delivery of TV programming is not a separate product.[88] Comcast continues to refuse to acknowledge that it has market power in the MVPD and broadband Internet access markets. Both of these claims are contradicted by evidence before the Commission. The Wall Street analysts clearly identify Internet TV as a nascent competitor. As noted above, Comcast's own analysis {{

}} Evidence of this continuing market power includes: (1) Comcast's continuing dominance of subscriptions in its service territory, in MVPD and broadband access; (2) the inferior quality of alternative broadband access services in much of its service territory; and (3) barriers to entry into the broadband access market and {{

}}

As discussed in our original Declaration, TV Everywhere (a.k.a. On Demand Online or Fancast Xfinity TV) was created to protect Comcast's core video revenues.[89] Outside of the posturing in this proceeding, Comcast executives have been clear that this is the case.[90] {{

[91]

}} NBC documents offer a similar perspective {{

[92]

[88] Opposition at 205.
[89] *Declaration* at 62-64.
[90] *Ibid.,* at 54-55.
[91] 31-COM-00000040, Slide 1.
[92] 29nbcu0012837, Slide 5.

[93]}}

Key elements of the analogy we have made to the anticompetitive practices used by Microsoft in its attack on the Netscape's browser[94] can be found in the Comcast analysis – particularly with regard to a threat being born on the Internet which acts like "middleware" that loosens the hold of the incumbent and renders the consumer indifferent to the types of device via which she receives her video content. {{

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A primary way Comcast is managing this risk is through {{

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[93] 39nbcu0005743, Slide 41.
[94] *Declaration* at 64-65.
[95] 31-COM-00001500, Slide 4.
[96] *Ibid.*, Slide 7.
[97] 29nbcu0004283, Slide 9.
[98] 31-COM-00001500, Slide 4.
[99] *Ibid.*, Slide 7.
[100] *Ibid.* {{

}} (*See* 25-COM-00000001, pp. 14-15). Comcast offered similar statements in other arenas such as in responses to Congressional questions on the merger. *See* Comcast Response to Senator Herb Kohl, Hearing on "The Comcast/NBC Merger: What does the Future Hold for Companies and Consumers?" U.S. Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy, and Consumer Rights, March 15, 2010 {{

(continued on next page)

[101]}}

Numerous third party reports submitted by Comcast confirm the use of On Demand Online to limit this nascent competition. [[

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[104]

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(footnote continued)

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[101] *Ibid.*
[102] 11-COM-00000811, p. 2.
[103] 17-COM-00090397, p. 36.
[104] 11-COM-00000343, p. 38.
[105] *Ibid.*
[106] 26-COM-00000333, P. 12.

[107]]]

D. Drs. Israel and Katz Efforts to Dismiss the Competitive Potential of Internet Video Are Fundamentally Flawed

The bevy of primary evidence offered above directly rebuts the assertions of Applicants' hired experts. To wit, the initial study by Drs. Katz and Israel is so replete with flaws, it is difficult to treat as a serious analysis meant to advance the discussion. At the outset, they claim Internet video is merely a complement to traditional viewing and will remain so.[108] Clearly, the internal documents of the companies at issue in this proceeding illustrate such a claim has no merit. Nevertheless, Drs. Katz and Israel pursue this erroneous assumption, and focus their analysis on "a hypothetical scenario" in which an online multichannel video programming distributor (online MVPD) has already emerged and gained considerable market share.[109] The authors appear unable or unwilling to grasp the concept that Internet video is "a nascent industry".[110] Instead, they spend the overwhelming majority of their analysis on the merged entity's incentives to try and win back customers by removing their content from the online MVPD. The first problem with their analysis is that they treat NBCU and Comcast as distinct entities, when Applicants insist that the very purpose of the merger is to "align" the companies' "incentives."[111] To that end, in Comcast's recent quarterly call, the company stated "just to be

[107] *Ibid.* This cable-like environment may also include dedicated capacity for Applicants Internet destinations. For instance, {{

}} (11-COM-00000166, p. 17).

[108] Israel/Katz, p. 28, 31.

[109] *Ibid.*, p. 40.

[110] Opposition at 200.

[111] *Ibid.*, p. 59.

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...We will be one company."[112]

In their analysis Drs. Katz and Israel all but ignore the analysis of harms to "new entrants." Treatment of this important issue is relegated to only three pages at the conclusion of the study, and, bizarrely, relies on the same analysis as that of an already successful over-the-top distributor.[113] In defense, the Authors unconvincingly assert that "the mechanics [for new entrants *vs*. established online providers]...are largely the same"[114] In fact, the mechanics are far different. Even if the actions were unprofitable in the short term, preventing a competitor from emerging over time would offer lasting benefits. To paraphrase a popular axiom, "Withholding programming: *short-term costs*; destroying a nascent competitor: *priceless*. Drs. Katz and Israel also discount the ability of Comcast to prevent third party content owners from making their content available in a reasonable timeframe, if at all.[115] {{

[116]}}

Drs. Israel and Katz also attempt to diminish the competitive capabilities of an emerging online video distributor, based on technological difficulties. To this end they suggest that cable networks would not be cable of supporting widespread adoption of online video as a substitute to the traditional MVPD service.[117] It is true that Comcast's network would certainly see increased traffic following the move of a subset of customers to online MVPD subscribers. However, the company recently boasted about its near-unlimited capacity.[118] Following its "all-digital"

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[112] Comcast Corp., Q2 Quarterly Call, Transcript, July 28, 2010.
[113] Israel/Katz, p. 79-82. *See also* Israel/Katz Response, p. 164.
[114] *Ibid.*
[115] Israel/Katz Response, at 170.
[116] *See infra* at 9-11.
[117] Israel/Katz, p. 33.
[118] *Declaration* at 21, n. 10.

upgrade, Comcast offers customers speed tiers up to 30 and 50 Mbps.[119] Obviously, with the company encouraging customers to use their complementary Fancast Xfinity TV service, in upcoming years many would already be subscribed to a tier with the ability to stream HD content and have a far higher usage profile then at present.[120] Thus, Comcast should be prepared to see consumption levels of 288 GB.[121] An amount that the highest tier customer could hit in just over 45 seconds if Comcast's network performed as advertised. Time shifting would substantially offset peak hour viewing, as Drs. Katz and Israel illustrate by showing the similar peaks and valleys of DVR usage as to linear viewing.[122] Nonetheless, the authors pose a doomsday scenario that 275 cable modem customers would potentially share a single cable channel (with a capacity of 38.75 Mbps).[123] If this were the case, the Commission should have larger concerns. Namely that only four cable modem customers, who are now being routinely sold connections of "up to" 12 Mbps, could be utilizing their full connection at the same time (out of a pool of 275), before usage would exceed network capacity. This is not the case. In fact, the authors subsequently state that presently up to four downstream channels may be used.[124]

Furthermore, overall usage patterns are predictable. The authors rely on their hypothetical situation where tomorrow 10 percent of Comcast customers utilize the online MVPD.[125] Obviously this hypothetical is far removed from reality. Yet, authors state, "as configured today and for at least the next few years, Comcast's broadband Internet local access networks would

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[119] *See e.g.* Todd Spangler, "Comcast Digital Upgrade 75% Complete in Freedom Region," *Multichannel News*, Dec. 16, 2009.
[120] *See also* Stacey Higginbotham, "Will TV Everywhere Swamp Cable Networks?" *GigaOm*, July 31, 2009.
[121] Israel/Katz, p. 33.
[122] *Ibid.*, p. 23.
[123] *Ibid.*, p. 35. See also Opposition at 94, n. 294.
[124] *Ibid.*
[125] *Ibid.*, p. 33.

very likely suffer from congestion."[126] As noted above, the emergence of a competitor will be a multi-year process and customers would be continuously consuming larger quantities of Internet video, as well as Internet capacity in general. Thus, the trend lines would grow slowly in the aggregate bandwidth across 275 households.[127]

Drs. Israel and Katz also claim that the online MVPD would find the service unprofitable due to the costs of transporting 288 GB to each customer. A brief review of the current CDN prices show rates as low as 2 cents per GB, not the {{ [128]}} claimed by the Authors.[129] This is due to the simple fact that the more you transport, the less it costs per GB. {{

[130]}}Thus, it is wholly inappropriate to extrapolate current figures and apply it to a world with far larger traffic needs. Correcting this assumption makes delivery go from {{ [131]}} to $5.76. Authors also somehow fail to note the benefits peer-to-peer technology has in offsetting transport costs. {{

[132] [133]}} This is the same technology Comcast spent nearly three years secretively blocking.[134] {{

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[126] *Ibid.*, p. 35.

[127] *See e.g.* Comments of Free Press, *Preserving the Open Internet, Broadband Industry Practices*, GN Dkt 09-191, WC Dkt 07-52, pp. 41-42 (Jan. 14 2010).

[128] Israel/Katz, p. 33.

[129] *See* Dan Rayburn, "Data From Q1 Shows Video CDN Pricing Stabilizing, Down 25% in 2010," *BusinessofVideo.com*, June 22, 2010. *See also* 50nbcu0000536 {{

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[130] 50nbcu0005390, Slide 2.

[131] Israel/Katz, p. 33.

[132] *See* 11-COM-00000166, Slide 6, 10.

[133] 39nbcu0006641, Slide 47.

[134] *See Declaration* at 28-29.

[135]}}

In conclusion, the Katz and Israel study suffers from numerous defects. It focuses on the wrong competitive environment, it makes numerous erroneous assumptions, dismisses important considerations and fails to recognize market realities such as Comcast's influence over {{ }} Most importantly, the hypothetical economic analysis fails to negate Comcast's stated business intentions.

E. Evidence Clearly Illustrates Comcast's Emerging High-Speed Internet Monopoly

Our initial Declaration offered an abundance of evidence that Comcast will face little competition throughout most of its footprint for high speed broadband.[136] Indeed, one analyst argues that cable market power is so much greater in the broadband Internet access business that cable operators should abandon the video business altogether and leverage their market power over broadband to the maximum extent possible.[137] This analyst does not expect the cable operators to actually go down this path – but it does expect them to leverage their market power in other ways. Operators will stay in both businesses, but capture the efficiency gains that make larger rents available by increasing prices for Internet access and reducing the opportunity for Internet TV to undermine traditional MVPD.[138]

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[135] 29nbcu0004283, Slide 8.
[136] *Declaration* at 23-27.
[137] Bernstein, *Web TV,* p. 14: [[

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[138] Bernstein, *Web TV,* p. 15: [[

(continued on next page)

The confidential information submitted by Comcast provides further insights on this strategy. {{

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(footnote continued)

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[139] 11-COM-00000280, p. 18.

[140] The only mention of wireless was that Comcast plans to {{ }} 25-COM-00000194, Slide 38.

[141] 25-COM-00000194, Slide 67. *See* Comcast Corp. "Conference Call to Discuss NBC Joint Venture with General Electric," Transcript, p. 7, Dec. 3, 2009 ("If you go to page 19, I think this is a wow slide if there ever was one and pretty much speaks for itself. It's really what brings us to this transaction -- cable channels with outstanding growth and profitability. You just don't find too many businesses with growth rates of over 15% compounded for the past six years, and margins that are really the best in the business at nearly 50% "). *See also* Comcast Corp., "Investor Presentation to Discuss NBC Joint Venture with General Electric," Slide 19 (Dec. 3, 2009).

[142] *Ibid.* at Slide 66.

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This is not lost on financial analysts. [[

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Indeed, as the broadband market matures from a basic level of broadband to higher-speed broadband, consumers are increasingly migrating to cable modem service, as shown in Exhibit 8, *infra*.

What this chart fails to capture is the legacy duopoly landscape of cable modem service vs. DSL service. The most recent set of financial calls from broadband providers marks the first

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[143] 31-COM-00001500, p. 10.
[144] *Ibid.*
[145] 26-COM-00000333, p. 11 (emphasis in original). *See also* 11-COM-00000845.
[146] 11-COM-00001194, p. 3 (emphasis in original).

time a major phone company (AT&T) reported a *net decline* in subscribers.[147] Leichtman Research Group recently reported that in the second quarter of 2010 phone companies as a whole had a *net loss* of more than 7,000 high-speed Internet customers, while cable operators added nearly 344,000.[148] However, these figures don't show the true extent of cable's dominance, due to the fact that these are net losses, thus roping in any gains, thanks to the limited FTTx deployments by the largest phone companies. For instance, Qwest had net additions of 7,000, with their higher speed FTTN network gaining 52,000 additions while losing 45,000 DSL customers.[149] Qwest attributed the losses to "customer migrations and competitive market conditions"[150] and stated, "our pressure point right now is in our legacy DSL... the slower speeds...[with] an uptick in the complete disconnect."[151] Since early 2009, Verizon's public financial figures offer the ability to determine their broadband additions by type (see Exhibit 9, *infra*).

This data makes it clear that DSL is quickly losing share to cable modem service. The Commission should take notice of these developments. Verizon, AT&T and Qwest have stated publicly the extent of their FTTx plans.[152] Meanwhile, the Commission required Frontier to deploy DSL to more customers as a condition of their transaction and has not yet determined

[147] It appears AT&T lost approximately 280,000 DSL subscribers in the quarter. However, given the inclusion of satellite connections in AT&T's overall broadband subscriber figure, we cannot be completely confident in this estimate. AT&T Inc., "AT&T Delivers Double-Digit Earnings Growth in Second Quarter, Raises Full-Year Outlook," Press Release, July 22, 2010.
[148] Leichtman Research Group, "Under 350,000 Add Broadband in the Second Quarter of 2010," Press Release, August 11, 2010.
[149] Qwest, "Qwest Reports Second Quarter 2010 Results," Press Release, Aug. 4, 2010.
[150] *Ibid.*
[151] Qwest, Q2 2010 Earnings Call, Transcript, August 4, 2010.
[152] *See e.g.* Peter Svennson, "Verizon winds down expensive FiOS expansion," *Associated Press,* March 26, 2010; Matthew Lasar, "AT&T: drop net neutrality or U-verse gets it," *Ars Technica*, June 15, 2010; Karen Brown, "Qwest FTTN could reach 6M homes passed," *OneTRAK*, Jan. 5, 2010.

what, if any, conditions will be placed on the Qwest-CenturyLink merger.[153] Thus, at this time, it appears the majority of consumers increasingly seeking speeds above 6 Mbps will have be reliant on cable operators like Comcast.

IV. Comcast and NBCU's Head-to-Head Competition in Advertising Markets

A. The Internet as a Platform for Nascent MVPD Competition

In our Petition to Deny and accompanying Declaration, we pointed out that Comcast exhibited a schizophrenic attitude toward Internet competition. After years of declaring that the Internet is a competitor, with its proposed acquisition of NBCU, Comcast changed direction and asserted that the Internet and cable are complements not competitors. Now, in response to Public Interest Petitioners' demonstration that the Comcast/NBCU merger will increase their market power in the local TV advertising market, the Applicants' experts have again switched course, and maintain that the Internet is a competitor for cable and broadcast television -- this time with regard to local advertising sales.[154]

As is the case throughout the most of Applicants' Opposition filing, Applicants and their experts fail to properly define the product and geographic markets for advertising. But, our analysis shows that the appropriate market definition encompasses video, and specifically television, advertising. For example, through 2008, which is the last year for which Applicants provide data, online advertising was primarily a competitor to newspaper advertising. The loss of ad revenue by newspapers was overwhelmingly in the classified advertising space, which is arguably not a space that television advertising ever filled. As shown in Exhibit 10 *infra*, cable

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[153] *See Applications Filed by Frontier Communications Corporation and Verizon Communications Inc. for Assignment or Transfer of Control*, Memorandum Opinion and Order, WC Docket No. 09-95 25 FCC Rcd 5972, Appendix C (Rel. May 21, 2010); CenturyLink and Qwest Communications, "CenturyLink and Qwest Agree to Merge," Press Release, April 22, 2010.
[154] Opposition at 120.

TV had been steadily nibbling away at broadcast revenue for at least a decade before online advertising came upon the scene. Newspaper ad revenue share had been declining modestly. While it is possible that cable TV advertising's ability to target local ads may have had some effect on newspaper advertising, it was not until online advertising arrived that the newspaper share began to decline sharply. Exhibit 11 *infra* presents Applicants' version of this graph.

Applicants' experts should have been aware of this trend. Applicants' own data reveals that in 2009, only {{ [155]}} of online advertising revenue was video advertising. It is also difficult to conceive that Applicants' experts were ignorant of a major study commissioned by Comcast entitled {{ }}, but they have failed to reflect this important evaluation in their analysis. As noted above, this document underscores the potential for {{ }} In the advertising space, in a scant five years, video advertising's share of online advertising is projected to more than {{ }} to {{ }} of the total.[157] Thus, online advertising revenue is projected to grow from a mere {{ }} of video advertising to {{ [158]}} The report recognizes that even this {{ }} expansion can {{ [159]}} That is what the Internet is capable of, which is exactly what Comcast fears.

If putting together two data sets was too challenging for the Applicants' experts, then they should have been alerted to this issue by Comcast's {{ [160]}} Therein, Comcast reviews several examples of {{

[155] This estimate is derived by comparing the data from the source cited in Exhibit 6 of Rosston/Topper Response, which is available from the Television Bureau of Advertising (hereafter TVB), to 26-COM-00000001, Slide 14.
[157] Compare TVB and 26-COM-00000001, Slide 14.
[158] *Ibid.*
[159] 26-COM-00000001, Slide 8.
[160] 25-COM-00000194.

[161]}} More explicitly, one of the primary {{

[162]}} Thus, Applicants' experts have incorrectly attributed the growth of online advertising revenue to the video sector. Over-the-top TV had not yet fully emerged to threaten traditional MVPDs and, instead, the growth of online advertising came primarily at the expense of print media.

B. The Head-to-Head Competition in Local Advertising Markets

The failure to acknowledge the role of the Internet in first disintermediating {{ }} is compounded by another flaw in the Applicants' expert analyses: the failure to define markets carefully and recognize the competition between cable and broadcast in the local video advertising markets. In spite of the evidence that we presented showing that broadcasters have recognized this competition,[163] Applicants continue to erroneously claim that cable does not compete with local broadcasters for advertising dollars.[164]

The head-to-head competition between cable and local broadcast stations has not only been recognized by the broadcasters, it is recognized by the cable industry. For example, the Cable Advertising Bureau regularly evaluates the status of that competition with analyses like "Why Ad Supported Cable?"[165] The analysis charts the gains of cable at the expense of

[161] *Ibid.*, Slide 51.
[162] *Ibid.*
[163] *See e.g.*, Comments of NBC, filed MB Dky 06-121 (Oct. 23, 2006).
[164] Opposition at 126 (citing Rosston/Topper Reply Report at ¶79).
[165] Cable Advertising Bureau, "Why Ad-Supported Cable," April 20, 2010, *available at* http://www.thecab.tv/main/bm~doc/why-cable-4-20-10a.pdf.

broadcast in prime time and all day market shares, time spent viewing, viewer loyalty, recall, trust, purchase behavior, among other characteristics. The ability of cable to target geographic areas within their service territory does not mean they do not compete with broadcast stations. It means they have an advantage.

When Applicants and their experts concede that cable and local broadcasters are located in the same advertising market, they mis-define the market. Failing to recognize that video advertising is an identifiable market, they include billboards and yellow pages in a market definition that is absurdly overly broad.[166] {{

}} The empirical evidence and industry analyses contradict that overly broad definition as well. The FCC, too, defines local TV as a distinct market. This was the basis for the Commission's most recent media ownership order.

> We base our decision on our assessment that the Commission's local television ownership rule promotes competition for viewers and advertisers within local television markets...Therefore, although we recognize that other types of media, such as radio, newspapers, cable and the Internet, contribute to viewpoint diversity within local markets, we do not believe they should be counted as voices under the local television ownership rule.[167]

Thus, Applicants' failure to recognize that local TV advertising is a distinct product market undercuts their critique of our video advertising market structure analysis.

The Applicants' internal documents confirm our concerns that they plan to leverage

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[166] Opposition at 120-1, 127.

[167] *2006 Quadrennial Regulatory Review*, Report and Order and Order on Reconsideration, 23 FCC Rcd 2010, ¶¶ 98, 100 (2008).

[168]

[169]}} In short, the Applicants see advertising as a key driver of value in the merger and this value will be captured through consolidation and leverage of advertising markets. Applicants' evaluation of the aggregation of local assets {{ }} the evaluation we presented in our initial Declaration. Compare Exhibit 12 *infra*, to Exhibit II-7 of our original Declaration.[170]

It does not appear that the Applicants' experts ever considered these factors and plans in their analyses. These experts make no reference to the economic analyses that Comcast conducted in assessing the merger, which give a much better picture of the motivations behind the transaction. Either the experts never reviewed the internal documents, or they chose to ignore them. In either case, the arguments they make are undercut by Comcast's own analyses.

Once the market for local TV advertising is properly defined, our market structure analysis is affirmed. The markets we analyzed are moderately to highly concentrated and the merger increases concentration sufficiently to raise strong concerns about the anticompetitive effects. Comcast will have a sufficient market share in the overall market and will straddle the two TV advertising distribution platforms, with a dominant market share in the superior technology, to exercise market power to the detriment of competition. This market power will unfairly weaken the local broadcast competitors, who will seek to consolidate with other broadcasters, or with MVPDs in an attempt to re-gain market share.

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[168] 31-COM-00000298, Slides 25-26, 29-30, 37.
[169] *Ibid.,* Slide 26.
[170] *Declaration* at 48-49.

V. Applicants' Confidential Information Casts Serious Doubt With Regard To Applicants' Commitment To Serving Broadcasting Audiences

Applicants have repeatedly assure the Commission that the merger will generate substantial public interest benefits, and that Comcast is committed to investing in the future of over-the-air broadcasting.[171] However, a number of documents submitted in response to the Commission discovery request suggest that such commitments amount to little more than glorified public relations gestures that cannot be effectively monitored or enforced, and in any event, are contracted by Applicants' own internal business plans.

The Petition to Deny already listed the effects that NBCU's 2002 purchase of Telemundo had on those stations. Namely, firing staff and a resulting decline in quality and news.[172] Based on Comcast's internal business plans, {{

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Comcast's internal business plans also call into question Comcast's commitments to children's programming. These commitments are primarily focused on expanding cable video on demand (VOD) options for children's programming.[177] {{

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[171] *See e.g.* Opposition at 18-20.
[172] *Petition to Deny of Consumer Federation of America, Consumers Union, Free Press, and Media Access Project,* filed MB Dkt 10-56, pp. 56-57 (June 21, 2010).
[173] 11-COM-00000678, Slide 42.
[174] *Ibid.*
[175] *Ibid.*
[176] *Ibid.*
[177] Application at 42.

[178]

[179]}} Yet while Comcast is willing to utilize children's programming to drive up usage of its VOD platform for those families that can afford it, it makes no commitment to increasing the quantity and quality of children's programming for those families that rely on over-the-air broadcasting. {{

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[181]}} Thus, Comcast appears willing to make public interest commitments to children's programming when it also drives up revenues for Comcast's services. It does not appear willing to embrace such programming with regard to free over the air broadcasting, or to better serve NBC and Telemundo's broadcast communities of license.

Comcast has also assured the Commission that the fact that the company will own local cable systems and local broadcast outlets will not adversely affect the current retransmission consent regime.[182] {{

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[178] 58-COM-00000001, Slide 10.
[179] *Ibid.*
[180] *Ibid.*, Slide 12.
[181] *Ibid.*, Slide 14 (emphasis removed).
[182] Application at 121.

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These dual local video distribution platforms will also have serious detrimental effects on local advertising, as explained here, as well as in our initial Declaration.[187] Comcast does not deny the competitive advantage that will exist in the local markets post-merger. Indeed, Comcast intends to take full advantage of this advertising market power post merger {{

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VI. Applicants Internal Documents Raise Significant Concerns Regarding Comcast's Acquisition of NBCU Cable Networks

The confidential information submitted by the Applicants also confirms our concerns about the combined company's ability to leverage control over popular cable programming. This leverage will be used to shoe horn larger bundles of commonly controlled programming onto consumers. For example, in an internal analysis evaluating the pros and cons of acquiring NBCU, {{

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[183] 31-COM-00000298, Slide 33.
[184] *See e.g.* John Eggerton, "ACA Addresses Rising Retransmission Consent Payments," *Broadcasting and Cable* (May 7, 2009).
[186] 26-COM-00000333, p. 14.
[187] *Declaration* at 45-52.
[188] 31-COM-00000298, Slide 31.

[189]

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}} This type of bundling arrangement only serves to increase costs for end-consumers while forcing them to purchase networks they have little interest in.

Finally, similar to the joint venture's advantage in overcoming increased retransmission consent fees, the combined company can also offset any cable programming cost increases with increases of their own. {{

[191]}} As a consequence, other large video distributors will seek to acquire even more content so that they can similarly offset these increased operating costs. Meanwhile, smaller MVPDs or those without the financial standing to execute such an acquisition will be left with a distinct competitive disadvantage.

[189] *Ibid.*
[190] *Ibid.*, Slide 35.
[191] 31-COM-00001500, p. 6. *See e.g.* Comcast Corp., "Investor Presentation to Discuss NBC Joint Venture with General Electric," Slide 27 (Dec. 3, 2009).

A. The Joint Venture Will Wield Considerable Control Over Critical Content Categories

In our initial Petition and accompanying Declaration we identified five categories of programming that are a competitive concern with regard to the proposed transaction. Four of those have been defined by the FCC as distinctive, "must have" programming – i.e. News, Sports, Broadcast Networks and Hispanic content. The fifth is a category that Applicants themselves define as a product space in which they would amass a bundle of programming that would set them far apart from the competition. Applicants' Opposition does not refute our conclusions; moreover, the companies' documents reinforce our conclusion.

Perhaps the most egregious example of the double talk that results from the experts saying one thing and the company knowing another occurs with regard to the "news" category. Applicants' experts denigrate petitioner Bloomberg for claiming that the business news category is distinct, yet Comcast's internal documents {{ [192] }} Yet, in the Opposition Applicants deny the possibility that control over these programming categories would allow the joint venture to withhold, bundle or seek to increase the price of the content. This weakness is the crux of Applicants' Opposition. They are happy to suggest that market power would be used to advance benign strategies, but disavow any incentive to pursue harmful strategies, even when such strategies are at least as – if not more – attractive than the benevolent ones.

The reasons that Comcast covets NBC content are the reasons that such content is considered must have:

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[192] 31-COM-00000298, Slide 35.

- The national reach of the broadcast network, {{ [193]}}, as well as the popularity of its USA cable network which Comcast considers to be {{ [194]}}
- National sports properties that are described as {{ [195]}}
- National news that has {{ [196]}}
- National reach in the Hispanic population {{ ,[197] [198]}}
- Women's programming that is a source of leverage in an important demographic {{ [199]}}
- Local signals that strengthen Comcast's hand in the retransmission negotiations {{ [200]}}. This will make Comcast less sensitive to transmission fee increases, with the possibility that it will have an interest in fee increases, and
- Important local reach of the O&Os {{ [201]}} and
- Leverage gained from {{ [202] [203]}}

[193] 31-COM-00000298, Slide 17.
[194] *Ibid.*, Slides 35.
[195] *Ibid.*, Slides 17, 19, 27. {{ }}
[196] *Ibid.,* Slides 17, 20.
[197] *Ibid.,* Slides 17.
[198] *Ibid.,* Slide 14.
[199] 11-COM-00000739, Slide 19.
[200] 31-COM-000298, Slides 2, 25, 26, 33; 31-COM-000739.
[201] 31-COM-000298, Slide 17.
[202] 31-COM-000298, Slide 29.
[203] 31-COM-000298, Slides 31, 35.

1. Applicants Rebuttal of Women's Networks Concentration is Misleading and Ultimately Supports Public Interest Petitioners Position

In their Opposition Applicants attempt to rebut the Public Interest Petitioners assertions about the merged company's market power in the niche category of women's networks.[204] At the outset, it is worth highlighting that {{

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[206]}} The evidence relied on for this rebuttal, in fact, confirms our concerns. Applicants employ Nielson data in an attempt to illustrate that the merged entity will not control a distinct entertainment segment.[207] However, the data makes clear the market concentration that will result in women's networks that skew towards females aged 18-49. A finding that is in agreement with what we detailed in our original declaration.[208]

Applicants assert that networks like "the Disney Channel, ABC Family, [and] Nickelodeon…all attract audience demographics that are similar to the profile of E!."[209] The Applicants appear to be asserting that these networks act as advertising substitutes. Given the divergent programming content between these areas, advertisers clearly do not treat them as substitutes.[210] Disney, ABC Family, and Nickelodeon all produce programming designed to be

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[204] Opposition at 110-112.
[205] 11-COM-00000678, Slides 14, 16.
[206] 11-COM-00000739, Slide 36.
[207] *Ibid.* Applicants assertions regarding Lifetime are unpersuasive given it is but a single network amidst the sea of the merged entity's networks (p. 112). Furthermore, the Applicants fail to address the fact that they already own a sixteen percent share of the network. *Declaration* at 42.
[208] *Declaration* at 42-44.
[209] Opposition at 112.
[210] A review of the top advertisers for E! and Nickelodeon reveals that overlap is limited to Hasbro and Kraft, along with three movie studios (Paramount Pictures, Universal Pictures and Warner Brothers), out of a total of 77 advertisers. Furthermore, it is unlikely that these companies are advertising the same products across both networks.
(continued on next page)

viewed by children and families. Conversely, much of E!'s programming focuses on extremely adult oriented themes.[211] Instead, Applicants' results are likely attributed to a conflation of family television viewing as opposed to personal viewing.

Beyond these flawed assertions, the Applicants point to an analysis by Drs. Israel and Katz. This analysis is uninformative if not misleading. The authors conclude, "that those viewers who watch 'women's' cable networks also tend to watch many other networks."[212] However, this premise itself is flawed. Together Comcast and NBCU's networks would target a particular demographic within this niche category. Indeed, a look at the Cable Advertising Bureau profiles shows their "viewer targeted programming" is women between the ages of 18-49.[213] Thus, attempting to assert the substitutability of far more popular networks like TBS and TNT is misleading.[214] The networks' advertising units would likely gasp at being told an advertiser could find an adequate replacement with likes of ABC Family or TBS.[215] This is

(footnote continued)
See Cable Advertising Bureau, "Nickelodeon Network Profile," p. 5, 2010; Cable Advertising Bureau, "E! Network Profile," p. 5, 2010 ("E! Network Profile").

[211] For instance, E!'s current show roster includes several programs focused on the lives of former Playboy Playmates. Take for example, The Girls Next Door ("takes viewers behind closed doors to reveal the world of Hugh Hefner's mansion") and Kendra ("Follow the life of Kendra Wikinson as she moves out of the mansion") (*See* E! Network Profile at 4). These programs highlight adult themes, including sexual intimacy, pornography, and often feature (albeit blurred) nudity. As such, it is highly unlikely that these programs are ones that advertisers would view as substitutes for Nickelodeon or Disney programming directed at, and designed for, child audiences. *See also* 11-COM-00000739, Slides 39, 46.

[212] Israel/Katz Response at 93.

[213] Bravo focuses on "persons 18-49 & 25-54." This is likely due to their popularity with gay demographics. *See e.g.* Prime Access, Inc and PlanetOut.com, "Highlights from 2008 Prime Access/PlanetOut Gay and Lesbian Consumer Study," p. 3, May 13, 2008. Nonetheless, Applicants data illustrates that approximately 70 percent of Bravo viewers are female. Opposition at 91.

[214] Katz/Israel Response at 92-93. In 2009, the average 24 hour rating for TNT and TBS ranked T-5th and 8th, respectively. The highest ranking for the networks at issue was Bravo at 34. *See* SNL Kagan, "Basic Cable Networks by Average 24 Hour Rating," 2010.

[215] *See e.g.* E! Network Profile; Cable Advertising Bureau, "Style. Network Profile," p. 5, 2010 ("Style Network Profile"); Cable Advertising Bureau, "Oxygen Network Profile," p. 5, 2010 ("Oxygen Network Profile"); Cable Advertising Bureau, "Bravo Network Profile," p. 5, 2010 ("Bravo Network Profile").

illustrated with advertisers like L'Oreal and Duramed Pharmaceuticals who rely on each of these networks to cost effectively reach women between the ages of 18 and 49.[216]

The Authors rely on viewer duplication data from Nielson in attempt to prove this. However, an appropriate review of this data proves just the opposite. These networks serve a niche category in which there are, by nature, low viewer duplication rates. By looking at these rates across all available networks for each of the networks in question, we see that Applicants networks are closely related. In other words, to the extent these female targeted networks offer duplicity with other networks, it is with the other women's networks that will be also owned by the merged entity, as shown below.

[[

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For instance, Style ranks either as [[

[218]]] Thus, despite the misleading assertions of Applicants and their retained experts with regard to the merged entities' market power over female-oriented networks, the facts say otherwise. Perhaps this is why the Applicants have failed to respond to Comcast's own executive stating that the merged entity's ability to "speak for an entire group of assets for

[216] *Ibid.*, p. 5. Oxygen does not release specific advertising lists but general categories include "Cosmetics" and "Pharmaceuticals." Duramed Pharmaceuticals maintains a "leadership role in women's healthcare." *See* "Duramed Pharmaceuticals, Inc. Launches LoSEASONIQUE™ Oral Contraceptive," Press Release, April 30, 2009.

[217] Analysis of Nielson April 2010 Duplication Report.

[218] [[ ]]