Second, when NCTC sought to apply the Commission's collective bargaining provision to RSN negotiations, it found that the programming supplier limited any NCTC negotiation to a "sub-class" of its members with subscribers distributing that RSN. This effectively decreased NCTC's ability to negotiate a fair market rate for the programming.

Third, the "small cable company" restriction removed the larger NCTC members from potential representation in a class for collective bargaining purposes, with the effect of further limiting NCTC's representation to an even smaller sub-class of its "small cable company" members.

Fourth, those "small cable companies" typically had widely disparate contract expiration dates, whereas the bargaining agent provisions effectively required any small cable companies that wanted to be represented by a bargaining agent to have simultaneous contract expiration dates. This had two effects. First, this fact precluded all the small cable operators from being represented. Second, since any "small cable companies" whose contracts expired later could only join a separate class, which would have to negotiate its own agreement with its own three-year term, it effectively precluded those small cable companies from ever joining an earlier class. Thus, by negotiating staggered contract expiration dates, a programmer could easily, effectively, and permanently preclude a meaningful class from ever being formed.[109]

[109] NCTC's historic solution to this problem, which has been its uniform practice in all affiliation agreements with programmers throughout its 25-year history, is to provide in NCTC's agreements with programmers the right for NCTC's members to opt into NCTC's agreements and to simultaneously terminate any direct pre-existing contractual arrangements such members might have with the programmers.

In the one instance where NCTC invoked the arbitration procedures, it reversed its historic business practice and secured appointments of agency from a small number of its members. Without acknowledgement of the effect of its "opt-in" procedure on its ability to collectively bargain, however, NCTC was precluded from assembling for the arbitration (or for that matter, for any agreement resulting from the arbitration or for any subsequent arbitration), a meaningful class of members to conduct an effective collective bargaining.

In summary, because of the juxtaposition of collective bargaining with the opt-in nature of NCTC's actual bargaining position, where NCTC has acted as bargaining agent and invoked the Commission's arbitration remedy, it has been unable to secure the benefits of lower programming costs that true collective bargaining would provide, thus frustrating the goals of the Commission in establishing the arbitration remedy.

ACA's proposed conditions, described below, build upon the strengths and correct the weaknesses of the conditions imposed on the News Corp.-DirecTV and Adelphia-Comcast-Time Warner transactions to better target the transaction-specific horizontal and vertical harms posed by the combination of Comcast and NBCU programming and distribution assets.

### D. The ACA's conditions are targeted to addressing the competitive harms of the proposed combination and are sufficiently robust and durable to ameliorate these effects.

#### 1. Introduction and Summary of Remedies.

In these and earlier comments, the ACA has demonstrated that the proposed combination of NBCU's programming assets with Comcast's programming and

distribution assets would generate diverse and significant harms that affect both traditional and new multichannel distribution platforms. While the MVPDs throughout the industry and their subscribers would incur these harms, smaller MVPDs – especially those that compete with Comcast's distribution assets – and their subscribers would suffer the greatest. The Commission thus faces real challenges in fashioning sufficient remedies that would ensure the proposed transaction is in the public interest. These challenges are magnified by the fact that remedies used in previous combinations have often proven insufficient.

It is from these perspectives that the ACA has fashioned its proposed remedies. In the proposals that follow the ACA provides an integrated series of remedies with two overarching objectives:

- Address the principal harms from the proposed combination, i.e. increases in the programming prices MVPDs and their subscribers will pay to Comcast-NBCU when the programming assets of NBCU and Comcast are combined; and increases in programming prices rival MVPDs and their subscribers will pay to Comcast-NBCU when the programming assets of NBCU are combined with the distribution assets of Comcast.

- Enable smaller MVPDs to enforce any rights provided in the remedies either directly or through a bargaining agent.

At its core, the ACA's remedies ensure that all MVPDs – and especially smaller MVPDs – can carry NBCU's O&Os and its cable networks and Comcast's RSNs at rates, terms, and conditions reflecting pre-combination market conditions. To achieve this aim, the ACA proposes two sets of measures. The first are general measures, most of which were either used in or based upon previous Commission decisions. These general measures, which apply to all MVPDs, include extension of

the program access rules to cover all programming sold by Comcast-NBCU and all platforms by which MVPDs may distribute that programming, the stand-alone sale by Comcast-NBCU of local broadcast stations and RSNs, and commercial arbitration for all programming. The ACA then proposes three critical special measures to ensure that smaller MVPDs can effectively utilize these remedies. The following summarizes the key features of these two integrated proposals:

1. General Remedies to Address Increases in Programming Prices

- The program access rules shall be expanded so that they apply to Comcast-NBCU's sale of its broadcast stations and its other programming regardless of the means by which any of the programming is delivered to consumers (*e.g.*, online and mobile).

- Comcast-NBCU must sell each NBC O&O and each Comcast RSN on a stand-alone basis to all MVPDs. This remedy will significantly decrease the complexity and cost of commercial arbitration, including the proposed special commercial arbitration process for smaller operators.

- Comcast-NBCU is subject to a commercial arbitration remedy to ensure that it does not sell programming – broadcast stations, RSNs, and national cable networks – at a price that exceeds fair market value.

2. Special Provisions to Ensure Remedies are Useful for Smaller MVPDs

- MVPDs with fewer than 125,000 MVPD subscribers in the relevant market cannot be charged more than 5% higher than the lowest Net Effective Rate charged to other MVPDs for NBC O&Os and Comcast RSNs. To ensure transparency and assist in enforcing this right, the Joint Venture and Comcast must file annual certifications.

- To enable smaller MVPDs to enforce their ability to access NBC O&Os and Comcast RSNs at competitive rates, a new, lower-cost arbitration process with an automatic right of continued carriage is established.

- Comcast-NBCU must negotiate in good faith with Bargaining Agents, and these agents shall have comparable rights to MVPDs to obtain programming from Comcast-NBCU.

Finally, to ensure the remedies adequately address the harms and reflect the dynamic of the programming market and other agreements entered into by the Applicants with other parties to the FCC's proceeding, the license conditions should remain in effect for 9 years. The sections that follow discuss the conditions and enforcement mechanisms in detail.

### 2. ACA Proposed Conditions.[110]

#### a. Definitions.

**Proposal:**[111] *For purposes of the conditions set forth below, the following definitions apply:*

- ***"Bargaining Agent"*** *means any entity that negotiates retransmission consent or carriage agreements on behalf of one or more of its principals or members, regardless of whether they are bound by the prices, terms and conditions entered into by the Bargaining Agent.*[112]

- ***"Comcast-NBCU"*** *shall include Comcast Corporation ("Comcast") and the joint venture, composed of assets of Comcast and NBC Universal, Inc., ("NBCU"), and each of the companies' subsidiaries, affiliates, parents, successors, and assigns.*

- ***"Covered NBC Stations"*** *means all NBC broadcast television stations currently or in the future owned, controlled or managed by Comcast-NBCU and all independent NBC affiliates on whose behalf Comcast-NBCU currently or in the future negotiates retransmission consent agreements.*

---

[110] ACA's Proposed Comcast-NBCU License Transfer Conditions are attached hereto as Attachment C.

[111] The ACA discusses these definitions further in the next sections.

[112] It is intended that the National Cable Television Cooperative (NCTC), as currently organized and as it operates, would be considered a Bargaining Agent for purposes of these conditions.

- ***"Covered RSNs"*** *means all regional sports networks ("RSNs") that are currently or in the future owned, controlled or managed by Comcast-NBCU.*[113]

- ***"Covered National Cable Networks"*** *means all national cable programming networks that are currently or in the future owned, controlled, or managed by Comcast-NBCU.*

- ***"Covered Programming"*** *means all Covered NBC Stations, Covered RSNs, and Covered National Cable Networks.*

- ***"Net Effective Rate"*** *means the net cash consideration charged under a retransmission consent agreement or an RSN carriage agreement, adjusted to reflect the value of: (1) all other economic consideration exchanged, including marketing or launch support, penetration or other discounts, advertising availabilities, channel positioning, and payment terms; and (2) any other rights or obligations related to such agreement, including the packaging of the Covered NBC Station or Covered RSN, and other distribution rights or obligations, which may include digitization, streaming, and/or dual feeds, and the distribution of the Covered NBC Station or Covered RSN on a vidao-on-demand basis or via a high-definition format or interactive version or broadband technology.*

- ***"Smaller MVPD"*** *means a multichannel video programming distributor ("MVPD") that serves 125,000 MVPD subscribers or less in either the DMA served by a Covered NBC Station, or the region commonly served by a Covered RSN.*

- ***"Stand-Alone Retransmission Consent Agreement"*** *means a retransmission consent agreement that does not include any provision to carry any video programming networks, other services, or other items unrelated to the carriage of a broadcast station signal, other than the primary and multicast streams of a single broadcast station, and any ancillary programming or service.*

---

[113] "Regional Sports Network" shall have the same meaning as in the Adelphia-Time Warner-Comcast Order. *Adelphia Order*, ¶ 158 ("For purposes of the foregoing conditions the term 'RSN' means 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.").

- ***"Stand-Alone RSN Carriage Agreement"*** *means a carriage agreement that does not include any provision to carry any video programming networks, other services, or other items unrelated to the carriage of a RSN, other than a single RSN, and any ancillary programming or service.*

**b. General Remedies Applicable to all MVPDs to Ameliorate Price Increases Caused by the Proposed Combination.**

**Proposal: Extended Applicability of Program Access Rules**

1. *The program access rules will apply to Covered NBC stations and all other broadcast television stations currently or in the future owned, controlled or managed by Comcast-NBCU and all independent broadcast television station on whose behalf Comcast-NBCU currently or in the future negotiates retransmission consent agreements.*

2. *The program access rules will apply to Covered RSNs and Covered National Cable Networks, regardless of the means of delivery to MVPDs, including terrestrially delivered programming.*

3. *The program access rules will apply to all programming discussed in Conditions II.A.1 and II.A.2., which shall include all means by which such programming is offered, in whole or in part, to consumers by Comcast-NBCU through any platform, including online and mobile platforms.*

**Discussion:**

The ACA proposes that the Commission extend the applicability of the non-discrimination and non-exclusive requirements of the existing program access rules to retransmission consent agreements for NBCU broadcast stations and all terrestrially transmitted networks. Moreover, the ACA proposes that the program access rules apply to Comcast-NBCU's distribution of Covered Programming to consumers over any distribution platform (*e.g.* linear, online, or mobile). For example, to the extent that Comcast-NBCU distributes Covered Programming online either directly or through an unaffiliated entity to consumers, a MVPD shall have the right to

access the Covered Programming for delivery online to its subscribers. As discussed earlier in this Reply and in Rogerson II,[114] the program access rules are somewhat beneficial to ensura rival MVPDs have recourse when Comcast-NBCU discriminate against them, although they are clearly not sufficient to address the vertical harms from the proposed combination. The ACA's proposal expands the existing rules to correct some of their flaws by:

- Extending the rules to retransmission consent agreements for all of Comcast-NBCU's broadcast television stations, including its NBC and Telemundo O&Os – a condition proffered by the Applicants;
- Applying the conditions to the carriage of all Comcast-NBCU programming regardless of the means of delivery, including terrestrial delivery – an issue addressed to some extent earlier this year by the Commission; and
- Providing MVPDs with the right to obtain carriage of all Comcast-NBCU programming delivered to consumers on any platform, including online distribution and distribution on mobile networks.

In regard to ensuring that program access requirements extend to additional consumer distribution platforms used by MVPDs, the Applicants recognize this trend and discuss in their Application the fact that high-quality video content is increasingly being distributed online by both traditional, new media, and user-generated sources,[115] and "[a]ny relevant market(s) for online video distribution would share many characteristics with the market(s) for traditional video programming."[116] The ACA agrees. "Must have" video programming will retain its "must have" nature regardless distribution platform. Further, Comcast and other MVPDs are developing

[114] Rogerson II at 38-39.

[115] Application at 4.

[116] Application at 88.

sophisticated business strategies to permit their existing video subscribers to have access to the same content online. Thus, the rapidly accelerating movement of video programming online as a complement to existing offerings will make online access to "must have" local broadcast stations, RSNs, and national cable programming essential for competing MVPDs. As a result, the concerns about the vertical harms of the transaction discussed above with respect to MVPD distribution networks extend to the evolving online marketplace.[117] It is clear that by controlling such a significant amount of "must have" programming post-transaction, Comcast-NBCU would have the incentive and ability to use this newfound market power to either withhold consent from competitors or impose higher fees and discriminatory or other unreasonable conditions for carriage.

**Proposal:** **Require Stand-Alone Agreements for Covered NBC Stations and Covered RSNs**

1. *All retransmission consent agreements entered into by Comcast-NBCU for Covered NBC Stations must be Stand-Alone Retransmission Consent Agreements.*

2. *All RSN carriage agreements entered into by Comcast-NBCU for Covered RSNs must be Stand-Alone RSN Carriage Agreements.*

**Discussion:**

The ACA proposes that Comcast-NBCU sell Covered NBC Stations and Covered RSNs on a stand-alone basis. The term "stand-alone" means the economic value of carrying only the broadcast station or RSN, respectively, without any linkage to carriage of other programming or the exchange of any other items of value. This

[117] ACA Initial Comments at 41-42.

proposal will simplify contracts for must have programming, thereby facilitating compliance with the ACA's commercial arbitration and special arbitration proposals. Having a process that is more straightforward and has greater transparency is important for all MVPDs, but particularly important to smaller MVPDs which have limited resources to participate in arbitrations.

**Proposal: Provide Rights to Binding Commercial Arbitration**

> *When negotiations fail to produce a mutually acceptable set of prices, terms, and conditions for carriage of (i) Covered NBC Stations, (ii) Covered RSNs, or (iii) Covered National Cable Networks, an aggrieved MVPD may submit a dispute over the prices, terms, and conditions of retransmission consent or carriage agreements for Covered Programming to commercial arbitration, subject to the arbitration rules outlined in the Adelphia-Time Warner-Comcast Order.*[118]

**Discussion:**

The ACA proposed that the Commission again adopt as a condition a commercial dispute resolution process – baseball-style arbitration – that can be used by MVPDs unable to achieve carriage at fair market rates for any Covered Programming from Comcast-NBCU. As discussed in the previous section, the Commission adopted this mechanism to address vertical harms in the News Corp.-Hughes transaction and again used it in the more recent Adelphia-Time Warner-Comcast transaction. The ACA agrees that, if properly structured, this process will create incentives for the parties to reach a negotiated solution, and the use of arbitration should be limited.

While the Commission has used commercial arbitration to address vertical

[118] The ACA would not object to the Commission enhancing the terms and conditions of this commercial arbitration remedy to make it more efficient and effective.

effects in recent mergers, ACA notes that it also may prove beneficial to remedying horizontal harms. As Professor Rogerson observes:

> "An important point to note about the regular arbitration process in the context of Comcast-NBCU transaction is that it can remedy both the vertical and horizontal harms of the transaction. That is, to the extent that the arbitration process allows MVPDs to obtain programming from Comcast-NBCU at fair market value, it will prevent Comcast-NBCU from charging fees higher than fair market value regardless of whether the problem originates with the horizontal or vertical aspect of the transaction. The fact that the condition remedies both vertical and horizontal competitive harms is one of the rationales for applying it to all types of Comcast-NBCU programming and not just to programming that was owned by NBCU prior to the transaction."[119]

The ACA proposes this remedy despite the fact that it is too expensive and resource intensive to be used by smaller MVPDs. The Commission should note that the ACA proposes two measures that can rectify some of the shortcomings in the current process. First, as discussed above, the ACA proposes a requirement that Comcast-NBCU sell carriage for its broadcast stations and RSNs on a stand-alone basis, which would simplify the process and significantly lower the cost of accurately valuing the carriage price. Second, as discussed in the next section, for smaller MVPDs, the ACA proposes the creation of a new special arbitration process, which is more streamlined and cost-efficient.

Finally, the ACA's commercial arbitration proposal applies to all Covered Programming, whereas the Commission previously used the arbitration process only to settle disputes for carriage of local broadcast stations and RSNs. The ACA submits that disputes over Comcast-NBCU national cable networks should be covered by the arbitration remedy because of the demonstrable harm to competition

[119] Rogerson II at 44-45.

that arises when NBCU's national cable networks are combined with Comcast's distribution assets. As argued by Professor Rogerson in his report accompanying the ACA's initial comments, the fact that the block of NBCU national cable networks has ratings similar to, if not greater than, Big 4 broadcast networks, provides evidence that withdrawal of this block would have a similar significant effect on rival MVPDs to withdrawal of an NBC O&O or Comcast RSN.[120]

### c. Special Provisions to Ensure Remedies are Useful for Smaller MVPDs.

**Proposal:** **Establish Special Requirements for Stand-Alone Agreements for Covered NBC Stations and Covered RSNs for Smaller MVPDs**

1. *Upon entering into a Stand-Alone Retransmission Consent Agreement for a Covered NBC Station with an MVPD that serves 125,000 MVPD subscribers or less in the DMA served by the Covered NBC Station, and throughout the life of the agreement, Comcast-NBCU may neither require nor accept fees, terms, and conditions from the MVPD that result in a Net Effective Rate more than 5% higher than the lowest Net Effective Rate of any retransmission consent agreement for the Covered NBC Station with any MVPD including itself, that is currently in force. Moreover, Comcast-NBCU may neither withhold terms and conditions related to carriage of the Covered NBC Station that are made available to other MVPDs, including itself, nor require terms and conditions related to carriage of the Covered NBC Station that are technically infeasible or commercially prohibitive for the MVPD.*

2. *Upon entering into a Stand-Alone RSN Carriage Agreement for a Covered RSN with an MVPD that serves 125,000 MVPD subscribers or less in the region commonly served by the Covered RSN, and throughout the life of the agreement, Comcast-NBCU may neither require nor accept fees, terms, and conditions from the MVPD that result in a Net Effective Rate more than 5% higher than the lowest Net Effective Rate of any carriage agreement for the Covered RSN with any MVPD including itself, that is currently in force. Moreover, Comcast-NBCU may neither withhold terms and conditions related to*

[120] Rogerson I at 37-40. See also Rogerson II at 45.

*carriage of the Covered RSN that are made available to other MVPDs, including itself, nor require terms and conditions related to carriage of the Covered RSN that are technically infeasible or commercially prohibitive for the MVPD.*

3. *Each principal executive and financial officer of Comcast-NBCU will certify to the Commission on an annual basis that Comcast-NBCU, based on his or her knowledge, has calculated the Net Effective Rate for each retransmission consent agreement for Covered NBC Stations and for each carriage agreement for Covered RSNs currently in force, and is not in violation of III.A.1. or III.A.2. (1. or 2. above).*

**Discussion:**

The special requirement for stand-alone agreements for Covered NBC Stations and Covered RSNs for smaller MVPDs establishes the basic right enabling these MVPDs to obtain Comcast-NBCU programming at rates comparable to that of other MVPDs: Comcast-NBCU is required to make Covered NBC Stations and Covered RSNs available to smaller MVPDs at rates no more than 5% higher than the lowest "Net Effective Rate" of any retransmission consent agreement or carriage agreement, respectively; and, Comcast-NBCU cannot as part of these agreements withhold terms and conditions made available in other agreements or impose conditions that are technically infeasible or commercially prohibitive.

The ACA defines smaller MVPDs as those that serve fewer than 125,001 video subscribers in the relevant market served either by the Covered NBC Station or the Covered RSN. This is based on the discussion earlier in these comments regarding the excessive costs incurred by Massillon in its arbitration with Fox and confronted by WOW! as it was considering filing for arbitration against Comcast. In other words, because they have fewer subscribers, for smaller MVPDs the threshold at which the cost of arbitration, which is relatively fixed, exceeds the benefits of any

price decrease is much lower. Professor Rogerson described this clearly in the attached report and provides the rationale for the "125,000 level":

> "Suppose that Comcast-NBCU is raising the fee for a particular network above its fair market value by $.50 per subscriber per month. Suppose that an MVPD believes that it has a 50% chance of winning an arbitration case on this issue, which would result in a fee decrease of $.50 per subscriber per month over the life of the contract. I will assume that the contract lasts 3 years (36 months) and that the MVPD uses a cost of capital of 10%. Straightforward calculation shows that the expected discounted gain to the MVPD from engaging in an arbitration is then equal to $7.80 per subscriber. If the MVPD has s subscribers, then its expected net benefit to participating in the arbitration is given by
>
> $$7.80\,s \quad - 1{,}000{,}000 \qquad \text{(IV.1)}$$
>
> The first term of Equation (V.1) is the expected benefit from winning the arbitration and the second term is the cost of the arbitration. Let $s^*$ denote the level of subscribership at which the MVPD would just break even from participating in the arbitration. It is given by
>
> $$s^* = 1{,}000{,}000/7.80 = 128{,}205. \qquad \text{(IV.2)}$$
>
> Based on this calculation, it therefore appears that an MVPD with fewer than approximately 125,000 subscribers for any particular piece of programming would not find it affordable to enter into arbitration even when it had a reasonably strong case."[121]

The 5% rate allowance reflects the fact that Comcast-NBCU may have cost savings when, for larger MVPDs, the fixed costs of contracting can be spread over a larger number of subscribers. Professor Rogerson notes that "5% is likely a very generous over-estimate of the extent to which programmers' per subscriber costs of dealing with smaller MVPDs are higher then their per subscriber costs of dealing with larger MVPDs. In the course of reviewing this transaction, the Commission may

[121] Rogerson II at 42-43 (citations omitted).

consider assessing for itself the magnitude of such cost differences and use this to determine the appropriate percentage."[122]

The term "Net Effective Rate" as used in the special commercial arbitration provision for smaller MVPDs is based upon standard industry Most Favored Nation ("MFN") provisions and practices, including the arbitrator's use of a benchmark value – the "Net Effective Rate" – upon which to base a decision. The definition proposed by the ACA for "Net Effective Rate" reflects current commercial agreements and seeks to account for all consideration, whether in cash or other value, received by the programmer and paid by the MVPD. The ACA recognizes that determination of the "Net Effective Rate" may seem difficult; however, it is important to note that parties regularly enforce MFN provisions in commercial agreements based on calculations of "Net Effective Rate," and the ACA conditions facilitate this by requiring that Comcast-NBCU provide broadcast stations and RSNs on a stand-alone basis.

Finally, due to the lack of transparency for smaller operators with respect to the prices, terms, and conditions paid by other MVPDs and to ensure compliance with ACA's proposed Special Requirements for Smaller MVPDs, the ACA proposes an annual certification from "each principal executive and financial officer of Comcast-NBC." This is similar to certifications used by the Commission to enforce other requirements.[123]

**Proposal: Special Commercial Arbitration Remedy for Smaller MVPDs**

---

[122] Rogerson II at 48.

[123] *See, e.g.*, the certification requirement used to ensure compliance with the Commission's Customer Proprietary Network Information ("CPNI") rules. 47 C.F.R. § 64.2009(e).

1. *An MVPD that serves 125,000 MVPD subscribers or less in either the DMA served by a Covered NBC Station, or the region commonly served by a Covered RSN, may submit a dispute over the terms and conditions of carriage of a Covered NBC Station or a Covered RSN subject to a special commercial arbitration remedy for smaller MVPDs designed to affordably resolve disputes related to Conditions III.A1. or III.A.2. (1. and 2. under the Special Requirements for Stand-Alone Agreements above).*

2. *The special commercial arbitration remedy for Smaller MVPDs shall be a traditional arbitration conducted in accordance with the Rules for Special Commercial Arbitration Remedy for Smaller MVPDs contained in Appendix A. (4. below), different from the "final offer" or "baseball" arbitration outlined in Condition II.C.1. (under the commercial arbitration condition above).*

3. *An aggrieved MVPD shall be granted an automatic right to continued carriage of the Covered NBC Station or Covered RSN until the resolution of the special commercial arbitration remedy for smaller MVPDs.*

4. *Rules for the Special Commercial Arbitration Remedy for Smaller MVPDs:*

    a. *Upon receiving timely notice of a Smaller MVPD's intent to arbitrate, Comcast-NBCU shall submit to the arbitrator in writing its last offer to the MVPD, and may include, at its discretion, an explanation of why its offer complies with Conditions III.A.1. or III.A.2. (1. or 2 under the Special Requirements for Stand-Alone Agreements above).*

    b. *Comcast-NBCU shall be obligated to make available to the arbitrator all relevent contracts and other data and information, including its calculations of the Net Effective Rate for each retransmission consent agreement for the Covered NBC Station or for each carriage agreement for the Covered RSNs currently in force, as the arbitrator deems necessary to resolve the dispute.*

    c. *The Smaller MVPD may submit to the arbitrator in writing an explanation for why it believes Comcast-NBCU's last offer does not comply with Conditions III.A.1. or III.A.2. (1. or 2. under the Special Requirements for Stand-Alone Agreements above).*

d. *Comcast-NBCU may respond in writing to the Smaller MVPD's filing.*

e. *After receiving the written briefs of both parties and all relevant contracts and other data and information, the arbitrator shall determine whether Comcast-NBCU's last offer complies with Conditions III.A.1. or III.A.2. (1. or .2. under the Special Requirements for Stand-Alone Agreements above). If the arbitrator finds that Comcast-NBCU's offer does not comply, then the arbitrator, after informal consultation with the parties, shall adjust the Comcast-NBCU offer to bring it into compliance. The MVPD and Comcast-NBCU shall be bound to accept the arbitrator's modified terms and conditions.*

**Discussion:**

A special arbitration process is established so that individual smaller MVPDs can benefit from the remedy. This process is a traditional arbitration process (not "baseball" style) and is based on standard commercial practices. This arbitration is less burdensome for smaller MVPDs because it will only focus on whether the "Net Effective Rate" for a programming network is within 5% of the lowest rate obtained by any other MVPD.[124] In addition, the arbitrator's task in making this determination will be facilitated because the Covered NBC Stations and Covered RSNs must be

[124] Professor Rogerson in the attached report discusses the nature and benefits of this arbitration process more fully: "[N]ote that the arbitration process is this case is not baseball-style arbitration where both parties make offers and the arbitrator selects the offer that most closely meets the condition specified in the arbitration rules. Instead, only Comcast-NBCU makes a final offer and then the arbitrator directly determines if this offer meets the 5% condition or not. The rationale for using this simpler type of arbitration is that, since Comcast-NBCU and the arbitrator will both have access to all of Comcast's contracts and the MVPD will not, Comcast-NBCU and the arbitrator will both have vastly superior information about the value of the correct rate than will the MVPD. Furthermore under the specified arbitration process Comcast-NBCU will know that it has to choose a rate that meets the 5% condition because the arbitrator will find it very easy to determine if the condition is met. Therefore there will be no need (or advantage) to try to involve the MVPD in a more active way. That is, the arbitrator is the appropriate actor to discipline Comcast-NBCU because it will have access to the same information that Comcast-NBCU has access to and it will be simple and inexpensive for the arbitrator to directly determine if the 5% condition is met." Rogerson II at 48.

offered on a stand-alone basis. This process thus stands in contrast to the Adephia-Time Warner-Comcast arbitration process where the arbitrator needs to determine the tair market value of programming by estimating the revenue stream of the programming and compare the fees charged for all types of related programming offered on the market. Finally, the ACA proposal includes a "standstill" provision, enabling the smaller MVPD to continue to carry the programming until the dispute is resolved.

**Proposal: Enable Bargaining Agents to Represent Smaller MVPDs**

1. *Comcast-NBCU shall negotiate in good faith with Bargaining Agents. The following actions by Comcast-NBCU would violate this duty to negotiate in good faith:*

   a. *Refusal to negotiate with a Bargaining Agent on behalf of all its principals or members.*

   b. *Refusal to enter into a retransmission consent or carriage agreement with an MVPD unless it contains a restriction on either being represented by a Bargaining Agent, or opting into an agreement subsequently reached by a Bargaining Agent.*

   c. *Refusal to put forth an offer to a Bargaining Agent with members who are not bound by the prices, terms, and conditions entered into by the Bargaining Agent, for any set of different subscriber levels specified by the Bargaining Agent so long as none of the subscriber levels are greater than the aggregate number of MVPD subscribers served by the entire membership of the Bargaining Agent.*

2. *When negotiations involving Bargaining Agents fail to produce a mutually acceptable set of prices, terms, and conditions for Covered Programming, an aggrieved Bargaining Agent shall have the same rights to submit a dispute over the prices, terms, and conditions of carriage for Covered Programming to commercial arbitration as an MVPD, pursuant to the rules outlined in Condition II.C.1 (under the commercial arbitration condition above), with the following additional rules:*

a. *An aggrieved Bargaining Agent with members who are not bound by the prices, terms and conditions entered into by the Bargaining Agent and Comcast-NBCU shall present final offers to the arbitrator based on each disputed set of subscriber levels specified by the Bargaining Agent so long as none of the subscriber levels are greater than the aggregate number of MVPD subscribers served by the entire membership of the Bargaining Agent. For each set of different subscriber levels, the arbitrator will choose the final offer of the party that most closely approximates the fair market value of the Covered Programming.*[125]

**Discussion:**

The previous proposal addressed concerns with smaller MVPDs obtaining carriage of Covered NBC Stations and Covered RSNs. The "Bargaining Agent" proposals address Comcast-NBCU's post-combination ability to increase prices for carriage of Covered National Cable Networks by smaller MVPDs. It is important to note that the term "Bargaining Agent" includes the National Cable Television Cooperative (NCTC), as currently organized and as it operates. Because NCTC already bargains on behalf of smaller MVPDs to access national cable networks, the implementation of the ACA's proposal is relatively straightforward. In addition, it permits MVPDs to join together in other ways, including for the purpose of negotiating single or multiple agreements for all or any programming, and employing an individual or entity as an agent to bargain on its behalf with Comcast-NBCU, and such individual or agent also would be considered a Bargaining Agent.

The ACA proposal strengthens the ability of Bargaining Agents (and thus smaller MVPDs) to negotiate programming fees on behalf of its members in two

[125] The actual prices, terms, and conditions of the agreement entered into by the Bargaining Agent's members will then be determined by the aggregate number of MVPD subscribers of the Bargaining Agent's members that subsequently opt into the agreement.

important ways. First, the ACA's proposal requires Comcast-NBCU to negotiate in good faith with a Bargaining Agent. This means that Comcast-NBCU cannot refuse to negotiate with a Bargaining Agent. In addition, it must make an offer to a Bargaining Agent even if the agent's members are not bound by the agreement, and such offer must be for "any set of different subscriber levels specified by the Bargaining agent."

Second, the ACA's proposal gives a Bargaining Agent the ability, just like any MVPD, to request binding commercial arbitration to resolve disputes over programming fees for Covered Programming. This means that the agent can ask for arbitration for any individual covered network (*e.g.*, a NBCU O&O or a RSN) or a group of covered networks (*e.g.*, the block of NBCU cable networks) which it seeks to negotiate with Comcast-NBCU on behalf of a group of smaller MVPDs. In addition, in an arbitration proceeding, the Bargaining Agent and Comcast-NBCU shall provide final offers on "each disputed set of subscriber levels that could opt into the agreement, as specified by the Bargaining Agent." The arbitrator will then select the final offer for each subscriber level that is closest to the fair market value for the programming. Finally, the actual prices, terms, and conditions of the agreement entered into by the Bargaining Agent's members will be determined by the aggregele number of subscribers of the MVPDs (members) that subsequently opt into the agreement.

**d. Conditions Should Remain in Effect While Harms are Likely to Occur.**

**Proposal:** *These conditions shall apply to Comcast-NBCU for nine years, regardless of whether, during this period, any statute or regulation referenced in any condition, including the program access rules, are not extended by the Commission or are overturned by the Courts.*

**Discussion:**

The ACA proposes that its conditions remain in effect for nine years.[126] This is based on several factors. First, the competitive harms from the proposed combination are significant and extensive, and there is little likelihood that market events by themselves will soon diminish the increased market power Comcast-NBCU will obtain by the proposed combination. Second, current program carriage agreements may not be negotiated for some time, and rates tend to ratchet-up as subsequent agreements are negotiated. Thus, conditions need to remain in effect through a series of renegotiation cycles. Finally, the Applicants have already entered into privately negotiated agreements with other parties to the proceeding that have a duration of 7 years.[127]

## IV. CONCLUSION.

This Reply is the third set of lengthy and well-documented comments the ACA has filed in this proceeding. In its initial comments, the ACA presented the significant horizontal and vertical harms that would ensue from the proposed combination of

[126] The ACA notes that the conditions adopted in the Adelphia-Time Warner-Comcast proceeding remain in effect for 6 years. (*See Adelphia Order*, Appendix B.)

[127] *See Ex Parte* Letter of Michael H. Hammer, Counsel for Comcast Corporation, and David H. Solomon, Counsel for NBC Universal, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 10-56 (filed Aug. 6, 2010), and attached Agreements with NBC Television Affiliates, ABC Television Associates Association, CBS Television Network Affiliates Association, and FBC Television Affiliates Association).

Comcast and NBCU. This was supported by a detailed report from Professor Rogerson on the economic rationale underlying such harms and with empirical evidence of the nature and magnitude of the harms. In ACA's Response to Comments, it presented and analyzed documents submitted to the Commission by the Applicants to demonstrate that Comcast and NBCU recognized and understood the proposed combination would enable them to obtain additional market power. This Reply completes the ACA's presentation of its case: the Commission cannot approve the proposed transaction without adopting sufficiently robust and durable conditions. In this Reply, the ACA and its economic expert, Professor Rogerson, first have rebutted the arguments presented by the Applicants' economists, which sought to demonstrate the proposed combination raised little or no competitive concerns. It is clear the horizontal and vertical harms are real and significant. Second, the ACA set forth a series of conditions – both general for all MVPDs and specific for smaller MVPDs – all of which are necessary to ameliorate these harms.

The proposed combination of Comcast and NBCU is a "big deal," and a wide swath of the industry and a great many consumers will suffer grave harm if it is approved without sufficient relief. Consequently, the ACA intends to continue to advocate vigorously and persistently for the Commission to adopt such relief. The ACA recognizes and appreciates that the Commission too has taken a very serious and rigorous approach to reviewing the proposed combination. It stands ready to assist the Commission in further analyzing the transaction and drafting appropriate conditions.

Respectfully submitted,

**AMERICAN CABLE ASSOCIATION**

By: Barbara Esbin

Matthew M. Polka
President and Chief Executive Officer
American Cable Association
One Parkway Center
Suite 212
Pittsburgh, Pennsylvania 15220
(412) 922-8300

Ross J. Lieberman
Vice President of Government Affairs
American Cable Association
2415 39th Pl, NW
Washington, DC 20007
(202) 494-5661

Christopher C. Cinnamon
Barbara S. Esbin
Jeremy M. Kissel
Cinnamon Mueller
307 North Michigan Avenue
Suite 1020
Chicago, Illinois 60601
(312) 372-3930

Thomas W. Cohen
Kelley Drye & Warren LLP
Washington Harbour, Suite 400
3050 K. Street, NW
Washington, DC 20007
(202) 342-8400

Attorneys for the American Cable Association

August 19, 2010

# ATTACHMENT A

## A FURTHER ECONOMIC ANALYSIS OF THE PROPOSED COMCAST-NBCU TRANSACTION

WILLIAM P. ROGERSON

# A FURTHER ECONOMIC ANALYSIS OF THE PROPOSED COMCAST-NBCU TRANSACTION*

**August 19, 2010**

**by**

**William P. Rogerson****

* Prepared for the American Cable Association.

** Professor of Economics, Northwestern University. FCC Chief Economist, 1998-99.

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY . . . . . 1

II. VERTICAL HARM . . . . . 2

1. INTRODUCTION . . . . . 2

2. REDUCED DOUBLE MARGINALIZATION . . . . . 7

3. RAISING RIVALS' COSTS . . . . . 12

4. REGIONAL CABLE OVERBUILDERS . . . . . 22

III. HORIZONTAL HARM . . . . . 23

1. INTRODUCTION . . . . . 23

2. THE UNDERLYING ECONOMIC MODEL . . . . . 24

3. DIFFERENT TYPES OF PROGRAMMING . . . . . 27

4. PERFECT SUBSTITUTES . . . . . 28

5. DEMOGRAPHIC DIFFERENCES IN VIEWERS . . . . . 29

6. CONCENTRATION RATIOS . . . . . 29

7. EMPIRICAL ANALYSIS . . . . . 30

IV. REMEDIES . . . . . 37

1. INTRODUCTION . . . . . 37

2. PROGRAM ACCESS RULES . . . . . 38

3. BINDING ARBITRATION . . . . . 39

4. THE ACA CONDITIONS . . . . . 43

V. CONCLUSION . . . . . 52

APPENDIX: ESTIMATING THE MAGNITUDE OF THE REDUCED DOUBLE MARGINALIZATION EFFECT . . . . . 54