

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

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In the Matter of: )

Applications for Consent to the )  
Transfer of Control of Licenses )

**General Electric Company,** )  
Transferor, )

to )

**Comcast Corporation,** )  
Transferee )

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MB Docket No. 10-56

To the Commission:

**REPLY TO OPPOSITION TO PETITIONS TO DENY AND RESPONSE TO  
COMMENTS OF WEALTHTV**

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## EXECUTIVE SUMMARY

In this Reply to Opposition to Petitions to Deny and Response to Comments, WealthTV establishes that the proposed merger of the Applicants in this proceeding would result in a vertically integrated entity that combines one of the nation's leading programming providers, NBCU, with the nation's dominant cable and broadband provider, Comcast, and establishes an entity that would have interests in as many as 54 cable channels, movie studios, and online properties, as well as Comcast Media Center and iN DEMAND. That combined entity would have a greatly enhanced ability and incentive to discriminate against unaffiliated programming channels, such as WealthTV and would harm the ability of independent programmers to reach viewers through both Applicant Comcast and other MVPDs. Applicants, in opposing WealthTV's Petition to Deny, have failed to overcome their burden to prove that this unprecedented Transaction serves the public interest.

Comcast has a clear history of treating independent programmers in a discriminatory manner with respect to carriage of channels in both the linear and the video-on-demand ("VOD") markets both through refusal of carriage and by other means, such as discriminatory channel placement. WealthTV has, in fact, experienced such discriminatory treatment by Comcast and has had a program carriage complaint pending at the Commission since April 2008. As a threshold matter, the Commission should not act on the Transaction until it resolves WealthTV's carriage complaint against Comcast.

WealthTV's concerns regarding foreclosure of carriage on Comcast systems are clearly justified. Comcast is the nation's largest cable operator and it dominates major metropolitan markets with demographics that are key for any programmer seeking advertising revenue. As the largest cable system operator in the nation, Comcast's 24 percent market share includes the

major metropolitan markets of Boston, Chicago, New York City, Philadelphia, San Francisco, and Washington, D.C. Comcast also controls, through the Comcast Media Center, independent programmers' access to the systems of numerous other cable operators throughout the United States and Comcast also has significant ownership in and/or programming carriage decision-making in Bresnan Cable (the nation's 13<sup>th</sup> largest MVPD) and numerous smaller cable systems that purchase content through Comcast.

The Venture would also have the incentive and ability to harm unaffiliated programmers with respect to all MVPDs as, with interests in 54 channels, the Venture is likely to employ channel tying (or bundling), thus squeezing WealthTV and other independents off third-party MVPD systems or forcing their placement on less-watched tiers.

If the Commission is to approve the Transaction, it should impose conditions on its approval to ameliorate the public interest harms. In its Petition to Deny, WealthTV has presented ample evidence of the reasons why the existing program complaint process fails to provide a meaningful remedy. The opportunity and incentive for Comcast to practice even greater discrimination against unaffiliated programmers will be greatly enhanced if the Transaction is approved. It is thus essential that any approval of the Merger be tempered by meaningful and practical conditions that will protect independent video programmer voices as existing remedies and those proposed by the Applicants are inadequate to afford such protection. Conditions imposed should include adoption of the Fair-Carriage Terms remedy proposed by WealthTV and a condition subjecting carriage complaints against the Venture to a timely baseball-style arbitration remedy. It is imperative, at minimum, that the Commission impose such conditions to alleviate the anticompetitive incentives this unique Transaction brings to the marketplace.

The Commission must also examine and address anticompetitive issues associated with iN DEMAND and Comcast Media Center / Headend-in-the-Sky (HITS). Those entities, being owned or majority-owned by Comcast, are critical facilities for the distribution of video in the cable market, and with the acquisition of ownership interests in not only in 54 cable channels, but also Universal Studios and Focus Features, Comcast will have far greater ability and incentive to foreclose access to those distribution systems for unaffiliated programmers. WealthTV calls for the divestiture of iN DEMAND to prevent the use of such delivery systems for anticompetitive purposes of benefit to the Venture.

This proceeding is the proper forum for addressing the issues raised in WealthTV's Petition, not general rulemakings. Granting the Application without significant conditions because the Commission may have authority to promulgate general rules would be contrary to Section 309 of the Communications Act.

Comcast not only has the incentive and ability to detrimentally refuse carriage to unaffiliated programmers, it has a well established history of doing so while affiliated channels receive special treatment. The Commission has concluded that vertically integrated cable operators have the incentive and ability to favor affiliated programmers over unaffiliated programmers with respect to granting carriage on their systems and this Merger will provide Comcast with at least *twenty-six new affiliated cable channels* to favor to the detriment of independent programmers. It is, therefore, appropriate that the Commission should grant WealthTV's Petition to Deny or, alternatively, adopt its proposed conditions, which are reasonable, necessary and consistent with the public interest.

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WealthTV, pursuant to Section 309(d) of the Communications Act of 1934, as amended (the “Communications Act”),<sup>1</sup> and Section 73.3584(b)<sup>2</sup> of the Commission’s Rules,<sup>3</sup> hereby replies to Comcast and NBCU’s Opposition to WealthTV’s Petition to Deny the above-captioned application for transfer of control of NBC Universal, Inc. (“NBCU”) from General Electric Company (“GE”) to Comcast Corporation (“Comcast”).<sup>4</sup>

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<sup>1</sup> 47 U.S.C. § 309(d) (2006 & Supp. III).

<sup>2</sup> This Petition extends to all of the licenses and authorizations included in the Application.

<sup>3</sup> 47 C.F.R. § 73.3584(b) (2009).

<sup>4</sup> See Applications for Consent to the Transfer of Control of Licenses, General Electric Company, Transferor, to Comcast Corporation, Transferee, Public Notice, MB Docket No. 10-56, DA 10-457 (Mar 18, 2010) (hereinafter, the applications referred to therein, “Application,” the transaction referred to therein, the “Transaction” or the “Merger,” and the parties thereto, “Applicants” or “Venture”).

WealthTV has demonstrated that this Transaction would lead to a vertically integrated company with an enhanced ability and incentive to discriminate against unaffiliated programming channels. The Merger would not only make it more difficult for independent programmers to obtain carriage and receive fair treatment from our country's largest cable operator; it would also harm the ability of independent programmers to reach viewers through other MVPDs. Applicants, in opposing WealthTV's Petition to Deny, have failed to overcome their burden to prove that this unprecedented Transaction serves the public interest.<sup>5</sup>

## **I. INTRODUCTION**

The Application seeks approval to vertically integrate one of the nation's leading programming providers, NBCU, with the nation's dominant cable and broadband provider, Comcast. Comcast has a clear history of treating independent programmers in a discriminatory manner. In light of Comcast's undeniable past practices with respect to carriage of independent programming channels and the video-on-demand ("VOD") market, the Transaction is not in the public interest. As described below, each of Applicants' arguments to the contrary relies on inapposite and incorrect statements of law, distortions of fact, and self-serving, faulty discussions of the public interest. The Commission therefore should deny the Application. Alternatively, if the Commission does not take this step, it should at least impose conditions on its approval to ameliorate the public interest harms to WealthTV and others described in the many petitions and comments submitted in this proceeding.

It bears reiterating that the proposed Transaction is of unique, historic magnitude. The communications industry has yet to experience a merger that places such a vast array of content under the control of an entity that is our nation's largest single multichannel video programming

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<sup>5</sup> 47 U.S.C. §§ 309, 310(d).

distributor<sup>6</sup> and largest broadband operator.<sup>7</sup> If the Merger is approved, for example, the Venture will be affiliated with 54 cable programming channels, thus leading to additional horizontal as well as vertical integration. As the Commission considers whether to approve or how to condition the Merger, it is imperative, at minimum, that appropriate conditions are commensurately powerful and effective to alleviate the anticompetitive incentives this unique Transaction brings to the marketplace. Indeed, if the Commission grants the Application and permits the Merger to proceed, the resulting merged entity will have an enormous incentive to harm independent programmers by demanding greater concessions or by simply denying carriage. The source of the incentive is clear. The Venture will have ownership interests in 54 channels, many of which are must-have channels.

Despite Applicants' arguments to the contrary, this proceeding is the proper forum for addressing the issues raised in WealthTV's Petition, not general rulemakings. Granting the Application without significant conditions because the Commission may have authority to promulgate general rules would be contrary to Section 309 of the Communications Act.<sup>8</sup> Section 309 requires the Commission to determine whether a grant of the Applications to facilitate *this Transaction* will serve the public interest.<sup>9</sup> It must determine whether this Transaction "could result in public interest harms by substantially frustrating or impairing the objectives or

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<sup>6</sup> See <http://www.ncta.com/Stats/TopMSOs.aspx>

<sup>7</sup> "Comcast Continues To Beat Telcos In Broadband Growth", Karl Bode, DSL Reports, April 28, 2010.

<sup>8</sup> 47 U.S.C. § 309.

<sup>9</sup> Id.

implementation of the Act or related statutes.”<sup>10</sup> “The Commission’s public interest evaluation encompasses the ‘broad aims of the Communications Act,’ which include, among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private sector deployment of advanced services, ensuring a diversity of information sources and services to the public, and generally managing the spectrum in the public interest.”<sup>11</sup> The Commission, thus, “relies upon [its] extensive regulatory and enforcement experience to impose and enforce conditions to ensure that a transaction will yield overall public interest benefits.”<sup>12</sup> In the event that the Commission does not deny the Application, the pro-competitive and anti-discriminatory provisions of the Communications Act should inform the Commission’s decision to impose conditions to alleviate the Transaction-specific harms, described below, that the proposed Transaction will certainly cause.<sup>13</sup>

## II. WEALTHTV’S PENDING PROGRAM CARRIAGE COMPLAINT

The Commission should not act on the Application until it resolves WealthTV’s program carriage complaint against Comcast. In their Opposition, Applicants argue that the Commission should not be worried about the Venture discriminating against independent programmers because “no court or agency has ever found that Comcast engaged in unlawful or anti-

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<sup>10</sup> Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Assignors to Time Warner Cable, Inc., et al., Memorandum Opinion and Order, MB Docket No. 05-192, 21 FCC Rcd 8203, at para. 23. (“Adelphia Order”)

<sup>11</sup> Id. at para. 24.

<sup>12</sup> In re News Corp. and DirecTV Group, Inc., 23 FCC Rcd \_\_\_\_, \_\_\_\_ (¶ 26) (2008) (hereinafter “News Corp. and DirecTV”). See e.g., Adelphia Order at ¶ 156 & App. B (2006) (imposing commercial arbitration remedy tailored to program access and carriage concerns with respect to regional sports networks).

<sup>13</sup> See News Corp. and DirecTV ¶ 26.

programmers.”<sup>14</sup> But WealthTV filed its program carriage complaint against Comcast on April 21, 2008, and the Commission, *over two years later*, has yet to resolve it.

It is certainly true, as Applicants point out, that the Chief Administrative Law Judge in his Recommended Decision concluded that Comcast had not discriminated against WealthTV.<sup>15</sup> Many of the Chief ALJ’s findings, however, directly contradicted those of the Media Bureau. Most importantly, the Media Bureau concluded that WealthTV “has established a prima facie showing that Comcast has discriminated against WealthTV in violation of program carriage rules.”<sup>16</sup>

Last November, WealthTV filed Exceptions to the Chief ALJ’s Recommended Decision and asked the Commission to sustain its carriage complaint. In particular, WealthTV pointed out that the Chief ALJ had: (1) impermissibly disregarded the Media Bureau’s findings that WealthTV had established a prima facie case of discrimination against Comcast; (2) erroneously concluded that WealthTV and Comcast’s affiliated channel MOJO were not similarly situated; (3) ignored substantial record evidence that Comcast had discriminated against WealthTV in favor of MOJO; (4) improperly failed to receive into evidence admissions of Comcast that it evaluated affiliated and non-affiliated networks for carriage differently and gave competitive advantages to affiliated networks; (5) arbitrarily denied WealthTV’s request for a subpoena for the President and CEO of iN DEMAND Networks, L.L.C.; (6) ignored substantial record

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<sup>14</sup> Opposition to Petition to Deny and Response to Comments at 175 (“Opposition”).

<sup>15</sup> In the Matter of Herring Broadcasting Inc. d/b/a WealthTV, et al., Recommended Decision of Chief Administrative Law Judge Richard L. Sippel FCC 09-D-01 (ALJ, rel. Oct. 13, 2009) (“ALJ Decision”).

<sup>16</sup> In the Matter of Herring Broadcasting Inc., d/b/a/ WealthTV, et al., Memorandum Opinion and Hearing Designation Order, MB Docket No. 08-214, 23 FCC Rcd 14787, ¶ 57 (MB 2008)

evidence that one of Comcast's key expert witnesses lacked sufficient indicia of reliability; and (7) demonstrated an improper bias against WealthTV.

Indeed, with respect to the last point of bias, the Chief ALJ at the hearing evidenced hostility to the very program carriage rules that Comcast stands accused of violating, implying that in his view cable operators should have complete freedom to make their own carriage decisions with the same prerogatives as European royalty:

I'm just bothered by the fact that here you've got a valuable piece of – valuable property rights. You know, it's just like having – It's like back when the king gave the governor of a province or something he had the right to set up a toll road and he sets up a toll road and he says, "Okay, We're going to set it up this way for people of the royalty and over here we have the people who are not royalty. They're going to have to pay tolls and all that kind of stuff." I mean it's – This is the way it is. I mean this is the way it's set up.<sup>17</sup>

Over nine months after WealthTV filed its Exceptions and over eight months after WealthTV requested that the Commission permit oral argument,<sup>18</sup> the Commission has still not

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<sup>17</sup> See Transcript, *Wealth TV v. Comcast, Time Warner, Cox, and Brighthouse* ("Transcript"), pg. 3855-56. Moreover, in his Recommended Decision, the Chief ALJ improperly mocked WealthTV programming involving philanthropy by making the following completely irrelevant observation: "Apparently, philanthropy shows a sense of one's noblesse oblige while gaining tax advantages." *ALJ Decision* at ¶ 24. Such a comment also casts serious doubt on the Chief ALJ's impartiality. The Chief ALJ's apparent hostility to WealthTV may have been caused in part by a tug-of-war that broke out between the Media Bureau and the Chief ALJ before the hearing. In October 2008, the Media Bureau issued an order requiring that recommended decisions be issued in six carriage access complaints within 60 days. The six complaints were comprised of the four complaints brought by WealthTV against the IN DEMAND owners, Comcast Corporation, Time Warner Cable, Cox Communications and Bright House, a complaint by the NFL against Comcast, and a complaint by MASN against Comcast. For unknown reasons, the Chief ALJ assigned all six complaints to another ALJ who was planning on retiring soon, thus jeopardizing any ability for the Media Bureau's deadline to be met. Then, after the complaints were taken over by the Chief ALJ, WealthTV was put in the position of siding with the Media Bureau and against the Chief ALJ with respect to the question of who had jurisdiction over the complaints because it wanted its complaints to be considered in a timely manner. Moreover, it is worth noting that the Chief ALJ has acknowledged that his wife owned a modest amount of Comcast stock.

<sup>18</sup> See Request for Oral Argument on Exceptions to Recommended Decision of Chief Administrative Law Judge Richard J. Sippel, MB Docket No. 08-214, Dec. 9, 2009.

acted, and WealthTV believes for two separate reasons that the Commission should not render a decision on the Transaction until it does so. First, it should prioritize WealthTV's pending program carriage complaint as a matter of fairness. WealthTV filed its complaint against Comcast in August 2008, filed its exceptions to the ALJ's Recommended Decision in November 2009, and requested oral argument in December 2009. By contrast, the Application in this proceeding was not filed until January 28, 2010. All companies, whether big or small, are entitled to invoke the Commission's processes and receive timely consideration. Indeed, if the Commission is going to act expeditiously to consider requests by large cable operators to become more vertically integrated, then it is vital for the Commission also to act in a timely manner to resolve complaints that vertically integrated operators are unlawfully discriminating against independent programmers.

Second, WealthTV's complaint is directly relevant to the issues under consideration in this proceeding. As noted above, Applicants seek to reassure the Commission that further vertical integration will not harm independent programmers because Comcast has yet to be found to have engaged in unlawful discrimination. But in making this argument, Applicants implicitly concede the relevance of the pending complaint to the critical issues under consideration in this proceeding and highlight the need for the Commission to resolve it before acting on the Application.<sup>19</sup> Examining whether Comcast to date has engaged in anti-competitive behavior vis-à-vis independent programmers will lend valuable insight into whether the current Transaction is likely to increase the risk of anti-competitive conduct, the question that is at the center of this proceeding.

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<sup>19</sup> Indeed, for the reasons stated above, the Commission should also resolve any other program carriage complaint filed against Comcast that was pending when the instant Application was filed, such as the Tennis Channel's, before deciding whether to approve the Transaction.

### III. FAIR CARRIAGE

Comcast is the nation's largest MVPD with nearly 24 million customers in 39 states and the District of Columbia.<sup>20</sup> Comcast's reach is both significant nationwide and targeted in important designated market areas ("DMAs"). Comcast is the dominant MVPD in many major metropolitan areas, including Chicago, Philadelphia, New York City, Boston, Washington, and Seattle.<sup>21</sup> With such a significant stronghold in major television markets, carriage by Comcast is essential in determining the success or failure of independent programming channels.

Comcast currently has a significant amount of affiliated programming, some of which, including the Comcast Sports Networks, is considered "must-have". And if the Commission approves the Application, Comcast will become affiliated with at least 26 new channels, including the most-watched cable channel, USA Network, which it will want to promote and protect from competitors. The Venture therefore will have an increased incentive to disadvantage independent, competing programming channels through discriminatory carriage decisions. Such discriminatory carriage decisions include, at the most draconian, complete refusal to carry an independent network. Alternatively, it can also take less brute (but similarly effective) forms, such as relegating independent channels to programming tiers with a limited reach and/or neighborhoods far removed from related content. When offering programming content to other MVPDs, the Venture will likewise have an incentive to bundle its must-have content with other affiliated content, to the exclusion of independent programming channels. Applicants have engaged in each of these practices in the past. Especially in light of their paltry

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<sup>20</sup> See Applications and Public Interest Statement, MB Dkt No. 10-56 (Jan. 28, 2010) at 17 (hereinafter "Applications").

<sup>21</sup> See Bloomberg Petition to Deny, Ex. 3 App. at 3.

and ineffective public interest commitments, the Commission, if it grants approval, must appropriately condition the Transaction.

A. Refusal of Access

Applicants make the bold assertion that the Venture could not engage in a successful foreclosure strategy against an independent programming network because Comcast “has a less than 24 percent share of MVPD subscribers.”<sup>22</sup> They therefore claim that an independent programmer denied carriage by Comcast would still have access to 76 percent of the MVPD market and thus a good chance to succeed in the marketplace.<sup>23</sup> Applicants’ argument is flawed for several reasons.

*First*, it is extremely difficult, if not impossible, for an independent programmer to become viable or sustain operations without carriage on Comcast for a very simple reason: Comcast is not only the nation’s largest cable operator; it also dominates major metropolitan markets with demographics that are key for any programmer seeking advertising revenue. As the largest cable system operator in the nation, Comcast’s 24 percent market share includes the major metropolitan markets of Boston, Chicago, New York City, Philadelphia, San Francisco, and Washington, D.C. It includes much of the suburban areas surrounding those markets and has a high penetration in each. One cannot argue that being deprived of access to those markets through the dominant cable system is anything but a major blow to the survival of an independent network. This is particularly true of WealthTV, which has an affluent target demographic more typical of income levels in metropolitan markets, such as the major markets dominated by Comcast.

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<sup>22</sup> Opposition at 165.

<sup>23</sup> Id.

*Second*, Comcast, through the Comcast Media Center/Headend-in-the-Sky (H.I.T.S.), effectively controls independent programmers' access to the systems of numerous other cable operators across the country. While Applicants argue that H.I.T.S. serves only about ten percent of MVPD subscribers,<sup>24</sup> these more than 10 million additional households are extremely significant when viewed against the backdrop of the 25 million households served directly by Comcast. Although Comcast maintains that independent programmers not carried by H.I.T.S. can still gain carriage on the systems of operators using H.I.T.S., that theoretical possibility provides cold comfort in reality. This is because small MVPDs using the H.I.T.S. service need to purchase additional, expensive reception equipment at significant capital expense if they wish to receive independent programming not carried by H.I.T.S.

*Third*, apart from H.I.T.S., Comcast has significant ownership in and/or influence with other cable companies. Comcast, for example, owns approximately 30 percent of Bresnan Communications, the nation's 13th largest cable operator. Additionally, smaller operators are allowed to purchase programming at preferred rates via Comcast's negotiated affiliation agreements, meaning that Comcast in effect serves as an acquisition agent for numerous additional cable systems. Finally, Comcast uses its market influence to serve as a "syndicator" for favored channels and secure carriage for those channels on other systems, thus leveraging the impact of Comcast's carriage decisions. For example, the President and Chief Operating Officer of Hip Hop On Demand has testified in front of Congress that Comcast acts as his network's "syndicator" and "secured distribution for [it] on Cox, Insight, Bresnan, and other cable systems almost doubling our reach."<sup>25</sup>

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<sup>24</sup> Opposition at 279.

<sup>25</sup> Will Griffin, President & COO of Hip Hop on Demand, Senate Judiciary Committee Hearing, June 7, 2010.

*Fourth*, by substantially increasing the number of vertically integrated channels, the Merger will make it harder for independent programmers to gain carriage on other vertically-integrated MVPDs. The evidence indicates that vertically-integrated MVPDs are more likely to carry channels affiliated with other MVPDs than are non-vertically integrated MVPDs.<sup>26</sup> As a result, with other vertically-integrated MVPDs now more likely to carry current NBCU channels (as well as the Venture's future start-up channels), there will be less space on those systems for independent programmers.

For all of these reasons, Applicants' attempt to invoke the D.C. Circuit's cable-cap decision is unavailing.<sup>27</sup> There, the D.C. Circuit rejected the Commission's rule forbidding any cable operator from serving more than 30% of the MVPD market, concluding, on the basis of the record compiled in a specific rulemaking proceeding, that such an operator would not necessarily have the ability to threaten competition and diversity in programming.<sup>28</sup> Here, however, the Commission must determine, based on the record compiled in this proceeding, whether a specific cable operator (Comcast) would have the ability post-merger to harm independent programmers. And due to a number of factors, including not only Comcast's size, but also its dominance in many key major metropolitan markets, the reach of H.I.T.S., and the role Comcast plays as an acquisition agent for smaller operators and a syndicator for favored programming services, the answer to that question is yes.<sup>29</sup>

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<sup>26</sup> See, e.g., Jun-Seok Kang, Reciprocal Carriage of Vertically Integrated Cable Networks: An Empirical Study (2005) (submitted in MB Docket No. 05-192).

<sup>27</sup> Opposition at 164-65.

<sup>28</sup> Comcast Corp. v. FCC, 579 F.3d 1 (D.C. Cir. 2009).

<sup>29</sup> As Commissioner Copps has said, "If an aspiring cable channel cannot win carriage on these big concentrated networks, its fate is sealed. It's doomed." Seattle Times, Aug. 31, 2009 ([http://seattletimes.nwsourc.com/html/editorials/2009781427\\_edit01fcc.html](http://seattletimes.nwsourc.com/html/editorials/2009781427_edit01fcc.html))

Moving from Applicants' ability to harm independent programmers to their incentive to do so, Applicants contend that they will have no incentive to pursue "an anti-competitive foreclosure strategy" against independent programmers.<sup>30</sup> Congress has specifically found, however, that "cable operators have the incentive and ability to favor their affiliated programmers,"<sup>31</sup> and the Commission has similarly concluded that "vertically integrated cable operators have the incentive and ability to favor affiliated programmers over unaffiliated programmers with respect to granting carriage on their systems."<sup>32</sup> This Merger will provide Comcast with at least *twenty-six new affiliated cable channels* to favor to the detriment of independent programmers. Indeed, Applicants in their Opposition make their incentive clear.

Following the acquisition of NBCU, Applicants explain that "Comcast's actual cost for NBCU programming will fall to 49 percent of its pre-transaction cost,"<sup>33</sup> which would obviously place independent programmers at a substantial disadvantage when competing against NBCU channels for carriage and channel placement on Comcast systems. And while Applicants claim that the costs to Comcast of discriminating against independent programming would outweigh the benefits because competitive forces require Comcast to provide programming that "its customers will value,"<sup>34</sup> other arguments set forth in Applicants' Opposition belie this assertion. Applicants, for example, contend that they will not have an incentive to deny competing MVPDs

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<sup>30</sup> Opposition at 167.

<sup>31</sup> Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 § (2)(a)(5)(1992).

<sup>32</sup> Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Second Report and Order, 9 FCC Rcd 2642, 2643 ¶ 2 (1993).

<sup>33</sup> Opposition at 151.

<sup>34</sup> Applications at 109.

access to NBCU channels or NBC broadcast stations because such a foreclosure strategy would cause few customers to switch MVPDs.<sup>35</sup> But if Applicants believe that an MVPD's failure to carry highly established channels as NBC, USA, and Bravo will not generate substantial switching, then how can it seriously claim that Comcast's bottom line will be significantly harmed by a decision to add an affiliated channel to its lineup rather than a start-up independent channel?

Indeed, the available evidence overwhelmingly demonstrates that large cable networks, such as Comcast, discriminate against independent programmers. For example, a study by Dong Chen and David Waterman found that:

In each of the four network groups studied . . . , vertically integrated networks were almost uniformly favored by Comcast, Time Warner, and AT&T in terms of higher carriage and/or more frequent positioning on analog tiers that are more widely available to consumers. In a majority of cases, unaffiliated networks that we identified to be rivals to these integrated networks were carried less frequently and they were more often placed on limited-access digital tiers.<sup>36</sup>

Indeed, in 2006, Chen and Waterman specifically found that Comcast was about 20% more likely than other cable operators to carry its affiliated OLN channel but 30% less likely to carry OLN's rival, the unaffiliated Outdoor Channel.<sup>37</sup> Moreover, the General Accounting Office has calculated that "[a] cable operator is 64 percent more likely to carry a cable network that it owns than to carry a network with any other ownership affiliation."<sup>38</sup>

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<sup>35</sup> Opposition at 133, 155.

<sup>36</sup> Dong Chen and David Waterman, Vertical Ownership in Cable Television: A New Study of Program Network Carriage and Positioning at 20 (2006) (submitted in MB Docket 05-192).

<sup>37</sup> See id. at 16. Notably, this finding directly contradicts Applicants' claim that Comcast is more likely than other cable operators to carry both its affiliated networks as well as rival independent programmers. See Opposition at 172-173.

<sup>38</sup> United States General Accounting Office, Report to the Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate: Issues Related to Competition and Subscriber Rates in

For example, Comcast not only carried its affiliated channel MOJO; according to Robert C. Wilson, a member of iN DEMAND's Board of Directors, "the only reason MOJO exists is because owners are willing to support and pay a license fee not commensurate with its value."<sup>39</sup> Needless to say, Comcast was unwilling to "support and pay a license fee" for WealthTV "not commensurate with its value." Indeed, Comcast was not even willing to carry it at all.

Comcast not only has the incentive and ability to detrimentally refuse carriage to unaffiliated programmers, it has done so. As discussed above, Applicants' attempt to conflate administrative delay in finally adjudicating carriage complaints against it with full exoneration.<sup>40</sup> The record reveals that independent programmers repeatedly feel compelled by Comcast's stonewalling to resort to litigation,<sup>41</sup> and the Commission's failure to address these complaints in a timely manner does not mean that they lack validity.<sup>42</sup> Indeed, Comcast's weak attempt to renege its claim of fairly treating independent programming networks is belied by statements of Comcast's President, Stephen Burke. He has confirmed that channels affiliated with Comcast

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the Cable Television Industry, at 30 (2003) (submitted in MB Docket 05-192). *See also* Michael E. Clements and Amy D. Abramowitz, "Retransmission Consent, Network Ownership, and the Programming Decisions of Cable Operators" (2003) (submitted in MB Docket 05-192).

<sup>39</sup> Transcript at 4976.

<sup>40</sup> See Opposition at 175.

<sup>41</sup> See NFL Enterprises LLC v. Comcast Cable Commc'ns, LLC, Program Carriage Complaint, ¶ 4, File No. CSR-7876-P (May 6, 2008); see also TCR Sports Broadcasting Holding, L.L.P. v. Comcast Corp., Program Carriage Complaint, File No. 8001-P (Aug. 7, 2008); The Tennis Channel, Inc., Program Carriage Complaint, File No. CSR-8258-P (Jan. 5, 2010).

<sup>42</sup> As discussed below, it also shows that that the complaint process is not appropriately tailed for a transaction combining the largest MVPD with one of the largest programming content providers. The vast vertical integration of this Transaction calls for a Transaction-specific carriage remedy.

receive a “different level of scrutiny” from Comcast than do independent programmers”<sup>43</sup> and has said that “Comcast views its own networks as ‘siblings’ but other networks as ‘strangers’ ...”<sup>44</sup>

This has been WealthTV’s experience. It need not be rehashed here.<sup>45</sup> Nonetheless, Comcast continues to sidestep its history of discrimination against unaffiliated channels, arguing that it “has a strong record of carrying hundreds of non-affiliated channels.”<sup>46</sup> Even if true, this in no way counters the argument, buttressed by multiple examples that have already come before the Commission, that affiliated channels receive special treatment from Comcast.<sup>47</sup> As discussed in section III.B., infra, mere carriage of an independent channel has no bearing on whether the terms of that carriage are improperly influenced by affiliation status. Moreover, that Comcast carries some independent channels does not lead, ipso facto, to the conclusion that Comcast treats independent channels in a non-discriminatory fashion.

Comcast has discriminatorily decided in the past not to carry unaffiliated channels; WealthTV described such instances of discrimination in its Petition to Deny.<sup>48</sup> For instance,

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<sup>43</sup> Transcript at 1696.

<sup>44</sup> Justin Rohrlich, Cable Wars Get Litigious, MINYANVILLE, Jan. 8, 2010, available at <http://www.minyanville.com/businessmarkets/articles/cable-cablevision-comcast-hulu-scripps-time/1/8/2010/id/26281> (last visited June 20, 2010).

<sup>45</sup> WealthTV refers the Commission to the substantial record of discrimination against WealthTV presently before it in WealthTV’s Exceptions and as detailed in its Petition to Deny at 8-15.

<sup>46</sup> Opposition at 43, 245.

<sup>47</sup> While Applicants point out that some independent programmers have expressed support for the Transaction, this should not come as any surprise given that strong incentives exist for such programmers to curry favor with the nation’s largest and most influential cable operator.

<sup>48</sup> WealthTV Petition to Deny at 8-17.

Comcast initially denied carriage to the Retirement Living Television Channel (“RLTV”) and continued to refuse carriage until RLTV entered an agreement with it which permitted Comcast to take a minority stake in the channel.<sup>49</sup> As a result of granting Comcast an ownership interest in RLTV, it was able to gain carriage on a number of Comcast systems, including important systems to it in Arizona and New Mexico.<sup>50</sup> Applicants notably do not even attempt in their Opposition to rebut WealthTV’s arguments with respect to RLTV.

B. Discriminatory Carriage

Refusing carriage entirely is not the only means by which Comcast has discriminated against independent programmers. Comcast also has a demonstrated history of employing discriminatory channel placement as a means of weakening its competition. With the combination of Comcast and NBCU, the Venture’s incentive to engage in this practice will dramatically increase as Comcast becomes affiliated with substantially more programming channels.

The Commission need look no further than Comcast’s past treatment of unaffiliated channels. Comcast often relegates unaffiliated programming channels to upper tiers and refuses placement in basic channel neighborhoods. In Philadelphia, for example, the Gospel Music Channel is excluded from the neighborhood of music channels. The neighborhood consisting of the MTV networks and Country Music TV is channels 139–148, but the Gospel Music Channel is at 189, between Travel and a leased access channel. This holds true for news and sports programming as well. In Washington, DC, Fox News, CNN, CNN-HN, CNBC, and MSNBC

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<sup>49</sup> Sam Schechner and Vishesh Kumar, Retirement Living TV Gets Boost, [www.wsj.com](http://www.wsj.com) (Jan. 16, 2009).

<sup>50</sup> See id.

are all at Channels 34-39 while Bloomberg TV is at Channel 103.<sup>51</sup> Likewise, in the Washington, DC market, Comcast-affiliated sports networks, Versus, Golf and Comcast Sports Network are grouped together in its channel line-up with “must-have” ESPN and ESPN-2, while an unaffiliated, competing network, MASN, is placed in a significantly removed channel position.<sup>52</sup> Other petitioners and commenter’s have also recognized and discussed Comcast’s history of disadvantaging unaffiliated programming channels through discriminatory channel placement decisions.<sup>53</sup>

Discriminatory carriage practices can have a devastating impact on the viability of independent programming networks. The Black Family Channel (“BFC”) provides a salient example. BFC provided an alternative to BET and sought carriage on Comcast systems. Comcast, however, asked BFC, which was the only African-American-owned-and-operated cable television network for African-American families, for an equity interest in the channel. And when BFC refused, Comcast subsequently launched TV One, which had a similar focus, and provided it with financial support and carriage rights on Comcast systems.<sup>54</sup> Ultimately,

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<sup>51</sup> See [www.comcast.com/customers/clu/channellineup.ashx?area=0](http://www.comcast.com/customers/clu/channellineup.ashx?area=0).

<sup>52</sup> Id.

<sup>53</sup> See, e.g., Petition to Deny of Bloomberg L.P. at 29-41. TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network’s (“MASN”) also clearly described the Venture’s incentive to “engage in discriminatory channel placement practices,” Comments of TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid Atlantic Sports Network at 2, stating, “When a particular network is many channels away from the cluster of related programming, viewers that ‘hover’ around the cluster are much less likely to navigate to the outlying channel. This can have a substantial effect on a network’s viewership, ratings, and advertising revenue.” Id. at 5.

<sup>54</sup> “Sparks and Accusations Fly at Comcast-NBC Judiciary Committee Hearing,” Los Angeles Times, June 7, 2010 (<http://latimesblogs.latimes.com/entertainmentnewsbuzz/2010/06/sparks-and-accusations-fly-at-comcast-nbc-judiciary-committee-hearing.html>).

BFC reached only 16 million homes<sup>55</sup> while Comcast-owned TV One achieved carriage in 38 million households.<sup>56</sup> As a result of Comcast foreclosing BFC from significant carriage on Comcast systems, it was unable to compete in a fair manner with Comcast's affiliated TV One.<sup>57</sup> In short order, Comcast's refusal to carry BFC on terms similar to TV One led to the demise of BFC.

Applicants' Opposition contains a recitation of independent channels it has carried.<sup>58</sup> However, the mere fact that Comcast may carry an independent programming channel does not detract from the anticompetitive effects of the proposed Transaction. As described above, the decision to carry a channel or exclude it from a broad swath of the marketplace is only the most draconian tool at the Venture's disposal. Discriminatory channel placement decisions are also a powerful tool to gain unfair advantages in the marketplace.

C. Bundling and Retransmission

WealthTV noted in its Petition to Deny that the Venture could harm unaffiliated programming networks through the use of bundling tactics. Such tactics would injure not only independent networks, but also smaller MVPDs forced to purchase packages of affiliated content. The Venture could employ bundling to the disadvantage of competing independent programmers by squeezing them off of third party MVPD systems. It could force the carriage of

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<sup>55</sup> Broadcasting & Cable, February 12, 2006

<sup>56</sup> See [http://www.tvoneonline.com/inside\\_tvone/news\\_content.asp?ID=1201](http://www.tvoneonline.com/inside_tvone/news_content.asp?ID=1201)

<sup>57</sup> Comcast asserts that it was more likely than other cable operators to carry the Black Family Chanel. Opposition at 173. In doing so, Comcast overstates its commitment to African-American programming content. Comcast required the Black Family Channel "to pay million of dollars in unnecessary launch fees [and]... moved [it] to a tier with fewer subscribers." NCOAMM Petition at \_\_\_.

<sup>58</sup> Opposition at 245.

multiple affiliated channels by bundling must-have channels with other affiliated content. While the Venture's fully-owned cable channels may account for only 12.8% of basic cable television viewing,<sup>59</sup> it will have a financial stake in 54 channels, including such highly rated channels as USA Network. With 54 affiliated programming channels to bundle, this could have the effect of preventing independent programmers, such as WealthTV, from accessing smaller MVPD systems with smaller channel capacity or being carried by cable operators of any size on tiers with a broad reach. Such a large offering of affiliated channels will give the Venture tremendous market power to consume bandwidth on MVPD systems.

Applicants seek to reassure the Commission by arguing that NBCU does not coerce MVPDs to purchase bundled channels, but rather offers channels on a stand-alone basis.<sup>60</sup> This is not true. In recent years, as rural telecommunications companies sought programming rights from NBCU, they were, and continue to be, faced with the demand that they carry a bundle of NBCU programming. The National Rural Telecommunications Cooperative, for example, "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."<sup>61</sup> In fact, the Fair Access to Content & Telecommunications Coalition reports that its members were forced to purchase bundled packages of nine or more cable channels and "commit to carriage on that level of service for a channel *that has not even been named or launched!*"<sup>62</sup>

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<sup>59</sup> Opposition at 105

<sup>60</sup> Opposition at 213-14.

<sup>61</sup> FACT Comments at 15.

<sup>62</sup> Id. at i (emphasis in original).

But while Applicants' argument does not reflect the reality of NBCU's behavior, it does set forth the standard of conduct to which the Venture should be held. If the Merger is approved, the Commission should require the Venture to behave in the manner NBCU now claims to be behaving. Specifically, because Applicants maintain that "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,"<sup>63</sup> the Commission should require the Venture to do just that: offer each of its channels on a standalone basis at a commercially reasonable price. By prohibiting anticompetitive bundling, the Commission will preserve more carriage opportunities for independent programmers and assist small MVPDs. Moreover, because NBCU already claims to be conducting itself in a manner consistent with this proposed condition, it cannot seriously assert that the condition will materially harm the Venture.

D. Existing and Applicant-Proposed Remedies are Insufficient

As it has in the past,<sup>64</sup> the Commission, if it approves the Merger, should impose Transaction-specific conditions to alleviate the public interest harms the Transaction will cause. Existing remedies through the carriage complaint and program access complaint processes are ineffective remedies.<sup>65</sup> As the Tennis Channel has noted in this proceeding, these processes are "expensive, time-consuming and, by definition, only addresses after-the-fact allegations of

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<sup>63</sup> Opposition at 214.

<sup>64</sup> Adelphia Order at ¶¶ 155-165, App'x B.

<sup>65</sup> See 47 C.F.R. §§ 76.1001 et seq., 76.1301.

discrimination.”<sup>66</sup> Because the public interest harms here stem from discriminatory treatment, an ex post remedy is insufficient.

1. *Video On Demand Insufficient Remedy to Carriage Discrimination*

Applicants attempt to argue that offering independent programmers and networks carriage on an on-demand basis should somehow demonstrate to the Commission that it does not engage in discriminatory channel placement tactics.<sup>67</sup> This is an insufficient remedy for the reasons stated above. Moreover, it is an inappropriate remedy for independent programming networks with sufficient content to support linear carriage, a fact that Applicants tacitly acknowledge.<sup>68</sup>

2. *The Applicant’s Public Interest Commitment is Insufficient*

In the Application, Comcast made the following commitment:

*Commitment 13: As Comcast makes rapid advances in video delivery technologies, more channel capacity will become available. So Comcast will commit that, once it has completed its digital migration company-wide (anticipated to be no later than 2011), it will add two new independently-owned and -operated channels to its digital line-up each year for the next three years on customary terms and conditions.*

After WealthTV and other parties demonstrated the woeful inadequacy and vague nature of this commitment, Applicants set forth a revised commitment in its Opposition, promising to add ten new independently-owned and –operated programming services over the next eight

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<sup>66</sup> Comments of The Tennis Channel, Inc. at 4.

<sup>67</sup> See Opposition at 246-47.

<sup>68</sup> See id.

years, with at least four of these being owned by African-Americans and two owned by American Latinos.<sup>69</sup>

This new commitment, however, continues to be entirely insufficient to address the anticompetitive harms that would be caused by this Transaction. A commitment to add ten independent programming channels pales in comparison to the number of new channels that will become affiliated with Comcast as a result of the Transaction and only amounts to one-and-a-quarter new channels a year. Furthermore, this commitment says nothing about how the Venture will treat the independent channels with respect to such critical issues as subscriber fees, tier placement, or channel placement. Applicants' commitment to add independent programming must also protect independent programmers in terms of length of carriage, not having to relinquish equity to Comcast, and other terms that Applicants have left unaddressed. Finally, while WealthTV applauds efforts to assist African-American and Latino independent programmers, it must be noted that Applicants' revised commitment only leaves room for at most four non-African-American and non-Latino independent programmers over the course of the next eight years.

3. *Generally Applicable Carriage Rules Are Inadequate in the Context of this Transaction*

Applicants argue that the Commission need not be concerned about Comcast discriminating in favor of the Venture's own channels on Comcast's cable systems, and thus harming independent programmers, because the "program carriage rules provide safeguards for

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<sup>69</sup> See Opposition at 44, 47. In addition, while Applicants pledge to establish a venture capital fund of at least \$20 million to expand opportunities for minority entrepreneurs to develop media content, such an amount is entirely insufficient to develop new programming channels. Moreover, this fund could be used as a means of leveraging equity interests for Comcast in channels seeking carriage on its cable systems.

independent programmers.”<sup>70</sup> In its Petition to Deny, however, WealthTV set forth numerous reasons why the Commission’s existing program complaint process does not provide a meaningful remedy for independent programmers.<sup>71</sup> To begin with, the process is prohibitively expensive and does not resolve complaints in a timely manner. WealthTV, for example, filed four complaints against major cable operators, including Comcast, between December 20, 2007 and April 21, 2008. Yet, as noted above, the Commission’s process still has not reached completion with respect to any of these complaints. As Commissioner McDowell eloquently stated in 2007:

Although the substance of these regulations provides MVPDs and programmers with standards and processes for redress of their program access and program carriage disputes with cable providers, very few parties have filed complaints to adjudicate their disputes. Those that are filed often wait too long for resolution. In fact, it seems that many disputes are never resolved. Why? Because the FCC has not been doing its job. The parties to these complaints deserve better treatment from this Commission. More importantly, so do consumers. Competition, in this quickly evolving market, should not be held back by an indolent bureaucracy’s failure to obey simple Congressional mandates.<sup>72</sup>

In addition to the inordinate length of the process, the Commission’s program carriage rules fail to address specifically such important issues as forced bundling, tier placement, and channel adjacency. Moreover, independent programmers face retaliation from Comcast and other major cable operators simply for filing a complaint. For example, Time Warner Cable’s Executive Vice President and Chief Programming Officer has stated that Time Warner Cable minimized its consideration of WealthTV because it filed a program carriage complaint with the Commission, explaining that “[i]t was not our preference to enter into a relationship with

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<sup>70</sup> See Opposition at 245.

<sup>71</sup> See WealthTV Petition to Deny at 33.

<sup>72</sup> Adelphia Order (Statement of Commissioner McDowell).

someone who chose to litigate with us.”<sup>73</sup> Similarly, WealthTV has reached out several times to engage Comcast in business discussions after filing its program carriage complaint, and following one such attempt in January 2010 to Comcast’s Chairman and Chief Executive Officer, WealthTV received a response stating that Comcast was willing to consider any new material facts relevant to determining whether it should carry WealthTV but only “once the litigation has been concluded.”<sup>74</sup> Needless to say, such retaliation acts as a substantial deterrent to the filing of program carriage complaints given that independent networks are heavily dependent on large cable operators for their financial viability.

In its Opposition, Applicants do not attempt to rebut any of the arguments about the existing program complaint process raised by WealthTV; they simply claim that the proper place for the Commission to address any problems is in a rulemaking proceeding rather than the instant review process.<sup>75</sup> But Applicants can’t have it both ways. Specifically, they can’t affirmatively invoke the program carriage rules as a reason that the Commission should not be concerned in this proceeding about the Venture’s discriminatory conduct harming independent programmers while at the same time arguing that those rules’ efficacy is beyond the purview of this proceeding. Additionally, Comcast’s reliance on the program carriage rules here rings hollow in light of its regular invocation of the First Amendment in program carriage proceedings as supposedly rendering the Commission virtually powerless to remedy violation of those rules. In the WealthTV proceeding, for example, Comcast has argued that the First Amendment requires the Commission to “apply the prohibition against affiliation-based discrimination sparingly” and

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<sup>73</sup> Transcript at 4014.

<sup>74</sup> Letter from Thomas R. Nathan, Deputy General Counsel, Comcast Corporation to Charles Herring, President, WealthTV (Feb. 8, 2010) (attached as Exhibit A).

<sup>75</sup> See, e.g., Opposition at 7, 247, n.826.

that a “very high threshold . . . must be met before the government can require [cable operators] to carry particular content.”<sup>76</sup>

Neither is Applicants’ argument consistent with Commission precedent. In reviewing the Adelphia transaction, for example, the Commission adopted a special arbitration condition with strict deadlines for both program access complaints involving Regional Sports Networks (RSNs) controlled by Comcast or Time Warner and program carriage complaints involving unaffiliated RSNs seeking carriage on Comcast or Time Warner cable systems.<sup>77</sup> Critically, the Commission took this step despite already having generally applicable program access rules and program carriage rules. Because of the heightened prospect that the Adelphia transaction would cause competitive harm in the area of Regional Sports Networks (RSNs), the Commission decided that a special transaction-specific remedy was required.

To be sure, the Commission did suspend the special arbitration condition as applied to program carriage one year later.<sup>78</sup> That decision, however, stemmed from questions regarding the appropriate definition of an RSN rather than any concern about whether a special process should or could be required when a transaction presents a heightened risk of harm.<sup>79</sup> Moreover, when the Commission suspended the Adelphia program carriage condition, it specifically stated its intent “to adopt shortly an expedited carriage process at the Commission that will provide a timely and predictable program carriage dispute resolution process for all unaffiliated

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<sup>76</sup> Defendants’ Join Proposed Findings of Fact and Conclusions of Law, MB Docket 08-214 (June 2, 2009) at 144.

<sup>77</sup> Adelphia Order at ¶¶ 156-165, ¶¶ 190-191 and Appendices B and C.

<sup>78</sup> Petition for Declaratory Ruling that *The America Channel is not a Regional Sports Network*, Order, 22 FCC Rcd. 17938 (2007).

<sup>79</sup> See id. at ¶ 24.

programmers, including RSNs.”<sup>80</sup> But almost three years later, no such process yet exists for independent programmers, and the Commission must take account of that important fact in deciding whether to deny the Application and/or to impose a transaction-specific complaint process for program carriage complaints.

The current FCC rules are insufficient to the public interest harms of this Transaction. Existing carriage related rules do not encompass the unique anticompetitive market concerns stemming from this Transaction, and future rulemakings are not the appropriate forum for addressing the Transaction-specific harms here. In Adelphia, the Commission extended unique program carriage protections to regional sports networks through a commercial arbitration remedy,<sup>81</sup> and the Commission should afford the same Transaction-specific consideration to Established Independent Networks here.

E. WealthTV’s Proposed Condition is an Appropriate Remedy

WealthTV has proposed a reasonable remedy to the fair-carriage public interest harms the Transaction will incentivize. By imposing WealthTV’s proposed Fair Carriage Terms remedy,<sup>82</sup> the Commission would be vindicating the rights of independent programmers to compete fairly in the marketplace and upholding the express will of Congress in that regard. The Communications Act calls on the Commission to

(A) ensure that no cable operator or group of cable operators can unfairly impede, either because of the size of any individual operator or because of joint actions by a group of operators of sufficient size, the flow of video programming from the video programmer to the consumer; [and]

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<sup>80</sup> Id. at ¶ 1.

<sup>81</sup> Adelphia Order at ¶ 83.

<sup>82</sup> See WealthTV Petition at 34.

(B) ensure that cable operators affiliated with video programmers do not favor such programmers in determining carriage on their cable systems or do not unreasonably restrict the flow of the video programming of such programmers to other video distributors[.]<sup>83</sup>

WealthTV, therefore, proposes that the Commission require the Venture to carry Established Independent Networks<sup>84</sup> on its basic or expanded basic programming tiers across all of its subscribers. Comcast advances a number of throw-away arguments to counter WealthTV's proposed remedy.

Comcast first argues that the proposed condition should not be imposed because WealthTV's claims of discrimination were disproved in an adversarial hearing.<sup>85</sup> The proposed condition is not self-serving, as it would apply to all Established Independent Networks. And significantly, the condition would only apply to those independent channels that have proven their appeal in the marketplace by meeting a ratings benchmark. More importantly, however, no claim of discrimination has yet been disproved in WealthTV's carriage complaint proceeding against Comcast. Interim findings of fact, a disputed factual record, and erroneous evidentiary rulings are before the Commission on WealthTV's Exceptions to the Administrative Law Judge's Recommended Decision. Comcast's related throw-away argument is that the Commission's experience with the company "convincingly demonstrate[s]" that Comcast will

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<sup>83</sup> 47 U.S.C. 533(f)(2)(A), (B).

<sup>84</sup> An Established Independent Network is a network (1) with no direct or common ownership by any MVPD and/or broadcast network; (2) having a current and established history of providing programming on a 24 hours a day, seven days a week basis for at least 36 consecutive months;(3) having current and continuous carriage for at least 36 months with a minimum of two major MVPD operators comprised of any two of the following: (a) a top five cable MVPD, (b) a top two DBS provider, (c) a top two telecommunications MVPD; and (4) having the ability to demonstrate via third-party ratings that the Established Independent Network performs in the top 75 percent of a major MVPD system.

<sup>85</sup> Opposition at 176.

abide by Commission rules.<sup>86</sup> Comcast's assertion is less than convincing when one considers the plethora of carriage complaints against it alleging discrimination based on affiliation notwithstanding the strong disincentives, reviewed above, for independent programmers to file such complaints.<sup>87</sup>

The Commission should also impose a condition subjecting program carriage complaints against the Venture to a baseball-style arbitration remedy.<sup>88</sup> Applicants argue that WealthTV's proposed reformed complaint process condition<sup>89</sup> is not part of this Transaction and not properly addressed through a condition to the merger.<sup>90</sup> As explained above, however, the magnitude of this Transaction, combining the nation's largest MVPD with one of the largest programming content providers, presents unique threats to fair competition between affiliated and unaffiliated programming networks, and, for the reasons set forth above, the Commission's current program carriage complaint process is plainly insufficient to address these threats.

This combination, bringing 54 programming networks under the Venture's umbrella, requires special protection for Established Independent Networks. WealthTV is not requesting an unprecedented remedy.<sup>91</sup> Rather, it has proposed a viable means by which the Commission

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<sup>86</sup> Opposition at 270.

<sup>87</sup> NFL Enterprises LLC v. Comcast Cable Commc'ns, LLC, Program Carriage Complaint, ¶ 4, File No. CSR-7876-P (May 6, 2008); see also TCR Sports Broadcasting Holding, L.L.P. v. Comcast Corp., Program Carriage Complaint, File No. 8001-P (Aug. 7, 2008); The Tennis Channel, Inc., Program Carriage Complaint, File No. CSR-8258-P (Jan. 5, 2010).

<sup>88</sup> In baseball-style arbitration, each side submits a final best offer and the arbitrator selects whichever is deemed best.

<sup>89</sup> WealthTV Petition at 7, 35.

<sup>90</sup> Opposition at 247.

<sup>91</sup> See Adelphia Order at App. B.

can ensure that qualified independent programming networks are granted carriage on fair terms without imposing an open-door requirement on Comcast that it carry every independent network.

#### **IV. iN DEMAND**

Applicant's claim, without explanation, that issues and proposed conditions related to iN DEMAND are "unrelated to the transaction" and thus should not be considered in this proceeding.<sup>92</sup> But in its Petition to Deny, WealthTV specifically set forth why iN DEMAND's anti-competitive conduct is relevant to the Transaction. First, by significantly expanding the amount of programming controlled by Comcast, the Merger will increase iN DEMAND's ability to prefer affiliated programming over independent programming when making carriage choices.<sup>93</sup> And second, iN DEMAND's ability to leverage exclusive contracts or to demand higher fees will be enhanced by Comcast's increased control of highly valued content: in particular, films produced by NBCU's theatrical studios (Universal Studios and Focus Features).<sup>94</sup>

Applicants also suggest that the Commission should not examine iN DEMAND in this proceeding because Comcast does not unilaterally dictate iN DEMAND's decision-making processes, but this argument fails as well.<sup>95</sup> As an initial matter, Applicants admit that Comcast owns a majority interest in iN DEMAND (53.7%).<sup>96</sup> Moreover, even if one looks solely at the votes cast by Comcast on iN DEMAND's Management Committee, Comcast's interest far

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<sup>92</sup> See Opposition at 276-77.

<sup>93</sup> See WealthTV Petition at 14.

<sup>94</sup> See id. at 15.

<sup>95</sup> See Opposition at 281.

<sup>96</sup> See id.

exceeds the attribution thresholds set forth in the Commission's rules.<sup>97</sup> Finally, the fact that the other owners of iN DEMAND are also large cable operators means that they have a common incentive to act jointly with Comcast to favor each operator's affiliated programming over independent programming. Accordingly, it is imperative that the Commission scrutinize iN DEMAND in its review of this transaction.

Turning to the merits of the issue, Applicants deny that iN DEMAND leverages its exclusive rights to benefit affiliated content. In particular, they assert that iN DEMAND did not tie its less successful MOJO programming service to its other PPV and VOD services.<sup>98</sup> But Robert C. Wilson, who serves on iN DEMAND's Board of Directors and is the Head of Programming for Cox Communications, has admitted the opposite. Specifically, he has stated that "for non-owners, iN DEMAND tied distribution of Mojo to other products."<sup>99</sup> Moreover, the reason why such tying was necessary is clear. As Mr. Wilson has testified under oath, MOJO had low viewership. In fact, it was the *second least watched channel* on the one system for which Cox had data.<sup>100</sup>

Indeed, the iN DEMAND venture, which vertically integrates a programmer with distributors, provides a stark example of how Applicants will operate if the Commission approves the Transaction. Comcast and iN DEMAND's other cable company owners do not engage in arm's length negotiations with iN DEMAND; they do not even have written affiliation

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<sup>97</sup> See e.g., 47 C.F.R. § 76.501 Note 2 (providing that, with certain exceptions, "partnership and direct ownership interests and any voting stock interest amounting to 5% or more of the outstanding voting stock of a corporation will be cognizable) (emphasis added).

<sup>98</sup> See Opposition at 283, n. 252

<sup>99</sup> See Transcript at 4976.

<sup>100</sup> See id. at 4947-48

agreements. Moreover, iN DEMAND's owners agree to pay licenses fees in excess of what its channels are worth and tie less valued channels to its more popular programming. This is what the future will hold with respect NBCU programming if the Commission approves the Application.

It is a reasonable and appropriate remedy to require that the Venture divest its interest in iN DEMAND. As with H.I.T.S., iN DEMAND is another distribution bottleneck that the merged entity will either control or greatly influence. These concerns are further exacerbated by the fact that Universal Studios and Focus Features are in the Venture and will now be part of the iN DEMAND family. Divestiture of iN DEMAND will reduce the programming that Comcast owns and favors to the detriment of independent programming networks, and it will prevent Comcast from using the venue to illegally coordinate activities among itself and other iN DEMAND owners.<sup>101</sup>

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<sup>101</sup> WealthTV also continues to believe that the Commission, if it approves the Merger, should prohibit Comcast from taking any action that imposes restrictions on access to online video programming (e.g., requiring authentication of an existing cable subscription to view online content, imposing exclusivity clauses and prohibitive alternative distribution platform clauses in its affiliation agreements with programmers). But in light of the fact that arguments pertaining to online video have been thoroughly presented by other parties, WealthTV does not address them here.

**VI. CONCLUSION**

For all of the foregoing reasons, the Commission should grant WealthTV's Petition to Deny or, in the alternative, condition its grant of the Applications as set forth in WealthTV's Petition to Deny and herein.

Respectfully submitted,

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Date: August 19, 2010

**CERTIFICATE OF SERVICE**

I, Jillian Gibson, hereby certify that on this 19th day of August 2010, I caused true and correct copies of the foregoing Reply to Opposition to Petitions to Deny and Response to Comments of WealthTV to be served via first-class mail on the following individuals:

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# EXHIBIT A



Comcast Corporation  
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February 8, 2010

Charles Herring, President  
WealthTV  
4757 Morena Blvd.  
San Diego, CA 92117

Dear Mr. Herring:

I am writing in response to your letter to Brian Roberts of January 25, 2010. Let me emphasize at the outset that the company remains open to receiving any material new facts that you wish to bring to its attention. But, in light of the history recounted below, we are wary -- and rightly so.

Your recent letters seeking business-to-business discussions are in marked contrast to your prior decision to spurn direct negotiations and to initiate costly and time consuming litigation. Since taking that action, you have continually engaged in conduct counterproductive to having business discussions. You have repeatedly and unjustifiably maligned Comcast at the FCC, on Capitol Hill, in the press, and elsewhere. Comcast, by contrast, has refrained from disparaging you and your company's behavior, or programming, and has limited its comments to the merits of your complaint and to appropriate governmental filings. You continue to make allegations against Comcast, even now, after the FCC's Chief Administrative Law Judge has thoroughly rejected each of your claims in his Recommended Decision.

While I can agree with you that mistakes were made by WealthTV during the past several years in its dealings with Comcast, I do not share the view that Comcast has treated WealthTV other than with patience and respect. As you know, on several occasions, Comcast worked diligently to find a business solution that WealthTV would agree to, both before and after you filed your program carriage complaint. In addition, over a number of years, several Comcast executives, including Matt Bond, listened patiently to your presentations as to why you believe your programming is more deserving of the costly and limited shelf space on Comcast's systems than numerous other programmers we have launched or to whom we have given expanded carriage during that period. Rather than continue with these efforts, you chose instead to file a program carriage complaint based on spurious allegations that the carriage arrangements WealthTV desired were not forthcoming because of improper actions on the part of Comcast.

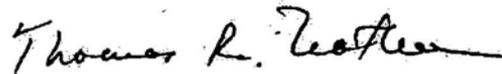
During the FCC hearing in April of last year, WealthTV was afforded a full opportunity to present its case, under judicial processes designed to maximize reliable and impartial determinations of fact and conclusions of law. Both the FCC's Enforcement Bureau and Chief Judge found that WealthTV had "failed completely" to prove any of its claims of unlawful discrimination. The Chief Judge specifically found WealthTV's witnesses' testimony to be "lacking in reliability," "speculative," "not credible," and "inconsistent" with numerous prior statements, including prior sworn testimony. By contrast, he found Comcast's witnesses to be "consistent, competent, and credible."

Comcast's legitimate business decision not to carry WealthTV has been validated by both the FCC's Enforcement Bureau and the Chief Judge. The Chief Judge expressly recognized that Comcast's decision not to carry WealthTV was due to its "lack[] [of] an established brand with a proven record of appeal to ... subscribers"; the fact that "WealthTV had not obtained carriage with a number of competing MVPDs"; that "the bandwidth necessary to carry WealthTV could be used for better purposes"; that "WealthTV's proposed terms and conditions of carriage were unfavorable"; among other legitimate reasons.

As the Chief Judge found: "Even though carriage of WealthTV was a low priority for Comcast, the preponderance of evidence ... shows that Comcast was willing to negotiate in good faith some form of affiliation agreement with WealthTV, and that Comcast made a good-faith effort to avoid this carriage complaint." Thus, at the most critical juncture, we offered good-faith negotiation as an alternative to litigation, but you chose litigation, and that path has been followed to within a single step of its terminus. We await only the Commission's adoption of the Chief Judge's ruling.

Once the litigation has been concluded, Comcast is willing to consider any new material facts you believe we should be aware of bearing on our evaluation of your network.

Sincerely,



Thomas R. Nathan  
Deputy General Counsel