from non-profit community organizations from across the country that Comcast has partnered with and supported for many years, including many minority-focused organizations. *See, e.g.*, Letter from Richard R. Farias, President & CEO, Tejano Center for Community Concerns, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Mar. 13, 2010) (“For the last four years, Comcast has supported not just the Tejano Center for Community Concerns with financial and volunteer support, but many other organizations serving those in need in our community.”); Letter from Louise Brown, President & Founder, Wood-to-Wonderful, to Julius Genachowski, Chairman, FCC, MB Docket 10-56 (June 14, 2010) (“Comcast is dedicated to the children we serve – 90% of whom live at or below the poverty level and are exposed to significant risk factors. Comcast provides philanthropic support to Wood-to-Wonderful, but the company also invests time and people to help further the mission.”); Letter from Karen J. Mathis, President & CEO, Big Brothers Big Sisters, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 15, 2010) (“Comcast has not only contributed significantly to Big Brothers Big Sisters in telecommunications services and other donations; many in the company have volunteered their time as youth mentors.”); Letter from Laura S. Thrall, United Way of Metropolitan Chicago, to FCC, MB Docket No. 10-56 (Apr. 15, 2010) (“It is through partnerships with corporate partners, like Comcast, that the United Way is able to work towards its goals and vision for Chicagoland: all families can earn a living income, all children enter kindergarten ready to learn and young people graduate from high school ready for college and a career, and everyone has guaranteed access to primary and preventive health care.”); Letter from Ann Turner, Executive Director, Cheyenne Village, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56, at 1 (Apr. 13, 2010) (“Comcast has been a long term partner in helping us fulfill our mission. . . . Comcast volunteers last year made our organization their choice site for Comcast Cares Day. . . . Our program has been featured on Comcast Newsmakers time and again, bringing greater attention to our work celebrating the and achievements . . . .”); Letter from Grover Johnson, President, Tacoma Chapter of the A. Philip Randolph Institute, to Julius Genachowski,

Comcast Corporation and cash contributions from the Comcast Foundation, Comcast has invested more than \$1.8 billion in cash and in-kind support in community organizations throughout its footprint over the past nine years.<sup>899</sup> Comcast’s non-profit partners include numerous diverse organizations<sup>900</sup> as well as numerous non-profit organizations that serve diverse clientele.<sup>901</sup> For instance, Comcast has partnered with the One Economy Corporation to create the Comcast Digital Connectors Program.<sup>902</sup> In addition, one of Comcast’s signature community investment programs is Comcast Cares Day, its annual nationwide day of service. Since Comcast Cares Day began in 2001, Comcast employees, family members, friends,

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Chairman, FCC, MB Docket No. 10-56 (Apr. 1, 2010) (“Comcast has been an incredibly valuable partner. . . . In addition to its unwavering support for our mission, Comcast has provided a tremendous gift to the students of Tacoma by funding our branch’s summer education program.”); Letter from Dr. Warner Dickerson, President, Memphis Branch NAACP, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (May 10, 2010) (“Comcast has been and continues to be a strategic partner in supporting the many programs and projects that we have created to fulfill our mission.”); Letter from Cindy Myers, Ph.D., CEO, Marin Services for Women, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 1, 2010) (“Comcast has supported numerous MSW programs, including our transitional housing and trauma recovery services offered to over 400 women and their families every year . . . . In addition to providing financial support, Comcast has featured MSW regularly [on] the Comcast Newsmakers program. The exposure we have achieved through the Newsmakers program has made more women in Marin County aware of our organization and has helped us save and transform their lives.”); Letter from Phyllis Y. Nichols, President & CEO, Knoxville Area Urban League, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 4, 2010) (“Comcast has provided essential grant funding for local initiatives aimed at increasing literacy and developing the self-sufficiency skills that Knoxville’s at-risk-youth need in order to be successful . . . .”).

<sup>899</sup> Responses to Questions from Several Members of Congress, *supra* note 88, at 9.

<sup>900</sup> These include the National Urban League (NUL), the National Association for the Advancement of Colored People (NAACP), the National Black Chamber of Commerce, National Council of La Raza (NCLR), League of United Latin American Citizens (LULAC), the U.S. Hispanic Chamber of Commerce, the Asian American Justice Center, and the Organization of Chinese Americans (OCA). *Id.*

<sup>901</sup> These include United Way, Boys & Girls Clubs, Big Brothers Big Sisters, City Year, and many local community organizations. *Id.*

<sup>902</sup> This program identifies talented young people in underserved communities (the majority of which are minorities), provides immersive technology training, and helps them build leadership and workplace skills. Waz July Testimony at 9.

community partners and public officials have volunteered approximately 1.4 million hours of service in support of community service projects around the country.<sup>903</sup>

**C. Character Issues**

In addition to the many benefits of the transaction and the history of compliance and public service that weigh in favor of approval, Applicants also possess the necessary character qualifications to hold broadcast licenses. Decades of Commission experience with Applicants convincingly demonstrate that the Commission can continue to trust Comcast and NBCU to comply with its rules. No commenter has raised any legitimate character issue to the contrary.<sup>904</sup> And, as explained in the Public Interest Statement, Comcast consistently has delivered the benefits it has promised to the Commission, and will do so here.<sup>905</sup>

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<sup>903</sup> Comcast, Comcast Community Investment, at 2 (2009), [http://www.comcast.com/MediaLibrary/1/1/About/IntheCommunity/CommunityInvestment/Comcast\\_ComInvest\\_bro\\_120109.pdf](http://www.comcast.com/MediaLibrary/1/1/About/IntheCommunity/CommunityInvestment/Comcast_ComInvest_bro_120109.pdf).

<sup>904</sup> Several parties bandy about “character” allegations without even attempting to square their claims with the Commission’s character policies. For example, the City of Seattle raises arguments about whether Comcast’s “HD Technology Fee” and other fees violate, or constitute an “evasion” of, provisions of Title VI of the Communications Act. *See City of Seattle et al. Comments*, at 5-16; *infra* Section VI.E. It acknowledges that there is a process in place for FCC adjudication of such alleged evasions, but nonetheless seeks to inject them into this unrelated proceeding. Moreover, in its conclusion it makes the unsupported and unexplained allegation that Comcast lacks character qualifications, presumably based on its unadjudicated allegations. *Id.* at 19. The City of Detroit alleges that Comcast has failed to carry out its obligations under its franchise agreement, but does not claim that this is adjudicated misconduct – in fact, the City acknowledges that it has filed a lawsuit which is currently pending in federal court. *See Comments of the City of Detroit, Michigan* at i, Attachment A. *See infra* Section VI.F. Detroit’s claims against Comcast involve the provisions of Title VI of the Communications Act, but also involve contractual claims concerning Comcast’s franchise agreement, matters of state law, and questions of preemption. Because these claims are interrelated, and the litigation is underway, there is no adjudicated finding of a violation of the Communications Act. The Commission’s policy is to consider violations of the Communications Act as FCC-related misconduct that relates to character. *See* 1986 Character Policy Statement ¶¶ 7 n.11, 23, 55-57. There has been no determination of any such violation with respect to either Seattle’s or Detroit’s claims, and even if these claims were true (which they are not), this proceeding is not the proper place to consider them because these claims are interrelated and the litigation is underway. In any event, these claims are addressed in more detail in Section VI below.

<sup>905</sup> *See* Public Interest Statement at 17 & n.16.

**1. Candor**

**a. Network Management**

Notwithstanding allegations to the contrary,<sup>906</sup> there is nothing in the Commission’s network management proceeding that creates a candor issue relevant to the instant transaction. Intent to deceive is the central element of misrepresentation or lack of candor, and there is no basis for finding or inferring any such intent.<sup>907</sup> To the contrary, Comcast promptly provided a full explanation of the reasons for and specifics of its practices when the Commission inquired about them;<sup>908</sup> and demonstrated that it had no intent to deceive or misrepresent technical details by voluntarily providing additional details to clear up the apparent confusion over how its network management techniques were employed.<sup>909</sup> The fact that the description of particular

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<sup>906</sup> CFA *et al.* argue that Comcast’s statement in the Application that it “has never blocked [Internet] subscribers’ access to lawful content” and that it lacks the incentive to pursue an Internet foreclosure strategy are “false,” based on the FCC’s “determination” in the *Comcast Network Management Order* that Comcast had “blocked” such access. CFA *et al.* Petition to Deny at 28-29 (citing *In the Matters of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications*, Memorandum Opinion and Order, 23 FCC Rcd 13028 ¶ 44 (2008) (“*Comcast Network Management Order*”), *vacated sub nom. Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010) (“*Comcast v. FCC*”). They also argue that in that Order the Commission “censured Comcast for its repeated lack of candor about its network management practices.” CFA *et al.* Petition to Deny at 29. *See also* Franken Comments at 9 (referring to Comcast’s behavior during the network management proceeding as “dishonest” and citing language from the *Comcast Network Management Order*).

<sup>907</sup> *See In the Matter of Citadel Broadcasting Co. for the Renewal of Licenses*, 22 FCC Rcd 7083 ¶ 14 (2007); *In the Matter of William L. Zawila*, 18 FCC Rcd 14938 ¶ 96 (2003); *In the Matter of LUJ, Inc. and Long Nine, Inc. for Assignment of Licenses*, 17 FCC Rcd 16980 ¶ 5 (2002); *In the Matter of Liberty Productions*, 16 FCC Rcd 12061 ¶ 41 (2001); *In the Matter of Trinity Broadcasting of Florida, Inc. for Renewal of License of Station*, 10 FCC Rcd 12020 ¶ 336; *Georgia Public Telecommunications Commission*, 7 FCC Rcd 2942 (Rev. Bd. 1992), *review denied*, 7 FCC Rcd 7996 (1992); *see also David Ortiz Radio Corp. v. FCC*, 941 F.2d 1253, 1259-60 (D.C. Cir. 1991).

<sup>908</sup> Letter from Mary McManus, Senior Director, FCC and Regulatory Policy, Comcast Corp. and Gerard J. Lewis, Jr., Vice President, Deputy General Counsel & Chief Privacy Officer, Comcast Cable Communications, LLC to Kris A. Monteith, Chief, Enforcement Bureau, FCC (Jan. 25, 2008).

<sup>909</sup> *See* Letter from Kathryn A. Zachem, Vice President of Regulatory Affairs, Comcast Corporation, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-52, at 5 (July 10, 2008) (“*Technical Detail Letter*”).

details regarding those techniques corrected misapprehensions and oversights in earlier versions is not evidence of a lack of candor.<sup>910</sup>

Even more importantly, it would be error to rely on purported findings and determinations in the *Comcast Network Management Order* because the D.C. Circuit vacated that decision in its entirety in *Comcast v. FCC*.<sup>911</sup> A vacated decision is void, treated as though it never existed, and has no precedential or preclusive effect.<sup>912</sup> Accordingly, lack of candor allegations based on the *Comcast Network Management Order* should be ignored.

Claims that Comcast was “censured” for “repeated lack of candor” in the vacated decision also are incorrect. While the *Order*, in *dicta*, said that there were “troubling questions about Comcast’s candor,”<sup>913</sup> the vacated decision made no findings or conclusions regarding Comcast’s candor, and the snippets relied on by CFA *et al.* are taken out of context.<sup>914</sup> A reference to *dicta* in an order that is a legal nullity does not raise any cognizable candor issues.

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<sup>910</sup> *In the Matter of Applications for Station WKYE, Semora, North Carolina*, Memorandum Opinion and Order and Notice of Apparent Liability, 18 FCC Rcd 23411 ¶ 12 (2003) (“Piedmont’s suggestion that amendments always indicate known falsehoods is incorrect. Our acceptance of that argument would discourage correction of legitimate mistakes or misunderstandings.”).

<sup>911</sup> *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

<sup>912</sup> *See Clerke v. Harwood*, 3 U.S. (3 Dall.) 342, 343 (1797); *Butler v. Eaton*, 141 U.S. 240, 243-44 (1891); *United States v. Williams*, 904 F.2d 7, 8 (7th Cir. 1990); *Simpson v. Motorists Mut. Ins. Co.*, 494 F.2d 850, 854-55 (7th Cir. 1974); *Rushton Mining Co. v. Morton*, 520 F.2d 716, 719 (3d Cir. 1975); *Stone v. Williams*, 970 F.2d 1043, 1054-55 (2d Cir. 1992).

<sup>913</sup> *Comcast Network Management Order*, 23 FCC Rcd at 13032 n.31.

<sup>914</sup> For example, CFA *et al.* say the order found that “Comcast misleadingly disclaimed any responsibility,” CFA *et al.* Petition to Deny at 29 n.56 (quoting *Comcast Network Management Order* ¶ 6 (emphasis supplied by CFA *et al.*)), without acknowledging that the reference was not to any Comcast representations to the Commission, but rather referred to statements by a Comcast spokesperson to a blogger at a very early stage, *before* the controversy reached the Commission; *see Comcast Network Management Order* ¶ 6 & nn.15-16. They also cite the Commission’s statement that “Comcast changed its account,” CFA *et al.* Petition to Deny at 29 n.56 (quoting *Comcast Network Management Order* ¶ 9), without noting that this “change” was from a casual response to a blogger’s question to a formal Comcast response to the complaint at the request of the Enforcement Bureau and Comcast’s subsequent Comments. *See Comcast Network Management Order* ¶ 9 & nn. 25, 27, 28. It is not surprising that formal filings at the FCC after an enforcement proceeding has begun are more detailed and

Finally, concerns regarding Comcast’s use of the term “delaying” rather than “blocking” are a non-issue. Comcast has good reasons for using the language that it did,<sup>915</sup> and even the vacated *Comcast Network Management Order* said that “the semantic dispute of ‘delaying vs. blocking’ is not outcome determinative here.”<sup>916</sup>

**b. Fin/Syn**

Claims of “broken promises”<sup>917</sup> regarding repeal of the Fin/Syn rules similarly do not give rise to any cognizable candor issue. If NBC executives “asserted [in the 1990s] that [Fin/Syn] repeal would not adversely affect the ability of independent producers to place their programming on NBC or cause it to favor its own programming”<sup>918</sup> or even “provided assurances that independent producers would continue to be a prominent part of primetime programming,”<sup>919</sup>

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considered than casual remarks to a blogger. The FCC’s reference to Comcast “changing its story yet again,” CFA *et al.* Petition to Deny at 29 n.56 (quoting *Comcast Network Management Order* ¶ 9), referred to Comcast’s clarification that it slowed customer upstream-only P2P traffic whenever it reached a certain threshold “at any time when P2P traffic levels threaten to degrade customers’ Internet experiences,” and not only at specified times of day when traffic congestion is expected. Technical Detail Letter at 5.

<sup>915</sup> Even when Comcast was using P2P-focused network management techniques, it carried 9 billion P2P flows per day, over 90 percent of those flows were unaffected by Comcast’s management techniques, and, when a P2P upload was interrupted from a computer, a successful P2P upload was effectuated from that computer within one minute over 80 percent of the time. See Technical Detail Letter at 3.

<sup>916</sup> *Comcast Network Management Order* ¶ 44. Similarly, the claim by Elan Feldman that Comcast lacked candor due to Congressional testimony by its Executive Vice President, David L. Cohen that Comcast did not “block” P2P traffic lacks merit. Feldman Petition to Deny at 11-12. Feldman does not provide the date or citation for the testimony quoted in the petition, but the excerpt appears to be similar to testimony given by Mr. Cohen several years before the FCC proceeding. See *Reconsidering Our Communications Laws: Ensuring Competition and Innovation, Hearing before the S. Comm. on the Judiciary, 109<sup>th</sup> cong.* (June 14, 2006) (testimony of David L. Cohen, Executive Vice President, Comcast Corp.), available at <http://judiciary.senate.gov/hearings/hearing.cfm?id=1937>. If this is the testimony to which Feldman refers, it obviously was not an attempt to contradict the facts elicited in an FCC proceeding that had not yet been held. Moreover, it bears noting that Mr. Cohen also testified that Comcast uses a variety of network management techniques to address the fact that “one bandwidth intensive application used by one group of users can have substantial adverse effects on the network’s ability to deliver other applications to all users.” *Id.* at 13; see also *infra* Section VI.I (addressing Feldman’s other arguments).

<sup>917</sup> Cooper/Lynn Decl. at 62.

<sup>918</sup> Franken Comments at 5-6

<sup>919</sup> Cooper/Lynn Decl. at 62.

these statements are not inconsistent with the fact that programming on the NBC Television Network continues to include independently-produced content today. As noted above, approximately 30 percent of NBC's Spring 2010 post-Olympics prime time schedule was occupied by independently produced programming,<sup>920</sup> a figure that will rise to 33 percent in the fall. The allegations here are not based on evidence that NBC engaged in knowing misrepresentations or lacked candor before the Commission; instead, the Fin-Syn "promises" are used as a way to illustrate some parties' general opposition to vertical integration and support for independently-produced programming.<sup>921</sup>

In any event, to the extent NBC airs less independent programming today than it did when the Fin/Syn rules were repealed (based on a variety of factors), this reduction does not represent a "broken promise." The executives made their predictions in good faith, and there is no evidence to the contrary.<sup>922</sup>

**c. Adult Programming**

As a cable operator, Comcast fully empowers subscribers to control what is viewed in their homes. Comcast Digital Cable service includes parental control features that allow parents to decide the programming that is appropriate for their families. These features provide customers with choice and control – maximizing the programming options available to all Comcast customers, while also providing easy-to-use technology to let customers decide what their family may see. Despite the availability of these tools, the Parents Television Council

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<sup>920</sup> Responses to Questions from Several Members of Congress, *supra* note 88, at 36-41.

<sup>921</sup> *Id.*; Franken Comments at 6.

<sup>922</sup> Moreover, predictions about the implications of the repeal of the Fin/Syn rules nearly two decades ago cannot be the basis of a candor or misrepresentation charge today. The Commission's policy is generally not to consider matters prior to the current license term, but to apply a ten-year limit even as to conduct reflecting a "flagrant disregard" of Commission rules, which is clearly not present here. 1986 Character Policy Statement ¶ 105.

(“PTC”) and a few co-commenters raise issues pertaining to adult programming. These issues do not provide any basis for the Commission to condition or deny the proposed transaction.<sup>923</sup> PTC accurately notes that “[t]here is no content regulation of cable-distributed programming” and, commendably, states that the group does “not propose such regulation.”<sup>924</sup> PTC questions, however, whether Comcast has the character qualifications to be a licensee based on the fact that it carries on cable legal adult programming that PTC considers to be “pornographic,” and it asks for a condition requiring Comcast to disclose the amount of revenue it derives from distribution of adult programming.<sup>925</sup> There is no need for such a condition.

PTC does not even attempt to identify how Comcast’s program distribution activities violate the Commission’s character policies – rather, it acknowledges that those policies “do not speak directly to the distribution of pornographic material.”<sup>926</sup> Nevertheless, PTC incorrectly concludes that the Commission’s policy is focused on “the moral decisions made by licensees and applicants” and therefore should take adult program distribution into account.<sup>927</sup> In fact, the Commission has specifically rejected attempts to assess applicants’ and licensees’ “moral

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<sup>923</sup> Morality in Media also provides an analysis of obscenity law without any indication of how it is relevant in this proceeding. In fact, its comments do not even reference Comcast, except in the caption and a heading. There is not even a request for relief. *See* Morality in Media Comments at 1-6. Morality in Media’s allegations are far less specific than those the Commission rejected as not relevant in the AT&T/Comcast proceeding: “Clancy does not offer any evidence that a court has adjudged the programming distributed by AT&T is or was obscene, nor any other evidence to support his allegations. To the extent that the petition describes programming that might be considered indecent, we note that the services provided by AT&T are not broadcast services, but subscription-based services, which do not call into play the issue of indecency. Clancy’s allegations do not justify action on the petition in the context of this proceeding.” *AT&T-Comcast Order* ¶ 213. The Commission should reach the same result here.

<sup>924</sup> Joint Comments of the Parents Television Council, American Family Association, Focus on the Family, Citizens for Community Values, Reclaim Our Culture Kentuckiana & the Coalition for Marriage and Family (“PTC”) at 2.

<sup>925</sup> *Id.* at 2-3.

<sup>926</sup> *Id.* at 2.

<sup>927</sup> *Id.*

character”<sup>928</sup> and instead focus on “the likelihood that an applicant will deal truthfully with the Commission and comply with the Communications Act and [FCC] rules and policies.”<sup>929</sup> Any change to this approach would require an industry-wide proceeding by the Commission and would be inappropriate in the instant transaction. Moreover, PTC does not identify any specific activities that are alleged to evince a lack of character qualifications.

Comcast has every intention of respecting the special legal obligations and the special public interest responsibilities that attach to television broadcasting, and PTC has furnished no credible argument to the contrary. Comcast follows Commission rules with respect to adult programming as a cable operator, and it will follow Commission rules with respect to adult programming when it becomes a broadcast licensee post-transaction. The new NBCU, like NBCU today, will be fully subject to the Commission’s powers with respect to indecency, and it will have its fitness as a broadcast licensee evaluated whenever a broadcast license comes up for renewal. Nothing more is required.

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In sum, Applicants have fully demonstrated the qualifications necessary for approval of the proposed transfer of control of broadcast licenses.

## **VI. OTHER ISSUES**

Despite longstanding Commission policy not to consider issues raised during a transaction review that are unrelated to the transaction, many parties have asked the Commission to do exactly that. As demonstrated in Section II, a license transfer proceeding is not the

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<sup>928</sup> 1986 Character Policy Statement, 102 FCC 2d at 1181-82, 1185, 1190.

<sup>929</sup> *Id.* at 1183.

appropriate forum for the Commission to consider pre-existing grievances, industry-wide issues, or other matters unrelated to the proposed transaction.<sup>930</sup>

Nevertheless, to dispense with any notion that the Commission should give any weight to these issues, Applicants briefly address below the following issues: (i) the suggestion that Comcast should divest Comcast Media Center and iN DEMAND; (ii) assertions of unfair labor practices; (iii) a request for specific disability-related conditions; (iv) complaints about the price of cable; (v) complaints raised regarding HD technology; (vi) complaints raised regarding PEG programming; (vii) concerns about piracy and the enforcement of copyrights; (viii) concerns raised by the Portland Trailblazers with regard to cable distribution of their basketball games; and (ix) an allegation of property damage.

**A. Claims Regarding iN DEMAND and Comcast Media Center Are Without Merit and Not Transaction Related, and Proposed Conditions with Respect to These Entities Should Be Rejected.**

Avail-TVN and a handful of other commenters allege that, post-transaction, Comcast will leverage its ownership interest in NBCU to harm competition in the marketplace for video transport, VOD, and PPV services. To address such alleged harms, these parties urge the Commission to require Comcast to divest its ownership interests in iN DEMAND and Comcast

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<sup>930</sup> As the Institute for Policy Innovation noted, “[W]e are troubled by the tendency to make policy through the merger review process – in other words, to extract policy commitments from companies while they are at the mercy of a regulatory agency during a merger review or license transfer review. Special interest groups and supposed ‘consumer’ groups have become adept at using such reviews as opportunities to further *their* agendas and achieve *their* policy goals through the unique and exceptional processes available to them during a review. Some, in fact, seemingly spring to life only to shake down those in a vulnerable position. This is policy making under duress, and these policy concessions inevitably obtain the power of precedent, even though they were obtained without anything resembling a deliberative policy process.” Comments of Institute for Policy Innovation, MB Docket No. 10-56, at 1-2 (June 21, 2010) (emphasis in original).

Media Center (“CMC”).<sup>931</sup> In the alternative, Avail-TVN urges the Commission to impose “behavioral remedies” on Comcast, CMC, and iN DEMAND.<sup>932</sup> There is no merit to these claims, and the proposed conditions should be rejected.

Applicants note that it appears that Avail-TVN is seeking to use this proceeding as leverage to advance its individual business interests, rather than the public interest. To cite one example, Avail-TVN made a bid earlier this year to buy CMC’s Headend-in-the-Sky (“HITS”) service. Comcast declined the offer. Now, Avail-TVN is asking the Commission to require divestiture of CMC, presumably in an effort to obtain control of CMC at a bargain-basement price via a forced sale. The Commission should reject such regulatory gamesmanship.

**1. CMC Does Not Exercise Bottleneck Control Over Video Transport Services in the MVPD Marketplace.**

Avail-TVN asserts that Comcast “already dominates the market” for video transport services and that the joint venture will give CMC the ability to harm competitors.<sup>933</sup> NTCA claims that the joint venture will use its control of CMC to create “sweetheart” deals at the expense of smaller MVPDs.<sup>934</sup> These claims fundamentally mischaracterize the video transport business and CMC’s role in it.

CMC is a wholly-owned subsidiary of Comcast. CMC’s HITS service aggregates and transmits digital video programming via satellite to cable operators and other MVPDs, which in turn transmit that content to their subscribers. In order to provide these services, CMC obtains

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<sup>931</sup> See Avail-TVN Comments at 3 (urging divestiture of iN DEMAND and CMC); NTCA Comments at 10 (urging divestiture of CMC); FACT Coalition Comments at 22-23 (urging divestiture of iN DEMAND and CMC); WealthTV Comments at 13 (contending that CMC is a programming “choke point”).

<sup>932</sup> See Avail-TVN Comments at 15.

<sup>933</sup> See *id.* at 9.

<sup>934</sup> See NTCA Comments at 10.

non-exclusive rights from programming networks to multiplex and uplink their content to leased satellite transponders for transmission to the headends of MVPDs that purchase this CMC service.<sup>935</sup> The overwhelming majority of networks with which CMC deals are unaffiliated with Comcast or NBCU. Importantly, MVPDs that utilize CMC must separately contract with each of the networks for rights to distribute the programming to their customers; the networks, not CMC, control contractual access to their programming.

CMC’s transport service is *not* a bottleneck; to the contrary, it is a facilitator. As Avail-TVN notes, HITS serves 10 million MVPD subscribers, which represents only about 10 percent of all MVPD subscribers.<sup>936</sup> Further, the use of third-party transport services is diminishing as MVPDs increasingly obtain their video programming directly from programmers (via so-called “direct feeds”) or self-provide by distributing linear feeds to their systems over their own fiber networks. Moreover, to the extent that MVPDs want to use a transport service, they can use Avail-TVN or EchoStar VIP, and are not limited to using HITS.<sup>937</sup>

NTCA claims that the joint venture would “have the incentive to create favorable pricing arrangements for itself and any partners” and that these “sweetheart deals would occur at the expense and to the detriment of competing companies, especially rural MVPDs.”<sup>938</sup> These claims are unfounded. In fact, CMC helps small operators by providing cost-effective solutions like

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<sup>935</sup> CMC has no exclusive agreements with respect to either linear or VOD content.

<sup>936</sup> Avail-TVN Comments at 9. Presently, HITS serves approximately three million non-Comcast subscribers, or about three percent of the MVPD marketplace.

<sup>937</sup> Consequently, FACT Coalition cannot credibly argue that the HITS service “is an essential facility.” FACT Coalition Comments at 23. Comcast has made all of its national linear programming networks available to Avail-TVN for transport and has made all of its national linear programming networks except PBS KIDS Sprout available to EchoStar VIP for transport.

<sup>938</sup> NTCA Comments at 10.

HITS Quick Take Plus, which enables capacity-constrained systems to deliver dozens of digital programming services, including HD programming, to their customers without having to invest in expensive plant upgrades.<sup>939</sup>

Applicants note that similar HITS-related concerns were raised in the context of the Comcast-AT&T transaction in 2002. There, the Commission found that “there are several alternative sources of digital programming, including direct feed options from the programmers themselves” and that the applicants “would not have the ability to prevent competing MVPDs from gaining access to other digital programming packages.”<sup>940</sup> In light of these marketplace facts, the Commission rejected proposed HITS-related conditions in its approval order.<sup>941</sup> The Commission should reach the same conclusion here.

**2. Commenters Mischaracterize the Nature of Comcast’s Ownership Interest in iN DEMAND, and Ignore the Competitive Marketplace for VOD Services.**

Avail-TVN and certain other commenters assert that Comcast is using its ownership interest in iN DEMAND to harm competition in the VOD marketplace, and will continue to do

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<sup>939</sup> See <http://www.comcastmediacenter.com/hits-quantum/hits-quicktakeplus.html> (last visited July 20, 2010). CMC is making every effort to meet the specialized needs of its Quick Take Plus customers. For example, in 2009, CMC made infrastructure investments that enabled approximately 50 small cable operators to provide HD channels to their subscribers for the first time. Likewise, the HITS VOD In a Box solution allows smaller operators to offer thousands of hours of SD and HD VOD content to customers, while avoiding the significant capital and operational expenses typically associated with traditional VOD service delivery. See <http://www.comcastmediacenter.com/hits-quantum/vod-in-a-box.html>. This service is offered to any entity that holds a cable franchise, including telco video providers. We also note that Avail-TVN offers a competing service. Lastly, CMC recently announced that it is offering a discount on its HITS Quantum Services, which provide a cost-effective way for operators to add HD channels. See Mike Reynolds, *CMC Dangles Digital Carrots Offers Discounts on HITS Quantum Services Through End of 2010*, Multichannel News, July 6, 2010, available at [http://www.multichannel.com/article/454486-CMC\\_Dangles\\_Digital\\_Carrots.php](http://www.multichannel.com/article/454486-CMC_Dangles_Digital_Carrots.php).

<sup>940</sup> *AT&T-Comcast Order* ¶ 116.

<sup>941</sup> See *id.*

so post-transaction.<sup>942</sup> These commenters misunderstand Comcast’s relationship with iN DEMAND and ignore the intense competition in the marketplace for VOD services. Their recommended conditions should be rejected.

These comments are predicated on the assumption that Comcast can dictate unilaterally the decision-making processes at iN DEMAND. That is *not* the case. While Comcast owns a 53.7 percent economic interest in iN DEMAND, it does *not* exercise control over the company. Under the In Demand LLC Agreement, there is a Management Committee with a member from each of iN DEMAND’s owners – Comcast, Cox, and the Time Warner Cable/Bright House partnership. Voting on the Management Committee tracks each member’s ownership percentage, which is revised annually based on relative number of subscribers. ||

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Avail-TVN’s claim that Comcast “already engages in anti-competitive conduct in the VOD market”<sup>943</sup> is false. The marketplace for VOD services is intensely competitive. Avail-TVN concedes that it – not iN DEMAND – is currently the largest aggregator of VOD services,<sup>944</sup> and it competes vigorously with iN DEMAND and CMC, among others, to obtain

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<sup>942</sup> See, e.g., Avail-TVN Comments at 8-9; FACT Coalition Comments at 23.

<sup>943</sup> Avail-TVN Comments at 8.

<sup>944</sup> See *id.* (“Avail-TVN today currently has more total subscribers than Comcast”).

VOD content from programmers and to sell VOD packages to MVPDs.<sup>945</sup> In fact, Comcast’s cable systems today receive VOD content from Avail-TVN, iN DEMAND, and CMC. And PBS KIDS Sprout, a Comcast-affiliated network, pays Avail-TVN to distribute its VOD assets.<sup>946</sup> Furthermore, Comcast and other MVPDs can acquire VOD content directly from programmers, as Comcast does in the case of HBO and Showtime, rather than using third-party aggregators. The reality is that no VOD aggregator can be a gatekeeper in this environment.

Avail-TVN errs in stating that Comcast “engages in anti-competitive bundling of its various video delivery services to reduce competition.”<sup>947</sup> MVPDs are free to purchase VOD or PPV services from iN DEMAND and transport services from CMC, but they are never required to take these services together. Importantly, even if Comcast wanted to do so, CMC and iN DEMAND lack the ability to force other MVPDs to agree to such deals.<sup>948</sup> An MVPD can use CMC to transport iN DEMAND content, or it can use some other method.<sup>949</sup>

In addition, Avail-TVN alleges that iN DEMAND and CMC engage in predatory pricing by “increasingly offering low-cost/no-cost deals to both content owners and MVPDs[.]”<sup>950</sup> Here

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<sup>945</sup> For example, Avail-TVN has certain VOD rights to distribute HBO and Showtime content that neither CMC or iN DEMAND possess.

<sup>946</sup> Contrary to Avail-TVN’s claim, *see id.* at 9, CMC does not have an exclusive arrangement to distribute VOD content from PBS Sprout and FEARNet.

<sup>947</sup> *Id.* at 10.

<sup>948</sup> For similar reasons, there is no basis to Avail-TVN’s suggestion that, post-transaction, Comcast “could require that MVPDs use iN DEMAND, CMC, or other delivery services in order to receive NBCU content.” *Id.* at 11.

<sup>949</sup> Avail-TVN also asserts that, post-transaction, “Comcast could make NBCU content available to MVPDs only if the MVPDs purchase Comcast’s integrated TV/PC service – a tactic that is already in progress with Fancast Xfinity TV.” *Id.* at 12. This completely misapprehends the notion of TV Everywhere, which allows Comcast – or any other MVPD – to make content from its MVPD service available online *to its own MVPD subscribers*, and Comcast does so at *no additional charge*. Comcast does not sell the service to other MVPDs. Rather, other MVPDs have developed their own TV Everywhere services, to provide similar capabilities to their own customers.

<sup>950</sup> *Id.* at 9.

again, Avail-TVN provides no evidence in support of its claims. In any event, it would not be economically rational for iN DEMAND and CMC to price their services in this way.<sup>951</sup> Further there is no merit to Avail-TVN’s claim, nor is it supported by any evidence. Like the service providers they must compete with every day, iN DEMAND and CMC price their services to content providers and MVPDs in response to the demands of the marketplace.<sup>952</sup>

**3. There Is No Basis for Avail-TVN’s Claim That iN DEMAND Acts Anti-Competitively in the Marketplace for PPV Programming.**

Avail-TVN asserts that “Comcast is able to use its large market share at iN DEMAND to limit the competitive delivery of PPV content.”<sup>953</sup> Essentially, Avail-TVN argues that it cannot compete in the PPV marketplace unless it is able to obtain exclusive rights to PPV content.<sup>954</sup> That may be Avail-TVN’s business model, but Comcast does not believe that PPV content is

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<sup>951</sup> As the Supreme Court has noted, “predatory pricing schemes are rarely tried, and even more rarely successful.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986). Allegations of excessively low prices should be discounted because “cutting prices in order to increase business often is the very essence of competition.” *Id.* at 594.

<sup>952</sup> DirecTV and WealthTV also make unfounded claims about Comcast and iN DEMAND. DirecTV charges that Comcast attempted to use iN DEMAND’s INHD services to extract from satellite competitors higher fees than Comcast itself paid for the same programming. See DirecTV Comments at 10 n.23. DirecTV made this claim in a 2005 program access complaint against iN DEMAND, and iN DEMAND demonstrated why the claim was false in its answer in that proceeding. See *In the Matter of DirecTV, Inc. v. iN DEMAND L.L.C.*, Answer of iN DEMAND L.L.C., CSR-6901-P (July 19, 2005). DirecTV subsequently withdrew its complaint, and the case was dismissed. See *In the Matter of DirecTV, Inc. v. iN DEMAND L.L.C.*, Order, 21 FCC Rcd. 3878 (2006). Likewise, there is no merit to WealthTV’s claim that iN DEMAND ties its less successful MOJO programming service to its PPV and VOD services. See WealthTV Comment at 15. MOJO discontinued service in 2008, but while it was in existence, iN DEMAND offered MOJO on a standalone basis to MVPDs and did not require MVPDs to take the service in a bundle with other iN DEMAND services.

<sup>953</sup> Avail-TVN Comments at 7. Although PPV often describes the particular pricing arrangement between an MVPD and its customers for specific content (such as a live boxing match or music concert), in its pleading Avail-TVN defines PPV to mean a mode of content distribution and consumption where the consumer elects to view the content during a regularly scheduled time and is charged a fee for such viewing. See *id.* at 6. Under this definitional framework, VOD is distinct from PPV in that VOD involves a mode of content distribution and consumption where the consumer views the content at a time of the consumer’s choosing. See *id.* at 8. For the purposes of this discussion, Applicants follow Avail-TVN’s nomenclature, but for the sake of clarity note that VOD includes much content that is offered on a transactional (or PPV) basis.

<sup>954</sup> *Id.* at 7.

generally provided on an exclusive basis. In the case of live sports programming, for example, the professional sports leagues generally license their out-of-market packages on a non-exclusive basis to PPV aggregators like iN DEMAND or directly to MVPDs. In instances where some degree of exclusivity is provided, it is not always the case that the holder of the exclusive rights actually enforces those rights. For example, in the limited cases where iN DEMAND has exclusive rights, such as to Howard TV and NHL Center Ice, it elects not to enforce those rights. Rather, as Avail-TVN concedes, “iN DEMAND will license PPV programming to Avail-TVN,” which Avail-TVN can then sell to other MVPDs.<sup>955</sup>

In contrast, Comcast’s experience has been that Avail-TVN *does* exercise exclusive control over certain VOD content, and *does* leverage that exclusive control to ensure that MVPDs that want certain content must use Avail-TVN’s services to deliver that content. Comcast today uses Avail-TVN services to obtain delivery from 48 programmers, including some of the largest programmers (*e.g.*, Viacom, Fox, and NBC). In a number of cases, Comcast *must* obtain delivery from Avail-TVN if it wants to receive certain content from a particular programmer because Avail-TVN is performing the VOD content delivery on behalf of the programmer and, where available, *vigorously enforces its own exclusivity rights*.<sup>956</sup>

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<sup>955</sup> *Id.*

<sup>956</sup> Avail-TVN states that “Comcast’s iN DEMAND refuses to license PPV programming from Avail-TVN, which effectively ‘blocks’ any content owner from offering exclusive rights to Avail-TVN.” *Id.* at 9. Comcast is not privy to the discussions that may have taken place between Avail-TVN and iN DEMAND on this subject, but the logic of Avail-TVN’s argument is not apparent. There is nothing to prevent Avail-TVN from seeking exclusives (it has built its business model around them), nor is it apparent why iN DEMAND should be forced to license content from Avail-TVN.

**B. Claims that the Proposed Transaction Should Be Denied or Conditioned Based on Allegations Regarding Labor Issues Should Be Rejected Both Because They Are Not Transaction-Specific and Because They Are Without Merit.**

Both Comcast and NBCU understand from decades of experience that successful communications, information, and entertainment businesses rely on trained, talented, and motivated employees.<sup>957</sup> Through the joint venture, Applicants will create an innovative media and entertainment company that increases its talented employee base over time. Comcast recognizes and respects the relationship that NBCU has with its current employees, and it is Comcast's desire to embrace, not disrupt, this relationship in creating the new NBCU. As a result, Applicants do not anticipate that any fundamental changes will be made to the manner in which NBCU conducts labor relations. To the contrary, Applicants have voluntarily committed to honor all of NBCU's collective bargaining agreements,<sup>958</sup> and both the Directors Guild of America and Joint Council 42 of the International Brotherhood of Teamsters (parent body to 23 Teamster Local Unions in Southern California, Southern Nevada, Hawaii, Guam, and Saipan)

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<sup>957</sup> Comcast's cable, Internet, and digital voice businesses employ and depend on tens of thousands of workers who, among other responsibilities, install advanced services in customers' homes, split fiber nodes, and improve Internet safety. Similarly, NBCU's successful broadcast and cable programming and successful movies are built from the labors of reporters, actors, writers, camera operators, stagehands, and other skilled workers and guild members.

<sup>958</sup> See Memorandum from David L. Cohen, Executive Vice President, Comcast Corporation, *Comcast/GE Announcement Regarding NBC Universal* (Dec. 3, 2009), available at <http://www.comcast.com/nbcutransaction/pdfs/PublicInterestCommitments.pdf>. Comcast has committed that, where bargaining unit employees have chosen to be represented by a union, Comcast will not delay good-faith negotiations with the bargaining unit representative. In fact, senior representatives of Comcast and NBCU already have begun to correspond and meet with representatives of guilds and unions in the businesses that would be directly affected by the transaction, and representatives of the new NBCU look forward to working constructively with union leaders. Since filing their applications, Applicants have made a number of additional employment-related commitments. See, e.g., Rush Letter, *supra* note 99 (outlining numerous workforce recruitment and career development initiatives the new NBCU will undertake to enhance workforce diversity); Hispanic MOU, *supra* note 120 (outlining Applicants' agreement to increase Latino representation at all levels of employment following the joint venture); Responses to Questions from Several Members of Congress, *supra* note 88, at 21 (discussing Comcast's commitment to developing Diversity Management Plans that will enhance workplace diversity by focusing on "four key areas: (1) recruitment and selection; (2) development, advancement, and retention; (3) communication and education; and (4) accountability and management practices").

and International Brotherhood of Teamsters, Studio Transportation Drivers Local #399 (Hollywood, California) have filed comments supportive of the transaction.<sup>959</sup>

CWA and a small number of other parties nonetheless have filed petitions or comments challenging the proposed transaction on the basis of various labor and employment-related claims, and urging the Commission either to deny the Applications or to impose onerous conditions on the joint venture.<sup>960</sup> CWA has made similar arguments in *at least six* prior license transfer proceedings, including proceedings in which it has asserted almost identical claims against Comcast, and in each of these proceedings the Commission has rejected its arguments.<sup>961</sup> The Commission should reject these arguments once again.

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<sup>959</sup> See Letter from Leo T. Reed, Division Director, International Brotherhood of Teamsters, Studio Transportation Drivers Local 399, to Julius Genachowski, Chairman, FCC (June 9, 2010,) (representing Hollywood, California); Letter from Randy Cammack, Vice President-at-Large, Joint Council 42 of the International Brotherhood of Teamsters, to Julius Genachowski, Chairman, FCC (June 10, 2010) (Joint Council 42 is the parent body to 23 Teamster Local Unions in Southern California, Southern Nevada, Hawaii, Guam, and Saipan.); Letter from Jay D. Roth, National Executive Director, Directors Guild of America, to Marlene H. Dortch, Secretary, FCC (June 21, 2010).

<sup>960</sup> CWA Petition to Deny at 8-12, 50-51; CWA Local 7037 Comments (representing Sante Fe, New Mexico); CWA Local 7201 Comments (representing St. Paul, Minnesota); CWA Local 7901 Comments (representing Portland, Oregon); CWA Local 9333 Comments (representing Modesto, California); CWA Local 9408 Comments (representing Fresno, California); CWA Local 9421 Comments (representing Sacramento, California); CWA Local 9423 Comments (representing San Jose, CA).

<sup>961</sup> See, e.g., *In the Matter of Applications Filed for the Transfer of Certain Spectrum Licenses and Section 214 Authorizations in the States of Maine, New Hampshire, and Vermont from Verizon Communications Inc. and Its Subsidiaries to Fairpoint Communications, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 514, ¶ 38 (2008) (“reject[ing] arguments that the transaction is likely to result in the loss of experienced employees” and finding that CWA offered “only speculative concerns . . . not supported by the record”); *Adelphia Order* ¶¶ 232-240 (based on CWA’s claims, the FCC “see[s] no reason to impose specific conditions regarding bargaining unit employees”); *In the Matter of Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation*, Hearing Designation Order, 17 FCC Rcd 20559 ¶¶ 31-33 (2002) (finding that “unadjudicated non-FCC violations, like those alleged by CWA, should be resolved by the governmental agency with proper jurisdiction”) (“*Echostar-Hughes Order*”); *In the Matter of Joint Applications of Global Crossing Ltd., and Citizens Communications Company*, Memorandum Opinion and Order, 16 FCC Rcd 8507 ¶ 13 (2001) (rejecting CWA’s request “that the Commission condition approval for the transfer of control on the transfer of all the assets and liabilities of the Frontier employee pension plans to Citizens” and noting that “employees who are entitled to benefits have remedies under contract law”); *AT&T-TCI Order* ¶¶ 140-41 (declining to consider CWA’s speculative, non-merger-specific employment-related claims); *MCI-WorldCom Order* ¶ 213 (rejecting CWA’s employment-related objections to the transaction and concluding that the union’s prediction that the merger would have an adverse impact on telecommunications employees was “speculative” and “not . . . credible”).

As a threshold matter, the labor and employment issues raised by these parties are not transaction specific and are beyond the scope of the Commission’s jurisdiction. The Commission’s examination of the potential harms of a particular transaction must be specific to that transaction, and, as described in Section II, the Commission’s review process should not serve as an open forum for airing extraneous disputes, including “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.”<sup>962</sup> The Commission has made clear that labor relations and employment disputes are not within the Commission’s jurisdiction, stating that the National Labor Relations Board (“NLRB”) is “the more appropriate forum” for addressing “labor-oriented concerns,”<sup>963</sup> and that “[i]t is long-standing Commission policy not to involve itself with private contract disputes.”<sup>964</sup> Moreover, allegations of labor and employment law violations are not among the categories of misconduct relevant in assessing a transferee’s character qualifications.<sup>965</sup> In rejecting the almost identical claims made by CWA in the *Adelphia* proceeding, the Commission found that the “character qualifications allegations raised by commenters do not raise a substantial and material question of fact warranting designation for hearing” and that the commenters have not “justified imposition of labor-oriented conditions”

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<sup>962</sup> *AOL-Time Warner Order* ¶ 6; *see supra* Section II.

<sup>963</sup> *Adelphia Order* ¶ 240 n.739.

<sup>964</sup> *Actions Taken Under Cable Landing License Act*, Public Notice, 20 FCC Rcd 8557, DA 05-1268 at 4 n.12 (2005).

<sup>965</sup> *See, e.g., In the Matter of Application of WPIX, Inc. for Renewal of the License of Commercial TV Station WPIX (TV) New York, New York*, Memorandum Opinion and Order, 5 FCC Rcd 7469 ¶¶ 2, 15 (1990) (finding “that WPIX’s adjudicated [NLRA] violations constitute non-FCC misconduct and . . . do not fall within the ambit of relevant, non-FCC misconduct contemplated by the Commission” because such violations do not “suggest any lack of truthfulness or candor in its dealings with [the Commission] or any other regulatory body”); *see also Policy Regarding Character Qualifications*, Policy Statement and Order, 5 FCC Rcd 3252 ¶ 7 (1990) (noting that the Commission continues “to believe that it is appropriate to refrain from making licensing decisions based on mere allegations of relevant non-FCC misconduct”) (“*Character Policy Statement*”).

because they “have not raised issues concerning Commission-related conduct or the types of adjudicated non-Commission misconduct relevant under the *Character Policy Statement*.”<sup>966</sup> The labor-related claims by CWA and certain other commenters consequently have no place in this proceeding and should be dismissed.

Not only are these claims beyond the scope of this proceeding, they completely mischaracterize Applicants’ approach to labor relations issues. For example, CWA’s assertion that the structure of the joint venture “will lead the new entity to cut costs and jobs” simply is incorrect.<sup>967</sup> As Comcast’s Chairman and Chief Executive Officer recently testified, “[t]he fact is [that] Comcast doesn’t own a theme park, doesn’t own a news channel, doesn’t own a broadcast [network], doesn’t own a film studio, and doesn’t own many of those cable type of news channels. So we don’t anticipate any reductions and movements and all the disruption to people’s lives at this really sensitive time in the economy.”<sup>968</sup>

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<sup>966</sup> *Adelphia Order* ¶ 238; see also *Echostar-Hughes Order* ¶ 33; *MCI-WorldCom Order* ¶ 213; *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, ¶ 63 n.178 (2000) (declining to review the labor concerns made against Qwest); *Bell Atlantic-NYNEX Order* ¶ 244 (noting that “[n]one of [the labor-related] allegations involve the kinds of non-FCC misconduct deemed relevant to an applicant’s character qualifications, let alone an adjudication of such misconduct.”).

<sup>967</sup> See CWA Petition to Deny at 8. CWA also erroneously claims that Comcast has shifted work to non-union contractors in San Francisco and in Michigan in an effort to deprive unionized workers of employment opportunities. *Id.* at 10. In fact, these decisions to shift work to contractors were based not on union affiliation but on legitimate business needs. Moreover, these decisions were designed to provide Comcast employees, including unionized employees represented by CWA, the opportunity to perform as much as of the advanced, high-paying workload as possible. By shifting a portion of the company’s basic residential installation work to contractors, Comcast allowed its existing employees to perform more skilled labor tasks such as maintenance of its fiber optic cable network. Comcast does not make any hiring decisions based on whether or not a facility is unionized. This fact is borne out by recent events. Comcast recently completed the construction of a new corporate headquarters building in Philadelphia. This project, which is the largest private sector development in the history of the Commonwealth of Pennsylvania, was completed using solely unionized labor sources.

<sup>968</sup> 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 119 (Mar. 11, 2010).

Applicants have a consistent track record of creating jobs in America, and the proposed transaction will stimulate investment and innovation, which in turn will promote job preservation and creation.<sup>969</sup> Many participants in this proceeding, including the governors of several large states, have recognized the companies' leadership in this area.<sup>970</sup> In addition to job creation, Applicants have a long history as pro-employee companies that offer their workers competitive wages, progressive benefits packages, comprehensive training, and job enrichment programs.<sup>971</sup> This pro-employee history and the positive impact the proposed transaction will have on the

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<sup>969</sup> Comcast has expanded from 12 employees in 1963 to over 100,000 today, and NBCU currently has over 33,000 employees. Because the proposed combination between Comcast and NBCU largely is a vertical combination, Applicants do not expect that the proposed synergies of this combination will include job losses. Following the transaction, the new NBCU is expected to hold an investment grade credit rating. This level of debt will not affect Applicants' ability to maintain current employment levels. *See generally* Public Interest Statement (describing the ways in which the joint venture will yield public interest benefits and advance the Commission's public policy goals of diversity, localism, competition, and innovation); *see also* Testimony of Brian L. Roberts, Chairman and Chief Executive Officer, 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 of the S. Comm. on the Judiciary*, Transcript at 59 (Feb. 4, 2010) ("I think that is one of the best parts of this [joint venture's] story, is that it is not based on the backs of eliminating jobs. It is a risk and a bet that America's economy is turning around, advertising is going to come back, that content is going to be copy protected, and that business models will be found that are successful in the future and make this a good investment.").

<sup>970</sup> *See, e.g.*, Letter from California Governor Arnold Schwarzenegger, New York Governor David Paterson, and Pennsylvania Governor Ed Rendell to Julius Genachowski, Chairman, FCC (May 25, 2010) ("Between them, Comcast and NBCU account for almost 130,000 jobs . . . [and] Comcast has made clear that this venture is not about cutting jobs . . . [Applicants] have also made commitments to grow their new media business.").

<sup>971</sup> *See, e.g.*, Letter from Mark Wilson, President & CEO, Florida Chamber of Commerce, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 11, 2010) ("Comcast and NBC Universal are two of Florida's strongest employers and revenue generators . . . Comcast and NBC Universal are already two very important members of our state's business community and will most certainly maintain and grow that trend should their transaction be approved."); Letter from Matt Smith, Pennsylvania State Representative, to Julius Genachowski, Chairman, FCC, *et al.*, MB Docket No. 10-56, at 1 (June 21, 2010) ("Comcast employees have consistently evaluated the company as a fair employer that is invested in its workforce."); Letter from Tyrone Ellis, Mississippi State Representative, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Mar. 26, 2010) ("Comcast invests heavily in continuing education, providing the opportunity to rise through the ranks and turn a job into a career. It is no wonder that Comcast has been ranked among the 'Most Admired Employers for Minority Professionals' by US Black Engineer and Women of Color magazines."); Letter from Clay Ford, Florida State Representative, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 14, 2010) ("I believe that the combination of an iconic company like NBC Universal with a business that has become one of America's leading innovators – Comcast – can only benefit our broader economy and create new jobs for Floridians and Americans."); Letter from Ronald S. Calderon, California State Senator, to Julius Genachowski, Chairman, FCC, *et al.*, MB Docket No. (June 18, 2010) ("I'm well aware of the critical economic role played by our entertainment industry and . . . believe the proposed transaction between Comcast and NBC Universal has the unique potential to simultaneously bolster the entertainment sector's technical capacity and strengthen its creative vitality.").

companies' employees have been explicitly recognized by a number of key Hollywood unions and the Directors Guild of America.<sup>972</sup>

Claims that Comcast has engaged in “anti-union” activities or other practices harmful to employees are baseless.<sup>973</sup> Contrary to the impression that CWA and certain CWA locals seek to create in this proceeding, Comcast respects its employees' right to choose union representation and does not attempt to stifle worker organizational efforts or union activity.<sup>974</sup> Comcast employees can – and do – freely choose whether to be represented by a union, using secret

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<sup>972</sup> See Letter from Leo T. Reed, Division Director, International Brotherhood of Teamsters, Studio Transportation Drivers Local 399, to Julius Genachowski, Chairman, FCC (June 9, 2010) (“We believe that the Comcast-NBCU transaction is strongly in the interests of the workers we represent . . . and our economy as a whole.”); Letter from Randy Cammack, Vice President-at-Large, 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.”); Letter from Jay D. Roth, National Executive Director, Directors Guild of America, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56 (June 21, 2010) (“In a time when the industry is facing financial pressures 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.”).

<sup>973</sup> Four individuals have filed comments and complaints setting forth various unsupported claims regarding employment conditions at GE and/or NBCU. See Nick Balsamo Comments; Harold Barber Comments; Charles Giles Complaint; Neil Winikoff Comments. The Commission should dismiss these comments and complaints without further consideration. These filings raise extraneous issues beyond the Commission’s jurisdiction, focus on isolated unadjudicated complaints (some of which have never even been filed with the appropriate adjudicatory body), and are unsubstantiated and without merit. Moreover, two of the four involve complaints about the treatment of daily hires under the prevailing collective bargaining agreement. NBCU’s treatment of daily hires is entirely consistent with the agreement the union has negotiated on their behalf.

<sup>974</sup> For example, there is no basis for CWA’s claim that Comcast “sought to eliminate the existing unions” following the AT&T Broadband/Comcast transaction. CWA Petition to Deny at 9. After that transaction closed, and consistent with its labor policies, Comcast at all times adhered to fair labor-management practices. In the Chicago area, for example, Comcast actively attempted to negotiate a union contract because the pre-existing union contracts had expired three years before Comcast acquired AT&T Broadband. Comcast acted in good faith throughout this negotiation process while the union engaged in delay tactics, continually altering its request for separate or joint negotiations with the employment units and failing to present its demands to Comcast in a timely manner.

ballots.<sup>975</sup> CWA loosely claims that the NLRB “has repeatedly cited Comcast for violations of labor law,”<sup>976</sup> but its only support for this allegation are vague assertions related to three NLRB proceedings arising out of events that took place seven or more years ago and that were resolved through those proceedings.<sup>977</sup> A few CWA union locals raise similarly unsubstantiated assertions regarding alleged labor law violations.<sup>978</sup> These claims, like those discussed above, provide no basis for denying or imposing conditions on the proposed transaction.

It is not uncommon for large employers to be subject to employment or labor law claims. Indeed, CWA itself has been the subject of such claims.<sup>979</sup> The dated, isolated matters cited by CWA and other parties fall far short of establishing any pattern of labor law violations by Comcast. To the contrary, Comcast’s active participation in the NLRB process demonstrates that Comcast is committed to addressing any complaints by adhering to the procedures established by the applicable CWA collective bargaining agreement.

The Public Interest Statement, as well as Applicants’ track record, demonstrates that the proposed transaction will benefit not only consumers, but also employees, of the new joint venture. Moreover, numerous commenters have attested to Applicants’ status as “excellent”

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<sup>975</sup> There are currently multiple bargaining units representing employees across Comcast’s business. In locations that are represented by a union, Comcast bargains in good faith to reach a fair labor contract and generally enjoys a favorable relationship with union locals.

<sup>976</sup> CWA Petition to Deny at 10.

<sup>977</sup> One alleged incident, which occurred in Hialeah, Florida, arose out of events that occurred prior to Comcast’s 2002 acquisition of AT&T Broadband, and that matter was settled without any finding of fault on the part of Comcast. Comcast’s actions in all of these cases were based on good-faith business decisions. Comcast has never fired or disciplined employees for participating in union organizing activities.

<sup>978</sup> See CWA Local 7037 Comments; CWA Local 7201 Comments; CWA Local 7901 Comments; CWA Local 9333 Comments; CWA Local 9408 Comments; CWA Local 9421 Comments; CWA Local 9423 Comments.

<sup>979</sup> See, e.g., *Catania v. Local 4250/505 of the Commc’ns Workers of Am.*, 834 N.E.2d 966 (Ill. App. Ct. 2005) (decision on appeal arising out of claim filed by former office manager against CWA local for retaliatory discharge, tortious interference with contract, and violations of Illinois Wage Payment and Collection Act).

employers that provide employees with “competitive wages and quality benefits.”<sup>980</sup> Neither CWA nor any other party provides any credible evidence to the contrary. Accordingly, the Commission should dismiss the labor-related claims set forth in the CWA petition and opposing comments.

**C. Coalition of Organizations for Accessible Technology Comments**

The Coalition of Organizations for Accessible Technology (“COAT”) requests that the Commission impose several conditions relating to closed captioning, video description, and other disabilities-related matters.<sup>981</sup> COAT’s proposed conditions are not transaction-specific and are unnecessary in light of Applicants’ records regarding disabilities access and current Congressional efforts to address disabilities access issues on an industry-wide basis. Accordingly, the Commission should deny COAT’s request.

Applicants appreciate COAT’s comment that individuals at Comcast and NBCU “have done much to promote accessibility and usability of products and services to people with disabilities.”<sup>982</sup> Comcast, for example, works closely with its equipment suppliers, programmers, and others to ensure that captioning services work properly;<sup>983</sup> includes on its website detailed information on the various captioning options for customers, as well as instructions as to how the

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<sup>980</sup> See, e.g., Letter from Beth Kirkland, Executive Director, Economic Development Council of Tallahassee/Leon County, Inc., to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 21, 2010) (asserting that Comcast “is an excellent employer, providing competitive wages and quality benefits, including health care, to its employees”).

<sup>981</sup> See COAT Comments (July 7, 2010). The COAT comments were filed more than two weeks after the comment deadline had passed. Because of Applicants’ continuing interest in serving people with disabilities, and despite the non-transaction-specific nature of the concerns raised, Applicants will respond to those comments here.

<sup>982</sup> *Id.* at 8.

<sup>983</sup> All of the models of set-top boxes that Comcast makes available to its customers include built-in caption decoding capability and/or have the ability to pass through caption data to TV sets connected via NTSC ports.

subscriber can activate the closed captioning features in his or her set-top box,<sup>984</sup> and constantly strives to improve its customer service outreach to customers with disabilities.<sup>985</sup> Likewise, with respect to Comcast Digital Voice service, Comcast already provides access to Telecommunication Relay Services; complies with the requirements of Section 255 of the Act; and supports Hearing Aid Compatibility in the only phone it distributes, among other things.<sup>986</sup>

NBCU has an equally strong commitment to serving individuals with disabilities. For instance, NBC is actively participating in the FCC's new Technical Working Group that is studying digital closed captioning and video description.<sup>987</sup> In addition, NBC.com was one of the first broadcast network websites to provide closed captioning of its online programs, beginning in the fall of 2007.<sup>988</sup> As of the first quarter of 2010, about 90 percent of the programming offered on NBC.com was provided with closed captioning.<sup>989</sup>

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<sup>984</sup> See Comcast Customer Central, Closed Captioning, <http://customer.comcast.com/Pages/FAQListViewer.aspx?topic=Cable&folder=f601e707-c196-4ef2-87b3-9be44fce7af6> (last visited July 13, 2010).

<sup>985</sup> Comcast also is working on solutions to enable closed captioning that is included in long-form video content provided on Fancast, and aims to make such solutions available to customers later this year.

<sup>986</sup> Comcast also makes billing statements available, upon request, in Braille or large-print format for its visually-impaired customers, and this option is available to Comcast's cable, voice, and HSI customers, as well.

<sup>987</sup> FCC Public Notice, FCC Announces Establishment of Technical Working Group to Study Digital Closed Captioning and Video Description Issues, Appointment of Members, Agenda for First Meeting, DA 09-995 (May 1, 2009) (identifying NBC representative, Greg DePriest, as a member of the working group).

<sup>988</sup> See James Hibberd, *Closed out; The Digital Revolution Has Made TV More Ubiquitous Than Ever-Except for Viewers Who Need Captioning*, Television Week, June 18, 2007 (discussing the 2007 launch of NBC's web player that included closed captioning capabilities); see also *NBC Gets with the Program and Offers Captioned Online Video, TV Jots*, available at <http://tvjots.com/nbc-gets-with-program-and-offers/> (last visited July 20, 2010).

<sup>989</sup> In addition to serving those with disabilities, NBCU works to educate its audience about disabilities and helps recognize significant achievements in the disabilities community. For example, NBCU's local and national news coverage has highlighted issues affecting those with disabilities. See, e.g., Meredith Vieira, *Disability Awareness*, NBC.com, <http://www.themoreyouknow.com/disability-awareness/> (last visited July 16, 2010) (explaining disability rights, discrimination, how to overcome attitudinal barriers and what people can do to empower those with disabilities); *Investigation: Protecting disabled adults* (NBC Philadelphia television broadcast Oct. 23, 2009) (explaining endemic problems in Pennsylvania's disability care laws and encouraging viewers to contact state legislators); *Disabled riders facing devastating MTA cuts* (NBC New York television broadcast May

Applicants are committed to improving, wherever feasible, the accessibility of their services to people with disabilities. On July 6, 2010, Applicants announced that Comcast will be establishing a Diversity Advisory Council that will include representatives of diversity communities, including the disabilities community.<sup>990</sup> The Council will facilitate open communication regarding the development, monitoring, and evaluation of initiatives relating to customers with disabilities. The Council also will provide advice to the senior executive teams at Comcast and NBCU regarding the companies' development and implementation of a strategic plan to improve their practices in this area post-transaction. Applicants would welcome COAT's involvement in these efforts.

Applicants further note that Congress is actively considering bills that would address, on an industry-wide basis, most of the issues discussed in COAT's comments, such as new requirements relating to video description and Internet-based services and equipment.<sup>991</sup> COAT, the cable and content industries, and numerous other stakeholders have been participating in these legislative efforts, with constructive results.<sup>992</sup> Applicants welcome the opportunity to work with COAT and others as the legislative process continues to move forward this year, and believe that COAT's proposals should be considered in that context, involving all stakeholders, rather than a Commission transaction review proceeding involving just Applicants.

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14, 2010) (reporting about transportation cuts that would leave those with disabilities with little or no access to key bus lines).

<sup>990</sup> See Hispanic MOU at 3-4, *supra* note 120.

<sup>991</sup> H.R. 3101, the Twenty-First Century Communications and Video Accessibility Act of 2010, was approved by the House Subcommittee on Communications, Technology and the Internet on June 30, 2010, and the House Energy and Commerce Committee is expected to consider the measure on the day of this filing. Likewise, the Senate Commerce Committee approved companion legislation, S. 3304, the Equal Access to 21st Century Communications Act, on July 15, 2010.

<sup>992</sup> See, e.g., <http://www.coataccess.org/> (detailing COAT's advocacy on the House and Senate legislation).

**D. Cable Prices**

Since the announcement of the deal, Applicants have stressed that this transaction should not affect cable pricing to consumers. A few commenters and petitioners made generalized attacks on cable prices that are not even specifically levied against Comcast.<sup>993</sup> Because these attacks are meritless, inaccurate, and not related to the transaction, the Commission should not consider them in its review.

Nevertheless, Applicants believe it is important to correct some of the inaccurate statements made by parties regarding pricing and the marketplace. A multitude of factors go into Comcast's decisions regarding the packaging and pricing of the services it offers, and Comcast believes that its offerings strike the appropriate balance by offering both high-value and high-quality service. One of the most prominent factors is the competition Comcast faces in the video distribution marketplace. Comcast competes against DirecTV and Dish nationally in every market in which it provides service. In many of those markets, Comcast also faces competition from telephone companies like AT&T and Verizon, as well as overbuilders like RCN, WOW!, Knology, and SureWest. And these competitors are fierce. In about 15 years, DirecTV and Dish have become the second and third largest MVPDs, respectively.<sup>994</sup> And Verizon and AT&T are now both top ten MVPDs and continue to grow every quarter.<sup>995</sup>

Along the way, Comcast – like its rivals – has continuously improved the value proposition for customers. Prices may have increased, but quality and choice have increased far

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<sup>993</sup> See Cooper/Lynn Decl. at 33-34; Sen. Franken Comments at 2.

<sup>994</sup> See NCTA, Top 25 Multichannel Video Programming Distributors as of Mar. 2010, *available at* <http://www.ncta.com/Stats/TopMSOs.aspx> (last visited July 16, 2010).

<sup>995</sup> *Id.*

more. Abundance and diversity of programming have never been greater, and cable is a better value proposition than ever.

There is little doubt that consumers are getting more for their money than they did in the past. Indeed, at a little over \$2 a day, cable is about the price of a morning cup of coffee. On a monthly basis, standard cable is less expensive than taking a family of four to the movies once and a fraction of the price of taking the family to a single sporting event. The average cable household viewing time is 310.5 hours per month; compare that to one three-hour ballgame or a couple of hours at a movie theater. When adjusted for inflation, the “price per viewing hour” of cable service has decreased 26 percent over the last 10 years.<sup>996</sup> Plus, the quality of the programs Comcast delivers has increased, as has the versatility of the service (*e.g.*, VOD, which offers thousands of choices, most at no additional charge).

In addition, many of Comcast’s customers take advantage of promotional or multi-product discounts. Comcast offers HSI and digital voice services in addition to video, and consumers who buy two- or three-product packages enjoy significant savings as compared to the prices of the services when purchased separately. Other customers receive promotional price discounts, *e.g.*, when they first sign up for service or when they agree to a service-level upgrade. The growing use of such discounts is often omitted from cable price surveys, and that has the effect of skewing the results.

Comcast is focused on controlling costs, which ultimately benefits its customers. Like all of its competitors, however, Comcast must adjust prices to account for the increased costs of

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<sup>996</sup> See The Proper Measure of Cable’s Value, National Cable & Telecommunications Association, *available at* <http://www.ncta.com/PublicationType/MiscellaneousPublication/The-Propor-Measure-of-Cables-Value.aspx> (last visited July 14, 2010).

doing business. It's a fact of life – separate and apart from the proposed transaction – that programming costs have risen and will likely continue to rise.<sup>997</sup> Notably, many of our competitors, including AT&T, Dish Network, DirecTV, and Verizon, have increased their prices by as much or more than Comcast, reflecting the continuing cost pressures of the business.<sup>998</sup>

**E. City of Seattle *et al.* Comments**

The City of Seattle and several other local franchise authorities (“LFAs”) seek to use this proceeding as a forum to raise various issues pertaining to rate regulation of Comcast’s cable systems. That strategy is inconsistent with longstanding Commission precedent, and, in any event, the arguments presented by Seattle *et al.* are clearly at odds with the regime of cable rate regulation established by Congress and the Commission.<sup>999</sup>

**1. Bona Fide Rate Disputes Should Be Addressed Through the Established Rate Review Process.**

If the LFAs have any *bona fide* grievances with Comcast’s rates, those grievances should be resolved through the local rate regulation process. The LFAs do not deny that the Commission’s rate regulation framework leaves them with initial responsibility for basic service and equipment regulation.<sup>1000</sup> Yet, none of the LFAs has taken any action with regard to the

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<sup>997</sup> See, e.g., Mike Farrell, *Tapped Out: How Much Will Consumers Pay for TV?*, Multichannel News, Apr. 19, 2010, available at [http://www.multichannel.com/article/451629-Tapped\\_Out.php](http://www.multichannel.com/article/451629-Tapped_Out.php); Roger Cheng, *DirecTV CEO: Programming Costs Will Continue To Be a Challenge*, Wall St. J., May 26, 2010, available at <http://online.wsj.com/article/BT-CO-20100526-711803.html>.

<sup>998</sup> See, e.g., Todd Wallack, *Cable TV, Satellite Prices Rise*, *Boston Globe*, Jan. 22, 2008, available at [http://www.boston.com/business/technology/articles/2008/01/22/cable\\_tv\\_satellite\\_prices\\_rise/](http://www.boston.com/business/technology/articles/2008/01/22/cable_tv_satellite_prices_rise/).

<sup>999</sup> The following discussion addresses the overarching jurisdictional issues raised by Seattle *et al.* without burdening the Commission or this proceeding with a comprehensive discussion of every particular rate regulation matter raised by the LFAs.

<sup>1000</sup> Indeed, as their comments acknowledge, “many of the LFAs are empowered to regulate basic service, equipment and installation rates in accordance with FCC regulations and local rules, and are certified rate regulation authorities that regularly monitor and review Comcast’s rate making practices and calculations.” City of Seattle *et al.* Comments at 3. Pursuant to the 1992 Cable Act, the Commission has given local franchising authorities initial

various rate allegations advanced in their comments. It appears the LFAs are seeking to extract concessions in the context of this proceeding that are not merited under applicable rate regulations. Comcast respectfully submits that any *bona fide* rate issues should be addressed by the LFAs through the established rate regulation framework, rather than in the context of a transactional review that has no bearing on the LFAs' rate allegations.<sup>1001</sup>

**2. The LFAs Seek Rate Regulation of Deregulated Systems and Services.**

The LFAs seek to impose comprehensive rate restraints through this proceeding without acknowledging that Comcast is no longer subject to rate regulation in significant portions of the country, including several of the participating LFA communities.<sup>1002</sup> Even for those Comcast communities still subject to local rate regulation, the LFAs' comments are jurisdictionally flawed. The LFAs repeatedly ask the Commission to regulate *non*-basic rates, despite the fact that Congress deliberately limited the permissible scope of cable rate regulation to basic service and associated equipment. Moreover, if the LFAs were to prevail in this proceeding, the perverse result in many instances would be an increase in the rates charged to Comcast's basic-

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responsibility for administering the rate regulation of basic service and equipment. In order to regulate basic service and equipment rates, a franchising authority must certify to the Commission that it "will adopt and administer regulations with respect to the rates for the basic service tier that are consistent with the regulations prescribed by the Commission for regulation of the basic service tier." 47 C.F.R. § 76.910(b)(1).

<sup>1001</sup> The problem with addressing community-specific rate issues in this proceeding is well illustrated by the suggestion at the conclusion of the LFAs' comments that there *may* have been a deficiency in the written notices Comcast submitted to certain Washington State LFAs in March 2010. City of Seattle *et al.* Comments at 18. No Washington State LFA has complained to Comcast about that notice, and Comcast cannot discern from the comments the precise nature of the purported deficiency. Comcast is, of course, prepared to work with the affected LFAs to address any legitimate notice concerns. Comcast submits, however, that any notice deficiencies should have been identified in a timely manner at the local level, where such notice issues are typically addressed. This proceeding is not the appropriate forum to resolve factual questions about community-specific notices wholly unrelated to the NBCU Transaction.

<sup>1002</sup> The LFAs' repeated claims that Comcast is trying to evade applicable rate regulations are irrelevant to the vast majority of Comcast's communities, in which Comcast is not currently subject to rate regulation due to a combination of "effective competition" determinations by the Commission and various deregulatory determinations by state and local authorities.

only subscribers. Even a cursory review of a few of the issues raised in the comments reveals the factual and legal flaws undermining the LFAs' attack.

*HD Technology Fee.* Comcast's introduction of an HD Technology Fee is consistent with Commission regulations, closely matches the HD offerings of Comcast's competitors,<sup>1003</sup> and ultimately benefits consumers.<sup>1004</sup> The LFAs ignore the critical fact that basic-only subscribers do not pay the HD Technology Fee because they do not utilize the full range of advanced network technologies used by customers of unregulated services – instead, they will pay only for the set-top box equipment they need at rates at or below the maximum permitted rate. In short, the LFAs are complaining about a charge that applies only to services (like most cable offerings today) that Congress has expressly placed outside the permissible scope of cable rate regulation. In addition, the LFAs contend that the HD Technology Fee evades the rate rules, and that Comcast should be required to file an FCC Form 1235 with local regulators before imposing *any* charge related to network upgrade costs.<sup>1005</sup> Comcast agrees that a new Form 1235 filing would be appropriate if the Company were seeking to further increase basic service rates to

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<sup>1003</sup> AT&T U-verse charges a \$10 HD Technology Fee. DirecTV charges a \$10 HD Access Fee. Dish charges a \$10 HD Enabling Fee. DirecTV and Dish recently announced promotional offers of "Free HD for Life." However, these offers are short-term promotions, and include significant restrictions such as term commitments with early termination fees, requirements for automatic bill pay, and restrictions on levels of service eligible for the promotion.

<sup>1004</sup> In the past, Comcast typically charged customers for each HD set-top box they leased based on the higher cost of HD-capable set top boxes. In contrast, when the HD Technology Fee is fully implemented, an HD customer will pay for HD on a whole-home basis (through the HD Technology Fee) regardless of the number of the customer's HD connections and, as a result, will generally see a savings on his or her monthly bill. Moreover, the HD Technology Fee better reflects the substantial investments in network capacity and equipment that allow Comcast to deliver more HD programming, such as expanded HD VOD libraries.

<sup>1005</sup> City of Seattle *et al.* Comments at 7-9.

recover additional upgrade costs.<sup>1006</sup> That is not the case here. The HD Technology Fee is an unregulated rate imposed on customers subscribing to unregulated levels of service. A new Form 1235 is not required where, as here, the cable operator is not trying to recover new upgrade costs by increasing regulated basic service rates.<sup>1007</sup>

*DVR Service Fee.* The LFAs' claims regarding Comcast's DVR service fee is similarly misguided.<sup>1008</sup> Contrary to the LFAs' assertion, there is nothing wrong with imposing an unregulated DVR service fee in addition to a regulated equipment fee. In fact, Comcast's DVR service fee has been in existence for many years, and none of the LFAs, in their administration of cable regulation, has ever denied Comcast's right to impose an unregulated DVR service fee.<sup>1009</sup> The DVR cable box provided by Comcast is simply a converter with storage. It is Comcast's *DVR service* that organizes the programming through a guide, organizes the recorded content,

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<sup>1006</sup> In fact, the Commission created Form 1235 in 1995 so that cable operators (struggling under the burdens of the new "benchmark" rate regime) could more easily recover the cost of significant network upgrades through their *regulated* service rates.

<sup>1007</sup> It is noteworthy that the LFAs' own expert witness – Richard Treich – is on record at the FCC stating that Form 1235 is unnecessary in light of current marketplace incentives. In particular, Mr. Treich said that: "In the current cable marketplace, there is no need for the Form 1235. . . . [I]t is clear that a cable operator has every incentive to upgrade its plant, and can easily recover all the costs of the upgrade, based on the new, high-value, unregulated service the upgraded plant can provide. . . . The FCC could eliminate this Form almost entirely." Letter from Libby Beaty, Executive Director, NATOA to Marlene H. Dortch, Secretary, FCC., MB Docket No. 02-144, at 8-9 (Oct. 7, 2004) (attaching white paper), *available at* <http://fjallfoss.fcc.gov/ecfs/document/view?id=6516492810>. Ironically, in arguing for a Form 1235 filing, the LFAs are effectively advocating an increase in the basic service rate. As just explained, the only reason to file a Form 1235 would be to justify an increase in the basic service rate to a local rate regulator. As Comcast is not seeking to impose those costs on basic-only customers, the LFAs' demand for the filing of Form 1235s is misguided and must be rejected.

<sup>1008</sup> See *City of Seattle et al.* Comments at 13-14.

<sup>1009</sup> Comcast's competitors, unencumbered by any rate regulation, charge their customers in the same way. A TiVo customer, for example, typically buys the TiVo DVR (box), then pays TiVo a monthly fee (for *DVR service*).

allows for customized recording settings, and – a most recent enhancement – provides the ability to program the DVR over the Internet when away from home.<sup>1010</sup>

*HD Additional Outlet Service Fee.* The LFAs argue that Comcast’s “High Definition Additional Outlet Charge” in Washington State should be subject to local rate regulation.<sup>1011</sup> However, as they acknowledge, the Commission addressed the issue of “additional outlet” charges a half dozen years ago and concluded that additional outlet fees are beyond the scope of basic regulation, provided such fees are assessed only on the delivery of non-basic services.<sup>1012</sup> Contrary to the LFAs’ suggestion,<sup>1013</sup> the contested Additional Outlet fees are unregulated under this Commission precedent because they are imposed by Comcast on the delivery of non-basic service. Basic-only customers are not assessed any Additional Outlet fees. Any of the equipment they use to receive basic service (including basic service offered in HD) at additional outlets is made available by Comcast at rates fully justified using the FCC Form 1205 without the imposition of a supplementary Additional Outlet service charge.<sup>1014</sup>

*Basic-Only HD Equipment Fee.* The LFAs also are mistaken in arguing that Comcast must charge all basic-only customers a \$1.00 receiver charge, regardless of whether the basic-

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<sup>1010</sup> DVR service requires ongoing, two-way communication between the Comcast headend and the customer premises equipment to operate.

<sup>1011</sup> *Id.* at 14-16.

<sup>1012</sup> *Id.* at 15 & Ex. 1 (Declaration of Richard D. Treich at 5).

<sup>1013</sup> *Id.* at 15 (claiming that the Commission precedent on additional outlets is “inapposite and distinguishable” because “[h]ere, the additional HD outlets at issue can be used to receive only the basic service tier, so the issue of additional outlets used to receive only non-regulated services is not raised.”).

<sup>1014</sup> The fact that Basic Service may include HD channels that are available on additional outlets is legally irrelevant because Comcast makes these Basic HD channels available on additional outlets without imposing any Additional Outlet charge.

only customer selects a standard-definition (“SD”) receiver or an HD receiver.<sup>1015</sup> The Commission never intended to deny cable operators the ability to charge basic-only customers the cost of advanced equipment that they actually use. As certain basic channels are now offered in HD, it follows that some basic-only customers may want Comcast to provide an HD-capable receiver. For that reason, Comcast is establishing different rates for SD basic-only receivers and HD basic-only receivers. LFAs with the requisite regulatory authority will have the opportunity to review the cost justification of each charge through their annual rate review.<sup>1016</sup>

*Impact on Retail Equipment.* The LFAs’ argument that Comcast’s HD Technology Fee is “anti-competitive and runs afoul” of Section 629 of the Act and the FCC’s rules is wrong due to an apparent misunderstanding of the facts. The LFAs contend that the fee “deters consumers from purchasing third-party receivers and manufacturers from designing and constructing them because it is highly unlikely that most subscribers would choose to pay for receivers twice – once at retail and again in the HD Technology Fee.”<sup>1017</sup> As explained above, the HD Technology Fee will be implemented as a fee covering the whole home, regardless of the number of HD devices in the home.<sup>1018</sup> It is not a fee for individual HD devices, nor does it provide a “subsidy” for

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<sup>1015</sup> As shown in Comcast’s Form 1205, Comcast’s \$1.00 Basic-Only receiver charge was calculated based on Comcast’s SD receivers. This approach produces a very modest equipment rate that benefits basic-only customers. It is also consistent with Commission policy (established long before the roll-out of HD receivers) to avoid having basic-only customers subsidize advanced equipment that they do not use. *Implementation of Section 301 (j) of the Telecommunications Act of 1996; Aggregation of Equipment Costs by Cable Operators*, 11 FCC Rcd 6778 ¶ 23 (1996) (“We conclude that Congress intended to ensure that basic-only subscribers not bear the costs of equipment used by subscribers taking services in addition to basic.”).

<sup>1016</sup> If Comcast were forced to combine SD and HD equipment costs in a single, hybrid basic-only receiver rate, based on the equipment basic-only customers actually use, the hybrid price for basic-only customers would increase from the low \$1.00 rate charged for SD equipment.

<sup>1017</sup> Seattle Comments at 16-17.

<sup>1018</sup> The HD Technology Fee is currently being applied on a whole-home basis in some markets, and that policy will be extended across the rest of Comcast’s footprint over the next several months.

leased devices.<sup>1019</sup> In any event, customers who use Unidirectional Digital Cable Ready Products (“UDCPs”) purchased at retail, such as DVRs manufactured by TiVo and Moxi, and do not lease set-top box equipment from Comcast, are not subject to the HD Technology Fee.<sup>1020</sup>

**F. City of Detroit Comments**

The City of Detroit’s comments provide no basis for the Commission to deny or condition the proposed transaction. The City’s sole grievance concerns a state-wide franchising statute enacted by the Michigan Legislature in 2006 – a grievance which the City belatedly took to federal court on the same day it filed its comments in this proceeding.<sup>1021</sup> As such, the issues raised by the City will be resolved in the federal court case and need not be addressed by the Commission in this proceeding.

Comcast operates in Detroit pursuant to a state Uniform Franchise granted under the Uniform Video Services Local Franchise Act, P.A. 480, passed by the Michigan Legislature in 2006 and effective January 1, 2007. Consistent with the Commission’s holdings in the First Report and Order on Section 621,<sup>1022</sup> the Michigan Act streamlined the franchising process in Michigan and limited the scope of franchise obligations a local franchise authority could

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<sup>1019</sup> Comcast acknowledges that a local government relations employee sent an e-mail response to a single local regulator’s inquiry, which response included the incorrect statement that the HD Technology Fee was “inclusive of the use of an HD cable box.” This may be the source of the LFAs’ misunderstanding of the facts.

<sup>1020</sup> The HD Technology Fee reflects Comcast’s investment in the infrastructure necessary to deliver HD VOD content to Comcast customers, among other things, and UDCPs cannot access such interactive content. Consequently, a customer who uses a UDCP and does not lease a set-top box, is not charged the Fee. Moreover, contrary to the implication in the LFAs’ comments, Comcast strongly supports efforts to promote a retail marketplace for navigation devices, consistent with the goals of Section 629 and the Commission’s implementing rules. *See* Comments of Comcast Corporation, CS Docket No. 97-80, PP Docket No. 00-67 (June 14, 2010); Reply Comments of Comcast Corporation, CS Docket No. 97-80, PP Docket No. 00-67 (June 28, 2010).

<sup>1021</sup> *City of Detroit v. Comcast of Detroit, Inc.*, Case No. 2:10-cv-12427 (E.D. Mich., filed June 21, 2010). The “Claim of Unconstitutionality” is an exhibit to the City’s Comment.

<sup>1022</sup> *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101 (2007).

demand. In compliance with the state law, Comcast submitted a Uniform Franchise to the City and is operating pursuant to that franchise.<sup>1023</sup> The City's numerous allegations of noncompliance and malfeasance are all predicated on the baseless notion that Comcast remains bound by a franchise agreement that was entered into in 1985 and that expired on February 28, 2007. In fact, Comcast's operations in the City are governed by the new state Uniform Franchise, and Comcast is in full compliance with the franchise.

Previously, the City and Comcast had a dispute over an attempt by the City to make an unauthorized modification to the Uniform Franchise in order to impose a new two percent PEG fee on City residents. On June 19, 2007, the City filed a complaint with the Michigan Public Service Commission ("MPSC") regarding this dispute.<sup>1024</sup> The City refused to participate in an informal mediation proposed by the MPSC.<sup>1025</sup> When the MPSC subsequently sought to commence a proceeding on the City's complaint, the City refused to participate.<sup>1026</sup> On July 1, 2009, the MPSC dismissed the City's complaint without prejudice due to its failure to prosecute the matter.<sup>1027</sup> To the extent the City's comments are an attempt to resurrect this three-year-old grievance over the Uniform Franchise, the appropriate forum for resolving its complaint is at the state level or in the federal court lawsuit, not as part of this proceeding.

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<sup>1023</sup> The City's web page shows that both Comcast and AT&T are operating in the City pursuant to Uniform Franchises under the State statute. See [www.detroitmi.gov/DepartmentsandAgencies/CableCommission/CableVideoServices.aspx](http://www.detroitmi.gov/DepartmentsandAgencies/CableCommission/CableVideoServices.aspx) (last visited July 16, 2010). Therefore, the City's claim that Comcast "is currently operating as a holdover tenant under its expired 1985 franchise," City of Detroit Comments at 3 n.1, is false.

<sup>1024</sup> *In the Matter of the Verified Complaint of City of Detroit for Resolution of a Dispute with Comcast of Michigan under the Uniform Video Services Local Franchise Act*, Case No. U-15329, Order (July 1, 2009). The parties had a dispute over what the Michigan Act allows the City to demand in the way of PEG fees.

<sup>1025</sup> *Id.* at 1.

<sup>1026</sup> *Id.* at 2.

<sup>1027</sup> *Id.*

The City’s reliance on two prior lawsuits in Michigan as evidence of Comcast’s alleged malfeasance fails because the City’s portrayals of both cases are inaccurate. The *City of Dearborn*<sup>1028</sup> case is well known to the Commission – the federal court referred to the Commission several questions regarding the carriage of PEG channels in digital format. As the Commission is also aware, the parties (which did not include the City of Detroit) reached a settlement fully resolving the proceeding.<sup>1029</sup> Similarly, the City’s statement that Comcast settled the *City of Flint* case “so no court order binding on Comcast that would affect other communities resulted”<sup>1030</sup> is untrue. The case never went beyond the filing of a complaint and was amicably settled between the parties with no indication from the Court as to the merits of the case.<sup>1031</sup>

The City’s overheated rhetoric regarding Comcast’s character fails to provide any basis for denying the transaction. Whatever the reason for Detroit making these statements now, the City is on record with statements that are decidedly to the contrary. As recently as April 24, 2010, in declaring that day “Comcast Cares Day,” the City issued a Testimonial Resolution stating that Comcast “not only provides quality communications products and services but enriches the communities it serves.” In fact, the day after the City filed its comments impugning Comcast’s character, the City Council hosted Comcast and a group of local high school students

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<sup>1028</sup> *City of Dearborn v. Comcast of Mich. III, Inc.*, No. 08-10156, 2008 WL 4534167 (E.D. Mich. Nov. 25) (“*City of Dearborn*”).

<sup>1029</sup> Letter from Wesley Heppler, Davis Wright Tremaine LLP, Counsel for Comcast, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 09-13, CSR-8128 (Dec. 23, 2009). The City relies on an unpublished ruling (earlier in the Dearborn litigation) on a motion to dismiss, but fails to disclose that the ruling was expressly limited in its effect: “The Court’s ruling that the Local Franchise Act is preempted by federal law simply means the Court concludes that Plaintiffs state a cause of action under their various franchise agreements.” *City of Dearborn*, 2008 WL 4534167 at \*6. The Court never ruled on the merits of the plaintiffs’ claims nor was the preemption issue further litigated or subject to appeal.

<sup>1030</sup> City of Detroit Comments at 10 n.5.

<sup>1031</sup> *City of Flint v. Comcast of Flint, Inc.*, Case No. 2:08-cv-14871 (E.D. Mich. 2008). Flint was represented by the same counsel as represents Detroit in this matter.

at a Council meeting to recognize the award of 15 \$1,000 scholarships to the students under Comcast's Leaders & Achievers scholarship program. Finally, the City's attempt to portray itself as a representative of grievances shared across Michigan is belied by the dozens of favorable comments filed by local and state officials, community organizations, and businesses in Michigan.<sup>1032</sup>

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<sup>1032</sup> See, e.g., Letter from Gerald Brown, Mayor, City of Trenton, Michigan to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 7, 2010); Letter from Gary Burtka, Mayor, City of Allen Park, Michigan, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Apr. 22, 2010); Letter from Victor W. Loomis, Jr., Mayor, City of East Lansing, Michigan, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 7, 2010); Letter from Karen F. Dunigan, Mayor, City of Jackson, Michigan, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 15, 2010); Letter from Robert A. Ficano, County Executive, Wayne County, Michigan, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 4, 2010); Letter from Ahmad Chebbani, Chairman and Co-Founder, American Arab Chamber of Commerce (Dearborn, Michigan), to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 21, 2010); Letter from Jennifer Giering, President, Dearborn Chamber of Commerce (Michigan), to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 4, 2010); Letter from Hassan Jaber, Executive Director, Arab Community Center for Economic and Social Services (Michigan), to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56 (Mar. 29, 2010); Letter from David Palsrok, Vice President, Government Relations, Small Business Association of Michigan, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 17, 2010); Letter from Kristin Beltzer, Senior Vice President, Government Relations, Lansing Regional Chamber of Commerce (Michigan), to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Apr. 29, 2010); Letter from Barbara Pyle, Executive Director, MacMedia (Michigan), to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Apr. 16, 2010). See also letters from 25 State Senators, Representatives, and government officials, including, *inter alia*, Letter from Terri Lynn Land, Secretary of State, Michigan, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 18, 2010); Letter from Bruce Patterson, Michigan State Senator, 7<sup>th</sup> District, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 16, 2010); Letter from Ron Jelinek, Michigan State Senator, 21<sup>st</sup> District, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 10, 2010); Letter from Mike Nofs, Michigan State Senator, 19<sup>th</sup> District, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 8, 2010); Letter from John J. Gleason, Michigan State Senator, 27<sup>th</sup> District, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 11, 2010); Letter from Gerald Von Woerkom, Michigan State Senator, 34<sup>th</sup> District, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 9, 2010); Letter from Roger Kahn, M.D., Michigan State Senator, 32<sup>nd</sup> District, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 9, 2010); Letter from Fred Durhal, Jr., Michigan State Representative, 6<sup>th</sup> District, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 10, 2010); Letter from Richard LeBlanc, Michigan State Representative, 18<sup>th</sup> District, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56 (June 10, 2010); Letter from Lee Gonzalez, Michigan State Representative, 49<sup>th</sup> District, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Mar. 26, 2010). Favorable comments also were filed by numerous Detroit community organizations and officials, see, e.g., Letter from Gil Hill, Former President of the Detroit City Council, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 11, 2010); Letter from Paul Bridgewater, President and CEO, Detroit Area Agency on Aging, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Apr. 26, 2010); Letter from Rev. Horace J. Sheffield, President, Detroit Association of Black Organizations, to Julius Genachowski, Chairman, FCC, *et al.*, MB Docket No. 10-56 (Mar. 29, 2010); Letter from John George, Founder and President, Motor City Blight Busters, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 7, 2010); Letter from Kenneth Harris, President and CEO, International Detroit Black Expo, Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56 (Apr. 6, 2010).

**G. Public, Educational, and Governmental Programming**

The National Association of Telecommunications Officers and Advisors (“NATOA”), the Alliance for Communications Democracy (“ACD”), and the Greater Metro Telecommunications Consortium (“GMTC”) (collectively, “PEG Commenters”), in largely duplicative comments, have raised questions and proposed new requirements regarding PEG channels. Applicants are pleased to provide certain requested clarifications regarding the voluntary PEG commitments set forth in their Public Interest Statement, but there is no basis for the additional requirements the PEG Commenters seek to impose.

The PEG Commenters fail to offer any evidence that the proposed transaction will have any harmful effect on PEG programming, which is already covered by Section 611 of the Act, state franchising laws, and the terms of local cable franchise agreements.<sup>1033</sup> They fail to provide any reason why the Commission should allow this transaction review to be used to rewrite Section 611 and to unilaterally modify the PEG provisions of existing franchise agreements and state franchising statutes. And they fail to demonstrate that the proposals they make are in the public interest, or that there is any reason for applying them to Comcast but not to other cable operators.

**1. Digital Carriage and Channel Placement**

The PEG Commenters focus primarily upon Applicants’ Commitment # 11.<sup>1034</sup> The PEG Commenters complain that this commitment is inadequate and propose that several additional PEG-related conditions be added. There is no basis for these suggestions.

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<sup>1033</sup> The PEG Commenters scarcely attempt to demonstrate that their concerns are transaction-specific. These conclusory statements are devoid of any meaningful analysis that justifies raising these issues in this proceeding.

<sup>1034</sup> See Public Interest Statement at 68. Commitment # 11 provides: “With respect to PEG channels, Comcast will not migrate PEG channels to digital delivery on any Comcast cable system until the system has converted to all-

NATOA makes the startling suggestion that Comcast should be required to move all digital PEG channels *back to analog carriage*.<sup>1035</sup> Despite the fact that these PEG channels have already been transitioned to digital carriage in a manner consistent with local franchise agreements or specific state laws or by agreement of PEG programmers, NATOA would force PEG programmers to abandon the advantages of digital signal carriage to return to the lower quality analog delivery even as the world moves inexorably to digital transmission technologies.<sup>1036</sup> The PEG Commenters offer no evidence of their authority to speak for the numerous communities and states<sup>1037</sup> in which these digital transitions have been lawfully and willingly implemented.

The PEG Commenters request that Comcast be required to carry all PEG channels on the Basic Service Tier after the digital transition is complete.<sup>1038</sup> The national commitment that the PEG Commenters seek would conflict with those franchise agreements and state franchising

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digital distribution (*i.e.*, until all analog channels have been eliminated), or until a community otherwise agrees to digital PEG channels, whichever comes first.”

<sup>1035</sup> NATOA Comments at 5 (“We request that the Commission require Comcast to agree to move PEG channels *currently* being provided in a digital format back to an analog format.”) (emphasis in original).

<sup>1036</sup> Full-power TV broadcasters ended all analog transmissions more than a year ago. As discussed in the Public Interest Statement, Comcast is rapidly migrating expanded basic channels to digital-only delivery via the “Project Cavalry” initiative, which will be complete across approximately 80 percent of Comcast’s footprint by the end of this year. *See* Public Interest Statement at 18 n.19.

<sup>1037</sup> The overreaching nature of the PEG Commenters’ arguments is starkly illustrated by the following incorrect assertion: “Comcast does not promise to restore to analog the PEG channels that it has already digitized – the PEG channels, for example, that were converted to digital format in the state of Nevada.” Comments of Alliance for Communications Democracy at 9. Comcast, however, has no cable systems in the state of Nevada.

<sup>1038</sup> The PEG Commenters note that Comcast agreed to such a provision in the Consent Order resolving litigation in the State of Michigan. However, the Consent Order provision mandating continued carriage of digital PEG channels on the Basic Service Tier was entered into in the specific context of the Michigan state franchising law as well as applicable local franchise agreements. *See City of Dearborn*, 2008 WL 4534167.

laws that specifically allow for a greater flexibility in the placement of PEG channels.<sup>1039</sup> The Commission should decline the proposed national mandate to forever carry digital PEG channels on the Basic Service Tier (even if the cable system is rate-deregulated), as it would change applicable federal law and conflict with such state legislation and negotiated local agreements.

Next, PEG Commenters ask the Commission to confer on PEG channels special privileges regarding channel placement that Congress expressly conferred on broadcast channels but not on PEG channels.<sup>1040</sup> It has been and remains Comcast's position that it will comply with all applicable federal, state, and local requirements pertaining to PEG channel placement.<sup>1041</sup> The Communications Act clearly does not provide for any such PEG channel placement obligations (as it specifically does so provide for broadcast channels). Approval of this transaction is not the appropriate forum to enact the very channel placement obligations that Congress chose not to apply to PEG.<sup>1042</sup>

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<sup>1039</sup> See, e.g., Ariz. Rev. Stat. § 9-506(D)(1); Fla. Stat. § 610.109(6); La. Rev. Stat. § 1369(B)(3); Mo. Rev. Stat. § 67.2703(1)-(3); Nev. Rev. Stat. § 711.800(1); Ohio Rev. Code § 1332.30(A), (B); Tenn. Code Ann. § 7-59-309(h); Tex. Util. Code § 66.009(d); Va. Code Ann. § 15.2-2108.19; W. Va. Code R. § 150-26-1, Form No. 2 (PSC Franchise Agreement § 4(f)); Wis. Stat. § 66.0420(5)(a)(3)-(4).

<sup>1040</sup> See Section 614 of the Communications Act.

<sup>1041</sup> The PEG Commenters point to the inclusion of a "placement" provision in the Michigan Consent Order. However, the Consent Order provision requires *only* that Comcast comply with PEG channel placement obligations as they appear in its Michigan local franchise agreements. Likewise, PEG Commenters give the impression that a separate "Settlement Agreement" in that same proceeding requires Comcast to maintain the current channel placement of all PEG channels on Comcast systems throughout Michigan for a two year period. However, that Settlement Agreement provision applies to only three of the plaintiff communities in the proceeding and does not apply to any other Comcast system community in the State of Michigan.

<sup>1042</sup> The Alliance for Communications Democracy also seeks a condition that would require Comcast to provide PEG channels in the same "format" and with the same "features and functionality" as provided in the carriage of local television broadcast stations. Once again, the Communications Act provides for no such PEG carriage requirements. Further, there are significant legal and technical distinctions between broadcast stations and PEG channels (e.g., multicast rights and capabilities, HD transmissions, sub-carrier content, etc.) that could impose substantial cost, capacity, and technology burdens upon a cable operator if such a national carriage requirement were to be enacted as a condition to approval of this transaction.

## **2. Trials to Develop New Platforms for PEG Distribution**

Two of the PEG Commenters also raise questions and concerns regarding Applicants' Commitment # 12 to develop prospective new distribution platforms for PEG programming.<sup>1043</sup> These commenters take Comcast's offer to work with a specific number of communities on innovative new distribution models for PEG (using VOD and the Internet in addition to linear channels) and propose to turn this positive initiative into massive and unjustified burdens: requiring "VOD for PEG programming [in] all Comcast communities significantly sooner than three years" and substituting franchising authority fiat for a cooperative and constructive discussion in determining what PEG content is made available on VOD.<sup>1044</sup> Bearing in mind that the PEG Commenters have made no showing of transaction-specificity for any requirements in this area, and that Comcast's two largest competitors have no local PEG obligations whatsoever, the Commission should decline this invitation to subject Applicants' voluntary offer to significant regulatory burdens.

One of the primary goals in conducting tests is to determine not just that a technology works – of course PEG content can be carried on VOD – but to determine whether there are more technologically efficient and cost efficient means for PEG programmers to reach more residents of the local community.<sup>1045</sup> Simply putting PEG programming on VOD does not

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<sup>1043</sup> See Public Interest Statement at 69 ("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.").

<sup>1044</sup> GMTC Comments at 7-8; *see also* NATOA Comments at 9-10.

<sup>1045</sup> For example, when a program is placed on VOD today, that program is available to all VOD subscribers served off of the system headend. A headend can and often does serve multiple communities, and the VOD program cannot be directed at a single community served from that headend. Given the inherently local nature of PEG programming, testing for potential solutions that would allow targeting PEG VOD programming to specific communities is one worthwhile goal of a trial.

accomplish that goal. The proposed trials will help determine which programming receives a significant VOD response, which programming is accessed most frequently by those online, which programming is most effectively communicated on a traditional linear PEG channel, and what mix and interplay of these platforms is most effective in reaching residents.

While PEG Commenters argue that all PEG content should be available on all Comcast distribution platforms, this demand has no basis in federal law and wholly ignores the implications for capacity, cost, and effectiveness. The objective of Comcast volunteering to perform these trials is to find out what works best – from a technology perspective, from a cost perspective, and, perhaps most importantly, from a subscriber interest perspective – that will allow PEG providers to strengthen PEG programming. Comcast believes that a three-year period to evaluate such tests in five different communities is the appropriate process to find these answers.<sup>1046</sup>

#### **H. Piracy and the Enforcement of Copyrights**

Some petitioners imply that the combination of Comcast and NBCU may create an incentive to more strictly enforce copyrights online and that this would somehow harm consumers and violate the process set forth in the Digital Millennium Copyright Act (“DMCA”).<sup>1047</sup> Such assertions are without merit.

Both Comcast and NBCU understand the importance of protecting intellectual property, which is the foundation of U.S. creative industries. Copyright infringement, including online

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<sup>1046</sup> The PEG Commenters seek assurances that Comcast will reach out to local governments and the PEG community in conducting the proposed trials. Comcast believes that the only way such trials will be effective is through extensive collaboration with local community partners. Similarly, while Comcast has no interest in selecting the PEG content that is distributed in these trials, it is essential that Comcast work with local community partners to determine what programming they believe is more effectively distributed over a particular platform.

<sup>1047</sup> See, e.g., Cooper/Lynn Decl. at 57-64.

piracy, hurts content owners and, ultimately, consumers, because it undermines the ability of content owners to earn the necessary return on their investment in developing high-value content and makes them less likely to put such content online. Comcast will continue to support content owners, including by forwarding to its ISP customers the notices of alleged copyright infringement that it receives from content owners.<sup>1048</sup> In 2009, Comcast received over one million emails into its DMCA notification inbox and forwarded valid notification to its customers so that they could understand the basis for the notifications Comcast received from copyright owners.

At the same time, Comcast has a well-established policy and history of compliance with the DMCA that fairly balances the interests of consumers and content owners, and the proposed transaction will not change that. Comcast also supports better consumer education about copyright as well as effective efforts to encourage consumers to use legitimate sources of content instead of pirate sources. For instance, Comcast has developed and launched Fancast Xfinity TV in an effort to bring more content online in a legitimate way that is easy for consumers to access and use.

Comcast is clear and transparent regarding its copyright enforcement policy and compliance with the DMCA.<sup>1049</sup> It is Comcast's policy, in accordance with the DMCA, to reserve the right to terminate the HSI service provided to any customer or user who is either

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<sup>1048</sup> Pursuant to its Terms of Service, when Comcast receives a "satisfactory notice of claimed infringement," it notifies the customer, who then has the opportunity to counter. Comcast, Acceptable Use Policy for High Speed Internet Services, Section V, <http://www.comcast.net/terms/use/#dmca> (last visited July 16, 2010) (detailing Comcast's DMCA compliance procedures).

<sup>1049</sup> Comcast, Acceptable Use Policy for High Speed Internet Services, Section V, <http://www.comcast.net/terms/use/#dmca> (last visited July 1, 2010) (detailing Comcast's DMCA policy, including how copyright owners should report alleged infringements to Comcast and how a customer can submit a counter notification).

found to infringe a content owner’s copyright or other intellectual property rights, including repeat infringers.<sup>1050</sup> Comcast is open to considering a voluntary “graduated response” policy with the right balancing of interests, because ISPs should have a role in helping to educate users about copyright infringement and legitimate sources of content. But Comcast does not support termination of any customer’s Internet service based on mere allegations of copyright infringement or without meaningful due process protections.

It is in the best interests of customers, ISPs, and content owners that any graduated response or similar process be clearly designed and communicated, be based on reliable, accurate information, and have a straightforward mechanism for customers to seek more information about – or to challenge – copyright infringement notifications regarding their accounts. Contrary to commenters’ assertions, the proposed transaction does nothing to change the current need for Comcast to apply fair and workable solutions for customers, ISPs, and content owners alike with respect to online copyright infringement.

**I. Trail Blazers Comments**

The criticism leveled by the Portland Trail Blazers (“Trail Blazers”)<sup>1051</sup> that Comcast has limited consumers’ access to Trail Blazers games is misplaced and inaccurate.

Comcast SportsNet-Northwest (“CSN-NW”) launched in the fall of 2007. In the season before CSN-NW launched, 21 Trail Blazers games were not televised anywhere on any outlet. Upon launch, CSN-NW significantly increased the amount of Trail Blazers-related content,

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<sup>1050</sup> 17 U.S.C. § 512(i)(1)(A); Comcast, Acceptable Use Policy for High Speed Internet Services, Section V, <http://www.comcast.net/terms/use/#dmca> (last visited July 1, 2010) (“It is Comcast’s policy in accordance with the DMCA and other applicable laws to reserve the right to terminate the Service provided to any customer or user who is either found to infringe third party copyright or other intellectual property rights, including repeat infringers, or who Comcast, in its sole discretion, believes is infringing these rights.”).

<sup>1051</sup> Letter from Larry Miller, President, Portland Trail Blazers, Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56 (June 21, 2010).

including live games, available to local fans. Now, between the Trail Blazers' over-the-air partner (which telecast 15 Trail Blazers games during the 2009-10 NBA season), the package of games made available on CSN-NW, and games carried on nationally distributed networks (which telecast seven Trail Blazers games during the 2009-10 NBA season), *all* of the team's regular season games are televised. In addition, prior to the advent of CSN-NW, only about 10 Trail Blazers games were available in HD. Now, all 60 games shown on CSN-NW are available in HD.

During the 2009-10 season, in addition to 60 Trail Blazers games that CSN-NW telecast, CSN also telecast other valuable programming of local interest such as Trail Blazers pre- and post-game shows and game replays for every game telecast, summer-league games, live games of the Vancouver Canucks,<sup>1052</sup> and coverage of the Oregon Ducks and other college sports.

CSN-NW has every business incentive to seek more, not less, distribution for its network. The network's revenues derive primarily from per-subscriber affiliate fees and advertising revenue, both of which grow with increased distribution. CSN-NW has invested substantial capital and assumed the risk associated with launching a new television network, and the path to recovering its investment lies in maximizing distribution at fair terms.

To that end, since its launch, CSN-NW (with its full slate of Trail Blazers programming) has been, and continues to be, made available to every MVPD serving the Trail Blazers' market, including all of Comcast Cable's direct competitors. CSN-NW has worked diligently to secure distribution of CSN-NW and its Trail Blazers games to every local cable, satellite, and telco provider in its footprint, including running costly marketing campaigns to raise consumer

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<sup>1052</sup> The three-year Canucks deal expired with the 2009-2010 season. CSN-NW is in discussions with the Canucks about a potential renewal.

awareness of CSN-NW. Beyond Comcast Cable, 11 other providers, including direct competitors of Comcast Cable, currently carry CSN-NW – the best proof that the network is fairly priced and being made available on fair and reasonable terms. CSN-NW is carried by the following cable and telco companies: Ashland TV, Beaver Creek Telephone, BendBroadband, Canby Telcom, Comcast Cable, Country Cablevision, Frontier Communications,<sup>1053</sup> MINET Fiber, Monroe Telephone, Oregon Cable Group, Scio Cablevision, and Wave Broadband.

The distributors who are not carrying CSN-NW and the Trail Blazers games, including Charter, Dish Network, and DirecTV, have made the decision not to carry the network notwithstanding the fact that it is available to them on the same terms agreed to by other distributors. CSN-NW cannot force these distributors to carry the network. The main reasons proffered by these distributors for their lack of interest are the cost of the network; the breadth of the network’s geographic footprint;<sup>1054</sup> sufficient availability of other sports programming of local interest via other means, including the Blazers’ over-the-air telecasts on KGW and telecasts of other local sports programming, including Seattle Mariners games, on FSN Northwest;<sup>1055</sup> and, in the case of Charter, the lack of bandwidth to accommodate another analog channel.

The Trail Blazers ask that the Commission require Comcast to “authorize distribution of Trail Blazers games” by competing MVPDs. In fact, this request mischaracterizes the issue –

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<sup>1053</sup> Until about July 1, 2010, Frontier’s systems were owned and operated by Verizon.

<sup>1054</sup> As an example of the misplaced blame in Mr. Miller’s letter, the letter omits the fact that CSN-NW worked diligently with the NBA – subsequent to the launch of the network in 2007 – to expand the Trail Blazers’ television territory into additional areas in Oregon and Washington and, with the move of the Seattle SuperSonics to Oklahoma City in 2008, to expand distribution into the greater Seattle DMA. CSN-NW then secured distribution with the major cable distributors in the Seattle area. It is puzzling that Mr. Miller does not properly assign blame for the limitations on CSN-NW’s distribution to those MVPDs that have rejected carriage of the network to underserved fans.

<sup>1055</sup> FSN Northwest is owned by a controlled subsidiary of DirecTV, Inc.

Comcast already licenses CSN-NW and its Trail Blazers games for distribution by competing MVPDs and remains ready and willing, as it has been since CSN-NW's launch, to license CSN-NW and its Trail Blazers games to DirecTV, Dish Network, and Charter. But, as explained above, each of these distributors has chosen not to carry the network, even though they are being offered the same price that others in the market are willing to pay.

Moreover, there are already remedies available to distributors that believe that they are being treated unfairly (via a program access claim with the FCC) or that the price and terms being offered do not reflect the fair market value of CSN-NW's programming (via baseball-style arbitration under the *Adelphia Order*). Because none of these distributors has elected to avail itself of these remedies, it would appear that they simply are not interested in paying fair market value for carriage of the network.<sup>1056</sup>

CSN-NW shares the frustration of the Trail Blazers and local fans who cannot follow all of the team's game on TV because certain MVPDs have elected not to carry the network. This, however, has nothing to do with the transaction pending before the Commission.

#### **J. Property Damage Allegation**

Elan Feldman has filed an Opposition<sup>1057</sup> and Petition to Deny<sup>1058</sup> in this proceeding, but his concerns are not properly cognizable here. Because Mr. Feldman's grievance with Comcast

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<sup>1056</sup> Claims that the baseball-style arbitration process is too costly for distributors such as DirecTV or Dish Network fall flat, given that both of those MVPDs have not been shy about utilizing that process in recent years to challenge the terms and conditions of carriage offered by other Comcast-affiliated RSNs based on allegations that the terms and conditions offered by such RSNs did not reflect the fair market value of such RSNs' programming.

<sup>1057</sup> See Elan Feldman, Opposition to Comcast Acquisition of NBC Universal Due to Comcast's Failure to Serve the Public Interest, Convenience and Necessity, MB Docket No. 10-56 (Apr. 19, 2010).

<sup>1058</sup> See Elan Feldman, Petition to Deny Comcast Acquisition of NBC Universal Due to Comcast's Failure to Serve the Public Interest, Convenience and Necessity, MB Docket No. 10-56 (June 16, 2010).

is long-standing and entirely unrelated to the proposed transaction,<sup>1059</sup> it cannot properly bear on the issues before the Commission and should be ignored. Mr. Feldman's complaint stems from a 2005 claim for alleged trespass and property damage which Comcast has tried in good faith to resolve, including by offering to engage in binding arbitration pursuant to Fla. Stat. § 44.104. Mr. Feldman instead filed a lawsuit in May 2009 that is still pending in the Florida courts. To the extent that Mr. Feldman suggests that Comcast lacks the requisite character qualifications to support approval of the proposed transaction due to the existence of this unresolved dispute, it strains credulity to suggest that a single alleged episode of trespass or property damage could bear on the question of fitness to hold a Commission license.<sup>1060</sup> In any event, to accord any weight to allegations in a pending lawsuit would be inconsistent with longstanding Commission precedent.<sup>1061</sup>

## **VII. CONCLUSION**

The public interest benefits of this transaction have been demonstrated, and opponents' theories of competitive harm have been refuted. The proposed joint venture will serve the public

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<sup>1059</sup> Indeed, in response to a formal complaint Mr. Feldman filed in February 2009, the Commission previously informed Mr. Feldman that his claims "are not matters that are within the jurisdiction of the Commission." See Letter from Steven A. Broeckaert, Senior Deputy Chief, Policy Division, Media Bureau, to Elan Feldman (Mar. 10, 2009).

<sup>1060</sup> See, e.g., *In the Matter of Policy Regarding Character Qualifications in Broadcast Licensing; Amendment of Rules of Broadcast Practice and Procedure Relating to Written Responses to Commission Inquiries and the Making of Misrepresentations to the Commission by Permittees and Licensees*, Report, Order and Policy Statement, 102 FCC 2d 1179 ¶ 23 (1986) ("*Policy Regarding Character Qualifications*") ("We will be concerned with misconduct which violates the Communications Act or a Commission rule or policy, and with certain specified non-FCC misconduct which demonstrate the proclivity of an applicant to deal truthfully with the Commission and to comply with our rules and policies."); *In the Matter of Application of Texas RSA 1 Limited Partnership For Facilities in the Domestic Cellular Telecommunications Service on Frequency Block B in Market No. 652, Texas 1 – Dallam RSA*, Memorandum Opinion and Order, 7 FCC Rcd 6584 ¶ 8 (1992) (holding that "isolated violations . . . would simply not raise character qualifications questions").

<sup>1061</sup> See, e.g., *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*, Order on Reconsideration, 25 FCC Rcd 3492 ¶ 8 n.24 ("The Commission's longstanding policy is that '[w]e will not take cognizance of non-FCC misconduct . . . unless it is adjudicated.'") (quoting *Policy Regarding Character Qualifications* ¶ 48).

interest, convenience, and necessity. Applicants therefore respectfully request that the Commission expeditiously complete its review and grant the Applications.

Respectfully submitted,

**COMCAST CORPORATION**

/s/ Kathryn A. Zachem  
Kathryn A. Zachem  
Vice President, Regulatory and  
State Legislative Affairs  
COMCAST CORPORATION  
2001 Pennsylvania Ave, NW  
Suite 500  
Washington, DC 20006  
(202) 379-7134

**GENERAL ELECTRIC COMPANY**

/s/ Brackett B. Denniston, III  
Brackett B. Denniston, III  
Senior Vice President  
& General Counsel  
GENERAL ELECTRIC COMPANY  
3135 Easton Turnpike  
Fairfield, CT 06828  
(203) 373-2211

**NBC UNIVERSAL, INC.**

/s/ Richard Cotton  
Richard Cotton  
Executive Vice President  
& General Counsel  
NBC UNIVERSAL, INC.  
30 Rockefeller Plaza  
New York, NY 10112  
(212) 664-7024

*Additional Counsel*

Joseph W. Waz, Jr.  
Senior Vice President, External  
Affairs and Public Policy  
COMCAST CORPORATION  
One Comcast Center  
Philadelphia, PA 19103-2838  
(215) 286-7607

Ronald A. Stern  
Vice President & Senior Competition  
Counsel  
GENERAL ELECTRIC COMPANY  
1299 Pennsylvania Avenue, NW  
9<sup>th</sup> Floor  
Washington, DC 20004  
(202) 637-4372

Margaret L. Tobey  
Vice President, Regulatory Affairs  
NBC UNIVERSAL, INC.  
1299 Pennsylvania Avenue, NW  
9<sup>th</sup> Floor  
Washington, DC 20004  
(202) 637-4262

Jordan Goldstein  
Senior Director, Regulatory Affairs  
COMCAST CORPORATION  
2001 Pennsylvania Ave, NW  
Suite 500  
Washington, DC 20006  
(202) 379-7124

A. Richard Metzger, Jr.  
Regina M. Keeney  
Charles W. Logan  
Steven J. Berman  
Emily J.H. Daniels  
LAWLER, METZGER,  
KEENEY & LOGAN, LLC  
2001 K Street, NW, Suite 802  
Washington, DC 20006  
(202) 777-7700

Bryan N. Tramont  
Kenneth E. Satten  
David H. Solomon  
J. Wade Lindsay  
Natalie G. Roisman  
WILKINSON BARKER KNAUER, LLP  
2300 N Street, NW, Suite 700  
Washington, DC 20037  
(202) 783-4141

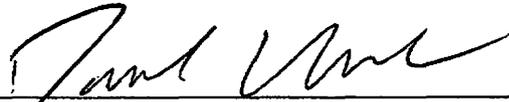
Michael H. Hammer  
James L. Casserly  
Michael D. Hurwitz  
Mia G. Hayes  
Mary M. Underwood  
Brien C. Bell  
WILLKIE FARR & GALLAGHER LLP  
1875 K Street, NW  
Washington, DC 20006  
(202) 303-1000

Arthur J. Burke  
Ronan P. Harty  
Rajesh James  
DAVIS POLK & WARDWELL LLP  
450 Lexington Avenue  
New York, NY 10017  
(212) 450-4000

July 21, 2010

**Declaration of David L. Cohen**

I, David L. Cohen, Executive Vice President of Comcast Corporation, hereby declare under penalty of perjury that the facts asserted in the foregoing Opposition To Petitions To Deny And Response To Comments as to Comcast Corporation and its affiliates are true and correct, to the best of my knowledge, information and belief.



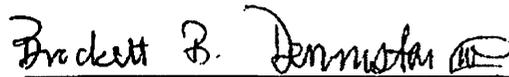
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David L. Cohen  
Executive Vice President, Comcast Corporation

July 21, 2010

**Declaration of Brackett B. Denniston, III**

I, Brackett B. Denniston, III, Senior Vice President and General Counsel of General Electric Company, hereby declare under penalty of perjury that the facts asserted in the foregoing Opposition To Petitions To Deny And Response To Comments as to General Electric Company are true and correct, to the best of my knowledge, information and belief.



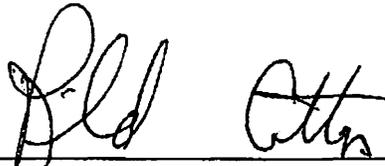
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**Brackett B. Denniston, III  
Senior Vice President and General Counsel  
General Electric Company**

July 21, 2010

**Declaration of Richard Cotton**

I, Richard Cotton, Executive Vice President and General Counsel of NBC Universal, Inc., hereby declare under penalty of perjury that the facts asserted in the foregoing Opposition To Petitions To Deny And Response To Comments as to NBC Universal, Inc. and its corporate affiliates are true and correct, to the best of my knowledge, information and belief.

Handwritten signature of Richard Cotton in black ink, consisting of stylized initials 'R Cotton'.

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Richard Cotton  
Executive Vice President and General Counsel  
NBC Universal, Inc.

July 21, 2010