WILTSHIRE & GRANNIS LLP

August 19, 2010

BY ELECTRONIC FILING AND HAND DELIVERY

Marlene H. Dortch
445 12th Street, S.W.
Room TW-A325
Washington, DC 20554

Re: **REDACTED — FOR PUBLIC INSPECTION**
In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc., for Consent to Assign Licenses or Transfer Control of Licensees, MB Docket No. 10-56

Dear Ms. Dortch:

Enclosed please find redacted copies of DIRECTV's reply comments in the above-captioned proceeding as well as an expert economic report by Dr. Kevin Murphy entitled *Response of Professor Kevin M. Murphy to Reply Report of Mark Israel and Michael L. Katz.* Please note that redacted confidential and highly confidential information are designated by the symbols [[ ]] and {{ }}, respectively.

As required by the Protective Orders, we are also hand delivering unredacted copies of this filing, along with a highly confidential computer disk containing backup data to Dr. Murphy's report.

Respectfully submitted,

/s/William Wiltshire
William Wiltshire
Counsel for DIRECTV

REDACTED – FOR PUBLIC INSPECTION

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

Applications of	)	
COMCAST CORPORATION,	)	
GENERAL ELECTRIC COMPANY,	)	
and	)	MB Docket No 10-56
NBC UNIVERSAL, INC.	)	
For Consent to Assign Licenses and/or Transfer Control of Licensees	)	

REPLY OF DIRECTV, INC.

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August 19, 2010

OVERVIEW AND SUMMARY

Nothing in the 600-page Opposition recently filed to defend Comcast's proposed takeover of NBCU meaningfully addresses the three key concerns raised by DIRECTV and others: that the proposed transaction would (1) enable Comcast to exploit an "online loophole" for critical content delivered via non-traditional platforms (such as the Internet), (2) enable Comcast to impose large price increases for broadcast and national network programming, and (3) not generate sufficient public interest benefits to offset these anticompetitive effects. Indeed, Applicants' opposition primarily rests on the counterintuitive premise that Comcast — an entity that *still* refuses to sell Philadelphia sports programming to its satellite rivals after the Commission revoked its basis for withholding — will not use programming assets to disadvantage its rivals if given the chance to do so. DIRECTV continues to believe that, on balance, grant of the pending applications would serve the public interest only if procompetitive safeguards are imposed as a condition of approval.

The Transaction Would Enable Comcast to Exploit an Online Loophole. DIRECTV demonstrated that this transaction would give Comcast the tools to exploit an "online loophole," under which Comcast could migrate NBCU programming to the Internet or to mobile or on-demand platforms, where Comcast could then deny it to competitors or restrict access for consumers. Comcast need not migrate entire channels to make such a strategy work. Rather, Comcast could:

- supply itself NBCU content in HD or 3D format but make it available to rivals only in SD format;

- make online NBCU content available to its own systems in an earlier window than it would be available to competitors;
- provide online NBCU programming to its own systems at a high throughput rate consistent with high-quality streaming video while offering competitors the same content at slower speeds that could result in a less satisfying consumer experience;
- provide competitors with content of different length, comprising fewer total hours, or with fewer advertising availabilities; or
- favor any content aggregation site in which it has (or acquires) an interest over sites affiliated with other MVPDs.

These are the kinds of advanced, value-added services that MVPDs are increasingly using to distinguish their services from competitors.

Applicants essentially ignore this concern, suggesting perfunctorily that Comcast would never engage in such conduct. Yet as Applicants admit, {{

}}. Moreover, Comcast's internal documents confirm {{

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}}. Consistent with that conclusion, Comcast's internal documents confirm that {{

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Comcast also suggests that any condition to remedy the online loophole would be unworkable and not transaction-specific. Yet the remedies proposed by DIRECTV are designed to be as minimally intrusive as possible consistent with the purposes of the program access rules. These remedies simply call for fair access to the same content at the same quality, the same speed, and the same time as Comcast makes it available to itself. They are not generalized obligations applicable to all aspects of Comcast's broadband operations, but are limited to the specific aspects of those operations affected by its vertical integration with NBCU.

The Transaction Would Permit Comcast to Raise Prices for NBCU Programming. DIRECTV and others presented voluminous economic and other evidence that the proposed transaction would enable Comcast to raise the prices paid by its MVPD rivals for NBCU programming. Applicants now present an array of reasons why the Commission should believe Comcast *won't* raise prices. None are persuasive. Indeed, the Commission has considered and rejected several of Applicants' primary arguments in prior proceedings.

- Applicants repeatedly invoke fiduciary duties owed by Comcast to its minority partner (GE) as a check on potential use of NBCU programming for anticompetitive ends. The Commission has repeatedly rejected this argument. Moreover, Applicants fail to acknowledge (much less explain) why Comcast has been able to withhold the Philadelphia regional sports network from MVPD rivals for over a decade *even though it had significant minority partners in that entity.*

In any event, Comcast will take 100% ownership of NBCU in the future, at which point no fiduciary constraint would even arguably apply.

- Applicants also continue to assert that NBC is not "must have" programming, even though the Commission has previously found that broadcast network content confers market power. This argument, too, ignores Comcast's recent deal with CBS, which demonstrates the value that Comcast ascribes to network programming. It also ignores Applicants' internal documents and its own expert's prior testimony, which make plain that {{

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- Applicants attempt to use Comcast's purported savings from the elimination of double marginalization to "swamp" the cost increases it would impose on MVPD rivals. In other words, Applicants argue that it is acceptable for Comcast to raise the prices paid by its rivals' subscribers so long as it might also lower the prices paid by its own subscribers. This could not serve the public interest. Even were the Commission to accept such a proposition, moreover, Comcast has nowhere demonstrated that it would actually lower prices.

Applicants' economic arguments also fail to address concerns about price increases. DIRECTV's economist, Prof. Kevin Murphy, has shown how a standard economic model predicts that the proposed transaction would significantly increase the prices other MVPDs pay for NBCU programming. Applicants' critique of that model are flawed — and in fact directly contradict their own expert's use of this very model for much the same purpose in a recent report to the Commission. They also criticize Prof.

Murphy's particular implementation of the model, but these arguments conflict with the empirical evidence and Applicants' own internal documents and public statements. Even adjusting his analysis in NBCU's favor, as Applicants suggest, would not change Prof. Murphy's conclusion that, as a result of market forces, the proposed merger generates incentives for Comcast to charge its MVPD competitors substantially higher prices for NBCU programming.

The Transaction Would Not Result in Cognizable Public Interest Benefits. As for alleged public interest benefits, Applicants argue their proposed "voluntary commitments" should count simply because Applicants propose to make them binding. But this assertion misconceives the nature of a "transaction specific" benefit that is cognizable under the Commission's analysis. The Commission recognizes only public interest benefits "that would not be achievable but for the proposed merger." Many of Applicants' commitments and claimed benefits — from Common Sense Media deployment to increased Spanish-language programming to faster VOD deployment to investment in NBCU programming — either are already occurring without this transaction or would likely do so. In addition, Applicants nowhere argue that the targeted conditions proposed by DIRECTV would prevent them from realizing any of these purported benefits.

* * *

In sum, nothing submitted in the 600 pages of Applicants' Opposition refutes DIRECTV's basic point. Because the harms arising from the proposed transaction so clearly outweigh any benefits it could be expected to create, the Commission can only

grant the pending applications by imposing the targeted, procompetitive conditions set forth in Exhibit C hereto.

TABLE OF CONTENTS

Page

OVERVIEW AND SUMMARY i
REPLY OF DIRECTV, INC. INTRODUCTION 1
DISCUSSION 5
- **I. Applicants Fail to Address the "Online Loophole."** 5
- **II. The Proposed Transaction Will Lead To Higher Prices for Broadcast and National Programming.** 9
  - **A. Applicants Continue to Rely Upon Arguments Previously Rejected By The Commission.** 10
    - **1. The Commission Has Rejected Fiduciary Duty As a Sufficient Check Against the Anticompetitive Incentives Created by Vertical Integration.** 10
    - **2. The Commission Has Rejected the Assertion That Broadcast Network Programming Does Not Drive Subscriber Switching.** 14
    - **3. The Commission Has Rejected Theoretical Reduction of Double Marginalization as an Offset to Actual Harm to Competition.** . 20
  - **B. Applicants' Economic Arguments Are Belied by the Empirical Evidence and Their Own Internal Documents.** 23
    - **1. The Nash Bargaining Framework Is Appropriate.** 26
    - **2. Prof. Murphy's Conclusions Regarding Nash Bargaining Are Backed By Empirical Evidence.** 27
      - a. Applicants' Claims About Diversion Rates Defy the Evidence. 27
      - b. Prices Charged to MVPD Rivals Would Increase Under Any Reasonable Estimate of Bargaining Power. 33
    - **3. Applicants' Consumer-Welfare Analysis Is Flawed.** 34
  - **C. National Programming Networks Owned or Controlled By Comcast Should Be Subject to Arbitration.** 36
- **III. Applicants Raise No Objections to the Arbitration Revisions Proposed by DIRECTV.** 40
- **IV. Applicants' Claimed Benefits Are Misconceived and Unsupported.** 41

CONCLUSION 48

Exhibit A: **Response of Professor Kevin M. Murphy to Opposition Report of Mark Israel and Michael L. Katz**

Exhibit B: **Declaration of Daniel Hartman**

Exhibit C: **Proposed Remedies and Conditions**

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

Applications of	)	
COMCAST CORPORATION,	)	
GENERAL ELECTRIC COMPANY,	)	
and	)	MB Docket No 10-56
NBC UNIVERSAL, INC.	)	
For Authority to Assign Licenses and/or Transfer Control of Licensees	)	

REPLY OF DIRECTV, INC.

INTRODUCTION

In its initial Comments,[1] DIRECTV, Inc. ("DIRECTV") demonstrated that the acquisition of NBC Universal, Inc. ("NBCU") by Comcast Corporation ("Comcast"), the nation's largest cable operator and largest Internet service provider ("ISP"), from General Electric Company ("GE", and together with Comcast and NBCU, "Applicants") would, on balance, serve the public interest only if certain procompetitive safeguards are imposed as a condition of approval. Specifically, DIRECTV argued that conditions should be imposed to ensure fair access to three types of programming under Comcast's control — online content, broadcast stations, and national networks — consistent with

[1] *See* Comments of DIRECTV, Inc., MB Docket No. 10-56 (filed June 21, 2010) ("DIRECTV Comments").

requirements imposed on regional sports network ("RSN") programming under Comcast's control. In support of its arguments, DIRECTV submitted an economic analysis in which Prof. Kevin Murphy demonstrated how, based on standard economic principles, the proposed transaction would result in significant increases in the prices paid for NBCU content by Comcast's multichannel video programming distributor ("MVPD") rivals.[2] DIRECTV also proposed specific amendments to the arbitration regime imposed by the Commission in similar situations, in order to make the process a more streamlined and attractive option for MVPDs in need of redress.[3] Lastly, DIRECTV showed that the public interest benefits claimed by Applicants are nowhere near sufficient to offset the harms arising from the proposed transaction.

In their Opposition, Applicants continue to maintain that no untoward effects should be expected from this combination.[4] As discussed below, each of Applicants' arguments is deeply flawed. Before discussing the substance of Applicants' objections, however, it is worth noting a recent development. Earlier this year, the Commission put in place a mechanism through which MVPDs could gain access to cable-affiliated programming that had previously escaped regulation under the program access rules

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[2] *See* Kevin M. Murphy, *Economic Analysis of the Impact of the Proposed Comcast/NBCU Transaction on the Cost to MVPDs of Obtaining Access to NBCU Programming* (June 21, 2010) (attached as Exhibit A to DIRECTV Comments) ("Murphy Report").

[3] *See* DIRECTV Comments at 46-51.

[4] The Opposition (including appendices) totals more than 600 pages. DIRECTV believes it would be better for all concerned — including the Commission — not to attempt to respond to every argument and claim raised in these materials. In doing so, it does not concede any point through silence.

because it was delivered by terrestrial means.[5] The Commission based its decision on a ten-year record of anticompetitive effects resulting from such withholding — primarily involving Comcast's denial of Comcast SportsNet Philadelphia ("CSN-Philly") to DBS rivals.[6] As soon as these new rules became effective, DIRECTV renewed its request that Comcast offer CSN-Philly for carriage on non-discriminatory terms and conditions.[7] By letter dated August 2, 2010, Comcast once again refused to offer CSN-Philly to DIRECTV.[8] Although Comcast later indicated that it would be willing to discuss carriage of CSN-Philly with DIRECTV, it has not made an offer for such carriage.[9]

Moreover, Comcast has indicated on several prior occasions that no such offer will be forthcoming unless DIRECTV voluntarily gives up its legal, exclusive rights to out-of-market NFL football games — an offer that does not constitute a genuine basis for negotiation, much less an offer on non-discriminatory terms and conditions, as the law requires.[10] Indeed, the Opposition all but asserts that Comcast acquired its interest in CSN-Philly and denied that programming to DIRECTV in order to gain leverage to break DIRECTV's exclusive carriage of the NFL Sunday Ticket,[11] an agreement between

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5 *See Review of the Commission's Program Access Rules and Examination of Program Tying Arrangements*, First Report and Order, 25 FCC Rcd. 746 (2010) ("*Terrestrial Loophole Order*").

6 *See id.*, ¶¶ 23-35.

7 *See* Declaration of Daniel Hartman, ¶ 4 (attached as Exhibit B).

8 *Id.*, ¶ 5.

9 *Id.*, ¶ 6.

10 *Id.*

11 *See* Comcast Corp, General Electric Co., and NBC Universal, Inc., Opposition to Petitions to Deny and Response to Comments at 139, MB Docket No. 10-56 (filed July 21, 2010) ("The Opposition") (noting that Comcast is on record saying that it will make CSN-Philadelphia available as soon as DIRECTV

DIRECTV and an unaffiliated sports league that, unlike Comcast's conduct, was contemplated by Congress and specifically approved by the Commission.[12]

As a result, DIRECTV will now have to go through the process of filing and prosecuting a formal complaint, which Comcast can be expected to contest vigorously. Before that proceeding reaches its conclusion, baseball season will be over, and basketball and hockey season will be well under way. Meanwhile, delay will continue to work in Comcast's favor, even as it denies Philadelphia sports fans freedom of choice among MVPDs.

If, as Applicants have asserted, "past is prologue,"[13] one can only imagine how Comcast would use its control over NBCU programming as leverage against DIRECTV in future negotiations.[14] As discussed below, none of the arguments made in the

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relinquishes NFL Sunday Ticket, and asserting that this indicates "Comcast's overall objective to bargain with DirecTV"). DIRECTV began carriage of NFL Sunday Ticket in 1995, and Comcast launched CSN-Philadelphia in 1997.

[12] *See* 47 U.S.C. § 548(c) (prohibiting certain actions by cable operators and affiliated programmers, but not other MVPDs); *General Motors Corp., Hughes Electronics Corp. and The News Corporation Ltd.*, Memorandum and Opinion and Order, 19 FCC Rcd. 473 (2004) ("*News/Hughes*"), Appendix F, Section II ("DirecTV may continue to compete for programming that is lawfully offered on an exclusive basis by an unaffiliated program rights holder (*e.g.*, NFL Sunday Ticket)").

[13] Comcast Corp., General Electric Co., and NBC Universal, Inc., Applications and Public Interest Statement: Description of Transactions, Public Interest Showing, and Related Demonstrations at 6, 55 (filed March 5, 2010) ("Application").

[14] *See* M. Reynolds, "NFL Scores With $4 Billion DirecTV Sunday Ticket Extension," MULTICHANNEL NEWS (Mar. 23, 2009) (available at http://www.multichannel.com/article/190542-NFL_Scores_With_4_Billion_DirecTV_Sunday_Ticket_Extension.php). Applicants also assert that "product differentiation is a legitimate and appropriate method of competition," whether achieved by contract or by vertical integration. Opposition at 139. They neglect to mention that Congress and the Commission have specifically found that product differentiation through exclusive agreements presumptively is *not* appropriate where it results from vertical integration with a cable operator. *See* 47 U.S.C. § 548; 47 C.F.R. § 76.1002(b)(4). Unlike Comcast, which owns both the RSN and two of the three professional teams it carries, DIRECTV has no interest in the NFL and must periodically compete with other distributors — including Comcast — for the rights to NFL Sunday Ticket.

Opposition allay the concerns DIRECTV has presented based on rigorous economic and legal analysis as well as Comcast's own past conduct.

DISCUSSION

I. APPLICANTS FAIL TO ADDRESS THE "ONLINE LOOPHOLE."

In its Comments, DIRECTV noted that the Commission's program access rules do not clearly cover "non-linear" content delivered over facilities other than those used by traditional MVPDs, and argued that Comcast could use NBCU programming to exploit the resulting "online loophole" by denying (or raising the price of) such non-linear programming to MVPD rivals.[15] Indeed, Comcast's internal documents show that DIRECTV's concerns are well placed, documenting {{

}}.[16]

Although the Opposition discusses some issues related to online programming at length,[17] it addresses DIRECTV's concern only briefly. While Applicants attempt to dismiss concerns about the online loophole as "implausible," their bases for doing so do not withstand scrutiny.[18] For example, Applicants argue that NBCU {{

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[15] *See* DIRECTV Comments at 28-30.

[16] *See* 25-COM-348; 17-COM-70496; 17-COM-70783; 17-COM-83640.

[17] With respect to online issues, the Opposition focuses primarily upon Comcast's incentives with respect to emerging online video distributors. *See, e.g.,* Opposition at 181-89.

[18] *See* Opposition at 161-62.

}} and has agreed with NBC affiliate stations not to move certain major sporting events from the NBC broadcast network.

Yet Comcast need not migrate entire NBCU channels or marquee events wholesale to new distribution outlets in order to gain a significant advantage over rival MVPDs. As Applicants admit, {{

}}.[19]

Moreover, if Applicants are to be believed, restrictions on online distribution could be relatively short-lived, as the proposed transaction will purportedly give NBCU the incentive to acquire additional rights from content providers to enable innovative distribution models going forward.[20]

Applicants further contend that moving programming online "would prove an entirely self-defeating maneuver" as it would force Comcast's cable customers to "view streaming live sports programming in a sub-optimal manner."[21] However, Comcast's internal documents reveal that {{

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[19] *See id.* at 158; Mark Israel & Michael L. Katz, *Economic Analysis of the Proposed Comcast-NBCU-GE* Transaction at 35 (July 20, 2010), *attached to* Opposition as Exhibit 2 ("Katz/Israel Opposition Report").

[20] *See* Opposition at 25-26. Indeed, it is worth noting that Applicants' agreement with NBC affiliates restricts migration of certain events to which NBCU holds rights as of June 3, 2010. *Id.* at 162. Thus, rights acquired once the joint venture is formed — including Olympic rights that will soon be available — would not be covered by this restriction.

[21] *Id.* at 162.

[22] 63 COM-697.

}} if

withheld from competing MVPDs, could give Comcast a distinct advantage in attracting and retaining subscribers. The confluence of all these factors demonstrates that the Commission cannot simply ignore the online loophole.

Applicants also assert that conditions proposed to address these concerns are unworkable, arguing in a single footnote that Commission intervention in such a nascent industry is unwise and would "raise extremely complex issues involving a wide range of stakeholders."[23] Yet the list of issues imagined by Applicants arises from just two questions: (1) who may invoke the regulatory protections, and (2) what content is covered.

Such issues do not arise under the conditions proposed by DIRECTV.[24] First, the conditions could be invoked only by MVPDs — a category defined as those entities the Commission deems eligible to invoke the existing program access rules, who would also be responsible for complying with other regulations generally applicable to MVPDs (such as closed captioning, emergency alerts, etc.). Second, Comcast would be neither forced to place content online nor required to do so. It would have total control over what content to deliver over each type of distribution network (*e.g.*, Internet, mobile, VOD, etc.). But once that choice is made, Comcast would be required to make that content available to other MVPDs and/or their subscribers on the same platform(s) and on non-discriminatory terms and conditions. If, as Applicants assert, NBCU has the

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[23] Opposition at 204 n.698.

[24] *See* DIRECTV Comments at 35.

incentive to seek the widest possible distribution of its content,[25] such a requirement would merely reinforce that incentive.

Overall, the conditions proposed by DIRECTV simply call for fair access to the same content at the same quality, the same speed, and the same time as Comcast makes it available to itself. Yet these proposed conditions would apply in a variety of situations that are (or soon will become) critical to an MVPD's ability to compete. For example, Comcast could not:

- supply itself NBCU content in HD or 3D format but make it available to rivals only in SD format;[26]
- make online NBCU content available to its own systems in an earlier window than it would be available to competitors;
- provide online NBCU programming to its own systems at a high throughput rate consistent with high-quality streaming video while offering competitors the same content at slower speeds that could result in a less satisfying consumer experience;
- provide competitors with content of different length, comprising fewer total hours, or with fewer advertising availabilities; or
- favor any content aggregation site in which it has (or acquires) an interest over sites affiliated with other MVPDs.

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[25] *See* Opposition at 25-29, 66-67.

[26] The Commission has recently recognized that an SD version of programming is not an acceptable substitute for HD/3D/VOD, and thus each must be treated as a distinct service for purposes of the program access rules. *See Terrestrial Loophole Order*, ¶¶ 54-55 & n.219.

The conditions proposed by DIRECTV are designed to be as minimally intrusive as possible consistent with the purposes of the program access statute and rules. They are not generalized obligations applicable to all aspects of Comcast's broadband operations, but are limited to those specific aspects of these operations affected by its vertical integration with NBCU. They limit the protected parties to MVPDs. They apply only to programming, and more specifically to only that programming which Comcast voluntarily decides to distribute by alternative means. It is hard to see how such narrowly tailored conditions targeted to the vertical nature of this transaction could impede any legitimate online initiative Applicants may have in mind.

II. THE PROPOSED TRANSACTION WILL LEAD TO HIGHER PRICES FOR BROADCAST AND NATIONAL PROGRAMMING.

DIRECTV and others demonstrated in initial comments that the proposed transaction will allow Comcast to increase the prices paid for NBCU programming by Comcast's rivals. In response to the significant issues raised by DIRECTV and other commenters, Applicants (1) continue to place critical reliance upon assertions that the Commission has considered in previous transactions and authoritatively rejected; (2) attack DIRECTV's economic analysis; and (3) suggest that any concerns could not apply to national programming. Applicants are wrong on all counts.

A. Applicants Continue to Rely Upon Arguments Previously Rejected By The Commission.

1. The Commission Has Rejected Fiduciary Duty As a Sufficient Check Against the Anticompetitive Incentives Created by Vertical Integration.

In their initial Application, Applicants and their experts asserted that fiduciary duties owed by Comcast to the NBCU joint venture would prevent anticompetitive behavior.[27] This assertion cannot bear the weight Applicants place upon it. As DIRECTV pointed out, the Commission has considered and rejected the argument that "corporate governance, corporate law or securities laws in general may be relied upon to adequately protect MVPD and video programming competitors from potential anti-competitive vertical foreclosure behavior on the part of Applicants. In that transaction (and others), the Commission concluded that applicants could harm rivals consistent with their fiduciary duties in a number of ways, including a uniform price increase or by making side payments to the minority interest holders as compensation.[28] Both of these strategies would be available to Comcast with respect to NBCU.

Rather than recognize the Commission's prior conclusion, Applicants now argue even more stridently that fiduciary duties would be sufficient to address concerns about potential anticompetitive conduct. For example, Applicants argue that officers and directors of the joint venture "would violate these [fiduciary] duties if they made business decisions that intentionally sacrificed joint venture profits in order to increase Comcast's

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[27] *See* DIRECTV Comments at 44 (discussing Applicants' corporate control assertions).

[28] *Id.* at ¶¶ 83-84. *See also* Murphy Report at 31 ¶ 76 (discussing side payments).

MVPD profits — as any foreclosure strategy necessarily would do."[29] Similarly, Katz/Israel assert that GE's ability to enforce fiduciary duties "would prevent NBCU from withholding access to — or raising the prices of — NBCU programming in order to benefit Comcast,"[30] and that GE has strong incentives to ensure that the joint venture "does not engage in costly foreclosure strategies, regardless of the benefits to Comcast Cable."[31] This simply cannot be squared with Commission precedent.

Even setting aside Commission precedent, there is a more practical reason to doubt Comcast's claims concerning fiduciary duty: ***Comcast has withheld CSN-Philly from its DBS rivals for over a decade despite fiduciary duties owed to two different partners.***

In July 1996, Comcast acquired a 66.3% interest in Comcast Spectacor, L.P. ("Spectacor"), a partnership that owned the Philadelphia Flyers, the Philadelphia 76ers, and their arenas. The Comcast-controlled Spectacor and the owner of the Philadelphia Phillies thereafter formed Philadelphia Sports Media, L.P. ("PSM"), a partnership that launched the CSN-Philly RSN in 1997. Spectacor's interest in the PSM partnership was 70%, giving Comcast an effective interest in the RSN of approximately 46%.[32] Although

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[29] *See* Opposition at 140-141.

[30] Katz/Israel Opposition Report at 12.

[31] *Id.* at 29.

[32] *See* Comcast Holdings Corp., Form 10-K for the Period Ending 12/31/97 at 13 (*available at* http://files.shareholder.com/downloads/CMCSA/725460497x0xS950159-98-50/22301/filing.pdf) ("Comcast 1997 Annual Report").

Comcast completed its acquisition of the Phillies' interest in the RSN in 2006, its Spectacor partnership {{ }}.[33]

Both Spectacor and PSM are Pennsylvania limited partnerships.[34] Under Pennsylvania law, partners owe a fiduciary duty to one another, including the duty of loyalty.[35] Accordingly, Comcast owed fiduciary duties twice over with respect to CSN-Philly — to both its partner in Spectacor and its partner in PSM (the owner of the Philadelphia Phillies). Yet at no time did the fiduciary duties owed to these third parties preclude Comcast from withholding CSN-Philly from its DBS rivals, thereby denying the partnership(s) the benefit of affiliate fees from those rival MVPDs. If Applicants are to be believed, such a foreclosure strategy would *necessarily* "sacrifice[] joint venture profits in order to increase Comcast's MVPD profits" in violation of fiduciary duties to the joint venture.[36]

DIRECTV is not asserting that Comcast has breached its fiduciary duty to its partners in either Spectacor or PSM over the years. Rather, this example demonstrates that Comcast has proven itself adept at implementing foreclosure strategies notwithstanding the impediments that such duties would theoretically place on such

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[33] *See* Comcast Corp., Responses to the Commission's Information and Discovery Request at 14.

[34] *See, e.g.,* Comcast 1997 Annual Report (listing subsidiaries); Comcast Corp., Form 10-K for the Period Ending 12/31/2002 (*available at* http://files.shareholder.com/downloads/CMCSA/725460497x0xS950159-03-238/1166691/filing.pdf) (same).

[35] *See Clement v. Clement*, 436 Pa. 466, 260 A.2d 728 (1970) (Pennsylvania law "very simply and unambiguously provides that partners owe a fiduciary duty one to another"); 15 Pa. Cons. Stat. §§ 8334 (entitled "Partner accountable as fiduciary"), 8504 (making provisions for general partnerships found in Chapter 83 applicable to limited partnerships).

[36] *See* Opposition at 140. Professors Katz and Israel admit that they have not studied any aspect of a foreclosure model applied to CSN-Philly. *See also*Katz/Israel Opposition Report at 33.

activities. This evidence confirms the Commission's decision to reject principles of corporate governance as a substitute for more transparent conditions enforceable by the parties that would be directly harmed by anticompetitive behavior.

Of course, the notion that NBCU would work sufficiently closely with its controlling shareholder to overcome "friction" and achieve a bevy of new business models (as Applicants claim) yet not take that shareholder's interests into account is unrealistic. It should thus come as no surprise that, in a conference call to discuss Comcast's most recent financial results, a Comcast representative explained how tightly NBCU would be bound to the company, stating

> just to be clear, once the deal closes and we issue our statements, we will be — NBCU will be consolidated with Comcast. We will control it and we will manage it. Obviously, we will have a lot of say in terms of how that business performs.[37]

Moreover, because Comcast has the right to acquire 100% of the joint venture within the next several years, the Commission could not rely upon fiduciary constraints as anything more than a short-term fix for a long-term problem. The Opposition makes clear that Comcast intends to take 100% ownership of NBCU in the near future.[38] And because Comcast will already have control of NBCU, no further regulatory review will be required for Comcast to exercise its rights to acquire the remaining interest in NBCU

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[37] Comcast Corporation, Q2 2010 Earnings Call, Management Discussion Section, at 13 (July 28, 2010) (statement by Michael Angelakis, Chief Financial Officer) (*available at* files.shareholder.com/downloads/CMCSA/980586264x0x391044/4414f8c7-a69e-4b94-9753-909a5f680991/Comcast_Transcript-7.28.10.pdf) ("Comcast Q2 Earnings Transcript").

[38] *See, e.g.,* Opposition at 67 ("The transaction also will result in a reduction initially and elimination (once Comcast owns all of NBCU) of double marginalization"), 69 (arguing that marginal costs would decrease by "eventually 100% when Comcast obtains full ownership of NBCU"). Applicants argue that this process could take up to seven years — but it could be completed immediately, if GE and Comcast agree. *See* Application at 15.

from GE. These factors further undercut any reliance Applicants would have the Commission place on fiduciary duty.

2. The Commission Has Rejected the Assertion That Broadcast Network Programming Does Not Drive Subscriber Switching.

The Application argued that NBC broadcast network fare is not "must have" programming, and therefore should not be subject to the procompetitive safeguards that the Commission has imposed in every other recent broadcast/MVPD combination.[39] As DIRECTV pointed out in response, the Commission found just the opposite in the *News/Hughes* proceeding: that "carriage of local television broadcast station signals is critical to MVPD offerings"[40] and that a broadcast network operator "possesses significant market power in the DMAs in which it has the ability to negotiate retransmission consent agreements on behalf of local broadcast television stations."[41] Nonetheless, Applicants continue to insist that NBC network programming in particular is not sufficiently important to warrant regulatory concern. As demonstrated below, this assertion is not only erroneous, but also conflicts with the parties' internal documents and their own expert's prior analysis.

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[39] *See* Application at 118.

[40] *News/Hughes*, ¶ 202.

[41] *Id.* at ¶ 201. In order to prevent anticompetitive use of such programming by vertically integrated companies, the Commission has required commercial arbitration of retransmission consent disputes (with continued carriage pending resolution) as a condition in both recent transactions that involved a combination of broadcast and MVPD assets — even though one of those cases involved only two broadcast stations and neither involved a dominant MVPD such as Comcast. *See id.*, ¶¶ VI.C; *News Hughes*, Appendix B, Section IV (2008).

Applicants argue that the conclusions reached in *News/Hughes* should not apply to this proceeding for three reasons, none of which can withstand scrutiny.[42]

1. Alleged "evidence in the record." First, Applicants contend that "for the first time" the record includes "evidence on actual switching to rival MVPDs that resulted from temporary foreclosure."[43] Yet the record in *News/Hughes* included evidence of switching during a period in which Time Warner Cable systems in Houston did not carry the ABC affiliate. The Commission thoroughly analyzed the data from the event and found a statistically significant effect demonstrating the significance of broadcast network programming.[44]

2. Lower ratings. Applicants also note that the ratings for broadcast television network programming have declined in general, and argue that viewers may no longer regard such programming as "must have." Yet as set forth in DIRECTV's Comments, NBC controls the rights to many marquee sporting events and highly popular shows.[45] Numerous studies confirm the Commission's conclusion that viewers still deem this programming a critical element in any MVPD service. For example, a recent survey found that 52% of current pay TV subscribers would consider switching to a different MVPD if NBC broadcast programming were no longer offered by their current MVPD

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[42] *See* Opposition at 142 n.475.

[43] *Id.*

[44] *See News/Hughes*, Appendix D, ¶¶ 18-23.

[45] *See* DIRECTV Comments at 14.

— the highest figure found in the survey.[46] Similarly, the Congressional Research Service noted that major broadcast networks "continue to capture relatively large audiences" and found that "in some ways network proliferation has increased the value of these networks, even if their audience share has shrunk over time."[47] Accordingly, it concluded that an MVPD "could find itself at risk of losing substantial numbers of subscribers if a contract negotiation impasse resulted in it not carrying the programming of one of those [network] affiliates."[48]

The notion that broadcast programming is no longer "must have" is also belied by Comcast's conduct, its internal documents and its economic expert. Comcast recently renewed its retransmission consent agreement with CBS well before the prior agreement expired in order to lock up CBS programming for ten years.[49] Analysts believe that Comcast will pay up to $1 per subscriber per month for CBS programming by expiration of the new agreement[50] — a figure suggesting that Comcast's *executives*, at least, consider broadcast programming to be "must have."

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[46] *See* J.P. Morgan, "J.P. Morgan Consumer Survey: Identifying 'Must Carry' Networks and Consumer Appetite For Channels A La Carte" (Apr. 20, 2010).

[47] Charles B. Goldfarb, *Retransmission Consent and Other Federal Rules Affecting Programmer-Distributor Negotiations: Issues for Congress* at 22 (Congressional Research Service Report for Congress July 9, 2007) (*available at* http://assets.opencrs.com/rpts/RL34078_20070709.pdf).

[48] *Id.*

[49] Mike Farrell, *Comcast Inks CBS Retrans Deal*, Multichannel News (Aug 2, 2010) (*available at* http://www.multichannel.com/article/455544-Comcast_Inks_CBS_Retrans_Deal.php).

[50] Sarah Rabil, *CBS, Comcast Sign 10-Year Contract to Carry TV Shows*, Bloomberg News (Aug 2, 2010) (*available at* http://www.bloomberg.com/news/2010-08-02/cbs-signs-10-year-contract-allowing-comcast-to-carry-its-television-shows.html).

Comcast's internal documents reflect this same conclusion. For example, {{

}}[51] Likewise, Applicants' own expert, Michael Katz, reached a similar conclusion just last year, stating that "[a]n MVPD that fails to obtain carriage of leading broadcast networks is at a significant competitive disadvantage relative to its MVPD rivals serving the same area," and that loss of the rights to carry a major broadcaster results in "a very significant reduction in consumer demand for the MVPD's service as consumers turn to MVPD competitors that have carriage rights."[52]

In this same regard, Applicants further attempt to distinguish this case by asserting that NBC is the number four network today while FOX (the network involved in *News/Hughes*) is the number one network. This argument is misleading in two respects. First, NBC is not the fourth-rated network today among the viewers most coveted by advertisers. For the 2009/2010 season, NBC tied ABC for third place in the Nielsen primetime ratings for Adults 18-49, and tied both ABC and CBS for second place

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[51] 31-COM-1781.

[52] Michael L. Katz, Jonathan Orszag, & Theresa Sullivan, *An Economic Analysis of Consumer Harm from the Current Retransmission Consent Regime*, at 2-3 (Nov. 12, 2009), *attached to* Letter from Neal M. Goldberg, National Cable & Telecommunications Association, to Blair Levin, Federal Communications Commission, GN Docket No. 09-47 (Dec. 16, 2009) ("Katz 2009 RTC Analysis"). This analysis was submitted in support of a request by multiple MVPDs for reform of the retransmission consent regime, potentially including the use of baseball-style arbitration. Whether or not the Commission ultimately determines that industry-wide reform is warranted, the particular facts involved here (*i.e.*, vertical integration of stations with a dominant MVPD) justify imposition of an arbitration condition in this proceeding.

among Adults 18-34.[53] This is consistent with a document produced by Comcast in this proceeding, which states that {{

}}.[54] Similarly, an exhibit proffered by Applicants' experts shows that [[

]].[55] These facts are not consistent with Applicants' attempts to belittle NBC's recent performance compared to its peers.

Second, even if FOX is the number one network today, it was not at the time the Commission was analyzing the *News/Hughes* transaction. *Then,* the FOX Network ranked fourth among all households and third among Adults 18-49 in primetime[56] — roughly where Applicants claim NBC stands today. This belies the implication that FOX in 2004 and NBC in 2010 are not comparable.

3. Comcast's limited footprint. Lastly, Applicants attempt to distinguish *News/Hughes* by arguing that DIRECTV's national footprint makes it better able to reap

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53 *CBS wins 2009-2010 Season in viewers; 7 out of 8 years*, Radio Business Report/Radio Television Report (May. 27, 2010) (*available at* http://www.rbr.com/tv-cable/tv-cable_ratings/24575.html).

54 39-COM-12.

55 Gregory L. Rosston and Michael D. Topper, *The Proposed Comcast-NBCU Transaction: Response to Comments and Petitions Regarding Competitive Benefits and Advertising Competition*, Confidential and Highly Confidential Supporting Data, Third Party Exhibit 7 (July 21, 2010) (attached as Exhibit 1 to Opposition) ("Rosston/Topper Opposition Report") ("Rosston/Topper Reply Report").

56 *See* Television Bureau of Advertising, "Full Season Broadcast vs. Subscription TV Primetime Ratings: 2004-2005 (figures for 2003-2004 season) (*available at* http://www.tvb.org/rcentral/ViewerTrack/FullSeason/fs-b-c.asp?ms=2004-2005.asp).

the benefits of foreclosure than a regional cable company. This might be true for a very small cable company with a limited geographic footprint and a small market share in the DMAs where it operates. However, Comcast does not fit that description. Its systems are located across the country, and pass nearly half of all U.S. TV households nationwide.[57] Moreover, while DIRECTV had on average a 13% market share nationwide,[58] Comcast's systems are clustered to concentrate market power, achieving 60% or greater share in a number of major markets.[59] As the Commission has found, a higher concentration level combined with a local network station yields far greater ability to threaten to withhold retransmission consent.[60]

Given these facts, it is simply not credible that the proposed combination of Comcast and NBCU is, as Applicants claim, "a vertical transaction between parties who do not, and will not, possess market power in any relevant market."[61] The Commission has found that broadcast stations have market power in their assigned DMAs, and Comcast's dominant share of MVPD subscribers in its clustered markets surpass levels regarded as conferring market power. There is no reason for the Commission to reach a different conclusion in this proceeding, or to conclude that the combination of these

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[57] *See* DIRECTV Comments at 38 n.107.

[58] *See News/Hughes*, ¶ 101.

[59] Mark Israel & Michael L. Katz, *Application of the Commission Staff Model of Vertical Foreclosure to the Proposed Comcast-NBCU Transactions*, at 29 (February 26, 2010), attached to letter from Michael Hammer, Comcast Corp., Docket MB 10-56 (March 5, 2010) ("Katz/Israel Report").

[60] *See News/Hughes*, ¶ 4. Although Comcast does not currently have systems in three of the markets where NBCU owns the NBC affiliate station, {{ }}. *See* 31-COM-338.

[61] *See* Opposition at 1.

assets does not require the sort of procompetitive safeguards that have been applied in the past.

3. The Commission Has Rejected Theoretical Reduction of Double Marginalization as an Offset to Actual Harm to Competition.

Applicants next ask the Commission to overlook the competitive harms that would result from the proposed transaction because (they assert) these harms would be "swamped" by extraordinary efficiencies — primarily, cost savings from reduced double marginalization. In short, Applicants claim that even if the transaction would raise the programming costs of Comcast's rivals and result in higher prices for their subscribers, there would be no harm to competition. This is true, they say, because the transaction would also reduce double marginalization such that Comcast could internalize the per-subscriber fees it pays for NBCU programming, allowing Comcast to *lower* its retail prices.[62]

Consider for a moment what Applicants are really saying: that it is in the public interest for the subscribers of Comcast's competitors to pay higher prices because Comcast would voluntarily lower its own retail prices. Because this "benefit" grows with the number of subscribers Comcast serves, this argument also suggests that the more Comcast dominates a market, the greater the consumer welfare benefits from this combination. DIRECTV submits that such a bargain would not serve the public interest.

Even if this alleged benefit was not dismissed outright, the Applicants have failed to substantiate their claims about the reduction of double marginalization with the evidence the Commission has held to be required to make it a cognizable benefit. As

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[62] Katz/Israel Opposition Report at 61 and Table IV.1.

DIRECTV noted in its initial comments, the Commission has shown skepticism in past transactions about the benefits of eliminating double marginalization. Although it has recognized that reductions in double marginalization can qualify as a benefit in theory, the Commission has required entities to prove that the reductions would actually result in lower prices for consumers rather than higher profit margins for the merged entity.[63] To do that, entities must submit data sufficient to establish the "pass-through rate" — the percentage of any savings that would be passed on to consumers. As the Commission explained, this pass-through rate in turn "will depend crucially on the elasticity of demand for the downstream product."[64]

Although DIRECTV noted the Commission's evidentiary requirement in its opening comments, Applicants still have presented *no empirical evidence* quantifying how much, if any, of the supposed savings they would pass-through to consumers. Unlike prior applicants, who have committed to cap prices following a merger,[65] Comcast has made no commitment on pricing — a noticeable omission among the many voluntary commitments and side agreements it has proffered in this proceeding. Nor have Applicants submitted any data regarding the elasticity of demand or the marginal cost of producing programming. The Commission found the lack of such information

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[63] *News/Hughes,* ¶ 155.

[64] *Id.,* ¶ 70 n.223.

[65] *Applications for Consent to the Transfer of Control of Licenses; XM Satellite Radio Holdings Inc., Transferor To Sirius Satellite Radio Inc., Transferee*, Memorandum Opinion and Order and Report and Order, 23 FCC Rcd 12348, 12394-12395 ¶¶ 106-108 (2008).

dispositive in rejecting the benefits of double marginalization in the *News/Hughes* proceeding.[66]

Rather than quantifying a pass-through rate, Applicants have simply assumed without any empirical support a rate of 50 percent.[67] Drs. Rosston and Topper suggest that this pass-through rate is reasonable for two reasons. First, they say, it is consistent with a 13-year-old article[68] that calculated the pass-through rate for the cable industry collectively based on data that is at least 16 years old.[69] But this does not change the fact that Applicants' assumed pass-through rate is still that — an assumption. As Applicants recognize, the MVPD market has changed greatly since 1994,[70] and it is not sufficient to assume that the elasticity of demand is the same today as it was then. This single article is a far cry from the up-to-date "relevant demand elasticities for different types of programming" that the Commission demanded in *News/Hughes*.

Second, Rosston and Topper assert that the Commission should assume a 50-percent pass-through rate because that rate is "consistent" with "the values relied on by

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66 *News/Hughes,* ¶ 155. Rosston and Topper criticize DIRECTV for suggesting this requirement, *see* Rosston/Topper Opposition Report at 18-19, but it was the Commission — not DIRECTV — that imposed the evidentiary standard.

67 Rosston/Topper Opposition Report at 18.

68 *Id.* at 17 (citing George Ford and John Jackson, *Horizontal Concentration and Vertical Integration in the Cable Television Industry*, 12 Review of Industrial Organization at 513-14 (1997) ("1997 Cable Analysis")).

69 Data for the cited report was taken from the FCC's *1994 Video Competition Report. See* 1997 Cable Analysis at 511. That report, in turn, was based on complete data submitted as of year-end 1993, with incomplete data related to some operators through mid-1994. *See Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 — Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, First Report, 9 FCC Rcd. 7442, 7449 ¶ 12 (1994).

70 *See* Opposition at 8.

DirecTV in" the *News/Hughes* transaction.[71] But that is incorrect. While DIRECTV's expert in *News/Hughes* did state that pass-through rates "are generally expected to fall between zero and unity" and calculated savings based on "assumed" pass-through rates ranging from 10 percent to 90 percent, DIRECTV never asserted a 50-percent pass-through rate.[72] Moreover, the Commission expressly *rejected* DIRECTV's assumed pass-through rates as insufficient to substantiate the benefit claimed.[73] The Commission should do the same here.

B. Applicants' Economic Arguments Are Belied by the Empirical Evidence and Their Own Internal Documents.

In its opening comments, DIRECTV submitted an economic report by Prof. Kevin Murphy, who applied a Nash bargaining model to explain how the proposed transaction would enable NBCU to raise the prices it charges to rival MVPDs for NBCU's programming.[74] The economic logic behind Prof. Murphy's model was straightforward: the fee that NBCU receives for its programming is the result of negotiations between NBCU and an MVPD over how to split the gains from trade. NBCU's "payoff" is equal to the profit it would obtain in its "next best alternative" (its "fallback position") plus some portion of the "incremental value" that NBCU and the MVPD create through the transaction. This means that if NBCU is able to improve its

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[71] Rosston/Topper Opposition Report at 18.

[72] *See* Steven C. Salop *et al.*, *News Corporation's Partial Acquisition of DIRECTV: A Further Economic Analysis*, MB Docket No. 03-124, at 23 ¶ 41 (September 8, 2003).

[73] *See News/Hughes*, ¶ 155.

[74] *See* Murphy Report, *supra* note 2.

"fallback position," it can expect to receive a greater share of the surplus from the transaction, and thus higher retransmission fees.

As Prof. Murphy explained in his opening report, NBCU's fallback position will improve if it combines with Comcast. Thus, using a standard economic model, Prof. Murphy showed that the proposed transaction would significantly increase the prices other MVPDs pay for NBCU programming. The reason is simple: if NBCU and an MVPD fail to reach a deal, some of the MVPD's customers will leave the MVPD and move to Comcast. Prior to the transaction, this fact had no economic significance to NBCU; but after the transaction, its improves NBCU's "fallback position" because NBCU's corporate parent profits from this customer movement.

Not surprisingly, Applicants offer no arguments that would impeach Prof. Murphy's basic economic logic. They instead criticize the model as "stylized" and therefore suggest that Prof. Murphy did not sufficiently acknowledge the uncertainty underlying his point estimates of the effect of integration on retransmission fees.[75] They offer no argument that would call into question the conclusion Prof. Murphy derives from the standard economic model — that the proposed transaction would tend to make the prices that Comcast's MVPD rivals pay for NBCU programming increase substantially.

They also criticize Prof. Murphy's specific application of the model, particularly his assumptions that: (1) the "diversion rate" (*i.e.,* the rate at which subscribers leaving a foreclosed MVPD would switch to Comcast) is proportional to Comcast's market share among non-foreclosed MVPDs ("proportional substitution"); and (2) that the programmer

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[75] *See* Opposition at 147.

and MVPD have equal bargaining skill in the sense that each is able to obtain half of the incremental gains from the transaction. Neither critique is valid. With respect to diversion, Prof. Murphy simply adopted the diversion rate that Comcast's own experts (and the Commission itself) had used. Now that Applicants have criticized their own diversion rate, Prof. Murphy has prepared a rebuttal report (attached as Exhibit A) that assesses available empirical evidence of diversion and finds that this evidence confirms the general conclusion of his economic model — that the proposed transaction will cause prices for NBCU programming to rise. As for equality of bargaining skill, it is common for economists to make this assumption, and Comcast's own expert, Dr. Katz, did so in a recent report to the Commission. In any event, under any reasonable assumption on relative bargaining skill of NBCU and one of Comcast's MVPD rivals (such as DIRECTV and DISH Network), Prof. Murphy's conclusion remains the same: the proposed transaction will improve NBCU/Comcast's bargaining position, and thus economic principles show that it would enable NBCU to charge MVPDs that compete with Comcast higher prices for NBCU programming.

Lastly, Applicants allege that even if the proposed transaction would cause programming prices to rise, these increases would be "swamped" by the benefits to Comcast from reducing double marginalization. Yet this argument wrongly assumes that Comcast would lower its own prices when the costs for all of its rivals increase. As Prof. Murphy explains, the effects of integration on consumer welfare cannot be quantified in the simplistic method that Israel and Katz use.

1. The Nash Bargaining Framework Is Appropriate.

Drs. Katz and Israel concede that the Nash framework "commonly is used in academic settings"[76] and offer no argument to challenge the model's key insight — that the terms a party receives will improve when its fallback position improves. Nevertheless, they criticize the model as imprecise and "far too stylized" to be useful here.[77] This critique is misplaced. Contrary to Applicants' claim, the Nash bargaining framework is commonly used outside academia to model negotiations between programmers and MVPDs. In fact, Applicants' own expert, Dr. Katz, used a Nash bargaining framework as recently as November 2009 to model negotiations between MVPDs and programmers in a report submitted to the Commission.[78] Just as Prof. Murphy explained in this proceeding, Dr. Katz argued that programmers would be able to command higher prices if they were able to improve their fallback position — as he called it, their "disagreement point." Nowhere did Dr. Katz suggest that a Nash bargaining model would be too "stylized" to be useful for that analysis. Nor could he have: the Commission itself has used a comparable framework to analyze past transactions.[79]

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[76] *See* Katz/Israel Opposition Report at 46.

[77] *See* Opposition at 42.

[78] *See* Katz 2009 RTC Report, *supra*, note 35.

[79] *See, e.g., News/Hughes*, ¶ 204 ("[a]s commenters have correctly observed, the *ability* of a television broadcast station to threaten to withhold its signal, even if it does not actually do so, changes its bargaining position with respect to MVPDs, and could allow it to extract higher prices, which ultimately are passed on to consumers); *See Adelphia Commc'n. Corp., Comcast Corp., and Time Warner Inc.*, Memorandum Opinion and Order, 21 FCC Rcd. 8203, ¶ 121 (2006) ("Adelphia/Comcast/TWC").

Applicants also suggest that Prof. Murphy failed to acknowledge the uncertainty underlying his estimates of the effect of integration on retransmission fees.[80] Prof. Murphy's key point, however, is not the exact amount by which prices will increase. Rather, the point is the *direction* in which the transaction would push prices and the *general magnitude* of those changes. These aspects of Prof. Murphy's analysis remain intact, and are confirmed by further evidence discussed below.

2. Prof. Murphy's Conclusions Regarding Nash Bargaining Are Backed By Empirical Evidence.

Implicitly recognizing that the Nash bargaining model is the appropriate tool for analyzing the likely effects of the proposed transaction, Applicants next question the numeric values that Prof. Murphy used in the model, focusing on two parameters in particular. First, Applicants challenge Prof. Murphy's assumption that the diversion rate would be proportional to Comcast's market share among the non-foreclosed MVPDs. Second, Applicants question the assumption that Comcast's MVPD rivals and NBCU would split the incremental gains from transactions equally (that is, that they would have equal "bargaining skill"). Neither critique has merit.

a. Applicants' Claims About Diversion Rates Defy the Evidence.

In his initial report, Prof. Murphy adopted Applicants' own assumption about the diversion rate — that the rate at which subscribers leaving a foreclosed MVPD would switch to Comcast is proportional to Comcast's market share among non-foreclosed MVPDs.[81] Applicants now fault Prof. Murphy for adopting their own assumption,

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[80] *See* Opposition at 42.

[81] *See* Murphy Report at ¶ 51; Katz/Israel Report at 31.

claiming that it is unreliable because it was not empirically based. They claim that their empirical analysis demonstrates that the actual diversion rate is "near zero."[82]

But the alleged "near zero" diversion rate is not supported by any of the evidence in this proceeding. As explained below, the evidence on which Drs. Israel and Katz rely is fundamentally flawed. Israel and Katz suggest that the diversion rate is zero because {{

}}. Ultimately, however, their analysis is flawed because they fail to account for another event that could have affected Comcast subscribership during the relevant time period. Moreover, the "near zero" diversion rate is also inconsistent with other available evidence — including Applicants' prior statements in this proceeding, Comcast's own internal survey data, Comcast's {{ }}, and subscriber surveys conducted by DIRECTV. Perhaps recognizing that a "near zero" position is indefensible, Katz/Israel assume in their own analysis that the diversion rate is "1/3 of the value" that they previously asserted.[83] Yet as explained below, the appropriate diversion rate is {{

}}. Thus, even if the diversion rate is not that which Katz/Israel originally proffered, NBCU programming prices would still be expected to rise substantially as a result of the proposed transaction under any reasonable estimate.

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[82] Katz/Israel Opposition Report at 55, ¶67.

[83] It is not clear how this one-third assumption is grounded empirically, though it is certainly more reasonable than "near zero" diversion.

1. There Is No Evidence to Suggest a Near-Zero Diversion Rate.

As Prof. Murphy explains in his attached rebuttal report, the evidence on which Drs. Israel and Katz base this conclusion is fundamentally flawed.[84] To reach their conclusion, Drs. Israel and Katz rely on data from the "Fisher event," the dispute in which DISH Network lost carriage rights in a number of DMAs for an affiliate of a major broadcast network. Although the data indicate that {{

}}, Israel and Katz conclude that {{

}}. But the comparison between DMAs affected by the Fisher event and the "control group" could be misleading because at the same time as the Fisher dispute, another event was occurring that could have affected Comcast subscribership in some of the areas subject to the Fisher dispute but not in the control group. The event was Comcast's transition to an all-digital cable system, which occurred in certain Fisher DMAs during the relevant period but did not occur in any of Israel and Katz's control-group DMAs.[85] Comcast's switch to all digital was the subject of numerous complaints.[86] As with any period of transition, one could expect the accompanying disruption to affect both the number of subscribers choosing to leave Comcast as well as those thinking about switching to Comcast. Drs.

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[84] Murpy Rebuttal Report at 14-15 ¶¶ 36-37.

[85] Kevin M. Murphy, *Response of Professor Kevin M. Murphy to Reply Report of Mark Israel and Michael L. Katz* at 14-15 ¶ 36 (Aug. 19, 2010) (attached as Exhibit A) ("Murphy Rebuttal Report").

[86] *See* Rob Pegoraro, *Can You Make Comcast's Digital Transition Without a Cable Box?*, WASHINGTON POST (Sep. 22, 2009) *at* http://voices.washingtonpost.com/fasterforward/2009/09/cables_digital_transition.html.

Israel and Katz make no effort to account for this event, and their analysis is therefore unreliable.

The resulting unreliability of Israel and Katz's analysis is reflected in their conclusion, as a near-zero diversion rate would be flatly inconsistent with all the other evidence the Applicants have proffered in this proceeding, including Comcast's own internal survey data and Comcast's {{ }}. In order to see why, it is important to understand exactly what a "near zero" diversion rate would imply. If the diversion rate actually were near zero, then *no subscribers* that leave DIRECTV would switch to Comcast. In other words, if the diversion rate were zero, Comcast and DIRECTV would not be considered to be direct competitors. In many markets, Comcast would, if Katz and Israel are correct, again be something very close to the monopoly it once was in a market for "cable service."

Even Comcast does not believe that such a claim accurately reflects market reality. Comcast has repeatedly and affirmatively asserted — in this very proceeding, no less — that satellite providers *are* its direct competitors. For example, the Application asserts that "[t]he Commission has expressly rejected arguments that DBS and cable are not part of the same product market," and that "[t]here is no reason for the Commission to adopt a narrower product market definition in this case."[87] Similarly, in recent comments to the Commission for its annual assessment of competition in the market for

[87] *See* Application at 83. *See also id.* at 79 (asserting that Comcast faces "intense competition among MVPDs" and naming DIRECTV and DISH Network as prime examples of its competition).

delivery of video programming, Comcast discussed "the ongoing battle for subscribers with robust MVPD competition presented by DirecTV and Dish Network."[88]

Moreover, Comcast's own internal documents thoroughly refute the notion of a "near zero" diversion rate. Specifically, {{

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Tellingly, even Comcast's public statements outside this proceeding contradict the "near zero" assertion. For example, on a recent conference call with investors, Comcast President Neil Smit revealed that Comcast's own surveys of departing subscribers confirm that "most of the customers who are leaving are — clearly satellite is our bigger competitor right now."[90] Comcast has not provided any such surveys to the Commission, although the results would appear to be directly responsive to the Commission's request

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[88] Comments of Comcast Corporation, MB Docket No. 07-269, at 2 (filed May 20, 2009).

[89] 63-COM-351. Comcast's recent dispute with the NFL Network provides a particularly relevant example of how the loss of programming can lead consumers to switch between Comcast and its rival satellite providers. In 2009, Comcast was involved in a dispute with the NFL Network that threatened its continued carriage of the network. After the dispute was resolved,{{

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[90] Comcast Q2 Earnings Transcript at 14.

for information[91] and certainly would be relevant to the diversion rate issue Applicants' experts have spent so much time on.

2. *Other Available Evidence Demonstrates That the Diversion Rate Is Substantial.*

Fortunately, there is no need to speculate about what survey data would show. DIRECTV regularly conducts its own surveys to determine switching habits of both new and departing subscribers, and that data confirms that the diversion rate is significant. For example, based on Prof. Murphy's analysis of survey data, "subscribers leaving DIRECTV move to a cable provider at a rate equal to {{ }} of cable's national share of non-DIRECTV subscribers."[92] Moreover, based on surveys of customers who left DIRECTV because of dissatisfaction with DIRECTV's local channels, {{ }} of those who switched to other specified providers switched to cable.[93] Although alternative calculations by Prof. Murphy from the survey data give slightly lower results, all imply a diversion rate higher than the "near-zero" or 1/3 of proportional substitution that Drs. Israel and Katz use in their analysis, and 4 of the 6 estimates from survey data reported in the Murphy report imply a diversion rate higher than {{ }}.[94]

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[91] Information and Discovery Request for Comcast Corp. ¶ 11.

[92] Murphy Rebuttal Report at 11 ¶ 28.

[93] *Id.* at 13 ¶ 33.

[94] *Id.* at 13 ¶ 34.

Based on the totality of the data, Prof. Murphy concludes that a reasonable estimate of the diversion rate from a rival MVPD to Comcast is {{

}} of proportional substitution, and in any event would fall within the interval between {{ }} of proportional substitution.[95] Based on this range of diversion-rate estimates, Prof. Murphy show how a standard economic model predicts that the proposed transaction would significantly increase the prices other MVPDs pay for NBCU programming. For example, retransmission consent fees would increase by {{

}}.[96]

b. Prices Charged to MVPD Rivals Would Increase Under Any Reasonable Estimate of Bargaining Power.

Applicants similarly fault Prof. Murphy for assuming — as Dr. Katz assumed in his November 2009 report[97] and as economists applying a Nash bargaining model generally assume — that the parties have approximately equal bargaining power and would split the gains from trade equally. Applicants now claim that Prof. Murphy's conclusion is unreliable because, if NBCU had all the bargaining power, it would take 100 percent of the incremental gains from trade both before and after the transaction, and thus integration would not result in any change in the price it receives from MVPDs for its programming.[98] But it is simply unreasonable to assume that NBCU is able to achieve

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[95] *Id.* at 13 ¶ 38.

[96] *Id.* at 13 ¶ 39.

[97] *See* Katz 2009 RTC Report, *supra* note 35.

[98] *See* Katz/Israel Opposition Report at 47 ¶ 51.

this in negotiations with Comcast's MVPD rivals[99] — a group that includes DIRECTV (18.8 million subscribers), DISH Network (14.3 million), Verizon FiOS (3.2 million), and AT&T U-verse (2.5 million).[100] While it may not be possible to say that the parties would always split the gains 50-50, the exact proportion makes little difference to Prof. Murphy's ultimate conclusion — a standard economic model predicts that proposed transaction would result in significant price increases. As Prof. Murphy explains, even under the (extreme) assumption that NBCU has twice the bargaining skill of these MVPDs, and therefore is able to appropriate two-thirds of the incremental gains from trade, economic forces indicate that retransmission-consent fees would still rise significantly.[101]

3. Applicants' Consumer-Welfare Analysis Is Flawed.

Applicants next allege that even if the proposed transaction would cause programming prices to rise, these increases would be "swamped" by the benefits to Comcast from reducing double marginalization. They suggest that even if competing

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[99] This would be an especially unsupported assumption if, as Applicants assert, NBC is not "must have" programming and withholding retransmission consent would risk seriously damaging NBCU due to loss of ubiquitous distribution. *See* Opposition at 140; Israel/Katz Opposition Report at ¶¶ 24-25.

[100] *See* DIRECTV Announces Second Quarter 2010 Results (*available at* http://investor.directv.com/releasedetail.cfm?ReleaseID=496757); DISH Network Reports Second Quarter 2010 Financial Results (*available at* http://dish.client.shareholder.com/releasedetail.cfm?ReleaseID=497457); Verizon Reports Strong Wireless, FiOS Customer Growth (*available at* http://investor.verizon.com/news/view.aspx?NewsID=1067); AT&T Delivers Double Digit Earnings Growth in Second Quarter, Raises Full Year Outlook (*available at* http://www.att.com/gen/press-room?pid=18142&cdvn=news&newsarticleid=30971&mapcode=financial).

[101] *See* Murphy Rebuttal Report at 5-6¶¶ 14-16.

MVPDs will be forced to raise prices, *average* prices will decrease because Comcast will voluntarily lower the prices it charges its own customers.[102]

As explained above, there is no need to consider this alleged benefit because it is simply too speculative and because Applicants have not presented the data necessary to support it. But even if there were some non-speculative efficiency to consider, Applicants' analysis is flawed. It makes little sense to assume that when one competitor's costs decrease while the rest of the industry's costs increase that the price of the final product will go down on average. As Prof. Murphy explains, a key problem with Applicants' analysis is that it makes unjustifiable assumptions about the role of a firm's costs on its prices. Under Applicants' theory, the prices for MVPD service should decrease simply because the average industry cost for providing that service decreases. But economists recognize that the relationship between prices and costs is much more complicated and depends on numerous factors including the elasticity of demand for MVPD services.[103] Drs. Israel and Katz claim that examining these factors would be too complicated; but such an analysis is just what would be required in order to adopt Comcast's analysis — or, as the Commission has found, to substantiate the reduction of double marginalization as a cognizable benefit of the proposed transaction.[104] Applicants' continuing failure to provide such data is alone sufficient to justify rejection of their claims about the alleged benefits of reducing double marginalization. Moreover,

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[102] Katz/Israel Opposition Report at 59-62.

[103] *See* Murphy Rebuttal Report at 17-18 ¶¶ 43-44.

[104] *See News/Hughes*, ¶¶ 155-56.

and also as discussed above,[105] it would not be in the public interest to approve a transaction that would raise prices for the overwhelming majority of pay-television subscribers, even if it reduced them for the subscribers of Comcast.

C. National Programming Networks Owned or Controlled By Comcast Should Be Subject to Arbitration.

In its Comments, DIRECTV demonstrated that the proposed transaction would enable Comcast to wield a much larger group of popular national network programming in the same manner it could use broadcast and RSN programming, resulting in higher prices, carriage of less popular programming, and (in extreme cases) consumer disruption.[106] Accordingly, DIRECTV proposed that national networks owned or controlled by Comcast should be subject to the same procompetitive arbitration regime imposed on broadcast and RSN programming in past transactions. Although such a condition has not previously been imposed on national networks, no prior transaction involved so many and so popular networks combined with a distribution platform that reaches nearly 50 percent of households.[107] Moreover, in prior cases, the Commission drew comfort from the fact that such networks would be subject to the program access rules' ban on exclusive carriage arrangements[108] — a safeguard that expires in 2012.[109]

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[105] *See* Part II.A.3, above.

[106] *See* DIRECTV Comments at 36-40.

[107] NBCU controls 11 national networks, including the top-rated network overall (USA) and the top-rated financial news network (CNBC). As an internal NBCU document proudly trumpets,
}} 21-NBCU-56.

[108] *See Adelphia/Comcast/TWC*, ¶ 168; *News/Hughes*, ¶ 124.

[109] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791 at ¶ 1(2007) ("*2007 Exclusivity Extension Order*").

The Murphy Rebuttal Report further quantifies how economic forces would affect prices for NBCU's national programming. As stated in his original report, the general methodology used to predict price increases for broadcast programming arising from the transaction can be applied to any NBCU programming that would come under Comcast's control.[110] The report attached hereto applies that methodology to NBCU's national networks, and, not surprisingly, demonstrates that the expected price increases are substantial.[111] Indeed, taken together (as they would be if sold as a bundle), these increases rival the increase expected for "must have" NBC network programming.[112] As DIRECTV argued in its Comments, the Commission should consider these networks in the aggregate when assessing the potential effect of the proposed transaction, as the prospect of losing access to multiple channels is far more daunting than losing access to any one of them alone.[113]

Here again, Comcast's ongoing behavior and own internal documents confirm the validity of DIRECTV's concern. Although Comcast has assured the Commission that it always makes its programming networks available on an individual basis,[114] DIRECTV's

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[110] *See* Murphy Report at 22.

[111] Murphy Rebuttal Report at 16 ¶ 40.

[112] As stated in the Opposition, {{

}}. However, there is no reason to think that Comcast's market share will get materially smaller or that NBCU's programming will get materially less popular by that time. Thus, unless the Commission imposes procompetitive safeguards in this proceeding, {{

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[113] *See* DIRECTV Comments at 36-37.

[114] Opposition at 218 ("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.").

experience is to the contrary. Indeed, in an ongoing negotiation, Comcast has refused DIRECTV's repeated requests for individual offers on four networks, insisting that they be negotiated as a package.[115] Clearly, Comcast appreciates the additional leverage it can gain through such bundling, and can be expected to apply those same tactics to an even larger stable of programming should the proposed transaction be approved.

This conclusion is further borne out by documents Comcast has produced in this proceeding. For example, {{

}}.[118]

Taken together, these materials demonstrate that {{

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[115] Declaration of Daniel Hartman, ¶ 7.

[116] 31-COM-332.

[117] 31-COM-95.

[118] 31-COM-644. *See also* 31-COM-1766 ({

}}).

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As the Commission has acknowledged, a cable operator can use affiliated national programming to disadvantage rivals just like "must have" RSN programming because "a competitive MVPD's lack of access to popular non-RSN networks would not have a materially different impact on the MVPD's subscribership than would lack of access to an RSN."[119] Accordingly, logic dictates that the Commission should apply the same regulatory safeguards to both categories of programming. DIRECTV concedes that national programming is not uniformly deemed to be "must have" in the same way that broadcast network and RSN programming is.[120] However, the Commission need not engage in an exercise to determine which networks fall into which category. By establishing an arbitration remedy to resolve negotiation impasses, the Commission will allow the market to determine which programming is "must have" for the parties involved, removing the Commission from the equation. Moreover, because the arbitration process will continue to require a significant investment of resources and effort (even with the improvements suggested by DIRECTV), there is no need to worry

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[119] *2007 Exclusivity Extension Order*, ¶ 39.

[120] As the Commission is aware, DIRECTV did not carry Comcast's Versus network during the period from September 2009 through February 2010. While Applicants prefer not to characterize this episode as a case in which Comcast withheld programming from a rival (*see* Opposition at 158 n.529), the fact remains that DIRECTV suggested continued carriage during negotiations but Comcast demanded that the channel be taken down at expiration of the prior contract on August 31, 2009. Although DIRECTV does not consider Versus to be "must have" programming, {

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that MVPDs will invoke arbitration needlessly. Accordingly, arbitration offers an appropriate remedy to apply to national networks controlled or managed by Comcast.

III. APPLICANTS RAISE NO OBJECTIONS TO THE ARBITRATION REVISIONS PROPOSED BY DIRECTV.

DIRECTV has proposed that broadcast network and national programming controlled by Comcast be made subject to the same arbitration regime the Commission has imposed to address competitive issues in previous transactions, including the RSN conditions imposed on Comcast in the *Comcast/TWC/Adelphia Order*.[121] However, DIRECTV has also made targeted suggestions for ways in which the arbitration regime could be streamlined so that it would offer the rapid and affordable means of redress originally envisioned by the Commission.[122] Neither Applicants nor any other participant in this proceeding has raised any objection to the modest revisions proposed by DIRECTV.

As noted in its Comments, DIRECTV has found the availability of arbitration to be invaluable to resolve impasses in negotiations for carriage of other programming controlled by Comcast. DIRECTV has invoked arbitration with respect to four Comcast-affiliated RSNs since the condition was imposed in 2006. In the first proceeding, the parties settled just days before the arbitration hearing was scheduled to begin. The other three proceedings were settled much earlier in the process, before discovery materials had been exchanged. In each case, the availability of an impartial third party to review the two sides' positions was instrumental in driving them toward a resolution — even though

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[121] *See* DIRECTV Comments at 28, 40.

[122] *Id.* at 46-51.

no arbitrator ruled on the merits in any of these proceedings — and consumers were able to continue viewing the content at issue without disruption.

Attached as Exhibit B hereto is a proposed set of conditions that include provisions for arbitration of negotiating impasses related to the carriage of broadcast network, RSN, and national network programming. This draft is based on the arbitration conditions imposed by the Commission in prior proceedings, but has been modified to reflect the proposals made by DIRECTV in its Comments. DIRECTV urges the Commission to adopt this slate of conditions if it is to grant the pending Application.

IV. APPLICANTS' CLAIMED BENEFITS ARE MISCONCEIVED AND UNSUPPORTED.

DIRECTV has raised questions about several of the public interest benefits that Applicants claim will result from the proposed transaction, or that they have committed to achieve.[123] Applicants attached to their Opposition a response by Drs. Gregory L. Rosston and Michael D. Topper in an effort to further substantiate their claims and rebut the issues raised by DIRECTV and others.[124] Yet even this latest effort falls short of the mark.

At the outset, DIRECTV notes that Applicants appear to be laboring under a misconception about what makes a particular benefit "transaction specific" for purposes of the Commission's analysis. They assert that "a commitment in furtherance of the public interest and offered to be made into a binding condition is still valuable in its own right," even if that commitment "costs little to nothing and even if it *could* be

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[123] *Id.* at 51-52.

[124] *See* Rosston/Topper Opposition Report.

accomplished without the transaction."[125] Applicants' understanding of this concept is not shared by the Commission. To be considered transaction-specific, a benefit must be "unlikely to be realized by other means that entail fewer anticompetitive effects,"[126] and must be one "that would not be achievable but for the proposed merger."[127] Thus, the Commission has found, for example, that a claimed benefit is not transaction-specific if it could be accomplished by a joint venture between the parties or other means that pose fewer competitive risks rather than merger.[128]

Using the Commission's definition, several claimed benefits of the proposed transaction are quite plainly *not* transaction-specific. For example, as DIRECTV pointed out, Comcast and NBCU could bid for sports rights as a joint venture, just as TNT and CBS did for the rights to the Men's NCAA Basketball Tournament.[129] Other examples are discussed in more detail below.

1. Common Sense Media. Applicants have committed to expand Comcast's existing partnership with Common Sense Media and to "look for more opportunities for

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[125] Opposition at 34 (emphasis in original).

[126] *See EchoStar Commc'n. Corp., General Motors Corp., and Hughes Electronics Corp.,* Hearing Designation Order, 17 FCC Rcd. 20559, ¶ 189 (2002) ("*EchoStar HDO*").

[127] *NYNEX Corp. and Bell Atlantic Corp.*, Memorandum Opinion and Order, 12 FCC Rcd. 19985, ¶ 158 (1997).

[128] *See, e.g., EchoStar HDO*, ¶ 230 (rejecting claimed benefit related to satellite broadband service because applicants failed to show that the "critical mass" of subscribers and facilities could not be achieved through a joint venture rather than merger); *News/Hughes*, ¶¶ 328, 337, 350, 357 (rejecting several claimed benefits because applicants had not explained why those benefits could not take place in the absence of the transaction); *Comcast Corp., AT&T Corp., and AT&T Comcast Corp.* Memorandum Opinion and Order, 17 FCC Rcd. 23246, ¶ 203 (2002) (rejecting claimed benefit where applicants had failed to show that it required special expertise that could not be duplicated absent the transaction).

[129] *See* DIRECTV Comments at 59.

[Common Sense] to work with NBCU."[130] Yet the Opposition reveals that Comcast "is now in the process of formalizing with Common Sense" the very undertakings made in the Application.[131] Given that DIRECTV has already integrated Common Sense Media ratings information into its on-screen guide,[132] this "commitment" is almost certainly driven by market forces rather than any imperative arising from the proposed transaction.

2. Spanish-language programming. Documents produced in this proceeding call into question the transaction-specificity of Applicants' commitments with respect to carriage of additional Spanish-language programming. For example, {{

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[130] *See* Application at 46 (Commitment #5).

[131] Opposition at 35.

[132] *See* DIRECTV, *DIRECTV Is First to Deliver Easy-to-Understand On-Screen TV Ratings From Common Sense Media* (Feb. 24, 2010) (*available at* http://www.directv.com/DTVAPP/global/article.jsp?assetId=P6700131&_DARGS=/DTVAPP/global/component/cmpt_v.jsp&_requestid=1405345).

[133] 63-COM-728.

[134] 63-COM-733, -736.

}} there is no basis for Comcast to argue that this proffered commitment is transaction-specific.

3. VOD programming. In its Comments, DIRECTV compared the many sources of VOD content available to Comcast with the much smaller amount of VOD content actually made available to subscribers, and concluded that "something other than the availability of content — such as limitations in Comcast's own facilities — was responsible."[135] In response, Applicants assert instead that Comcast's ability to meet consumer demand for high-quality content across multiple platforms was delayed by the reluctance of content owners to embrace new and untested distribution platforms, such as VOD.[136] Similarly, Rosston and Topper assert that the launch and expansion of the VOD platform took longer than expected because of limits on the quantity, quality, and variety of content that was available to Comcast.[137]

Such assertions are {{

}}.[139] Moreover, with respect to NBCU specifically, {{

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[135] DIRECTV Comments at 54.

[136] Opposition at 57.

[137] Rosston/Topper Opposition Report at 4.

[138] 63-COM-308; 63-COM-358; 63-COM-701.

[139] 63-COM-296; 63 COM-700.

}}[140] This internal evidence further undercuts Applicants' claims about the benefits of the proposed transaction.[141]

DIRECTV also pointed out that, while NBCU content may become more available in more ways to Comcast, it is likely to be more difficult for Comcast's MVPD rivals to access.[142] Applicants have not challenged this observation. As with their arguments related to double marginalization, it appears that Applicants believe that what is good for Comcast is good for the public at large. The Commission cannot take such a narrow view in its analysis.

4. Investment. Another benefit claimed by Applicants is the likelihood that Comcast will invest in NBCU programming, just as it has done with other networks it has acquired.[143] DIRECTV challenged this purported benefit, noting that there was no evidence that NBCU networks lacked for investment or were otherwise in a similar position as Comcast's other programming acquisitions.[144] In response, Rosston and

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[140] 11-COM-755, 803.

[141] Perhaps then it should come as no surprise that the CEO of Comcast's wholly-owned online media management and publishing company, the Platform, opined that "'[m]edia companies are now wholeheartedly embracing multi-platform video distribution.'" *See Comcast Media Center and the Platform Announce Validation of Their Online Video Publishing Capabilities in Preserving Nielsen's Audio Watermarks*, THEPLATFORM (May 20, 2010) (*available at* http://theplatform.com/about/details/cmc_theplatform_nielsen_c3_announcement).

[142] *See* DIRECTV Comments at 53-54.

[143] *See, e.g.*, Application at 5-7; Rosston Report at 5-6.

[144] *See* DIRECTV Comments at 58-59.

Topper point to NBC as an example of programming that is underperforming and would benefit from greater investment by Comcast.[145] Yet the evidence does not support this assertion.

For example, internal documents produced by NBCU show {{

}}[146] — a year when NBC was the top-ranked network.[147] Another presentation {{

}}.[148] Moreover, an exhibit provided by Rosston and Topper shows that [[

]].[149] Such robust advertising results are not consistent with an "underperforming" network that lacks investment.

Significantly, Applicants did not even attempt to argue that NBCU's cable networks are underperforming or lack for investment. Indeed, an exhibit submitted by

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[145] Rosston/Topper Opposition Report at 10.

[146] 21-NBCU-12998 at 9.

[147] *See, e.g.,* Network Rankings (*available at* http://tviv.org/Nielsen_Ratings/Historic/Network_Television_by_Season/2000s).

[148] 29-NBCU-9370 at 9.

[149] Rosston/Topper Reply Report, Third Party Exh. # 7. And as noted above, another document produced by Comcast in this proceeding states that{{

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39-COM-12.

Katz/Israel shows that: (1) {{

}}.[151]

As for investment, {{

}}[153] Applicants themselves state that, after buying Telemundo for $2.7 billion in 2002, NBCU subsequently invested an additional $900 million to acquire stations and create Telemundo Studios (which currently produces more than 3000 hours of original content a year) and Telemundo International.[154] Conversely, there is evidence that Comcast may actually invest less in NBCU. For example, {{

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[150] Israel/Katz Reply Report, Confidential and Highly Confidential Supporting Data, Document 11.2.1.7 at NBCU-107, NBCU-110, NBCU-117 (July 22, 2010).

[151] *Id.* at 129, 160.

[152] *Id.* at 117.

[153] *Id.* at 113.

[154] Opposition at 235.

}}.[155]

As DIRECTV pointed out, there is no evidence that NBCU has under-invested in its broadcast network or cable channels. Moreover, the success of any content depends more upon developing programming that viewers want to watch than upon simply spending more money. NBC presents a vivid and recent example of this principle, having engaged in a high profile gambit to move Jay Leno to primetime and Conan O'Brien to The Tonight Show, only to reverse those decisions after less than five months — while absorbing a $45 million charge to buy out O'Brien's contract.

Thus, many of the benefits claimed by Applicants are not cognizable under the Commission's public interest analysis. In addition, it is worth noting that Applicants have not asserted that the procompetitive conditions proposed by DIRECTV in this proceeding would prevent them from achieving any of these purported benefits.

CONCLUSION

For the foregoing reasons, DIRECTV respectfully submits that the public interest would be served by approving the proposed transaction only if the Commission imposes the narrowly tailored conditions to safeguard competition and consumers. Accordingly, DIRECTV requests that the conditions set forth in Exhibit B hereto be included in any grant issued in this proceeding.

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[155] 31-COM-1785.

Respectfully submitted,

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August 19, 2010

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Caitlin /s/ McDonnell

EXHIBIT A

RESPONSE OF PROFESSOR KEVIN M. MURPHY TO REPLY REPORT OF MARK ISRAEL AND MICHAEL L. KATZ

August 19, 2010

Kevin M. Murphy*

* George J. Stigler Distinguished Service Professor of Economics, Department of Economics and Booth School of Business, University of Chicago, and Principal, Navigant Economics (formerly Chicago Partners)

Table of Contents

I. Introduction 1

II. My Bargaining Framework for Analyzing Negotiations Over Retransmission Fees Is Appropriate and Informative 2

A. Katz' Previous Use of a Nash Bargaining Framework To Analyze Negotiations Over Retransmission Fees is Inconsistent with His Current Claim That This Framework Is Inappropriate For Analyzing Retransmission Negotiations 2

B. Israel and Katz' Criticism of the Specific Implementation of My Framework Ignores that Estimates of Departure Rates Associated with Broadcast Stations Derived From My Framework Are Consistent With Other Evidence on Departure Rates 4

C. Other Evidence Supports the Use of the Equal-Sharing Assumption In this Context 5

D. Israel and Katz Wrongly Claim That My Assumption about Firms' Bargaining Positions is Inconsistent With the Rest of My Model 7

III. Economic Evidence Indicates That Israel and Katz' Newly Adopted Estimate of the Share of MVPD Subscribers That Switch From a DBS Firm to Comcast Is Too Low 9

A. DIRECTV Surveys of Lost and Gained Subscribers Show Substantial Switching to Cable 10

B. The "Near Zero" Diversion Rate Claimed by Israel and Katz Would Imply that Comcast and DBS Firms Do Not Compete. 13

C. Israel and Katz' Only Empirical Evidence of a "Near Zero" Diversion from DBS to Comcast in the Fisher DMAs May Be Flawed by Confounding Events 14

D. My Model Predicts Substantial Increases in Retransmission Fees 16

IV. Israel and Katz' Analysis of the Welfare Implications of the Integration Is Flawed and Unreliable 17

A. Changes in the Weighted Average of MVPDs' Costs Do Not Indicate Changes In Consumer Welfare 17

B. Katz and Israel's Own Empirical Analysis Provides no Support for their Conclusion that Vertical Integration and Elimination of Double Marginalization Benefits Consumers 18

V. Other Critiques of the Israel and Katz' Analysis 19

A. Economic Evidence Reveals that NBC and MVPDs Do Not Act as if Bargaining Breakdowns Between NBC and MVPDs Would Do Major Harm to NBC's Network 19

B. If Networks Are "Substitutes In Usage," But Complements At the Time of Purchase, Then the Marginal Effect of Adding a Broadcast Network to an MVPDs' Lineup Need Not Be Declining With the Number of Networks 20

C. Israel and Katz' New Comparison of Comcast's Subscribership During the Last Month of the Fisher Dispute and the Following Three Months Sheds No Additional Light On How Changes in DISH's Channel Lineup Affected Comcast Subscribership Levels 21

I. Introduction

1. On June 21, 2010, I submitted a report[1] in which I explained why the analysis presented in the submission to the Federal Communications Commission ("FCC") by Mark Israel and Michael L. Katz on behalf of the Applicants[2] failed to address the likely impact of the proposed transaction on the cost of licensing NBCU programming. In my report, I presented an economic model that provided a framework for understanding how the acquisition by Comcast of NBCU's owned and operated ("O&O") broadcast stations and national cable programming would create conditions that make higher carriage rates likely.

2. On July 20, 2010, Israel and Katz submitted a new report in which they comment on my submission, as well as on submissions on behalf of other parties.[3] Israel and Katz criticize my framework and conclusions, and reiterate their opinion that there is no basis in economic theory or empirical observations to expect the proposed transaction to harm consumers. Indeed, Israel and Katz claim that efficiencies generated by the transaction likely will result in lower consumer prices.

3. In this submission, I reply to Israel and Katz' critique of my model. I provide empirical analysis that, in DMAs served by Comcast, a substantial portion of the subscribers that would leave a DBS firm in response to a loss of attractive programming would move to Comcast. My model predicts substantial increases in carriage rates based on a reasonable estimate of this diversion rate. I also explain that Israel and Katz' other critiques of my analysis are unfounded, and that the evidence they offer to support their claims that diversion to Comcast from DBS is "near zero" and that the transaction is likely to reduce consumer prices is flawed.

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[1] *Economic Analysis of the Impact of the Proposed Comcast/NBCU Transaction on the Cost to MVPDs of Obtaining Access to NBCU Programming*. ("Initial Report")

[2] Mark Israel & Michael L. Katz, *Application of the Commission Staff Model of Vertical Foreclosure to the Proposed Compact-NBCU Transaction* (February 26, 2010).

[3] Mark Israel & Michael L. Katz, *Economic Analysis of the Proposed Comcast-NBCU-GE Transaction* (July 20, 2010) ("Israel and Katz Opposition Report").

II. My Bargaining Framework for Analyzing Negotiations Over Retransmission Fees Is Appropriate and Informative

4. Israel and Katz claim that the model that I presented to evaluate the effect on retransmission fees of the proposed transaction is "inappropriate for analyzing pricing in this industry and, in any event, fail[s] to yield precise, reliable predictions."[4] They claim that my model is "too stylized" to yield accurate predictions about the outcome of retransmission negotiations.[5] In particular, they question the appropriateness of the standard Nash bargaining assumption about the split of the gains from trade, and my analysis of how firms' bargaining positions change with integration.

A. Katz' Previous Use of a Nash Bargaining Framework To Analyze Negotiations Over Retransmission Fees is Inconsistent with His Current Claim That This Framework Is Inappropriate For Analyzing Retransmission Negotiations

5. Israel and Katz claim that the "theoretical" bargaining model that I present – a Nash bargaining model – is "inappropriate" for analyzing pricing in this industry. However, as I discussed in my Initial Report, Professor Katz endorsed the equivalent framework in his submission to the FCC at the end of 2009.[6] In that report, Professor Katz and his coauthors apply a Nash bargaining model to analyze the outcome of retransmission consent negotiations. The fundamental features of Professor Katz' model in his prior report are the same as those in my model.

6. In a footnote to their Opposition Report, Israel and Katz attempt to distinguish the application of the bargaining model in Katz' earlier report from my application in this context. They claim that the earlier report "is not directly relevant" because (1) it "discussed only departure rates from MVPDs, not switching rates to any particular alternative MVPD" such as Comcast; and (2) "its discussions of departure rates was not informed by the results of our studies of the various retransmission disputes or local-into-local events."[7] But their explanation

[4] Israel and Katz Opposition Report ¶5.
[5] Israel and Katz Opposition Report ¶43.
[6] Initial Report ¶¶64-66, discussing Michael L. Katz, Jonathan Orszag, & Theresa Sullivan, *An Economic Analysis of Consumer Harm from the Current Retransmission Consent Regime*, GN Docket No. 09-47 (Nov. 12, 2009) ("Katz 2009 RTC Report").
[7] Israel and Katz Opposition Report ¶244 & fn 352.

provides no justification for rejecting application of the bargaining framework in this proceeding, while endorsing it in connection with the FCC's retransmission consent proceeding. The two factors they identify relate only to their empirical findings (and thus choices of values for the parameters used in the model), and not to the applicability of the Nash bargaining model in this setting.

7. Israel and Katz claim that, although my "stylized" model "provides useful insights in academic settings, it relies on strong assumptions that very likely are not satisfied in actual negotiations between content owners and MVPDs."[8] Even without regard to Katz' own application of this framework in analyzing and offering opinions on real-world negotiations over retransmission rates, however, Israel and Katz ignore empirical application of this framework in other contexts. In particular, the FCC applied a bargaining framework in supporting its conclusions in the News/Hughes and Adelphia/Comcast/TWC transaction.[9]

8. Thus, Israel and Katz' assertion that my model is purely an academic construct that is not useful for analyzing retransmission negotiations is contradicted both by Katz' recent use of a Nash bargaining model to analyze the outcome of retransmission negotiations and by the application of bargaining models more generally. Importantly, the questions in this matter hinge critically on the magnitude of the loss of subscribers an MVPD would incur if it lost access to particular programming (such as NBCU O&O stations). This value, together with the incremental value of adding a subscriber, determines the amount MVPDs are willing to pay for retransmission rights. Thus, as an economic matter, the level of negotiated retransmission fees is the natural place to look for evidence on this parameter. That is exactly what the Nash bargaining model permits.

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[8] Israel and Katz Opposition Report ¶44.

[9] *General Motors Corp., Hughes Electronics Corp. and The News Corporation Ltd.*, 19 FCC Rcd. 473 (see, e.g., "[a]s commenters have correctly observed, the *ability* of a television broadcast station to threaten to withhold its signal, even if it does not actually do so, changes its bargaining position with respect to MVPDs, and could allow it to extract higher prices, which ultimately are passed on to consumers" (¶204); see, also, ¶¶ 4 and 151); *Adelphia Communications Corp., Time Warner Cable Inc., and Comcast Corp.*, 21 FCC Rcd. 8203, Appendix D (2006) .

B. Israel and Katz' Criticism of the Specific Implementation of My Framework Ignores that Estimates of Departure Rates Associated with Broadcast Stations Derived From My Framework Are Consistent With Other Evidence on Departure Rates

9. Israel and Katz claim that "using the bargaining model to derive precise predictions about pricing effects from the proposed transaction pushes the model beyond what [it] can reasonably do."[10] They question whether the framework, combined with the specific assumptions that I make (in particular, the "equal sharing assumption"), can generate reliable predictions. Their critique is unfounded for two reasons.

10. First, Israel and Katz misinterpret the conclusion that I derive from my parameterization of the bargaining model. I did not conclude that the estimated increases in retransmission fees obtained from application of the model reflect the precise actual increase in rates that would result from unconditional approval of the merger. Rather, my calculations indicate what market forces would imply for the change in rates if other forces (such as potential regulatory restraints) did not intervene. I use the model to demonstrate the incompleteness of the theoretical and empirical analysis provided by Israel and Katz in their initial report, which ignored completely the potential impact on retransmission fees from vertical integration. Nothing in Israel and Katz' critique of my framework refutes my fundamental conclusion, which is that their exclusive focus on the likelihood of foreclosure is improper and that the merger would create conditions that make higher retransmission rates likely.

11. Second, Israel and Katz ignore my use of empirical evidence to support the predictions of my theoretical model. The first step of my analysis uses the model and a common assumption about firms' "bargaining skill"– combined with empirical evidence on outcomes of retransmission negotiations, broadcast advertising revenues, MVPD margins and other economic variables – to predict departure rates associated with the elimination of NBCU O&O broadcast stations from an MVPD's lineup. But my analysis has a second step, in which I compare these predicted departure rates to empirical evidence on how MVPDs' subscribership changed historically when broadcast networks were added to or removed from MVPDs' channel lineups.

[10] Israel and Katz Opposition Report ¶44.

This empirical evidence comes from (a) DIRECTV's addition of local broadcast stations (local into local ("LIL")) to its lineup and (b) the elimination of local broadcast stations from DISH's lineup during the Fisher dispute. My predicted departure rate from parameterizing the bargaining model was broadly consistent with the empirical evidence on departure rates from historical experience.

12. Thus, my analysis did not rely on economic theory alone, but provided a framework for deriving testable implications, which I supported with empirical evidence from related historical events. These comparisons provided evidence that my bargaining model, combined with the parameter assumptions that I make, provides a useful framework for understanding the outcomes of real-world retransmission negotiations and for predicting how market forces would affect retransmission rates after the proposed transaction.

C. Other Evidence Supports the Use of the Equal-Sharing Assumption In this Context

13. Israel and Katz challenge my assumption that the gains from trade resulting from reaching agreement on retransmission consent will be shared equally by the parties. Rather, they suggest that a more complex assumption is appropriate, in which the division of gains from trade reflects differences in the parties' "degrees of risk aversion or different discount rates."[11] They argue that the price prediction resulting from an assumption of equal sharing cannot be characterized as "a natural summary of the range of possibilities," because, they claim, it is inconsistent with empirical evidence from previous vertical integration events.[12]

14. Israel and Katz correctly note that, if NBC possesses virtually all the bargaining skill and the MVPD possesses virtually none, then the bargaining model implies that integration would have little or no effect on the outcome of retransmission negotiations.[13] However, they provide no basis for the kind of extreme sharing assumption needed for my model to generate the conclusion that the proposed transaction would not tend to increase retransmission rates. While extreme deviations from equal sharing would generate predictions that differ from the estimates I

[11] Israel and Katz Opposition Report ¶45.
[12] Israel and Katz Opposition Report ¶52.
[13] Israel and Katz Opposition Report ¶51.

presented in my Initial Report, more moderate changes (e.g., assuming that the gains are split 1/3:2/3, rather than 50:50) still predict large changes in retransmission rates.

15. It is straightforward to derive a more general version of the model in my Initial Report, which allows NBCU and the MVPD to differ in their bargaining skill. Let *s* index NBCU's bargaining skill, where *s* is between zero and one, so *(1-s)* represents the MVPD's bargaining skill. Then the expression for the departure rate (equation (14) in my Initial Report) becomes:

$$d = \frac{r^* + (1-s)(1-a)b}{(1-s)\left[\left(r_c\alpha + r_2(1-\alpha)\right) + (1-a)b\right] + sP_1(N=1)k}$$

and the expression for the increase in retransmission fees associated with integration (equation (18) in my Initial Report) becomes:

$$r_I^* - r^* = (1-s)d\alpha(P_c(N=0) - r_c)$$

Note that if s = ½ (meaning the parties have equal bargaining skill), I obtain the expressions in my Initial Report.

16. Using this expression, Exhibit 1 shows that, {{

}} Israel and Katz provide no basis for assuming that either one of these alternative assumptions is better or worse than adopting the typical assumption of equal bargaining skill.

17. In my Initial Report, I supported the reasonableness of my assumption of equal sharing by comparing departure rates predicted by my model to historical evidence. This comparison provided empirical support for my conclusion that the combination of the equal-sharing assumption with other parameter assumptions was reasonable. The reasonableness of the equal-sharing assumption also is supported by Professor Katz himself, who adopted this assumption

without questioning its reasonableness, or even suggesting that it was speculative or controversial, in his previous report to the FCC on retransmission consent negotiations.[14] Indeed, his conclusion in his RTC report that increased competition among MVPDs explains increases in retransmission rates is inconsistent with a claim (which he suggests here) that networks' bargaining skill (or, more generally, their share parameter) is extremely high relative to that of MVPDs. Katz assumed in his RTC Report that, independent of the extent of competition between MVPDs, equal sharing of gains from trade was a reasonable assumption.[15]

D. Israel and Katz Wrongly Claim That My Assumption about Firms' Bargaining Positions is Inconsistent With the Rest of My Model

18. Israel and Katz claim that empirical evidence from "events involving non-integrated networks," by which I presume they mean the Fisher episode and LIL introduction, "very likely overstate the departure rate that a vertically integrated Comcast could induce by withholding NBCU networks from rival MVPDs."[16] They claim that "by the logic of the model, an MVPD negotiating with a vertically integrated NBCU would have an incentive to reduce the extent to which it would lose subscribers, say by committing itself to reducing its subscription charges conditional on losing access to NBCU content."[17] However, this critique is invalid. I properly incorporated both price and quantity effects into my model and into my predictions of the effect of the merger on retransmission rates.

19. I explained in my Initial Report that an MVPD that loses the right to retransmit a broadcast station will in general earn lower profits because of both reduced subscribership (lower quantity from "departures") and lower prices (i.e., discounts made to reduce the loss of subscribers). The split between lower quantity and lower price reflects the MVPD's new choice of price given its changed channel lineup. {{

[14] Katz 2009 RTC Report ¶26. I infer that he viewed this as reasonable because he keeps this assumption unchanged when he compares the outcome implied by the bargaining model in the scenarios of less and then more MVPD competition.

[15] In its Order in the Adelphia matter, the FCC stated that "[t]hroughout our analysis, we adopt a standard solution to bargaining games by assuming that the parties split the gains from trade ($\gamma_0 = \gamma_1 = 0.5$)," where γ is the sharing parameter (*see*, *Adelphia Communications Corp., Time Warner Cable Inc., and Comcast Corp.*, 21 FCC Rcd. 8203, Appendix D (¶24) (2006), citing D. Fudenberg and J. Tirole, *Game Theory* 117 (1991)).

[16] Israel and Katz Opposition Report ¶59.

[17] Israel and Katz Opposition Report ¶59 (footnote omitted).

}} Ex-ante, a firm might want to "commit" to cutting price more than would be profit maximizing in an attempt to negotiate a better deal, but it is unclear why such a commitment would be credible.

20. Israel and Katz appear to claim that the MVPD's optimal subscriber price in the absence of an agreement would be lower if it is negotiating with an integrated firm than if it were negotiating with an unintegrated broadcast station. They argue that the MVPD has a strategic incentive to reduce its price in order to reduce its loss of subscribership, and thus the subscribership gain by the integrated firm, and thereby to worsen the integrated firm's bargaining position. They claim that it is inconsistent with the logic of my model to ignore the parties' expectation that a breakdown in negotiations would cause the MVPD to price strategically in this way.[18]

21. Israel and Katz' argument is invalid. First, even if there were some basis to make such an adjustment, they provide no evidence of how it would affect the model's conclusions. A substantial fraction of the effect of the MVPD's lower price would prevent departures to the parties' MVPD competitors. This means that the lower the share of departures gained by the integrated firm, the higher the cost to the MVPD from adjusting price strategically. If Comcast would gain 40 percent of the subscribers that leave a DBS firm for another MVPD if the DBS firm lost retransmission rights to NBC, then lowering its subscription rate would cause the DBS firm to reduce price to the 60 percent of subscribers that would choose other MVPDs, even though by assumption it would not be in the DBS firm's interest to do so (given that it was not in its interest before the vertical integration).

22. Second, Israel and Katz ignore a symmetric incentive on the part of the vertically integrated firm (in this case Comcast-NBCU) to commit to reduce price in order to increase the MVPD's loss of subscribers (and thus improve Comcast-NBCU's bargaining position). They provide no reason why, if such strategic actions were part of firms' equilibrium response, the only strategic pricing effect is for the MVPD to adjust price, and not for the integrated firm to do so. In general, whether firms' bargaining positions incorporate these strategic considerations in

[18] Israel and Katz Opposition Report ¶¶267-9.

the "no trade" outcome depends on assumptions about MVPDs' and networks' beliefs about each other's actions (and about each other's beliefs) should they reach such a point. These assumptions, in turn, affect whether an MVPD could commit to lower price strategically during an impasse. Israel and Katz imply that, "say by committing itself to reducing its subscription charges conditional on losing access to NBCU content," the MVPD could limit its loss of subscribers, but they provide no arguments or evidence beyond this.[19]

23. My assumption that firms would lower prices in the "no trade outcome" in a way consistent with past behavior (and thus presumably with their profit-maximizing choices historically) does not imply that they can commit to lower price strategically even more. Israel and Katz provide no evidence that such strategic commitments have been an important part of past negotiations.

III. Economic Evidence Indicates That Israel and Katz' Newly Adopted Estimate of the Share of MVPD Subscribers That Switch From a DBS Firm to Comcast Is Too Low

24. Israel and Katz correctly state that my model implies that retransmission fees will increase after integration "*only if* Comcast would gain subscribers when other MVPDs lost access to NBCU networks."[20] They claim that "no one has presented any evidence in this proceeding to establish that Comcast would gain significant numbers of subscribers in such a circumstance."[21] {{

}}[22] They criticize me for adopting their assumption (which they made in their initial report) that the diversion rate to Comcast from an MVPD that loses programming is proportional to Comcast's market share among the MVPDs that did not lose programming. They now claim that the assumption in their initial report is "contradicted by the evidence."[23]

[19] Israel and Katz Opposition Report ¶59.
[20] Israel and Katz Opposition Report ¶34 (emphasis in the original).
[21] Israel and Katz Opposition Report ¶34.
[22] Israel and Katz Opposition Report ¶34.
[23] Israel and Katz Opposition Report ¶56.

25. In their implementation of a version of my pricing model, in which they claim to incorporate "efficiencies into the analysis,"[24] Israel and Katz assume that "diversion from a DBS provider to Comcast is equal to 1/3 of the value that would be implied by proportional diversion based on market shares."[25] They now claim that even this assumption is conservative given that, they claim, their empirical results imply a{{ }} diversion rate.[26] However, Israel and Katz' claim about diversion to Comcast requires extreme assumptions about substitutability between Comcast's offerings and those of the DBS suppliers that is not supported by other empirical evidence.

26. Below, I examine evidence on substitution between DBS firms and cable, none of which supports Israel and Katz' claim of{{ }} diversion between a DBS provider and Comcast (or cable more generally). Rather, it supports an assumption of a diversion rate from DBS to cable greater than "1/3 of what would be implied by proportional diversion based on market shares."[27] Based on this evidence, I conclude that Israel and Katz' assumption is not conservative. Although Israel and Katz' original assumption of proportionate substitution (which I also adopted in my Initial Report) likely overstates the degree of switching to cable, the evidence I report below, taken together, indicates that a reasonable assumption is a substitution rate of between {{ }} of that implied by proportionate substitution.

A. DIRECTV Surveys of Lost and Gained Subscribers Show Substantial Switching to Cable

27. DIRECTV conducts surveys to identify which MVPD, if any, its former subscribers choose after they cancel their subscription to DIRECTV. Results from surveys in the first quarter of 2010 indicate that {{

[24] Israel and Katz Opposition Report ¶64.
[25] Israel and Katz Opposition Report ¶67.
[26] Israel and Katz Opposition Report ¶67. It is not clear how this {{ }} assumption is grounded empirically, although, as I show below, it is more reasonable than {{ }} diversion.
[27] Israel and Katz Opposition Report ¶16.
[28] {{ }} of lost subscribers report that they have not subscribed to a new MVPD. I understand, based on my Staff's discussions with DIRECTV, that a significant portion of these usually subscribes to another MVPD in

}}

28. Nationally, cable's share of all MVPD subscribers {{

}}[29] This means that, according to the survey, subscribers leaving DIRECTV move to a cable provider at a rate equal to {{ }} percent of cable's national share of non-DIRECTV subscribers. Although less than proportionate substitution, this exceeds substantially the diversion rate that Israel and Katz now claim is conservative.

29. Moreover, these calculations likely provide an underestimate of diversion to cable, because they focus exclusively on the *existing* subscribers that DIRECTV likely would lose if it became less attractive (such as by losing access to some programming) and ignore the corresponding decline in *new* subscribers to DIRECTV that would result if DIRECTV's programming became less attractive. It also ignores the fact that telco is growing rapidly, so exit rates to telco likely overstate telco's steady-state representation among the new MVPD selected by DIRECTV subscribers. For both of these reasons, the distribution of prior MVPDs for new DIRECTV subscribers, also tracked by DIRECTV, provides useful additional evidence on substitution.

30. In the first quarter of 2010, {{

}} of new DIRECTV subscribers that indicated they switched from another MVPD had switched from cable. If the decline in DIRECTV subscribers from a loss of particular programming were due equally to a reduction in the number of new subscribers and an increase in the number of lost subscribers, then the simple

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a short period of time. The switching identified in the report accounts for only 98 percent of those responding to the survey. I understand from my Staff's discussions with DIRECTV that the remaining two percent did not respond to this survey question. *See*, DIRECTV Marketing Research. "Past & Current TV Service Trends Q2 2009 to Q1 2010."

[29] {{

}}

DIRECTV Marketing Research. "Past & Current TV Service Trends Q2 2009 to Q1 2010."

average of the two diversion percentages might be a more relevant indicator of the diversion rate than an estimate based only on those leaving DIRECTV. This would suggest a diversion rate of about {{ }} of that implied by proportionate substitution.

31. The previous estimates are derived from nationwide surveys, which cover DMAs that do and do not have service available from telco providers (U-Verse or FiOS). Since telcos serve all the DMAs where NBCU has O&Os,[31] a potentially better estimate of diversion in NBCU's O&O markets might be obtained by looking only in markets where at least one telco is available. In markets that DIRECTV categorizes as "Telco-TV markets,"{{

}}

32. I also obtained additional detail from surveys that DIRECTV conducted between September 2009 and June 2010, which allows me to look only at former subscribers who indicated that they cancelled their DIRECTV subscription because of dissatisfaction over DIRECTV's programming, and to investigate the share of these subscribers that went to various competitors. The identified competitors are ten cable providers, DISH, U-Verse, and FiOS. In addition, the survey identified the share that switched to "Other (specified)" providers. Using

[31] Media Census: All Video By DMA, 4Q2009. The data indicate there are telco subscribers in all NBC O&O markets identified in Israel-Katz Report Table 1.
[32] DIRECTV Marketing Research. "Past & Current TV Service Trends Q2 2009 to Q1 2010."
[33] This is calculated as share of non-DIRECTV subscribers to MVPDs.
[34] DIRECTV Marketing Research. "Past & Current TV Service Trends Q2 2009 to Q1 2010."

supplemental data provided by DIRECTV, I determined that about {{ }} of those who switched to "Other (specified)" providers switched to cable providers.[35]

33. I used these data to estimate diversion rates to cable for customers who indicated that they ended their DIRECTV subscriptions because "DIRECTV didn't offer certain channels you wanted," in particular customers who indicated dissatisfaction with DIRECTV's local and/or sports channels. Among those indicating dissatisfaction with local channels, {{ }} of those who discontinued DIRECTV subscriptions moved to cable, which implies diversion to cable of {{ }} of that implied by proportionate substitution; the corresponding numbers for those dissatisfied with DIRECTV's sports channels are {{ }}, respectively.[36]

34. The estimates of diversion to cable derived from the DIRECTV survey data are summarized in Exhibit 2. The diversion rates range from {{ }} of that implied by proportionate substitution, with {{

}} This survey evidence shows considerable substitution between cable and DIRECTV. All these comparisons indicate that Israel and Katz' {{ }} diversion claim is unsupported, and suggests a diversion rate to cable that exceeds one-third of that implied by proportionate substitution.

B. The "Near Zero" Diversion Rate Claimed by Israel and Katz Would Imply that Comcast and DBS Firms Do Not Compete.

35. Israel and Katz' claim that their estimate of a "near-zero" increase in Comcast penetration when DISH loses access to broadcast stations, coupled with evidence that DISH loses substantial subscribership, would imply that subscribers do not consider services offered by DBS firms and Comcast as good substitutes. Substitution as limited as this, however, is at odds with historical findings that entry of DBS firms increased competition for cable firms like

[35] A sample of the raw survey data from DIRECTV indicated that of those customers who left DIRECTV for a MVPD in the 'Other' category due to dissatisfaction with the local channel offerings {{ }} left for a cable company. The data indicated that the analogous number for those leaving due to dissatisfaction with the sports programming was {{ }} These tabulations are provided in my backup file.

[36] Details of these calculations are provided in my backup file.

Comcast. Analyses of MVPD competition, including Katz' RTC Report,[37] as well as the history of regulatory actions and opinions, acknowledge that DBS and cable providers compete for subscribers.[38] Comcast has acknowledged that the MVPD industry has become increasingly competitive, as first DBS and now telco firms have entered and taken share from cable.[39] The regulatory and market history is consistent with findings from DIRECTV's surveys and from Comcast's own documents[40] that subscribers substitute not only between DBS firms or between cable firms, but between firms offering MVPD service using different technologies.

C. Israel and Katz' Only Empirical Evidence of a "Near Zero" Diversion from DBS to Comcast in the Fisher DMAs May Be Flawed by Confounding Events

36. In their analysis of the Fisher event, Israel and Katz do not take into account, or even acknowledge, the possibility that their regression analysis – which they claim demonstrates that Comcast did not gain subscribers in DMAs where DISH stopped providing Fisher networks – was uninformative because of concurrent operational changes by Comcast in the Pacific Northwest, in particular its movement to eliminate analog channels and move to an "All-

[37] See, Katz 2009 RTC Report ¶30: "Indeed, the DC Circuit Court recently found that cable operators face 'ever increasing competition,' particularly in recent years, from DBS operators and phone companies that 'have entered the market and grown in market share since the Congress passed the 1992 Act'" (citing Comcast v. FCC, No. 08-1114 (D.C. Cir. Aug. 28, 2009), slip op. at 14).

[38] See, e.g., Federal Communications Commission, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming* 24 FCC Rcd. 542, ¶¶ 4, 169 (Adopted November, 2007 & Released January, 2009).

[39] *See, e.g., Applications and Public Interest Statement of General Electric Company and Comcast Corporation* at 83 ("The Commission has expressly rejected arguments that DBS and cable are not part of the same product market. There is no reason for the Commission to adopt a narrower product market definition in this case") (footnote omitted); Comments of Comcast Corporation, MB Docket No. 07-269, at 2 (filed May 20, 2009) (discussing how cable operators are "continuing the ongoing battle for subscribers with robust MVPD competition presented by DirecTV and Dish Network"); "We operate our businesses in an intensely competitive environment. Competition for the cable services we offer consists primarily of direct broadcast satellite ("DBS") operators and phone companies. In 2009, our competitors continued to add features and adopt aggressive pricing and packaging for services that are comparable to the services we offer" (Comcast Corporation 2009 Form 10-K p. 2); "Federal regulation and regulatory scrutiny of our Cable and Programming segments have increased in recent years, even as the cable industry has become subject to increasing competition from DBS providers, phone companies and others for video, high-speed Internet and phone services" (Comcast Corporation 2009 Form 10-K pp. 7-8)

[40] See, e.g., Comcast Slide Titled "Five Year Plan Assumes Taking Share From Satellite To Do So We Must… 2. Eliminate satellite industry 'The Most Channels' advantage… Until we have 'infinite channels' … Satellite will be a thorn in our side… Consumers will not easily 'see' satellite is not the future." (Comcast, *Video Roadmap*, December, 2009 63-COM-00000349-84 at 51). Comcast's advertisements during the Fisher dispute indicate that Comcast was attempting to gain customers from DISH. (*See,* 37-COM-00000001-2).

Digital" service in Oregon and Washington.[41] Portland was the first major market in which Comcast implemented the "digital migration."[42] Eugene Oregon had converted as of mid-February 2009,[43] and "over half of the Portland market" had converted as of April 30, 2009, with the remainder of the Portland market planned by Comcast to be completed within another 60 days.[44] Conversions did not take place in Fresno and Sacramento, Israel and Katz' control markets for analyzing the Fisher event, until 2010.[45]

37. While the switch to all digital likely would increase the value of Comcast's network over the long term, the switch also created the possibility of dissatisfaction for some customers, which potentially could hurt Comcast's subscribership in the short-run.[46] If some Comcast subscribers had to obtain new equipment, and had been considering leaving or planned to leave Comcast, they might do so immediately rather than convert.[47] Thus, the transition to the "All-Digital" service could have affected Comcast's subscriber growth rate in some of the Fisher DMAs, while not affecting the control DMAs of Fresno and Sacramento at that time. As a result, comparisons between Comcast's penetration rates in the Fisher DMAs and these control DMAs may not provide reliable estimates of the impact of the elimination of local channels from DISH's lineup on Comcast.

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[41] Comcast's "All-Digital" conversions were intended to "recapture approximately 250 megahertz to 300 megahertz of spectrum by moving 40 to 50 channels from analog to digital." Comcast Corporation Earnings Conference Call – Q1 2009, p. 5

[42] Comcast Corporation Earnings Conference Call – Q1 2009, p. 6.

[43] Andrea Damewood, *Comcast makes switch from analog to digital programming,* February 11, 2009. Available: (http://special.registerguard.com/csp/cms/sites/web/news/cityregion/7427524-41/story.csp).

[44] Comcast Corporation Earnings Conference Call – Q1 2009, p. 6. "Portland became the first large system to go All-Digital in June," Comcast Corporation Earnings Conference Call – Q2 2009 (August 6, 2009), p. 6.

[45] *Just the Facts about Comcast's Digital Migration.* Available: (http://comcastcalifornia.mediaroom.com/index.php?s=110) from the link "The FAQs" (last downloaded August 18, 2010); "News about Digital switch in Sacramento, CA. Available: (http://outside.in/sacramento-ca/tags/Digital%20switch). *See also,* Smith, Darrell. "Comcast makes room for more digital by dropping some analog channels." February 6, 2010. Available: (http://www.definitivesynergy.com/billiards-industry-news/comcast-makes-room-for-more-digital-by-dropping-some-analog-channels.html).

[46] Pegoraro, Rob. "Can You Make Comcast's Digital Transition Without a Cable Box?" The Washington Post Online. Available: (http://voices.washingtonpost.com/fasterforward/2009/09/cables_digital_transition.html).

[47] Customers had to either pick up new equipment at Comcast outlets or pay a fee to have it delivered or installed. Dudley, Brier. "More on Comcast digital: TiVos, Media Centers, HD and "free"." April 6, 2009. The Seattle Times Blog. Available: (http://blog.seattletimes.nwsource.com/brierdudley/2009/04/06/more_on_comcast_digital_tivos.html).

D. My Model Predicts Substantial Increases in Retransmission Fees

38. As summarized in Exhibit 2, the survey evidence of switching from DIRECTV provides a range of estimates of switching to cable from a DBS operator {{ }} of that implied by proportionate substitution. A reasonable point estimate of the diversion rate from a DBS operator to Comcast is {{

}}

39. As shown in Exhibit 3, after adjusting the diversion rate parameter in my Initial Report to values that correspond to {{ }} percent of proportionate substitution, predicted increases in retransmission rates (for an MVPD with a 10 percent share in the DMA) resulting from the proposed transaction remain substantial, ranging from {{

}}[48] An estimate of {{

}}

40. As I noted in my Initial Report, the methodology used to predict increases in retransmission consent fees also can be applied to NBCU's national programming networks. Exhibit 4 summarizes the application of my model to forecast what market forces would imply for the change in license fees for NBCU's national programming if other forces (such as potential regulatory restraints) did not intervene. The model predicts increases in license fees of {{ }} using the same model and assumptions that I used to estimate the impact of the proposed transaction on retransmission fees.

[48] If I assume that NBCU has twice the bargaining skill as the MVPD (as Israel and Katz appear to claim, but which I explained is unsupported and contrary to Katz' assumption in his RTC Report and the sharing assumption commonly adopted), then the range is {{ }} These calculations are provided in my backup file.

IV. Israel and Katz' Analysis of the Welfare Implications of the Integration Is Flawed and Unreliable

41. Israel and Katz criticize my implementation of the bargaining model, because they claim that I failed to "account for transaction-specific efficiencies including the mitigation or elimination of double marginalization."[49] I have not reviewed the parties' claims regarding transaction-specific efficiencies, and I offer no opinion whether the integration of additional programming into Comcast's cable operations represents such an efficiency. However, even if it did, Israel and Katz' approach to evaluating the overall impact of the transaction on consumer welfare is improper.

42. Israel and Katz claim to provide a bargaining model that improves on my parameter estimates and also incorporates transaction-specific efficiencies, and which then implies that "the transaction will lead to lower average MVPD marginal costs for NBCU programming…[which] would very likely benefit consumers."[50] They use their revised version of the bargaining model to predict increases in retransmission rates to Comcast's competitors. They then calculate a discounted weighted average of the predicted increased rates paid by competitors and the reduced rate (to zero) now paid by the integrated firm for NBCU programming. They conclude that this weighted average reduction in average MVPD marginal costs would result in a "reduction in the average per-subscriber, per-month cost of NBCU programming."[51] However, as I now explain, this overly simplistic approach is not informative about the likely impact on consumer welfare.

A. Changes in the Weighted Average of MVPDs' Costs Do Not Indicate Changes In Consumer Welfare

43. The Israel and Katz weighted-average approach to evaluating the impact of the transaction on consumer welfare assumes that the impact of cost changes is proportional to firms' market shares. But, in general, economic models of competition do not imply that the impact of cost changes will be proportional to market shares. Individual firms' costs can be

[49] Israel and Katz Opposition Report ¶35.
[50] Israel and Katz Opposition Report ¶64.
[51] Israel and Katz Opposition Report ¶79.

more or less important for market prices than their shares indicate. One cannot assume that a decline in Comcast's marginal cost together with a smaller increase in its competitors' marginal costs necessarily would reduce market prices. Israel and Katz' claim that an effect that lowers one firm's costs but raises all of its rivals' costs would "very likely benefit consumers" has no basis as a theoretical statement and they provide no empirical evidence that it is true in this context.

44. A proper analysis of the net impact on consumer welfare of eliminating double marginalization while raising the costs of rivals would require exactly the type of analysis that Israel and Katz claim is complex and "speculative." In particular, it would require consideration of how competition works in the marketplace, and thus how changes in firms' costs affect their prices, "the shape of the demand curve for MVPD services, and other factors,"[52] as the Commission has recognized.[53] Assuming away the real-world factors that determine whether consumers benefit from elimination of double marginalization and are harmed by increased marginal costs of Comcast's MVPD competitors does not make the Israel and Katz weighted average approach meaningful.

B. Katz and Israel's Own Empirical Analysis Provides no Support for their Conclusion that Vertical Integration and Elimination of Double Marginalization Benefits Consumers

45. In Table IV.5 of their Opposition Report, Israel and Katz provide an analysis that they claim shows that "integration events" have no impact on price or "output" (proxied by ratings). However, their reported regression results do not support the conclusion that they claim follows from this analysis. {{

[52] Israel and Katz Opposition Report ¶75.
[53] *See News/Hughes*, ¶¶155-6.

}} Furthermore, their data on programming prices likely would not capture much of the impact of vertical integration on programming fees, because changes in average license fees occur slowly as long-term contracts expire and new ones are renegotiated by the now-vertically integrated network. The short time window for estimating the impact of these events, combined with the delay between the integration and renegotiation of new contracts, would make it difficult to discern the true effect of integration.

46. Moreover, if Israel and Katz' finding were correct, and "integration events" did not affect price or output, it is hard to understand how "consumer welfare" could be enhanced by Comcast's acquisition of NBCU. While I do not endorse their empirical findings, their own failure to find any impact of vertical integration on "output" is inconsistent with their claim that the changes in marginal costs would increase consumer welfare.

V. Other Critiques of the Israel and Katz' Analysis

A. Economic Evidence Reveals that NBC and MVPDs Do Not Act as if Bargaining Breakdowns Between NBC and MVPDs Would Do Major Harm to NBC's Network

47. Israel and Katz claim that "a strategy of foreclosure based on withholding access to NBC would risk seriously damaging the very asset in which Comcast is acquiring an interest" by "'breaking the system' of ubiquitous distribution…that distinguishes the NBC broadcast network from a highly rated cable network."[54] But the fact that all NBC stations elect retransmission consent, rather than electing must carry, and are able to negotiate positive retransmission fees, is inconsistent with claims that bargaining breakdowns would do major harm to NBC's network. Instead, this fact is consistent with the idea that the threat of withholding allows NBCU and its affiliates to negotiate positive retransmission rates with MVPDs.

48. Moreover, if the loss of MVPD carriage would impose a significant cost on NBCU, then my calculated diversion rates are too small. It would take an even higher diversion rate to produce the observed level of retransmission fees when NBCU's loss from a lack of carriage is greater (this would mean that the loss of advertising revenue to NBCU would be greater than the

[54] Israel and Katz Opposition Report ¶¶24-5. Israel and Katz made similar claims in their initial report (see, e.g., Israel and Katz Report ¶10).

average currently observed in the DMA, meaning NBCU incurs a higher penalty from loss of retransmission). This in turn would imply that the predicted increase in retransmission fees from the proposed transaction would be larger than I have estimated. If Israel and Katz are correct that the loss of ubiquity for the NBC network would be costly, then my estimates of how market forces would increase retransmission fees after the merger would have to be revised upward.

B. If Networks Are "Substitutes In Usage," But Complements At the Time of Purchase, Then the Marginal Effect of Adding a Broadcast Network to an MVPDs' Lineup Need Not Be Declining With the Number of Networks

49. Israel and Katz criticize my assumption that the effect of adding a single network to an MVPD's lineup is reasonably approximated by 25 percent of the effect of adding all four networks. They claim that this assumption is "unreasonable unless the major broadcast networks are not substitutes for one another."[55] They claim that "as a *matter of economics*, the fourth network surely has less effect than the first,"[56] because individuals consider networks to be good substitutes. Thus, they claim that my 25 percent assumption is an estimate of the upper bound, likely too high, of the effect of adding one network.

50. However, Israel and Katz are wrong that "as a matter of economics" a fourth network must have a smaller marginal value to the MVPD than do the first three networks (assuming that they mean by this that it follows as a matter of fundamental economic principles). If customers are heterogeneous in their tastes for local channels – some value them a lot while others value them less – then the marginal effect of the fourth network on an MVPD's subscriber levels can exceed the marginal effect of the first. All else equal, households that value local affiliates highly will switch from an MVPD providing all four local stations to a competing MVPD only if the competing MVPD also offers all four network affiliates, even though subscribers that place little value on local stations may be willing to switch to an MVPD that offers only one. If there are more of the former group than the latter, then the incremental impact from the fourth network on an MVPD's subscribership could exceed the impact of the first. This could be true in spite of the fact that the marginal value of adding a fourth network is smaller than the marginal value of

[55] Israel and Katz Opposition Report ¶260.
[56] Israel and Katz Opposition Report ¶261 (emphasis added).

the first for each individual subscriber. The key is that the marginal customers for an MVPD with no local stations have a weaker preference for local stations (that is why they chose an MVPD with no local stations) than the marginal customers of an MVPD with four local stations. This difference in customer composition generates a relationship that is the reverse of that obtained for any given individual.

51. Thus, heterogeneity in customers' tastes can lead goods that are substitutes from the perspective of each individual to be complements in the aggregate. Katz and Israel cannot conclude that, as a matter of economic principles, the fourth network is worth less than the first.

52. Furthermore, if the marginal impact of the fourth network on an MVPD's attractiveness were substantially less than the marginal impact of the first, I would expect it to be reflected in retransmission rates, so that MVPDs would be willing to pay less for the fourth network in retransmission fees (or perhaps the fourth network would have to select "must carry" in order to obtain carriage). I know of no evidence that supports these predictions.

53. Finally, it is possible that local stations may not be substitutes at the time of purchase for some individual customers given technology by which local stations can be obtained. A MVPD subscriber may consider two alternatives: obtain all over-the-air stations through the MVPD, or obtain them all using an antenna. For individuals that have a strong preference for getting all four local stations, local stations would be complements. The marginal effect of the fourth local affiliate on a subscriber's choice of MVPD would exceed that of each of the first three, since only by getting all four is the individual willing to stop obtaining broadcast stations over-the-air using an antenna.

C. Israel and Katz' New Comparison of Comcast's Subscribership During the Last Month of the Fisher Dispute and the Following Three Months Sheds No Additional Light On How Changes in DISH's Channel Lineup Affected Comcast Subscribership Levels

54. {{

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55. In response, Israel and Katz offer a new version of their regression analysis in which they add to their original specification a separate dummy variable that equals one for the last month of the Fisher event. They find that the coefficient on this dummy variable is not statistically different from the coefficient on the "three months after" dummy. They claim that this is evidence that "the negative effect…actually commences *before* the end of the Fisher event period"[57] and that "[t]he evidence, taken as a whole, makes it clear that Comcast did not gain a significant number of subscribers due to the Fisher event."[58] {{

}} – which they do not disavow and cannot explain – began before the Fisher dispute ended.

56. However, Israel and Katz' interpretation of their findings is flawed. First, they offer no theory or evidence why there would be a change in Comcast's subscribership trend in the month before the Fisher dispute ended. If there is no economic logic to explain this effect, then there is no reason to accept their analytical framework for determining whether there was a positive impact on Comcast during the period of the dispute. In other words, if Comcast's subscribership changed in ways that cannot be explained in the month before and three months following the end of the dispute, and they claim that their measured effects are unrelated to the end of the dispute, then Israel and Katz cannot be confident that the absence of any measurable impact during the Fisher dispute is valid evidence that Comcast did not gain during the dispute.

57. Second, even with this dummy variable in the regression, Israel and Katz continue to find that Comcast's subscribership was lower after than during the event. While their data are not sufficient to allow them to ascertain precisely when, relative to the end of the Fisher event, the

[57] Israel and Katz Opposition Report ¶255.
[58] Israel and Katz Opposition Report ¶255.

decrease in Comcast's subscribership began, the evidence they present is consistent with the hypothesis that Comcast's penetration rate was lower after than during the Fisher event, and thus that adding a broadcast station to DISH's lineup affects Comcast's subscribership.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed this 19th day of August, 2010.

Kevin M. Murphy

Kevin M. Murphy

EXHIBIT 1 TO MURPHY REPORT

(REDACTED)

EXHIBIT 2 TO MURPHY REPORT

(REDACTED)

EXHIBIT 3 TO MURPHY REPORT

(REDACTED)

EXHIBIT 4 TO MURPHY REPORT

(REDACTED)

EXHIBIT B

DECLARATION OF DANIEL HARTMAN

1. My name is Daniel Hartman. My title is Senior Vice President, Programming Acquisition at DIRECTV, Inc. ("DIRECTV.") In this role, I am responsible for agreements DIRECTV negotiates for the carriage of programming.

2. I have personal knowledge of the negotiations between DIRECTV and Comcast Corp. ("Comcast") relating to DIRECTV's request to carry Comcast Sportsnet Philadelphia (CSN-Philly).

3. Earlier this year, the Commission closed the "terrestrial loophole" by putting in place a mechanism through which MVPDs could gain access to cable-affiliated programming that had previously escaped regulation under the program-access rules because it was delivered by terrestrial means.

4. As soon as these new rules became effective, DIRECTV requested that Comcast offer CSN-Philly for carriage on non-discriminatory terms and conditions.

5. By letter dated August 2, 2010, Comcast refused to offer CSN-Philly to DIRECTV.

6. By letter dated August 12, 2010, Comcast indicated that it would be willing to discuss carriage of CSN-Philly with DIRECTV. Yet Comcast has not made an offer for such carriage. It has indicated on several occasions that no such offer will be forthcoming unless DIRECTV voluntarily gives up its legal, exclusive arrangement for out-of-market NFL football games (presumably with no compensation from Comcast). If this is Comcast's position, I do not believe it constitutes a genuine basis for negotiation, much less an offer on non-discriminatory terms and conditions, as the law requires.

7. We are also involved in a separate negotiation with Comcast regarding four of its networks. Comcast has refused DIRECTV's repeated requests for individual offers on each of the four networks, insisting that they be negotiated as a package.

I declare under penalty of perjury that the above is true and correct.

Daniel Hartman

Dated: August 19, 2010

EXHIBIT C

APPENDIX __

REMEDIES AND CONDITIONS

A. D EFINITIONS

For purposes of the conditions set forth below, the following definitions apply:

"Comcast" means Comcast Corporation and its subsidiaries, affiliates, parents, successors, and assigns.

"NBCU" means NBC Universal, Inc. and its subsidiaries, affiliates, parents, successors, and assigns.

"Affiliated Program Rights Holder" includes (i) a program rights holder in which Comcast or NBCU holds a non-controlling "Attributable Interest" (as determined by the Commission's program access attribution rules); and (ii) a program rights holder in which an entity holding a non-controlling Attributable Interest in Comcast or NBCU holds an Attributable Interest, provided that Comcast or NBCU has actual knowledge of such entity's Attributable Interest in such program rights holder.

"Attributable interest" means a cognizable interest in an entity as defined pursuant to Section 76.1000(b) of the Commission's rules.

"Regional Sports Network" and "RSN" mean any non-broadcast video programming service that (1) provides live or same-day distribution within a limited geographic region of sporting events of a sports team that is a member of Major League Baseball, the National Basketball Association, the National Football League, the National Hockey League, NASCAR, NCAA Division I Football, NCAA Division I Basketball and (2) in any year, carries a minimum of either 100 hours of programming that meets the criteria of subheading 1, or 10% of the regular season games of at least one sports team that meets the criteria of subheading 1.

A "Covered RSN" is an RSN (i) that Comcast or NBCU currently manages or controls, or (ii) in which Comcast or NBCU, on or after the date of adoption of this Order, acquires either an attributable interest, an option to purchase an attributable interest, or an interest or other arrangement that would permit management or control of the RSN.

"Programmer" means a broadcast television station (or group of broadcast television stations if covered by a single retransmission consent agreement), an RSN, or a national network (i) that Comcast or NBCU currently manages or controls, or (ii) in which Comcast or NBCU, on or after the date of adoption of this Order, acquires either an attributable interest, an option to purchase an attributable interest, or an interest or other arrangement that would permit management or control of the relevant entity.

B. C ONDITIONS

1. Program Access Conditions Applicable to All Modes of Delivery

a. Neither Comcast nor NBCU will offer any of its existing or future programming or programming-related services on an exclusive basis to any MVPD, including Comcast's own cable systems, regardless of the mode of medium or method used for delivery of such programming.

b. Comcast and NBCU will make such existing or future programming and programming-related services available to all MVPDs and/or their subscribers on a non-exclusive basis and on non-discriminatory terms and conditions within each medium or method used for delivery of such programming, consistent with the Commission's program access rules (as modified by this condition). Accordingly, the same content shall be made available at the same speed, quality, and time to all MVPDs as it is made available to Comcast.

c. For purposes of the preceding paragraph, and without limiting the general applicability of the term, the following shall be considered prohibited "discrimination."

i. Discrimination with Respect to Access to Comcast Content:

A. Failure to make any content that Comcast makes available for distribution over Comcast's broadband networks, which shall include distribution via wireless networks, mobile and other delivery technologies (collectively, "Distribution Networks") including live streaming of content and video-on-demand ("VOD") content) available to MVPDs for distribution on nondiscriminatory terms and conditions, including but not limited to, number of hours, length of content, availability windows, format (e.g., HD, 3D), features (e.g,, multiple camera angles) and advertising opportunities.

B. Offering any Comcast-affiliated exclusive content, early premieres or other exclusive features on discriminatory terms with respect to MVPDs over the Distribution Networks or on Comcast sites or devices.

C. Failure to give access to all content offered by Comcast-controlled entities on an "authenticated" basis (e.g., TV Everywhere) on nondiscriminatory terms (including, but not limited to, Comcast Cable and third party content sites with which Comcast is affiliated).

D. Favoring any content aggregation site in which Comcast has an interest with respect to any content and the terms thereof (e.g., premiere dates, windows, format (e.g., HD)).

E. Failure to make available to MVPDs streaming rights (including streamed delivery via mobile devices) to content owned or controlled by Comcast, including live sports content (e.g., MLB games), to which Comcast or an affiliated entity has streaming rights.

ii. Discrimination with Respect to MVPD Content:

A. Discrimination against MVPDs and their subscribers with respect to quality-of-service factors such as speed, quality, usage conditions or requirements in delivery of content over the Distribution Networks.

B. With respect to content delivered over the Distribution Networks, failure to treat content from MVPD-affiliated sites in the same manner as content received from Comcast-affiliated sites with respect to factors such as bandwidth caps or other limitations on downloading/uploading content.

C. Prioritizing or guaranteeing a higher quality-of-service for Comcast's own video-on-demand ("VOD") services and/or online content offerings over those services provided by other MVPDs that utilize the Distribution Networks.

d. Neither Comcast nor NBCU will enter into an exclusive distribution arrangement with any Affiliated Program Rights Holder.

e. Neither Comcast nor NBCU (including any entity over which either exercises control) shall unduly or improperly influence: (i) the decision of any Affiliated Program Rights Holder to sell programming to an unaffiliated MVPD; or (ii) the prices, terms and conditions of sale of programming by any Affiliated Program Rights Holder to an unaffiliated MVPD.

f. For purposes of enforcing these conditions, an aggrieved MVPD may bring a program access complaint against Comcast and/or NBCU using the procedures found at Section 76.1003, 47 C.F.R. § 76.1003, of the Commission's rules, except that the Commission shall be required to issue a final decision within 90 days of filing of said complaint.

2. Program Access Conditions Applicable to Programmers

a. Comcast, NBCU, and their existing or future Programmers, regardless of the means used for content delivery, shall not offer any programming or programming-related services on an exclusive basis to any MVPD, and Comcast, NBCU, and their affiliated Programmers, regardless of the means used for content delivery, are required to make such programming and programming-related services available to all MVPDs on a non-exclusive basis and on nondiscriminatory terms and conditions. This provision prohibits all exclusive arrangements, including those that may not be effectuated by a formal agreement.

b. Neither Comcast nor NBCU shall acquire an attributable interest in a Programmer or enter into any other arrangement that would permit management or control of a Programmer unless the Programmer is obligated to abide by the conditions set forth herein.

b. Comcast and NBCU will not enter into an exclusive distribution arrangement with any such Programmer, regardless of the means of delivery.

c. Neither Comcast nor NBCU (including any entity with which it is affiliated) shall unduly or improperly influence (i) the decision of any Programmer, regardless of the means of delivery, to sell programming or programming-related services to an unaffiliated MVPD; or (ii) the prices, terms, and conditions of sale of programming or programming-related services by a Programmer, regardless of the means of delivery, to an unaffiliated MVPD.

d. For enforcement purposes, an aggrieved MVPD may bring a program access complaint against Comcast, NBCU, or the relevant Programmer using the procedures found at Section 76.1003, 47 C.F.R. § 76.1003, of the Commission's rules.

C. Additional Remedies

1. When negotiations fail to produce a mutually acceptable set of price, terms and conditions for (1) a retransmission consent agreement with a local broadcast television station that Comcast or NBCU owns and operates or on whose behalf it negotiates retransmission consent, (2) carriage of RSN programming, or (3) carriage of national cable network programming, an MVPD may choose to submit a dispute to commercial arbitration in accordance with the following procedures:

    a. An aggrieved MVPD may submit a dispute over the terms and conditions of carriage of content subject to these conditions (i) that Comcast or NBCU currently manages or controls or (ii) in which Comcast or NBCU, on or after the date of adoption of this Order, acquires either an attributable interest, an option to purchase an attributable interest, or one that would permit management or control of the relevant programmer.

    b. Following the expiration of any existing contract, or 90 days after a first time request for carriage, an MVPD may notify the relevant programmer and either NBCU or Comcast, as appropriate, within five business days that it intends to request commercial arbitration to determine the terms of the new affiliation agreement.

    c. Upon receiving timely notice of the MVPD's intent to arbitrate, either NBCU or Comcast, as applicable, shall ensure that the Programmer allows continued carriage under the same terms and conditions of the expired affiliation agreement as long as

the MVPD continues to meet the obligations set forth in this condition.

d. Carriage of the disputed programming during the period of arbitration is not required in the case of first time requests for carriage.[1]

e. The period following the Programmer's receipt of timely notice of the MVPD's intent to arbitrate and before the MVPD's filing for formal arbitration with the American Arbitration Association ("AAA"), shall constitute a "cooling off" period during which time negotiations are to continue.

f. The MVPD's formal demand for arbitration, which shall include the MVPD's "final offer," may be filed with the AAA no earlier than the fifteenth business day after the expiration of the relevant contract and no later than the end of the twentieth business day following such expiration. If the MVPD makes a timely demand, either NBCU or Comcast, as applicable, shall ensure that the Programmer participates in the arbitration proceeding.

g. The AAA will notify the Programmer, NBCU or Comcast, as appropriate, and the MVPD upon receiving the MVPD's formal filing.

h. Either NBCU or Comcast, as appropriate, shall ensure that the Programmer files a "final offer" with the AAA within two business days of being notified by the AAA that a formal demand for arbitration has been filed by the MVPD.

i. The MVPD's final offer may not be disclosed until the AAA has received the final offer from the Programmer.

j. A final offer shall be in the form of a contract for the carriage of the programming at issue for a period of at least three years. A final offer may not include any provision to carry any video programming networks or any other service other than (1) the local broadcast signal, in the case of retransmission consent; (2) the Covered RSN, in the case of an RSN; and (3) the national network, in the case of a national network.

2. Rules of Arbitration

a. The arbitration will be decided by a single arbitrator under the expedited procedures of the commercial arbitration rules, then in effect, of the AAA (the "Rules"), excluding the rules relating to large, complex cases, but including the modifications to the Rules set forth in Appendix __. The arbitrator shall issue his decision within 90 days from the date that the arbitrator is appointed.

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[1] A first time request for carriage does not include a request for a previously carried RSN that has experienced a change in ownership.

b. The parties may agree to modify any of the time limits set forth above and any of the procedural rules of the arbitration; absent agreement, however, the rules specified herein apply. The parties may not, however, modify the requirement that they engage in final-offer arbitration.

c. The arbitrator is directed to choose the final offer of the party that most closely approximates the fair market value of the programming carriage rights at issue.

d. To determine fair market value, the arbitrator may consider any relevant evidence (and may require the parties to submit such evidence to the extent it is in their possession). However, there shall be a presumption that carriage agreements are relevant evidence of fair market value as follows:

   i. for arbitration related to RSNs, current or previous contracts between MVPDs and RSNs;

   ii. for arbitration related to retransmission consent, current or previous contracts between MVPDs and broadcast stations; and

   iii. for arbitration related to national networks, current or previous contracts between MVPDs and national networks.

   Any party seeking additional evidence from the other party must demonstrate that the likely probative value of such evidence clearly outweighs the burden of searching for and producing it.

e. If a Programmer contends that evidence of its costs and related financial information are relevant to the determination of fair market value for the programming at issue, it shall announce that contention in writing not later than ten (10) business days after submitting its final offer. The arbitrator shall determine whether such evidence is likely to be unique to the Programmer and of probative value to his determination. If so, discovery of cost and financial information should be commensurate with the limited nature of the evidence and limited solely to the Programmer at issue (unless a showing can be made that costs are spread across affiliates).

f. The arbitrator may not consider offers prior to the arbitration made by the MVPD and the programmer for the programming at issue in determining the fair market value.

g. If the arbitrator finds that one party's conduct, during the course of the arbitration, has been unreasonable, the arbitrator may assess all or a portion of the other party's costs and expenses (including attorney fees) against the offending party.

h. Following resolution of the dispute by the arbitrator, to the extent practicable, the terms of the new affiliation agreement or retransmission consent agreement will become retroactive to the expiration date of the previous agreement. If carriage of the relevant programming has continued uninterrupted during the arbitration process, and if the arbitrator's award requires a higher amount to be paid than was required under the terms of the expired contract, the MVPD will make an additional payment to the Programmer in an amount representing the difference between the amount that is required to be paid under the arbitrator's award and the amount actually paid under the terms of the expired contract during the period of arbitration. If carriage of the relevant programming has continued uninterrupted during the arbitration process, and if the arbitrator's award requires a smaller amount to be paid than was required under the terms of the expired contract, the Programmer will credit the MVPD with an amount representing the difference between the amount actually paid under the terms of the expired contract during the period of arbitration and the amount that is required to be paid under the arbitrator's award.

i. Judgment upon an award entered by the arbitrator may be entered by any court having competent jurisdiction over the matter, unless one party indicates that it wishes to seek review of the award with the Commission and does so in a timely manner.

3. Review of Award by the Commission

a. A party aggrieved by the arbitrator's award may file with the Commission a petition seeking de novo review of the award. The petition must be filed within 30 days of the date the award is provided to the parties by the arbitrator. The petition, together with an unredacted copy of the arbitrator's award, shall be filed with the Secretary's office and shall be concurrently served on the Chief, Media Bureau. The Commission shall issue its findings and conclusions not more than 60 days after receipt of the petition, which may be extended by the Commission for one period of 60 days.

b. The MVPD may elect to carry the programming at issue pending the Commission's decision, subject to the terms and conditions of the arbitrator's award.

c. In reviewing the arbitrator's award, the Commission will examine the same evidence that was presented to the arbitrator and will choose the final offer of the party that most closely approximates the fair market value of the programming carriage rights at issue.

d. The Commission may award the winning party costs and expenses (including reasonable attorney fees) to be paid by the losing party, if it considers the appeal or conduct by the losing party to have been unreasonable. Such an award of costs and

expenses may cover both the appeal and the costs and expenses (including reasonable attorney fees) of the arbitration.

e. Judgment upon an award entered by the Commission upon review may be entered by any court having competent jurisdiction over the matter.

4. **Provisions Applicable to Small MVPDs:** An MVPD meeting the definition of a "small cable company" as set forth in 47 C.F.R. § 76.901(e) may appoint a bargaining agent to bargain collectively on its behalf in negotiating with a Programmer, and either NBCU or Comcast, as applicable, shall ensure that the Programmer may not refuse to negotiate carriage with such an entity. The designated collective bargaining entity will have all the rights and responsibilities granted by these conditions. An MVPD that uses a bargaining agent may, notwithstanding any contractual term to the contrary, disclose to such bargaining agent the date upon which its then current carriage contract with the Programmer at issue expires.

5. **Additional Provisions Concerning Arbitration:** Not earlier than 60 business days and no later than 20 business days prior to the expiration of an affiliation agreement with an MVPD for video programming subject to this condition, the Programmer must provide the MVPD with a copy of the conditions imposed in this Order. No later than ten business days after receiving a first time request for carriage, the Programmer must provide the requesting MVPD with a copy of the conditions imposed in this Order.

D. Duration of Conditions and Remedies. The Commission will consider a petition for modification or termination of any aspect of these conditions if Comcast and/or NBCU can demonstrate that market conditions have changed sufficiently such that the particular requirement at issue no longer serves the public interest.

APPENDIX __

MODIFICATIONS TO RULES FOR ARBITRATION

1. We hereby modify the AAA Rules in several respects as they apply to the arbitration remedy set forth in Appendix __.

2. Initiation of Arbitration. Arbitration shall be initiated as provided in Rule R-4 except that, under Rule R-4(a)(ii) the MVPD shall not be required to submit copies of the arbitration provisions of the contract, but shall instead refer to this Order in the demand for arbitration. Such reference shall be sufficient for the AAA to take jurisdiction.

3. Appointment of the Arbitrator. Appointment of an arbitrator shall be in accordance with Rule E-4 of the Rules. Arbitrators included on the list referred to in Rule E-4(a) of the Rules shall be selected from a panel jointly developed by the American Arbitration Association and the Commission and which is based on the following criteria:

The arbitrator shall be a lawyer admitted to the bar of a state of the United States or the District of Columbia;

The arbitrator shall have been practicing law for at least 10 years;

The arbitrator shall have prior experience in mediating or arbitrating disputes concerning media programming contracts;

The arbitrator shall have negotiated or have knowledge of the terms of comparable programming network contracts.

4. Exchange of Information. At the request of any party, or at the discretion of the arbitrator, the arbitrator may direct the production of current and previous contracts between either of the parties and MVPDs, broadcast stations, and video programming networks that are considered relevant in determining the value of the programming to the parties. Parties may request that access to information of a commercially sensitive nature be restricted to the arbitrator and outside counsel and experts of the opposing party pursuant to the terms of a protective order, the model for which is attached hereto as Appendix __.

5. Administrative Fees and Expenses. If the arbitrator finds that one party's conduct, during the course of the arbitration, has been unreasonable, the arbitrator may assess all or a portion of the other party's costs and expenses (including reasonable attorneys' fees) against the offending party.

6. Locale. In the absence of agreement between the parties, the arbitration shall be held in the city that contains the headquarters of the MVPD.

7. **Form of Award.** The arbitrator shall render a written award containing the arbitrator's findings of fact and reasons supporting the award, and shall provide a copy of such award to each party promptly and simultaneously. If the award contains confidential information, the arbitrator shall compile two versions of the award; one containing the confidential information and one with such information redacted. The version of the award containing the confidential information shall only be disclosed to persons bound by the protective order issued in connection with the arbitration. The parties shall include such confidential version in the record of any review of the arbitrator's decision by the Commission.

APPENDIX __

Before the
AMERICAN ARBITRATION ASSOCIATION

In the Matter of Arbitration Between	)	
	)	
_____,	)	
	)	
Claimant,	)	
	)	
-and-	)	Case No. _____
	)	_____, Arbitrator
_____,	)	
	)	
Respondent.	)	
_____	)	

CONFIDENTIALITY AGREEMENT AND PROTECTIVE ORDER

1. This Confidentiality Agreement and Protective Order (the "Agreement") is intended to protect trade secrets and other commercially sensitive confidential information contained in (i) documents that are produced, given or exchanged by and among the Parties, or produced by non-parties, and deposition testimony provided, as part of discovery in the Proceeding, and (ii) documents and testimony submitted as part of the record in the course of the Proceeding or any review of the Proceeding by the Commission or a court of competent jurisdiction.

2. Definitions.

(a) Arbitrator. "Arbitrator" means _____, or any successor arbitrator assigned to this proceeding.

(b) Authorized Representative. "Authorized Representative" means an individual who has signed and filed a Declaration in the form of Attachment A to this Agreement and is one of the following:

(i) Outside Counsel of Record for a Reviewing Party to this Proceeding, or any associated attorney, paralegal, clerical staff member or other employee of Outside Counsel of Record's law firm reasonably necessary to render professional services in this Proceeding;

(ii) Outside Experts engaged by a Reviewing Party to this Proceeding, or any associated clerical or support staff member or other employee of the Outside

Expert's firm reasonably necessary to render professional services in this Proceeding; and

(iii) the Arbitrator, or any associated clerical or support staff member or other employee reasonably necessary to render professional services in this Proceeding.

(c) Commission. "Commission" means the Federal Communications Commission or any bureau or subdivision of the Commission acting pursuant to delegated authority.

(d) Confidential Information. "Confidential Information" means information, whether in oral or written form, so designated by a Designating Party (hereinafter defined) upon a determination in good faith that such information constitutes trade secrets or commercial or financial information privileged or confidential within the meaning of Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4) or any other *bona fide* claim of right or privilege. Confidential Information includes additional copies of, notes regarding, and information derived from Confidential Information. Confidential Information also includes transcripts of hearing sessions to the extent described in Paragraphs 5 and 6. Terms of this Agreement referring to Confidential Information apply equally as to Highly Confidential Information (defined below).

(e) Declaration. "Declaration" means a sworn declaration in the form of Attachment A to this Agreement.

(f) Designating Party. "Designating Party" means a person or entity that seeks confidential treatment pursuant to this Agreement for Confidential Information submitted in this Proceeding.

(g) Highly Confidential Information. "Highly Confidential Information" means Confidential Information so designated by a Designating Party upon a determination in good faith that such information would, if disclosed to a current or potential counterparty or competitor of the Designating Party, significantly disadvantage the current or future negotiating or competitive position of the Designating Party or any other party to this Agreement. Highly Confidential Information includes additional copies of, notes regarding, and information derived from, Highly Confidential Information. Highly Confidential Information includes, without limitation, the Protected Third Party Agreements (as defined below).

(h) Outside Counsel of Record. "Outside Counsel of Record" means the firms of attorneys, or sole practitioners, as the case may be, representing the Parties in this Proceeding, including their attorneys, paralegals, clerical staff and other employees of outside counsel, and vendors reasonably necessary to render professional services in this Proceeding. For the avoidance of doubt, Outside Counsel of Record shall exclude any employee of any of the Parties and includes the following law firms only:

[Insert Firm Name]
[Insert Firm Name]

(i) Outside Expert. "Outside Expert" means a person who, in addition to any other work for the Reviewing Party or others, is retained or employed as a *bona fide* expert to furnish testimony and/or technical or other expert advice or service, or who is otherwise engaged to prepare material for the express purpose of participating in this Proceeding, whether full or part time, by or at the direction of the Reviewing Party's Outside Counsel of Record, as well as personnel associated with such person who provide support or clerical services or other employees of such expert's firm reasonably necessary to render professional services in this Proceeding. For the avoidance of doubt, Outside Expert shall exclude any employee of any of the Parties.

(j) Parties. The "Parties" to this Proceeding are _____. No other entity or natural person may become a Reviewing Party in this Proceeding absent the express, written consent of all of the Parties and the express, written authorization of each signatory hereto. No entity or natural person other than one of the Parties or a non-party who produces documents or gives testimony in this Proceeding may become a Designating Party in this Proceeding absent the express, written consent of all of the Parties and the express, written authorization of each signatory hereto.

(k) Reviewing Party. "Reviewing Party" means a Party whose Authorized Representative has signed a Declaration.

(l) Proceeding. "Proceeding" means only the proceeding to arbitrate the dispute between the Parties, known as Case No. _____, currently pending before the American Arbitration Association, and does not include the arbitration or adjudication of any other complaint or matter.

(m) Protected Third Party. "Protected Third Party" shall mean any entity other than the Parties that agrees in writing with the Parties to produce information for this Proceeding as a Designating Party subject to the terms of this Agreement.

(n) Protected Third Party Agreements. "Protected Third Party Agreements" shall mean agreements, together with any term sheets, amendments, extensions, modifications, addenda, and other agreements related thereto, between any Party and any Protected Third Party (or any subsidiaries or affiliates thereof).

3. Claim of Confidentiality. A Designating Party shall, prior to disclosing to any other party any Confidential Information, designate such information (excluding Highly Confidential Information) by placing the legend "CONFIDENTIAL" in a conspicuous place on the front page (or other appropriate place) of each document, record, or other material containing such information. The inadvertent failure to designate a document or data as Confidential Information does not constitute a waiver of such claim and may be corrected by supplemental written notice at any time, accompanied by a copy of the document or data bearing the appropriate legend, with the effect that such document or data shall be subject to the protections of this Agreement from the time it is designated as Confidential Information.

4. Procedures for Claiming Documents and Data Are Highly Confidential.

(a) Documents or data comprising Protected Third Party Agreements (or any material contained therein or any copies or derivative works thereof) or other Highly Confidential Information shall be designated as Highly Confidential Information for purposes of this Agreement by affixing the legend "HIGHLY CONFIDENTIAL INFORMATION SUBJECT TO CONFIDENTIALITY AGREEMENT AND PROTECTIVE ORDER IN CASE NO. _____" to the front page of the document or, for data, to the outside of the container or medium in which the data is produced. A Designating Party shall, prior to disclosing to any other party any Highly Confidential Information, ensure that any Reviewing Party (and any representative thereof) is authorized under this Agreement to receive such Highly Confidential Information (including, without limitation, that such Receiving Party has executed the Declaration and that any applicable waiting period has expired). The inadvertent failure to designate a document or data as Highly Confidential Information does not constitute a waiver of such claim and may be corrected by supplemental written notice at any time, accompanied by a copy of the document or data bearing the appropriate legend, with the effect that such document or data shall be subject to the protections of this Agreement from the time it is designated as Highly Confidential Information.

(b) Highly Confidential Information submitted in writing to the Arbitrator shall be filed under seal and shall bear on the front page in bold print, "HIGHLY CONFIDENTIAL INFORMATION SUBJECT TO CONFIDENTIALITY AGREEMENT AND PROTECTIVE ORDER IN CASE NO. _____." Such filings shall also comply with Paragraph 13 of this Agreement.

5. Confidential Information in Deposition Testimony, Oral Hearing Testimony and Oral Argument. If any Reviewing Party desires to include, utilize, or refer to any Highly Confidential Information in testimony or exhibits during the Proceeding or during a deposition in such a manner that might require disclosure of such material, it shall serve such Highly Confidential Information in a manner reasonably calculated to ensure that its confidentiality is maintained. Examination of a witness, or other oral presentation, concerning Highly Confidential Information shall be conducted in camera and closed to all persons except Authorized Representatives of Reviewing Parties and the Arbitrator, a witness then testifying, and any reporter engaged to transcribe the Proceeding. Persons present at the Proceeding may not disclose any Highly Confidential Information to any person that is not an Authorized Representative of a Reviewing Party, except that Highly Confidential Information may be used with a witness that has prior knowledge of such information obtained through lawful means.

6. Designation of Confidential Information in Transcripts.

(a) Deposition testimony relating to Protected Third Party Agreements or other Highly Confidential Information shall be designated as Highly Confidential Information by (i) a statement on the record, by counsel, at or before the conclusion of the deposition, or (ii) by written notice, sent by counsel to all parties within five (5) business days after the receipt of the preliminary transcript of the deposition. All deposition testimony shall be considered Highly Confidential Information until five (5) business days from the receipt by counsel of the preliminary transcript, so as to allow for possible designation under subparagraph (a)(ii).

(b) Any portion of the transcripts of oral testimony and oral argument during the Proceeding shall be considered Highly Confidential Information, unless otherwise expressly agreed to by all of the parties to this Agreement whose Highly Confidential Information is contained in any such transcript. The reporter of the Proceeding shall not provide transcripts to anyone other than Outside Counsel of Record for the Parties in this Proceeding and the Arbitrator.

7. Storage of Confidential Information at the Commission. The Arbitrator and any other person to whom Highly Confidential Information is provided shall place the Highly Confidential Information in a non-public file. Highly Confidential Information shall be segregated in the files of the Arbitrator, and shall be withheld from inspection by any person not bound by the terms of this Agreement, unless such Highly Confidential Information is released to the Commission or a court of competent jurisdiction pursuant to paragraphs 11 and 18 hereto.

8. Access to Confidential Information and Highly Confidential Information.

(a) Other than in accordance with Paragraphs 5, 11, and 18 of this Agreement, Confidential Information may be disclosed, summarized, described, characterized or otherwise communicated or made available in whole or in part only to Authorized Representatives. Before an Authorized Representative may obtain any access to Highly Confidential Information, such person must execute a Declaration.

(b) Notwithstanding anything herein to the contrary, Protected Third Party Agreements or summaries, descriptions, or characterizations of the substance thereof shall not be disclosed to any in-house personnel of a Party, including, but not limited to, any in-house counsel.

(c) Except as otherwise provided in this paragraph, Confidential Information shall not be disclosed to any other person. All persons who obtain Confidential Information in this Proceeding shall ensure that access to that Confidential Information is strictly limited as prescribed in this Agreement and is used only as provided in this Agreement. For the avoidance of doubt, all persons who obtain any Highly Confidential Information in this Proceeding shall comply with the procedures prescribed in Paragraphs 4-13 of this Agreement concerning the ongoing designation and use of Highly Confidential Information as such, including, without limitation, any testimony, transcripts, pleadings, or documents containing or derived from Highly Confidential Information.

(d) Prior to the disclosure of any Protected Third Party Agreement, a Protected Third Party may redact certain portions of such Protected Third Party Agreement (i) that are not relevant to this Proceeding; or (ii) to the extent relevant, as necessary to assure the highest level of confidentiality practicable to protect the Protected Third Party's confidential and proprietary information to the extent not inconsistent with the purposes of this Proceeding. Notwithstanding the foregoing, no Protected Third Party shall redact the terms of a Protected Third Party Agreement that relate to pricing (including surcharges, rebates, or other consideration (monetary or otherwise)), packaging, minimum content, or most-favored-nation protections.

(e) Highly Confidential Information shall only be disclosed to an Outside Expert according to the terms of this subparagraph. If Highly Confidential Information is disclosed to an Outside Expert, for the period extending from the date of the disclosure until [date two years from today], such Outside Expert will not work for any [regional sports network, broadcaster, national programmer, etc.], in connection with securing distribution on any of the Parties' systems; nor, for such period, shall such Outside Expert work for any party (i) in connection with any agreement for the distribution by a multichannel video programming distributor ("MVPD") of programming owned by a Protected Third Party; or (ii) in connection with a negotiation for acquisition of programming or distribution rights in situations where a Protected Third Party also is interested in acquiring or selling the relevant programming (regardless of whether the Protected Third Party previously had any rights to carry or license such programming). Before any Highly Confidential Information is disclosed to any such Outside Expert, each Outside Expert so retained or employed shall sign and file a Declaration to confirm that he or she has read this subparagraph, meets the requirements of this subparagraph, and is bound by the obligations set forth herein. Such Declaration shall be provided to the Parties and the Protected Third Party. Nothing in this paragraph shall preclude an Outside Expert from advising, assisting, or otherwise participating on behalf of a Reviewing Party or a Protected Third Party in future arbitrations or program access proceedings that are not adverse to a Protected Third Party (except for any Protected Third Party that is owned by, affiliated with, or under common ownership with a Reviewing Party) and that are initiated by any MVPD (and any following proceedings at the FCC or in federal court) relating to [RSN carriage agreements, retransmission consent agreements, national programming carriage agreements, etc.], subject to any and all restrictions on the use of confidential information applicable in this, as well as any such future, arbitration or proceeding.

(f) If Highly Confidential Information is disclosed to a person who is Outside Counsel of Record, and such person subsequently becomes an employee of any Party or Protected Third Party, such person shall not be allowed to work for such Party or Protected Third Party (i) in connection with any agreement for the distribution of the programming of a Protected Third Party by an MVPD; or (ii) in connection with a negotiation for acquisition of programming or distribution rights in situations where a Protected Third Party also is interested in acquiring or selling the relevant programming (regardless of whether Protected Third Party previously had any rights to carry or license such programming) until [date two years from today]. Nothing in this paragraph shall preclude such counsel from advising, assisting, or otherwise participating on behalf of a Reviewing Party in future arbitrations or program access proceedings initiated by any MVPD (and any following proceedings at the FCC or in federal court) relating to [RSN carriage agreements, retransmission consent agreements, national programming agreements, etc.], subject

to any and all restrictions on the use of confidential information applicable in this, as well as any such future, arbitration or proceeding.

9. Procedures for Obtaining Access to Confidential Information or Highly Confidential Information. In all cases where access to Confidential Information or Highly Confidential Information by Authorized Representatives is permitted pursuant to Paragraph 8, before reviewing or having access to any Confidential Information or Highly Confidential Information, each person seeking such access shall execute a Declaration, file it with the Arbitrator, and serve it upon the parties hereto by email through their counsel (as identified in the signature block hereto).

10. Disclosure of Confidential Information or Highly Confidential Information. An Authorized Representative may disclose Confidential Information or Highly Confidential Information only to other Authorized Representatives to whom disclosure is permitted under this Agreement.

11. Additional Disclosure. If any Party to this Proceeding seeks review of any decision or order issued by the Arbitrator before the Commission or a court of competent jurisdiction, such Party shall notify the Commission or such court of the existence and terms of this Agreement. In the event of an appeal to the Commission or a court, the unredacted version of any decision or order or pleading containing Highly Confidential Information shall not be filed unless reasonably necessary, in which case, prior to such disclosure, the Parties shall (i) cooperate to have the Highly Confidential Information sealed and any proceedings on review closed; and (ii) seek confidential treatment of such Highly Confidential Information to the maximum extent possible, including, without limitation, treatment in accordance with Sections 0.442 and 0.461 of the Commission's rules, 47 C.F.R. §§ 0.442, 0.461. In addition, a Party submitting Highly Confidential Information to the Commission or a court shall mark and identify such Highly Confidential Information in a manner consistent with Paragraph 13 hereof so as to alert the Commission or court that it is receiving Highly Confidential Information subject to this Agreement.

12. Use of Confidential Information and Highly Confidential Information. Confidential Information and Highly Confidential Information shall be used solely for the preparation and conduct of this Proceeding; shall not be used for any other purpose (including but not limited to competitive business purposes); and shall not be disclosed except in accordance with this Agreement. This Agreement shall not preclude the use of any material or information that is in the public domain or has been developed independently by any other person who has not had access to Confidential Information or Highly Confidential Information nor otherwise learned of its contents through this Proceeding. Should the Arbitrator rely upon or otherwise make reference to the contents of any of the Highly Confidential Information in his decision in this Proceeding, he will do so by redacting any Highly Confidential Information from the version of his decision made available to the Parties (other than Outside Counsel of Record) and by making the unredacted version of the decision available only to the Commission or a court of competent jurisdiction in accordance with paragraph 11 hereof, and to those persons entitled to access to Highly Confidential Information under this Agreement.

13. Pleadings or Filings Using Highly Confidential Information. Parties may, in any pleadings or other documents that they file in this Proceeding, reference Highly Confidential Information, but only if they comply with the following procedures:

(a) Any portions of the filings that contain or disclose Highly Confidential Information must be physically segregated from the remainder of the filings and filed under seal in accord with the remainder of this paragraph. This requirement is satisfied when a Party files (1) a redacted version of the document; and (2) a non-public version of the document (of which only one copy should be filed) that contains the Highly Confidential Information and bears the legend set forth in Paragraph 13(c);

(b) The portions or versions of pleadings containing or disclosing Highly Confidential Information must designate the specific portions of the pleading containing such Highly Confidential Information;

(c) The cover page and each page of any Party's filing that contains or discloses Highly Confidential Information subject to this Agreement must be clearly marked: "HIGHLY CONFIDENTIAL INFORMATION SUBJECT TO CONFIDENTIALITY AGREEMENT AND PROTECTIVE ORDER IN CASE NO. _____"; and

(d) The Highly Confidential version of the pleading, to the extent it is required to be served, shall be served upon the Arbitrator and Outside Counsel of Record that have signed the Declaration. Such Highly Confidential versions shall be filed under seal, and shall not be placed in any public file or shared with any other party or person, except as expressly provided by this Agreement. Except as provided above, Parties may not provide courtesy copies of pleadings containing Highly Confidential Information to any other person.

14. Client Consultation. Nothing in this Agreement shall prevent or otherwise restrict Outside Counsel of Record from rendering advice to their clients relating to the conduct of this Proceeding or any subsequent administrative or judicial proceeding arising therefrom and, in the course thereof, relying generally on examination of Confidential Information or Highly Confidential Information; *provided, however*, that in rendering such advice and otherwise communicating with such client, Outside Counsel of Record shall not disclose Confidential Information or Highly Confidential Information except as consistent with this Agreement.

15. Violations of Agreement.

(a) Should a Party that has obtained access to Highly Confidential Information under this Agreement violate any of its terms, it shall immediately convey that fact to the Designating Party and to any Protected Third Party whose Highly Confidential Information has been utilized in violation of this Agreement, any of whom may choose to bring it to the attention of the Arbitrator or the Commission as appropriate. Further, should such violation consist of improper disclosure or use of Highly Confidential Information, the violating party shall take all necessary steps to remedy the improper disclosure or use. The violating party shall also immediately notify the Designating Party and any Protected Third Party whose Highly Confidential Information has been utilized in violation of this Agreement, in writing, of the identity of each party known or reasonably suspected to have obtained the Highly Confidential Information through any such disclosure. The Arbitrator retains full authority to fashion appropriate sanctions for violations of this Agreement, including but not limited to denial of further access to Highly Confidential Information in this Proceeding.

(b) The parties hereto agree that Highly Confidential Information is of special, unique and extraordinary character, and that a Protected Third Party's ability to pursue damages alone would be an inadequate remedy for a breach of this Agreement. In the event that any Protected Third Party believes that use of its Highly Confidential Information in violation of this Agreement has occurred or is about to occur, or that any other party hereto has breached or is about to breach this Agreement, such Protected Third Party shall be entitled to seek an injunction restraining any such violation or breach or threatened violation or breach and enforcement of this Agreement by a decree of specific performance requiring each party hereto to fulfill its obligations under this Agreement, in any such case without the necessity of showing economic loss or other actual damage and without any bond or other security being required. Protected Third Parties also shall have the right to seek appropriate relief from the Commission and, to the extent that the Commission's authority is so delegated, the staff of the Commission. Nothing in this Agreement shall limit any other rights and remedies available to a Protected Third Party at law or equity against any person using Highly Confidential Information in a manner not authorized by this Agreement.

(c) Each Protected Third Party shall have all of the rights and remedies identified herein only individually with respect to its own Highly Confidential Information; no Protected Third Party shall be required to act in concert or coordination with any other Protected Third Party to exercise its rights and remedies hereunder.

16. Termination of Proceeding. Within fifteen (15) days after final resolution of this Proceeding (which includes any administrative or judicial appeals), Authorized Representatives of Reviewing Parties shall make their best efforts to destroy all Highly Confidential Information as well as all copies and derivative materials made therefrom, and shall certify in a writing served on the parties hereto that such best efforts have been conducted to ensure that no Highly Confidential Information has been retained by any person having access thereto, except that the Arbitrator and each Outside Counsel of Record representing a Reviewing Party may retain two paper copies and one electronic copy of all pleadings filed in this Proceeding and all transcripts created in connection with this Proceeding, regardless of whether such pleadings or transcripts

contain Highly Confidential Information. Any Highly Confidential Information contained in any copies of pleadings or transcripts retained or in materials that have been destroyed pursuant to this paragraph shall be protected from disclosure or use indefinitely in accordance with this Agreement unless such Highly Confidential Information is released from the restrictions of this Agreement either through agreement of the parties or as otherwise expressly set forth herein. Authorized Representatives shall have a continuing obligation to destroy any previously undestroyed documents if and when they are discovered.

17. No Waiver of Confidentiality. Disclosure of Confidential Information or Highly Confidential Information as provided herein shall not be deemed a waiver by the Designating Party or any Protected Third Party of any entitlement to confidential treatment of such information. Reviewing Parties, by viewing these materials:

(a) agree not to assert any such waiver;

(b) agree not to use Confidential Information or Highly Confidential Information in any proceeding other than such as permitted herein unless obtained independently of this Proceeding; and

(c) agree that accidental disclosure of Confidential Information or Highly Confidential Information shall not be deemed a waiver of entitlement to confidential treatment of such information.

18. Subpoena by Courts, Departments, or Agencies. If a court or a federal or state department or agency issues a subpoena or orders production of Highly Confidential Information that a party has obtained under terms of this Agreement, such party shall promptly notify in writing each Designating Party, and any Protected Third Party whose Highly Confidential Information is affected, of the pendency of such subpoena or order. Consistent with the independent authority of any court, department, or agency, the party to whom the subpoena or order is directed shall not provide or otherwise disclose Highly Confidential Information prior to providing the Designating Party and Protected Third Party notice and waiting fifteen (15) business days so that the Designating Party and Protected Third Party shall have an opportunity to contest the validity of the subpoena or order of production through appeal or seek a confidentiality order or other protection against disclosure of any Highly Confidential Information.

19. Additional Rights Preserved. The execution of this Agreement is without prejudice to the rights of the Designating Party or any Protected Third Party to apply for additional or different protection where it is deemed necessary or to the rights of Reviewing Parties to request further or renewed disclosure of Confidential Information or Highly Confidential Information.

20. Effect of Agreement. This Agreement, which has been entered for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by all parties hereto, constitutes an agreement among the parties hereto and the persons executing the attached Declaration. This Agreement and its protections will continue in force indefinitely. This Agreement, together with all attachments, constitutes the full and entire understanding and agreement among the parties with regard to the subject matter hereof, and supersedes all prior

agreements, understandings, inducements or conditions, express or implied, oral or written, relating to the subject matter hereof. The express terms hereof control and supersede any course of performance and/or usage of trade inconsistent with any of the terms hereof. This Agreement has been prepared by all of the parties hereto, and no inference of ambiguity against the drafter of a document therefore applies against any party hereto.

21. Severability. In the event that one or more provisions of this Agreement are held to be unenforceable under applicable law, such provisions shall automatically be replaced with one that incorporates the original intent of the parties to the maximum extent permitted by law and the balance of the Agreement shall be enforced in accordance with its terms.

22. No Third Party Beneficiaries. No provision of this Agreement shall confer upon any person other than the parties hereto any rights or remedies hereunder.

23. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original as against any party whose signature appears thereon, and all of which shall together constitute one and the same instrument. This Agreement shall become binding when one or more counterparts hereof, individually or taken together, shall bear the signatures of all of the parties reflected hereon as the signatories.

Dated: _____

[SIGNATURE BLOCKS FOR COUNSEL]

SO ORDERED AND ENTERED,

Dated: _____ _____

Arbitrator

Before the
AMERICAN ARBITRATION ASSOCIATION

In the Matter of Arbitration Between	)	
	)	
_____,	)	
	)	
Claimant,	)	
	)	
-and-	)	Case No. _____
	)	_____, Arbitrator
_____,	)	
	)	
Respondent.	)	
_____	)	

DECLARATION

I, _____, hereby declare under penalty of perjury that I have read the Confidentiality Agreement and Protective Order that has been executed by the parties and entered by the Arbitrator with respect to the above-captioned Proceeding, and that I agree to be bound by its terms pertaining to the treatment of Confidential Information and Highly Confidential Information submitted by parties to this Proceeding. I understand that the Confidential Information and Highly Confidential Information shall not be disclosed to anyone except in accordance with the terms of the Confidentiality Agreement and Protective Order and shall be used only for purposes of the above-captioned Proceeding (except as otherwise provided in the Confidentiality Agreement and Protective Order). In particular, I will not use the Highly Confidential Information for competitive commercial or business purposes, including competitive decision-making. I acknowledge that a violation of the Confidentially Agreement and Protective Order may be referred to the Federal Communications Commission. I acknowledge that this Declaration is also a binding agreement with the parties to the Confidentiality Agreement and Protective Order.

To the extent that I am an Outside Expert as described in paragraph 8(e) of the Confidentiality Agreement and Protective Order, I acknowledge that I have read subparagraph 8(e) of the Confidentiality Agreement and Protective Order and agree, in addition to the restrictions set forth above, to be bound by the obligations described in subparagraph 8(e). I understand and agree to comply with the procedures described in paragraph 16 of the Confidentiality Agreement and Protective Order regarding the destruction or return of all Confidential Information and Highly Confidential Information to which I have access as well as any copies and derivative materials made, including the continuing obligation to destroy any previously undestroyed documents if and when they are discovered.

(signed) _____

(printed name) _____

(representing) _____

(title) _____

(em ployer) _____

(address) _____

(phone) _____

(date) _____