> distribution as part of any Non-Broadcast Programming Network or as Video Programming on the Internet, in which the Company has an ownership, controlling or Attributable interest, whether distributed via MVPD or by an Online Video Programming Distributor.[45]

Rather, than submit to the Commission's request, Comcast's response to these interrogatories is as follows: "[p]ursuant to discussions with Commission staff, the response to this request has been deferred pending further review and consultation."[46] Without access to such contracts it is impossible to determine the exact extent to which Comcast limits programmers' ability to distribute their content via the internet. Thus, we call on the Commission to secure these contracts for review.

In any event, we suspect that these types of contractual limitations are a consistent practice within the company. Comcast's other internal documents state that it {{

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[45] Federal Communications Commission, *Request for Information Sent to Comcast Corporation,* MB Dkt 10-56 (May 21, 2010) at questions 32, 44, and 51.

[46] Supplemental Response to request for Information filed by Comcast Corp. (Jun 30, 2010)

[47] *Id.* at Slide 7 (emphasis added).

[48] *Id.* Comcast's control over NBCU film and programming will further enhance the likelihood that other programmers will keep their programming off competing online platforms. Popular programming, like that owned by NBCU, would be a critical component to the success of any new online entrant. If independent programmers expect that these new online distributors will fail to gain access to NBCU content, programmers may be even less likely to risk offering these new platforms access to their own content because of concerns that the business will not be viable absent anchor programming from NBCU.

3. The Joint Venture Will Have Increased Incentive and Ability to Enhance Access to its Own Online Content and Platforms, While Degrading Access to Competing Content and Platforms

In addition to being able to withhold critical content from emerging online video distributors, the joint venture will have increased motivation and capacity to enhance access to Comcast/NBCU-controlled platforms and content, while degrading access to those of its competitors. Comcast has already engaged in such behavior in the past and Comcast's acquisition of NBCU would give it more content to favor, and even more incentive to degrade consumer access to competing online video providers and content. Unfortunately, because the Commission presently has no enforceable network neutrality regime, it cannot prevent a merged Comcast/NBCU from engaging in this type of conduct.

Applicants argue that concerns that the joint venture would engage in High Speed Internet foreclosure are overblown because "Comcast is and will remain committed to the principles of the Open Internet Policy Statement."[49] Unfortunately, as a consequence of the Commission's current inability to enforce this policy statement, coupled with Comcast's past practices, this assurance provides little comfort. Comcast also appears to suggest that a recent court decision to vacate an FCC order finding that Comcast had engaged in anticompetitive blocking assuages any concerns that Comcast would engage in similar conduct in the future.[50] Of course, as Comcast itself acknowledges, that case "focused on whether the FCC had acted within its statutory authority when it found that Comcast had violated federal Internet policy."[51]

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[49] Opposition at 195.
[50] *Id.* at 195, 272, citing *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010)
[51] *Id.* at 195.

The court did not address, nor did Comcast challenge, the underlying facts of the Commission's findings, or that Comcast had indeed blocked access to peer-to-peer applications.[52] The D.C. Circuit vacated the FCC's order on the grounds that the Commission lacked authority under Title I of the Communications Act to enforce the provisions of its Internet Policy Statement. But that does not erase the historical fact that Comcast engaged in practices that degraded and blocked consumers' access to specific applications. Thus, contrary to Applicants' assertions, the court opinion heightens the potential of the joint venture to engaging in anticompetitive "network management" because the Commission currently lacks authority remedy such behavior or to protect consumers from such conduct in the first place.

B. The Merger Will Adversely Impact Local Media Markets

In our initial Petition, we demonstrated that the joint venture will adversely affect local media markets by eliminating direct competition between Comcast's cable operations and NBC owned and operated broadcast stations.[53] Chief among our concerns was the concentration of power over local advertising in markets where Comcast will acquire an NBC-owned television station in the Comcast cable footprint. The merger of the local Comcast cable operations with a top-4 local broadcaster, such as NBC, is likely to result in a significant decline competition in the local ad market and excessive domination by the merged company – to the detriment of other local broadcasters (particularly, smaller, independent ones) who are already facing ad revenue declines in an economic downturn.

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[52] *Complaint of Free Press and Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, Memorandum Opinion and Order, 23 FCC Rcd 13028, ¶ 44 (2008).

[53] Petition at 46-61.

Applicants have tried to downplay the impact the merger would have on advertising competition in local video markets by suggesting that NBC and Comcast are not true competitors in these markets. To the contrary, we believe the evidence is overwhelming that cable competes with local broadcasters for advertising revenues, and the merger would have a significant impact on the fabric of local video market competition. The fact that Applicants suggest otherwise is not only inaccurate, it flies in the face of their own statements and commercial practices.

In our initial Petition to Deny and attached Declaration we demonstrated that the merger will have an adverse impact on specific local markets where Comcast cable operations overlap with NBC owned and operated stations. In particular, Dr. Mark Cooper and Adam Lynn – using data submitted by NBC and the National Association of Broadcasters – calculated the merger's effect on concentration in local video advertising markets. In doing so they found that five of the overlap markets

> would be highly concentrated post merger according to the current DOJ/FTC *Merger Guidelines* (only Miami falls below the threshold for a highly concentrated market of 1800). All of the post merger markets would be moderately concentrated according to the proposed, revised *Merger Guidelines.* In every case the increase in the market concentration exceeds the threshold that is a cause of concern under the *Merger Guidelines* by a wide margin.[54]

Applicants attempt to discount these findings by attacking the methodology and data used by Dr. Cooper and Mr. Lynn. First Applicants suggest the analysis is critically flawed because of its "narrow" reliance on television advertising.[55] Applicants suggest that a more appropriate analysis should have included "the Internet, radio, newspapers, mobile phones, billboards,

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[54] *See* Cooper/Lynn Declaration at II(C)(2).
[55] Opposition at 120.

yellow pages, direct mail, and other "out-of-home" advertising."[56] As a threshold matter, Applicants' list of relevant local advertising media is absolutely absurd. No one can credibly argue that the yellow pages and primetime television are legitimate advertising substitutes.

Applicants initially assert that Dr. Cooper and Mr. Lynn's HHI analysis is flawed because "television advertising market" is too narrow a definition. However, they later contradict themselves by arguing that cable operators and broadcasters do not really compete because defining the relevant market as "television advertising" is too broad.[57] Citing to the Rosston/Topper Reply report, Applicants assert that "[l]ocal cable operators and local broadcast stations differ in important ways in the inventory, reach, targeting, and demographics they offer to advertisers."[58] But Applicants' contention that billboards and the yellow pages provide advertisers with viable substitutes for cable and broadcast advertising, while simultaneously asserting that broadcast advertising and cable advertising are not substitutes, defies logic – and reality. The Commission should dismiss such contradictory statements and analyses as Applicant's self-serving attempt to have it both ways.

In any event, the Commission has repeatedly found that "[b]roadcast networks and stations are competitors to MVPDs."[59] In a 2007 Order on Multicast Must-Carry, the

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[56] *Id.* at 120-1, 127.
[57] *Id.* at 124.
[58] *Id.* at 126 (citing Rosston/Topper Reply Report at ¶79).
[59] *See, e.g. Annual Assessment of the Status o f Competition in Markets for the Delivery of Video Programming*, CS Docket No. 97-141, Fourth Annual Report, 13 FCC Rcd 1034, ¶ 90 (1998); *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 98-102, Fifth Annual Report, 13 FCC Rcd 24284, ¶ 95 (1998); *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 99-230, Sixth Annual Report, 15 FCC Rcd 978, ¶ 101 (2000);
(continued on next page)

Commission found that the broadcast and cable industry compete for advertising, relying on an NBC filing stating, "cable operators are encroaching on broadcasters' advertising base."[60] The Supreme Court and Congress have also noted that the two industries "compete for television advertising revenues."[61]

The cable industry also views local broadcast stations and cable operators as direct competitors for local advertising revenue. A promotional report by the Cable Advertising Bureau compares local broadcast advertising and local cable advertising in terms of their ability to reach desirable audience demographics (despite Applicants' assertions, the CAB does not appear to consider billboards or the yellow pages as substitutes for cable advertising).[62] Indeed, Comcast's own documents are also instructive on this point. {{

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(footnote continued)

Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 00-132, Seventh Annual Report, 16 FCC Rcd 6005, ¶ 98 (2001); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 01-129, Eighth Annual Report, 17 FCC Rcd 1244, ¶ 78 (2002).

[60] *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Third Report and Order and Third Further Notice of Proposed Rulemaking, CS Docket No. 98-120,22 FCC Rcd 21064, ¶ 52 (2007).

[61] *See, e.g., Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622 (1994) (quoting the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, §2(a)(14), 106 Stat. 1462).

[62] Cable Advertising Bureau, "Why Ad-Supported Cable," *available at* http://www.thecab.tv/main/bm~doc/why-cable-4-20-10a.pdf.

{{Exhibit 2:[63]

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[63] 11-COM-00000670 at Slide 4.

Because Applicants cannot legitimately refute the fact that local cable operators and broadcasters are competitors for advertising and that the merger significantly increases local ad market concentration in several DMAs, they instead suggest that the combination of these advertising resources will result in beneficial synergies.[64] Applicants also argue that that their combined market power will have no adverse affect as to advertisers.[65] But Applicants entirely miss the point. Public Interest Petitioners' primary concern lies not with advertisers, but with the consequence for consumers and the health of diverse media markets.

Comcast and NBCU's consolidated control over local advertising in overlap markets will result in an unparalleled share of market power that could adversely impact competing broadcasters' service to their communities, as well as increase local broadcasters' impetus to consolidate even further. Applicants will be able to offer consolidated advertising services across (1) Multiple platforms: i.e., cable television, broadcast television, online advertising; (2) Multiple channels: including all of the Comcast/NBCU-controlled broadcast and cable channels, as well as all other cable and broadcast channels because, as a cable operator, Comcast usually reserves the right to sell advertising time for all of the channels it carries; and (3) Multiple geographies: i.e., local, regional, and national advertising. Applicants call these "product improvements."[66] However, what Applicants do not acknowledge is that they will only be able to offer these "improvements" as a consequence of gaining an unfair market advantage via the proposed merger. No other broadcaster will be able to capture this amount of advertising market

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[64] Opposition at 121

[65] *Id.* at 122.

[66] *Id.* at 121.

share unless it consolidates with other local media, which would further reduce competition and diversity. No other broadcaster will be able to offer these kinds of volume discounts and package deals unless they consolidate with an MVPD and broadband access distributor, which would only further amplify the consolidation and competition problems that will result from this merger. Thus, Applicants' assertions that their proposed transaction "does not pose any of the harms" associated with "traditional media consolidation," or that it will not result in a domino-effect of consolidation are incorrect.[67] Instead, this merger will fundamentally change the structure of local media markets in way that increases pressures for local media to consolidate in ways and to levels hereto unseen.

Applicants do not address these concerns. But the Commission cannot ignore the merger's impact on the consolidation impetus in these media markets. Nor can this merger be assessed in a vacuum, divorced from the effect it will have on market structures. Broadcasters consistently complain to the Commission that they face increasing pressure from cable and Internet advertising – indeed, NBC made this very argument to the Commission in the last Quadrennial Media Ownership Review to support its contention that the Commission must substantially relax its local media ownership rules.[68] Post-merger Comcast and NBC could provide cable, broadcast, and Internet advertising in a number of markets which will push other in-market broadcasters to consolidate in an attempt to re-capture market share.

Not only can the combined company use this market power to siphon-off revenues from competitors, it can also leverage its power over multiple platforms to exact advertising terms that

[67] *Id* at iii.
[68] *See* Comments of NBC, filed MB Dkt 06-121 (Oct. 23, 2006).

would further injure local broadcasters. For example, it could require advertisers to dedicate a substantial share of ad buys to Comcast/NBCU controlled properties. This would guarantee ad revenue income for the joint venture, while further drawing off revenues from in-market broadcasters which do not possess the level of market share to exact these types of terms from advertisers.

Additionally, the joint venture could also exclude its competitors (such as other broadcasters, MVPDs, or Internet access providers) from advertising on any of the platforms and channels controlled by Comcast/NBCU. Indeed, Comcast already regularly prohibits programmers from accepting advertising for the delivery of multi-channel video television services and/or online video services. In response to the Commission's discovery request seeking details of Comcast's advertising policies,[69] Comcast makes clear that it places significant limitations on advertisements from their competitors. For example, Comcast states that with regard to Comcast Spotlight advertising it "generally limits the advertising it accepts from competitors to telephone/voice and cell phone advertisements."[70] Comcast further limits such advertising by the following restrictions: "the advertisement may not reference cable or cable products or contain any comparative statements with respect to any competitive product," and "the advertisement may not be for VoIP."[71] With regard to Comcast Regional Sports Networks,

> [n]etworks which are wholly-owned by Comcast do not accept advertising for products competitive with Comcast (i.e.,

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[69] Federal Communications Commission, *Request for Information Sent to Comcast Corporation*, MB Dkt 10-56 (May 21, 2010) at question 41-43.

[70] Responses of Comcast Corporation to the Commission's Information and Discovery Request, MB Dkt 10-56 (June 11, 2010) at 83.

[71] *Id.*

> advertisements for MVPDs, high speed internet services, and digital voice services) from any entity unless... [the advertising is] limited to "general image" advertising...and does not contain any reference to or feature and products or services of such competitors that are competitive with Comcast or...[are solely for] products or services of such competitor that Comcast does not then offer.[72]

Comcast's RSNs and other regional channels "generally do not accept advertising for other sports genre networks and ...generally do not accept day and date tune-in advertising for networks or programming they deem competitive (especially with games or news)."[73] Moreover, Comcast does not even permit unaffiliated programmers that it carries to {{

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With regard to Comcast Interactive media, "Fancast.com does not permit advertising that is on behalf of, or which promotes certain internet portals, search engines, and entertainment sites. Fancast.com does not permit advertising that promotes the online viewing of video."[75] Similarly,

> Comcast.net does not accept advertising that is on behalf of, or which promotes, Comcast's competitors and generally restricts advertising for any of the following products or services: (i) multichannel television services via any means of delivery; (ii) high speed internet access services; (iii) wireline or VoIP telephone service; or (iv) Internet portal or search services.[76]

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[72] *Id.* at 83-84.
[73] *Id.* at 84.
[74] 20-COM-00000028, p. 3. {{
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[75] Responses of Comcast Corporation to the Commission's Information and Discovery Request, MB Dkt 10-56 (June 11, 2010) at 84.
[76] *Id.*

The joint venture's substantial market power and control over multiple platforms and channels will limit competitors' ability to secure advertising revenues and to permit its competitors to advertise on media controlled or distributed by Comcast/NBCU. It is clear that Comcast already substantially limits advertising from competitors; this practice will be expanded and exacerbated once it acquires NBCU and gains incentives to further restrict promotions for competing broadcasters, networks, and film studios. The leverage garnered through this merger will unfairly diminish competing broadcasters' ability to secure the advertising revenues they need to maintain a viable business and to provide service to the public. Thus, the combination of NBC broadcast advertising with Comcast broadband and cable advertising would create unfair dominance and bottleneck capacity over advertising to the detriment of competition, and ultimately consumers.

C. The Commission's Existing Regulatory Systems Cannot Protect Consumers and Competition from the Increased Anticompetitive Harms Resulting from the Merger. Thus, the Commission Should Not Approve the Transaction

Public Interest Petitioners, in addition to other parties in this proceeding, have highlighted that the combination of Comcast's distribution assets with NBC and Comcast programming will uniquely position the merged company to engage in the following anticompetitive conduct:

- charge competing multichannel video programming distributors (MVPDs) exorbitant rates for Comcast/NBCU-controlled programming, which would ultimately be passed on to consumers, or to withhold critical programming altogether;[77]

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[77] *See, e.g.,* Petition at 30-40, discussing the merged company's increased anticompetitive incentives to withholding or charge unfair prices for Comcast/NBCU-controlled content, detailing current bundling and unfair pricing practices of Comcast that are not covered by the

(continued on next page)

- withhold or charge competing online video discriminatory rates for Comcast/NBCU-controlled programming[78]
- discriminate against non-affiliated programmers in carriage and terms of carriage;[79]
- block or degrade access to non-affiliated online programming and providers, and enhance access to Comcast/NBCU-controlled content and platforms.[80]

We and other parties have highlighted the insufficiency of the Commission's current program access and program carriage regimes to protect against the increased likelihood of anticompetitive conduct resulting from the merger.[81] We have also pointed that the Commission presently has no regulatory regime to protect competition and innovation in online video markets because there are currently no online program access or network neutrality rules.[82] Consequently, because the Commission's existing protections are insufficient to guard against the harms resulting from the merger, the Commission should not approve the present transaction.

Rather than address the substance of these concerns, Applicants dismiss them out of hand and suggest that they are "extraneous and irrelevant."[83] To the extent that Applicants acknowledge that there are problems in these areas, they suggest that they would be better dealt

(footnote continued)
program access rules, and explaining that program access rules are insufficient to curb anticompetitive practices resulting from the merger.

[78] *See, e.g., Id.* at 22-30.

[79] *See, e.g., Id.* at 42, detailing the adverse impact of tying practices on carriage of independent programmers, past discriminatory conduct of Comcast against independent programmers, and discussing the insufficiency of the program carriage rules, as well as Applicants' independent channel commitment.

[80] *See, e.g., Id.* at 28-30.

[81] *See, e.g., Id.* at 34-39, 43-45.

[82] *See Id.* at 21-30.

[83] Opposition at 16.

with as part of an "industry wide review."[84] But Applicants' argument begs the question: if, as Applicants appear to acknowledge, certain protections are insufficient or non-existent, then shouldn't the Commission withhold approval of the merger until it has put those safeguards in place? Even assuming for argument's sake that Applicants are correct in asserting that these problems are better dealt with as part of an industry wide review and not as part of this proceeding, logic dictates that the Commission should not approve this merger until it has conducted these industry-wide proceedings and ensures that competition and consumers are adequately protected.

Either way, examination of these rules – or lack of rules – is clearly consistent with the merger review process. The Commission "is charged with determining whether a transfer of control serves the broader public interest. In the communications industry, competition is shaped not only by antitrust rules, but also by the regulatory policies that govern the interactions of industry players."[85] Nevertheless, Applicants argue that the Commission should reject these issues as outside the scope of this proceeding.[86] While it is a longstanding principle that the Commission should avoid addressing non-transaction-specific harms in merger proceedings, Applicants confuse the issue. The purpose of the "transaction-specific" principle is to prevent

[84] *See, e.g., Id.* at 196 ("ISP network management practices should be addressed on an industry-wide basis."); *Id.* at 153 (an "industry-wide proceeding.... not this transaction review proceeding is the proper forum for considering any changes to the retransmission consent rules.'); *Id.* at 158 "the operation of the program access rules is the subject of a pending rulemaking, and that rulemaking – not this transaction review proceeding – is the proper forum for considering any changes to the program, access rules.")
[85] *In the Matter of SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18290,¶18 (2005).
[86] Opposition at 9.

the Commission from considering "disputes with one or the other of the applicants that bear little if any relationship to the transaction or to the policies and objectives of the Communications Act."[87] It is not, however, intended to prevent the Commission from considering how relevant external factors, such as regulatory and market conditions, will affect competition and diversity if the transaction is approved.

The effectiveness of the Commission's present regulatory regimes in addressing anticompetitive conduct, bears a very clear "relationship to the current transaction," as well as to the "policies and objectives of the Communications Act."[88] If existing provisions, such as the program access and program carriage rules, are insufficient to protect against current harms to competition and consumers, the Commission should not approve the creation of a larger, more horizontally and vertically integrated company that is uniquely situated to exploit them even more capably. More importantly, the fact that the Commission currently has no rules to prevent anticompetitive blocking or withholding of content online, cautions even more strongly against approval of the proposed transaction. Accordingly, it is not only appropriate, it is essential, that the Commission take into account the ability of the current the program access and program carriage regimes, as well as the FCC's current lack of online program access and enforceable network neutrality rules to prevent any anticompetitive conduct arising from the proposed merger.

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[87] *In the Matter of Application for Consent to Transfer Control of License and Section 214 Authorizations by Time Warner Inc., to AOL Times Warner Inc.*, Memorandum Opinion and Order, 16 FCC RCD 6547, ¶6 (2001).
[88] *Id.*

In any event, Applicants themselves have "teed-up" questions of the effectiveness of the FCC rules with regard to merger by invoking the "sufficiency" of program access and carriage rules as reasons why the FCC should grant the merger without fear of anticompetitive shenanigans.[89] Applicants have also asserted that anticompetitive blocking of internet content is not a concern because "Comcast has affirmed its unwavering commitment to operate its broadband Internet service in accordance with "open Internet" principles."[90] Applicants cannot have it both ways. Having opened the door to consideration of these issues, Applicants cannot now assert that interested parties may not raise concerns about the ability of these rules, or lack of enforceable rules, to protect competition.

II. Applicants Have Not Demonstrated that the Merger Will Result in *Bona Fide*, Enforceable, Transaction-Specific Public Interest Benefits

As Public Interest Petitioners demonstrate above, and in our initial filing, this merger presents multiple and substantial threats to competition and the public interest. Applicants have not adequately refuted these concerns, nor have they volunteered any solutions that would remedy these problems. Nevertheless, Applicants maintain that that the merger will generate substantial public interest benefits. However, Applicants have not shown that these commitments are substantive or verifiable, or that they outweigh the competitive harms

[89] For example, Applicants claim that "[t]he competitive discipline of the marketplace is backstopped by the Commission's program access rules." Opposition at 158. This confidence is fundamentally misplaced. It ignores the reality that the FCC's program access process skews in favor of large incumbent carriers like Comcast and that the burden of proof and costs to complainant can be so prohibitive that many complaints are never brought or are dropped before any resolution is reached.

[90] *Id* at 7.

emanating from the merger. Indeed, in its current form, the proposed merger suffers from a sizeable public interest deficit.

In evaluating a merger application, the Commission considers whether the purported benefits are transaction-specific. In other words, "the claimed benefit must be likely to be accomplished as a result of the transaction, but be unlikely to be realized by other means that entail fewer anticompetitive effects."[91] The Commission measures these potential benefits against the potential harms on a "sliding scale approach."[92] In instances where the potential harms are significant, the benefits resulting from the transaction are held to a higher standard. Thus, because we have demonstrated that that the anti-competitive harms resulting from a Comcast/NBCU union are both probable and significant, the Applicants bear a greater burden of showing that purported benefits are not only likely to occur, but are substantial.

As we demonstrated in our initial Petition and restate in this Reply, Applicants have not met this burden. In their Opposition, Applicants claim that the merger will result in accelerated "investment in and deployment of innovative products and services," as well as "a stronger system of free over-the-air broadcasting."[93] Unfortunately, these purported benefits suffer from one or more flaws:

- are not transaction-specific benefits
- do not adequately remedy a transaction-specific harm
- merely reflect a promise to preserve the *status quo*, not to affirmatively promote a public interest goal

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[91] *Sirius/XM Order*, 23 FCC Rcd 12348, ¶ 75.
[92] *Id.* at ¶ 76.
[93] Opposition at 16-17.

- to the extent they purport to promote affirmative public interest goals, the benefits are illusory and cannot be meaningfully monitored or enforced by the Commission or the public

A. Contrary to Applicant's Claims, the Merger Would Diminish, Not Enhance Innovation in the Marketplace

The primary benefit that Applicants advance in defense of their merger applications is the transaction's purported promotion of innovation. Applicants' assertions regarding merger-generated innovation are weak. First, the purported benefits are so tenuous and indeterminate that they simply do not constitute adequate grounds for merger approval. Second, the benefits that Applicants argue will allow their company to innovate will in fact diminish overall innovation and competition in burgeoning markets.

Applicants' support for their claim that the merger will spur innovation rests largely on a parable about Comcast's experience launching its Video on Demand (VOD) services. Specifically, Comcast says that the development of its VOD service was "much slower and more difficult than it should have been," given "transactional friction" that Comcast endured in negotiating with content providers.[94] Applicants make parallel arguments regarding Comcast's "day-and-date" DVD releases, as well as online distribution of content through its Fancast/Xfinity platform.[95] Applicants argue that the merger will reduce transactional friction, thereby accelerating investment and deployment of innovative services and platforms.[96]

It is not clear that these professed innovation benefits constitute a "merger-specific" benefit. A merger specific benefit is one that is "likely to be accomplished as a result of the

[94] *Id* at 62.
[95] *Id* at 58.
[96] *Id.* at 56.

transaction, but unlikely to be realized by other means that entail fewer anticompetitive effects."[97] As Applicants acknowledge, Comcast does not claim that the launch of any of the aforementioned services were impossible to realize without the vertical integration resulting from the merger.[98] To be sure, they were clearly accomplished, and continue to progress, via means that are considerably less anticompetitive than a full-fledged takeover of a vertical rival.[99] Nor do Comcast and NBCU suggest that if the merger is blocked their companies will stop innovating or that the launch of these services will stall. In fact, in internal documents evaluating the pros and cons of the proposed transaction, Comcast stated that {{

[100] }}Thus, the innovation benefits to consumers appear to be far less robust, less significant, and certainly *less merger-specific* than Applicants claim.

Applicants do suggest the merger will help to speed up some of their content and distribution negotiations, which, from Comcast's perspective, occurred more slowly than it would have liked. However, Comcast's complaints with regard to acquiring content appear overblown. A joint press release put out by Comcast, other major cable operators, and movies

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[97]*Sirius/XM Order*, 23 FCC Rcd 12348, ¶ 75 (2008).

[98] Opposition at 62.

[99] Indeed, Comcast's recent quarterly financial call makes clear that the negotiations for "day and date" DVD releases being made available on VOD are progressing without the need for vertical integration. Comcast states that "[a]bout half the films right now we're getting day and date with DVD, and as that 50% gets closer to 100 and consumers can pretty much count on it, the films being there day and date." *Comcast Corp., Q2 2010 Earnings Call*, Transcript, July 28, 2010. On that same earnings call, Comcast states that "studios have done a lot of testing and all the results suggest [DVD cannibalization is] incremental…that's why studios like Warner Brothers have basically as a matter of policy and Universal and others as a matter of policy have said this makes sense. We're going to do it." *Id.* In clear contradiction to Applicants' claims it would not appear that takeover of vertical competitor is necessary to realize innovation benefits.

[100] *See* 11-COM-00000739 at p. 17

studios claims that "in just two years there has been more than a seven-fold increase in the number of Day-and-Date titles offered to digital cable customers nationally."[101] With regard to On Demand Online (*i.e.* Fancast Xfinity TV), last December, Comcast bragged that it "is making thousands of hours of programming available," and that participating networks include HBO, Cinemax, Starz, A&E, History, CBS, BBC, E!, Style, G4, Hallmark, MGM Impact, Discovery, TLC, Animal Planet, Univision, Music Choice, C-SPAN, Travel Channel, Ovation TV, AMC, WE, IFC, Sundance, TNT, TBS and Mi Cine.[102] Currently, Comcast has participation from substantially more content providers.[103] It does not appear that lack of vertical integration has materially impeded Comcast's ability to secure content for these services or to deploy them to consumers. Thus, we are at loss as to why Comcast thinks that this Commission should approve a merger whose primary purpose is to grease the wheels of its negotiations with other businesses.

In any event, while negotiations between companies no doubt can be frustrating and inconvenient at times, they are evidence of an important competitive rivalry between content producers and distributors. While Applicants have taken great pains to diminish the ill-effects of

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[101] *See* Joint Press Release, "Major Hollywood Studios and Cable Companies Launch $30 Million National Campaign to Promote Movies on Demand," (March 17, 2010) (the major cable operators participating in the campaign include, Comcast, Time Warner Cable, Cox, Bright House Networks, Insight, Armstrong, Bend Broadband and iO TV; film studios participants include Universal Pictures, 20th Century Fox, Warner Bros. Entertainment, Sony Pictures, Lionsgate, Focus Features, Rogue and Summit Entertainment). Moreover, in the same release, a representative of Warner Brothers proclaimed "Warner Bros was the first major studio to test Day-and-Date on demand back in 2006 and the results have bee so positive that nearly all of our titles will be Day-and-Date this year." *Id.*

[102] *See* Deborah Yao, "Comcast Xfinity TV: Cable Shows On Demand Online For Subscribers," Associated Press (Dec. 15, 2009).

[103] [[

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this vertical consolidation, it does not obviate the fact that elimination of head-to-head bargaining has a detrimental effect on quality, competition, and innovation. As noted by the American Antitrust Institute, one negative effect of eliminating this vertical competition is that, "[w]hen the hard bargaining that characterizes arms-length transactions between independent content providers and distributors is eliminated, so are some of the incentives to produce valuable, diverse, high quality, innovative content."[104] In other words, because NBC is guaranteed distribution, it would no longer compete with others for Comcast's favor with regard carriage and terms for its content. Thus, it has that much less incentive to improve and innovate.

The elimination of vertical rivalry between Comcast and NBC not only produces questionable innovation incentives for the merging parties, it will have a detrimental affect on innovation in the market as a whole. Applicants do not acknowledge that the integration of Comcast and NBCU content and platforms gives the merged company incentives towards protectionist conduct. Such conduct would stifle, not promote, innovation and competition. Moreover, these incentives and capabilities would be unique to Comcast/NBCU. No other company will wield the same level of market power in <u>both</u> the content (broadcast, cable, and film) and distribution (broadcast, cable, and broadband access) markets as Comcast and NBCU would post-merger.

As discussed above, this would have a particularly negative effect on the incipient competition in the online video market.[105] The joint venture can use its power to withhold critical content from new and innovative online distribution competitors, thereby reducing the

[104] Comments of American Antitrust Institute, filed MB Dkt. 10-56 (June 21, 2010).
[105] *See infra* section I(A).

quality of their product and undermining their ability to compete. Because the combined company also controls access to the Internet and the traffic that runs over its broadband pipes, it can enhance access to its own online platforms, while degrading access to competing online video platforms. Likewise, it can deny or degrade the access that content producers have to Comcast's broadband subscribers, thereby undermining their ability to compete for audiences and diminishing consumers' access to diverse and innovative content from independent producers. Thus, it is clear that from a market-wide perspective that this transaction will thwart, not promote, innovation and competition.

B. The Merger Will Not Promote a Stronger Broadcast System

The merger will adversely impact local media markets through the consolidation of advertising markets, diminished competition, and undue leverage in local programming markets.[106] However, in their Opposition, Applicants continue assert that the proposed transaction will strengthen free over-the-air broadcasting, and boast that "there can be no doubt as to the significance of this benefit, as Applicants have now formalized legally binding agreements not only with respect to the NBC and Telemundo Networks and owned-and operated stations ("O&Os"), but also with respect to the associations representing the NBC affiliates and the affiliates of the other "Big Four" broadcast networks."[107] Applicants' suggestion that the deals it has cut with broadcast affiliate organizations will strengthen the broadcast system is an exaggeration, if not outright misleading. Rather, the alleged benefits to over the air broadcasting

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[106] *See infra* section I(B); *see also* Petition at 46-61.
[107] Opposition at 18.

amount to little more than preservation of the *status quo,* coupled with insignificant and unenforceable commitments.

First, Applicants appear to have entered into "agreements" solely with affiliates of the "Big Four" broadcast networks (i.e. ABC, CBS, Fox and NBC). Applicants have not disclosed any agreements with smaller, independent broadcasters who may be adversely affected by the transaction; thus it is disingenuous to suggest that these agreements benefit the broadcast system as a "whole." Second, the agreements with Big Four broadcast affiliates are not actually "benefits." Indeed, they amount to little more than promises by Applicants to avoid using their post-merger market power and bottleneck capability to discriminate against non-NBCU owned broadcast stations, or to leverage affiliation agreements or retransmission negotiations to unfairly disadvantage other broadcasters. This is not a transaction-specific benefit generated by the merger. At best, these agreements represent attempts by non-NBC O&O stakeholders to neutralize the unfair dealing that is likely to result from the merger. But this should not be confused with a legitimate benefit that affirmatively increases a public interest outcome. Importantly, even to the extent that these agreements prevent the joint venture from using its combined power to hurt other broadcasters, these agreements only extend such protections to the Big Four affiliates who were able to secure side deals with Comcast and NBCU. It is not clear that these agreements will protect smaller, independent broadcasters who may be most vulnerable.

Applicants also re-assert that they have made voluntary public interest commitments to increase NBC and Telemundo Programming. Applicants argue that no one has seriously contested the significance of their voluntary commitments.[108] This is not so. As Public Interest Petitioners demonstrated in the initial round of filings, Applicants' voluntary commitments do not remedy the competitive harms presented by the merger. A number of them are no more than promises to comply with existing legal requirements. Others amount to little more than glorified public relations gestures that cannot be effectively monitored or enforced. Still others appear to be contracted by Applicants own internal business plans. Applicants do not address many of Petitioners' concerns in their Opposition, and to the limited extent that they do, their reply is inadequate.

1. **NBC Programming**

First, Applicants' promise to "collectively provide an additional 1,000 hours per year of local news and information programming" for the NBC owned and operated stations. Public Interest Petitioners have done the math and the total commitment only adds up an additional 16 minutes per day, per NBC O&O station.[109] Applicants do not rebut our calculations; they merely assert that Public Interest Petitioners "dismiss these commitments out of hand."[110] Indeed, we did not dismiss them. We pointed out that, while any increase in local programming is welcome, sixteen minutes a day is a trifle given the scope of the merger and the resources of the merging parties.[111] Applicants claim that the merger will promote "a stronger system of free over-the-air

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[108] *Id.* at 38.
[109] *See* Petition at 54; Application at 42 (Commitment #2).
[110] Opposition at 52.
[111] Petition at 54.

broadcasting."[112] It is implausible that a short-shriven promise to offer 16 minutes of additional programming per day could achieve such a lofty goal.

More telling than the issue of quantity is the issue of quality. Applicants did not respond to Public Interest Petitioners' concerns that they have not actually promised to provide *bona fide* local news programming. Applicants do not explain exactly what they mean by local news and information programming, but instead have qualified their commitment with the caveat that "viewpoint diversity and localism is furthered not only by diverse news and public affairs programming but also by content other than traditional newscasts, such as *newsmagazine programs*."[113] There is no commitment that this programming will be locally-originated or will touch upon local news and public affairs. In their Response Applicants did not respond to our concerns, nor did they clarify what types of programming they intend to provide.

Applicants also failed to respond to Public Interest Petitioners point that neither the Commission nor the public can monitor or enforce this local "news" commitment under the terms Applicants have proposed. The Commission currently has no mechanism to require broadcasters to list the amount and types of programming aired, or importantly whether any "increase" in the provision of local programming is the result of repeating previously aired segments. Despite our enforceability concerns, Applicants have not volunteered to report on such programming themselves, so it is not clear how they intend to be bound by this commitment. As a consequence, neither consumers nor the Commission have the ability to determine the baseline amount of local news programming currently aired by NBC owned and

[112] Opposition at 16-17.
[113] Application at n.75 (emphasis added).