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October 12, 2010

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Room TW-A325
Washington, DC 20554

Via ECFS

Re: American Cable Association ("ACA") Ex Parte; *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licenses*; MB Docket No. 10-56.

Dear Ms. Dortch:

ACA has documented its concerns about the horizontal and vertical competitive harms of the proposed combination of assets associated with the Comcast-NBCU transaction, the lack of adequate safeguards to protect consumers and competition, and the conditions ACA believes necessary to mitigate these harms in Comments filed June 21, 2010, Response to Comments filed July 21, 2010 and Reply filed August 19, 2010 in the above-referenced proceeding.[1] The purpose of the attached information is to provide a more comprehensive explanation of the manner in which ACA's proposed conditions narrowly target the transaction-specific harms identified in its previous filings, remedy shortcomings in license conditions the Commission has previously utilized to mitigate similar harms, and are supported by the filings of other parties to the proceeding.

If you have any questions or require further information, please do not hesitate to contact me directly. Pursuant to section 1.1206 of the Commission's rules, this letter is being filed electronically with the Commission.

Sincerely,

Barbara Esbin

Attachments (2)

Barbara S. Esbin

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[1] *In the Matter of Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc., to Assign and Transfer Control of FCC Licenses,* MB Docket No. 10-56, Comments of the American Cable Association (filed June 21, 2010); Response to Comments of the American Cable Association (filed July 21, 2010); Reply of the American Cable Association (filed Aug. 19, 2010). In addition, ACA's concerns are documented in ex parte letters filed on Aug. 27, 2010, Sept. 21, 2010, and Sept. 22, 2010.

ATTACHMENT A

EXPLANATION OF ACA'S PROPOSED COMCAST-NBCU LICENSE TRANSFER CONDITIONS

Explanation of ACA's Proposed Comcast-NBCU License Transfer Conditions

I. Introduction

ACA's proposed license transfer conditions are narrowly-tailored to target only demonstrable transaction-specific harms arising from the proposed combination of Comcast and NBCU content and distribution assets.[1] This filing will first explain the conditions, relevant to ACA's proposed conditions, that the Commission placed on transactions that were expected to produce vertical harms similar to those associated with Comcast-NBCU, specifically News Corp.'s acquisition of DirecTV ("News Corp-DirecTV") and the Adelphia-Time Warner-Comcast transaction,[2] and the Commission's rationale for imposing those conditions. Next, we explain how those conditions fared in practice for those multichannel video programming distributors ("MVPDs") for whose protections the conditions were imposed. Lastly, we explain the key conditions that ACA has recommended the Commission impose on Comcast-NBCU and the rationale behind these conditions. It is important to emphasize at the outset that most of the conditions ACA recommends are the same as, or closely resemble, those imposed by the Commission on licensees in other transactions involving vertical combinations. To the extent that ACA has proposed new conditions, they are solely intended to address: (1) the practical problems experienced with prior conditions, consistent with the rationales for imposition of these prior conditions; and, (2) harms arising from the horizontal combination of video programming assets, which were not involved in either the News Corp.-DirecTV or Adelphia-Time Warner-Comcast transactions.

II. Conditions Previously Imposed on Media Transactions to Address Vertical Harms

In News Corp.-DirecTV, the Commission found that the vertical integration of News Corp.'s content and DirecTV's distribution assets had the potential to increase the incentive and ability of News Corp. to engage in temporary foreclosure bargaining strategies during carriage negotiations with competing MVPDs for two types of "must have" video programming products – broadcast television station signals and regional cable sports programming networks – in order to secure higher prices for its programming. Pre-transaction, both News Corp. and an MVPD would suffer losses if programming were withheld from the MVPD, creating a certain "balance of terror" sufficient in most cases to keep both parties at the bargaining table until a deal was struck, making permanent and even temporary foreclosure strategies relatively rare occurrences. News Corp.'s acquisition of DirecTV's distribution assets, however, was found to increase the likelihood and

[1] The complete set of conditions proposed by ACA is contained in Attachment B.

[2] *In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee*, Memorandum Opinion and Order, 19 FCC Rcd. 473 (2004) ("*News Corp.-Hughes Order*"); *In the Matter of Applications for Consent to the Assignment and/or Transfer of Control of Licenses Adelphia Communications Corporation, (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees; Adelphia Communications Corporation, (and subsidiaries, debtors-in-possession), Assignors and Transferors, to Comcast Corporation (subsidiaries), Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corporation, Transferee*, Memorandum Opinion and Order, 21 FCC Rcd. 8203 (2006) ("*Adelphia Order*").

frequency of foreclosure strategies being used due to the programmer's new ability to gain revenues when subscribers seeking the programming move from the affected MVPD to DirecTV as a result of the withholding, sufficient to offset its own temporary lost affiliate fees/advertising revenues.[3]

> [A]s a result of the transaction, the increased profits accruing to DirecTV and News Corp. as a result of the temporary withdrawal of regional sports networks and broadcast signals will give News Corp. an increased incentive to adopt a strategy of temporary foreclosure in order to uniformly raise the price of its broadcast television and regional sports programming and/or obtain other carriage concessions. News Corp.'s post-transaction ability to act anti-competitively to increase its competitor's programming costs is greater than it would otherwise be due to News Corp.'s post-transaction ability to off-set temporary revenue losses arising from foreclosure with increased profits accruing to DirecTV as subscribers drop off the affected MVPD and subscribe to News Corp.'s affiliated MVPD. This increased ability and incentive to seek and obtain higher programming prices and/or obtain other carriage concessions through temporary foreclosure would likely lead to higher prices to MVPD consumers and thereby harm the public interest. To avoid public interest harms that would result from such conduct, we impose several conditions to maintain the balance of bargaining power between News Corp. and other MVPDs at roughly pre-transaction levels.[4]

Similarly, in Adelphia-Time Warner-Comcast, the applicants were seeking license transfer approvals associated, *inter alia*, with the acquisition of Adelphia's distribution assets by Time Warner and Comcast; although Time Warner and Comcast each already owned RSN programming, the acquisitions would expand and/or enable additional clustering of their respective regional footprints and thereby increase vertical market power in key markets. The Commission found that the proposed transactions would "increase the Applicants' incentive and ability to adopt a uniform price increase strategy for RSN programming and that the program access rules will not likely deter such conduct," because they "do not prohibit a vertically integrated programmer from increasing prices charged to competing MVPDs if the price increase is not discriminatory or if the programming is delivered terrestrially."[5]

> Moreover, we find that a uniform price increase has no effect on the actual costs borne by an RSN's affiliated MVPD because, as DIRECTV states, the "payment goes from one pocket to another." Thus the prospect of charging itself a higher rate for an affiliated

[3] *News Corp.-Hughes Order*, 19 FCC Rcd. at 476 & 625, ¶¶ 4, 366 (summarizing competitive harms of the transaction).
[4] *Id.* at 625, ¶ 366.
[5] *Adelphia Order*, 21 FCC Rcd., at 8263, ¶ 140.

> RSN would not deter Comcast or Time Warner from charging a uniformly higher rate to DBS operators or other competing MVPDs. Uniform price increases will, in turn, result in higher cable prices and fewer alternatives for consumers.[6]

In each of these proceedings, the Commission fashioned general and specific conditions to mitigate the ability of vertically-integrated MVPDs post-transaction to (1) unfairly disadvantage rival MVPDs through discrimination, exclusive contracts, and undue or improper influence and (2) to raise rates above the level that they would have been able to command pre-transaction through various means, including uniform price increases, stealth discrimination, permanent foreclosure, and temporary foreclosure.[7] In News Corp.-DirecTV, the Commission imposed general conditions on the license transfers principally by bringing News Corp.'s broadcast station signals within the coverage of the program access rules and creating a commercial arbitration remedy for MVPDs to use where marketplace negotiations for retransmission consent and RSN carriage failed to produce satisfactory carriage agreements.[8] In the *Adelphia Order*, the Commission conditioned the license transfers with extension of the program access rules to Comcast and Time Warner's RSNs "regardless of the means of program delivery."[9] In addition, to complement these general conditions available to all MVPDs, the Commission crafted special conditions for programming negotiations with small MVPDs intended to permit them to benefit from the general remedies, which might otherwise have been beyond their financial reach.[10]

A. General Conditions for all MVPDs

1. Extension of Program Access Rules to All Affiliated Programming

To counter News Corp.'s enhanced post-transaction market power, and "to make certain that this critical programming is available to MVPDs," the Commission first extended commitments that News Corp. had proposed regarding application of the key program access protections to its cable programming networks to encompass any broadcast television station that News Corp. owns and operates, or on whose behalf it negotiates retransmission consent.[11]

Through the program access rules, Congress had prohibited exclusivity and discrimination with respect to satellite delivered cable programming owned by or affiliated with a cable operator, after determining that vertically integrated program suppliers had the

[6] *Id.*
[7] *Adelphia Order*, 21 FCC Rcd., at 8327, ¶ 297; *see also News Corp.-Hughes Order,* 19 FCC Rcd., 473.
[8] *See News Corp.-Hughes Order*, 19 FCC Rcd., at 551-55, ¶¶ 175-179; *Adelphia Order*, 21 FCC Rcd., at 8274, ¶ 156.
[9] *Adelphia* Order, 21 FCC Rcd., at 8274, ¶¶ 156-157.
[10] *News Corp.-Hughes Order*, 19 FCC Rcd., at 551 & 575, ¶¶ 176, 223-224.
[11] *Id.* at 572, ¶ 219; *id.* at 495-96, ¶¶ 41-42 (discussing how News Corp.'s satellite cable programming networks were subject to the program access rules because News Corp. was a "satellite cable programming vendor in which a cable operator has an attributable interest" under section 628(b) by virtue of Liberty Media's partial ownership of News Corp. and a cable system in Puerto Rico. News Corp. offered to keep the programming subject to the program access rules regardless of Liberty's continued ownership of the cable system.).

incentive and ability to favor their affiliated cable operators over non-affiliated MVPDs, and that competing MVPDs would not have a viable service without access to such programming on non-discriminatory terms.[12]

The Commission explained that extending the protections of the program access rules to broadcast programming would prevent News Corp. from engaging in competitive abuses such as selling Fox broadcast programming to DirecTV's competitors at prices that are substantially and unjustifiably higher than the price paid by DirecTV, or from refusing from making the programming available to competing MVPDs at any price. The program access condition was extended "to any broadcast station that News Corp. owns and operates, or on whose behalf it negotiates retransmission consent."[13] News Corp. was also prohibited from offering "any of its existing or future national or regional programming services on an exclusive basis to any MVPD" and required "to make such services available to all MVPDs on a non-exclusive basis and nondiscriminatory terms and conditions."[14]

Similarly, in Adelphia-Time Warner-Comcast, the Commission conditioned its license transfer approvals by extending the core program access prohibitions on exclusive contracts and practices, discrimination, and undue or improper influence on Comcast, Time Warner, and their existing or future covered RSNs, "regardless of means of delivery."[15] Enforcement of these conditions by aggrieved MVPDs would be by means of the program access complaint process set forth in the Commission's program access rules.[16] The Commission justified extending the program access protections to covered RSNs, regardless of means of delivery, to guard against Comcast and Time Warner in the future deciding that, because of the possibility of permanent withholding from competitors, distribution via regional terrestrial distribution networks is the most cost-effective means of distribution for their existing or future RSNs. The conditions would "ensure that such anticompetitive behavior does not result."[17]

Nonetheless, the Commission recognized that, as valuable as the program access non-discrimination and non-exclusivity protections are, they would be insufficient, standing alone, to remedy the principal public interest harm of unjustified rate increases threatened by the two vertical transactions. In News Corp.-DirecTV, for example, the Commission found that the program access rules "were not intended to regulate or address the level of rates per se, and even if they could adequately address rate levels (and not just discrimination),

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[12] *Id.* at 491, ¶ 41; 47 U.S.C. § 548.
[13] *Id.* at 572, ¶ 218.
[14] *Id.* at 676, app. F.
[15] *Adelphia Order*, 21 FCC Rcd., at 8274, ¶ 156. That is, Comcast and Time Warner were, regardless of means of delivery, (1) prohibited from offering any RSN on an exclusive basis to any MVPD; (2) required to make their covered RSNs available to all MVPDs on a non-exclusive basis and on non-discriminatory terms and conditions; and (3) prohibited from unduly or improperly influencing the decision of a covered RSN to sell programming or set the prices, terms and conditions of sale of such programming to an unaffiliated MVPD.
[16] *Id.*; 47 C.F.R. § 76.1003.
[17] *Adelphia Order* at 8275, ¶ 162. The Commission, however, accepted the applicants' explanation that the Philadelphia RSN situation was unique, and therefore refrained from bring that RSN under the program access condition. *Id.* at 8275, ¶ 163.

News Corp. would still be able to withhold programming pending resolution of a program access complaint."[18] In fact, the Commission found:

> [T]he very existence of the program access non-discrimination rules may create the perverse incentive for News Corp. to charge excessive rates for RSNs to DirecTV, in order for Applicants to disguise News Corp.'s behavior toward rival MVPDs. As we have found, the de facto control of DirecTV by News Corp. ensures that DirecTV will accept these rates, and rather than responding by raising its prices, will act in a manner that maximizes the joint profits of Applicants by holding its rates steady. This will permit DirecTV to gain market share. We believe that the same close coordination between News Corp. and DirecTV necessary to obtain many of the proposed benefits of the transaction ensure that the gains from the strategy of raising rivals' costs can be obtained and equitably distributed between the shareholders of the firms.[19]

Similarly, the Commission found that the transaction would increase News Corp.'s ability and incentive to raise rivals' costs of obtaining retransmission consent and that this harm would not be remedied by application of the program access rules.[20]

2. Commercial Arbitration Remedy for "Must Have" Programming

The Commission created the additional remedy of mandatory commercial arbitration for broadcast station and RSN carriage disputes at the request of any aggrieved MVPD in explicit recognition of the fact that "*the program access rules do not afford a remedy for allegations of competitive harm due to uniform price increases*."[21]

In News Corp.-DirecTV, the Commission found that broadcast station signals and RSN programming are "must have" programming for a viable MVPD service in the sense that an MVPD deprived of access on non-discriminatory terms would suffer subscriber losses and that the merger would increase News Corp.'s incentive and ability to abuse its market power and extract supra-competitive rates and/or other carriage concessions from MVPD competitors.[22] The order noted that Congress and the Commission had long recognized that carriage of local television broadcast station signals is critical to MVPD offerings, as evidenced by significant increases in DBS penetration once DBS operators were permitted to carry local broadcast station signals.[23] Similarly, the Commission noted

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[18] *News Corp.-Hughes Order*, 19 FCC Rcd., at 547, ¶ 162.
[19] *Id.* at 551, ¶ 170.
[20] *Id.* at 568, ¶ 209.
[21] *Adelphia Order*, 21 FCC Rcd., at 8273-75, ¶¶ 155-165 ("We adopt [the program access] condition to ensure that the exclusive contracts and practices, non-discrimination, and undue or improper influence requirements of the program access rules will apply to Comcast, Time Warner, and their covered RSNs, regardless of the means of program delivery.") (emphasis supplied); *Id.* at 8274, ¶ 157.
[22] *News Corp.-Hughes Order*, 19 FCC Rcd., at 476, ¶ 2.
[23] *Id.* at 565, ¶ 202.

that it had repeatedly recognized the importance of RSN programming to MVPD offerings, and that denial of access to RSN programming by a vertically integrated provider could competitively disadvantage competing MVPDs.[24]

In News Corp.-DirecTV, the Commission found that the primary public interest harm likely to follow from the vertical combination of News Corp.'s RSN and broadcast programming assets and DirecTV's distribution platform "is the competitive harm of an across-the-board MVPD price increase resulting from News Corp.'s ability to extract rents or other unfair carriage concessions from MVPDs" for carriage of RSN and broadcast station programming.[25] The Commission found that secondary public interest harm exists where MVPDs are de-authorized from carrying disputed programming during a period of foreclosure or where negotiations have reached an impasse, and "MVPD subscribers are deprived of programming that is highly desired."[26] In the Commission's view, if left unremedied, "[i]n the long term, News Corp.'s use of market power to extract artificially high levels of compensation from MVPD rivals, or other carriage concessions, could make rival MVPDs less viable options for consumers, thus limiting consumer choice."[27]

To counter-balance the increased market power of the post-transaction entity and provide a "useful backstop" where negotiations break down, the Commission created a mechanism whereby an aggrieved MVPD may choose to submit a dispute over the terms and conditions of carriage of RSNs and broadcast station retransmission consent to commercial arbitration and to permit the MVPD to continue to carry the disputed programming while the dispute is being resolved.[28] The Commission's commercial arbitration remedy was intended to restore, to the degree possible, the pre-transaction "balance of terror" between upstream programming suppliers and their downstream distributors by providing a "fair and neutral" mechanism by which disputants could quickly resolve carriage disputes that had reached an impasse.[29]

The arbitration remedy was devised to permit MVPDs to demand commercial arbitration when they are unable to come to a negotiated "fair market price" for the broadcast station or RSN programming.[30] The goal, as stated by the Commission, was "to push the parties toward agreement prior to a complete breakdown in negotiations. Final offer arbitration has the attractive 'ability to induce two sides to reach their own agreement, lest they risk the possibility that a relatively extreme offer of the other side may be selected by the arbitrator.'"[31]

In Adelphia-Time Warner-Comcast, the Commission imposed a similar commercial arbitration remedy to "constrain Comcast's and Time Warner's ability to increase rates for RSN programming uniformly or otherwise disadvantage rival MVPDs via anticompetitive

[24] *Id.* at 535, ¶ 133.
[25] *Id.* at 551 & 568, ¶¶ 172, 209.
[26] *Id.* at 551, ¶ 172.
[27] *Id.* at 568, ¶ 209 (discussing impact of such practices with respect to broadcast station signals).
[28] *Id.* at 549, 551-555, & 572-76, ¶¶ 168, 173-179, 220-226.
[29] ACA Reply at 32; *News Corp.-Hughes Order*, 19 FCC Rcd., at 549 & 572, ¶¶ 168, 220.
[30] *News Corp.-Hughes Order*, 19 FCC Rcd., at 551, ¶ 175.
[31] *Id.* at 551, ¶ 174.

strategies."[32] The Commission also found that, in addition to tempering across-the-board price increases through enhanced bargaining power, the conditions would "provide protection, if necessary, against 'stealth discrimination,' permanent foreclosure, and temporary foreclosure."[33]

Stand-Alone Final Offers. In News Corp.-DirecTV, to help achieve its goal of creating a simple commercial dispute mechanism, the Commission specified that the final offers for RSNs be submitted to the arbitrator in the form of a contract for carriage of the programming that may not include any provision to carry any video programming networks or any other service.[34] Similarly, for agreements involving retransmission of the broadcast signal, the final offers were not to include any provision to carry any video programming networks or any other service other than the broadcast signal.[35] A stand-alone final offer requirement was also imposed for RSN offers submitted to arbitration in Adelphia-Time Warner-Comcast.[36]

Adequate Comparables. Significantly, in Adelphia-Time Warner-Comcast, the Commission recognized the role that adequately comparable agreements play in ensuring the effectiveness of baseball-style arbitration. It therefore extended the scope of the arbitration remedy to cover *all* affiliated RSN negotiations with all MVPDs, rather than limit the remedy to only negotiations with rival MVPDs where there was found transaction-related incentives for price increases.

> Because arbitration outcomes may be affected by the general price level and price trends for RSNs, the imposition of an arbitration condition for only some of the Applicants' affiliated RSNs could give Applicants the incentive to increase the prices of affiliated RSNs not subject to the condition. In this way, Applicants could defeat the remedial effects of an arbitration condition were it limited only to a subset of markets.[37]

In News Corp-DirecTV, the vertically-integrated distributor - DirecTV - offered a national service in competition with all MVPDs so that the transaction-related incentives for temporary and permanent foreclosure applied in all negotiations with all MVPDs for its affiliated "must have" programming, and the concern that adequate comparables would not be available was not an issue as it was in Adelphia-Time Warner-Comcast.

Stand-Still Provisions. To further temper increased market power post-transaction and protect viewers' interests in uninterrupted access to must have programming, the Commission imposed a pair of stand-still carriage requirements. That is, News Corp. was prohibited from "deauthorizing" carriage of an RSN after an MVPD had chosen to avail itself

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[32] *Adelphia Order*, 21 FCC Rcd., at 8274, ¶ 156.
[33] *Id.* at 8275, ¶ 160.
[34] *News Corp.-Hughes Order*, 19 FCC Rcd. at 551 & 553, ¶¶ 175, 177.
[35] *Id.* at 573, ¶ 222.
[36] *Adelphia Order*, 21 FCC Rcd., app. B at 8337.
[37] *Id.* at 8275, ¶ 159.

of the arbitration condition,[38] and required to allow continued retransmission of the broadcast station signal under the same terms and conditions of the expired contract upon receiving notice of intention to submit a dispute to arbitration.[39] A stand-still provision was also included in the conditions imposed in Adelphia-Time Warner-Comcast.[40]

B. Special Conditions for Small MVPDs

The Commission found in News Corp.-DirecTV that small and medium-sized MVPDs would be at particular risk of strategies post-transaction aimed at securing supra-competitive programming rate increases for "must have" programming such as RSNs and broadcast stations post-transaction.[41] The Commission recognized that "[g]iven the size of their subscriber base and financial resources, small and medium-sized MVPDs may also be far less able to bear the costs of commercial arbitration, even on an expedited basis, than large MVPDs, thus rendering the remedy of less value to them.[42]

The Commission further recognized that, with respect to MVPDs with 5,000 or fewer subscribers, the costs of any form of arbitration for retransmission consent for broadcast station programming were likely to be overwhelming, "thus providing them with little relief from the harms associated with this transaction."[43] Accordingly, it required News Corp., when dealing with an MVPD with fewer than 5,000 total subscribers, "to either elect 'must-carry' status or negotiate retransmission consent for its owned and operated stations without any requirements for cash compensation or carriage of programming other than the broadcast signal."[44] Finally, the Commission granted small MVPDs (those with more than 5,000 but fewer than 400,000 subscribers) the ability to choose to appoint a bargaining agent to bargain collectively on their behalf in carriage negotiations for RSN and broadcast station programming.[45]

III. Practical Problems with the Commission's Previous Approach to Vertical Harms

The remedies previously utilized by the Commission to address the vertical harms threatened by media transactions, while well-intentioned, have failed in practice to protect all MVPDs, but have particularly failed to offer any relief from the anticipated vertical harms for small and medium-sized MVPDs.

A. Problems with Commercial Baseball-Style Arbitration

[38] *News Corp.-Hughes Order*, 19 FCC Rcd., at 551, ¶ 175.
[39] *Id.* at 573, ¶ 221.
[40] *Adelphia Order*, 21 FCC Rcd., app. B at 8337.
[41] *Id.* at 551, ¶ 176.
[42] *Id.*
[43] *Id.* at 570 & 575, ¶¶ 213, 224.
[44] *Id.* at 575, ¶ 224.
[45] *News Corp.-Hughes Order*, 19 FCC Rcd., at 551 & 576, ¶¶ 176, 223. The Commission also imposed a bargaining agent condition for small MVPDs in Adelphia-Time Warner-Comcast. *Adelphia Order*, 21 FCC Rcd., at 8339, app, B, at no. 5.

Baseball-style commercial arbitration remedy, the principal form of relief from vertical harms under the *News Corp.-Hughes* and *Adelphia Orders* proved too complex and expensive for rival MVPDs, but especially so for small operators. As DirecTV noted in its Comments, the arbitration remedy used in the past was not sufficiently quick or affordable, and urged the Commission to "streamline the arbitration process and thereby make it a more efficient and cost-effective means of dispute resolution."[46]

Because the arbitration process was so expensive, small and mid-sized operators did not consider it a viable option. Thus, not only did the costs of arbitration overwhelm very small MVPDs with 5,000 or fewer subscribers, as the Commission accurately predicted in News Corp.-DirecTV[47], they have in fact overwhelmed the utility of this remedy for MVPDs even with far greater subscriber levels. Colleen Abdoulah, President and Chief Executive Officer of WOW!, emphasized this point in her February 4, 2010 testimony before the Senate Committee on Antitrust, Competition Policy and Consumer Rights:

> WOW! considered using the arbitration process imposed on Comcast in the Adelphia decision but determined the cost of the process was likely to exceed $1 million, take one year or longer, and require key personnel to take large amounts of time from their regular jobs. In other words, the costs of using arbitration were going to be close enough to the extra price Comcast was going to charge us in the first place. Instead, we had no choice but to "eat" an enormous rate increase to carry Comcast's RSN. In effect, the program access process has essentially given us a right without a remedy.[48]

In his declaration attached to ACA's Reply, Robert Gessner, President of Massillon Cable TV, buttressed this conclusion in his discussion of the high cost of his company's five-year, and as yet unresolved, arbitration with Fox over carriage of Fox Sports Ohio. According to Gessner, when all costs of the arbitration are considered, Massillon [with approximately 40,000 subscribers] spent approximately $1,000,000 from the date of the arbitration request (October 2006) through 2010, not including the consideration out-of-pocket costs (including travel expenses) incurred by Massillon and substantial time and resources spent by Massillon management and employees to participate in the dispute and arbitration process.[49]

Like DirecTV, Massillon too has found the arbitration process to be neither quick nor efficient, as hoped by the Commission. As Mr. Gessner vividly stated:

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[46] Comments of DirecTV at 47, 51.
[47] *News Corp.-Hughes Order*, 19 FCC Rcd., at 575, ¶ 224.
[48] Testimony of Colleen Abdoulah, President and Chief Executive Office, WOW!, Board Member, American Cable Association, Before the Senate Committee on Antitrust, Competition Policy and Consumer Rights, The Comcast/NBC Universal Merger: What does the Future Hold for Competition and Consumers?, Feb. 4, 2010, at 8, *available at* http://judiciary.senate.gov/pdf/10-02-04%20Abdoulah%20Testimony.pdf (last visited Sept. 30, 2010).
[49] ACA Reply at 41; Attachment B, Declaration of Robert Gessner, ¶ 15 ("Gessner Declaration").

> In the final analysis, the arbitration process was far different than any expectations. It was not a relatively straightforward process. It did not live up to its potential as an expeditious and low-cost dispute resolution mechanism. Rather, it proved that one party can frustrate the process to the point where it is not feasible for a smaller entity to remain engaged either for lack of financial resources or personal time. Large program entities may say Massillon has "learned its lesson" because it would not be inclined to commit to binding arbitration again.[50]

ACA determined that, given these costs, arbitration would prove prohibitive for operators with 125,000 or fewer subscribers. The level of subscribership below which baseball-style arbitration becomes unaffordable was calculated by Professor Rogerson according to the formula described in Rogerson II and ACA's Reply. Using the approximately $1 million cost of arbitration described by ACA member companies WOW! and Massillon and reasonable estimates of likely price hikes demanded by the Applicants, Professor Rogerson determined that an operator with a reasonably strong case with respect to the fair market value of covered programming would find that the expected benefit from winning arbitration would exceed the cost of arbitration only where the operator had more than 125,000 subscribers who could benefit from expected cost savings gained by arbitrating disputes over carriage of that programming.[51]

Further and most importantly, the arbitration process has proven to be unduly complex and expensive because of the lack of readily comparable programming carriage agreements – stand-alone agreements – in the marketplace. This reality has undermined the value of the Commission's directive that the final offers be submitted to the arbitrator in the form of stand-alone agreements for the disputed programming. The problem facing an arbitrator has been that the comparable programming contracts to be reviewed to determine which of the two "final offers" comes closest to the fair market value of the programming were, unlike the two final offers, not in the form of stand-alone agreements. Rather, these market agreements covered a wide-range of carriage terms and conditions for other programming networks and related rights and responsibilities. As a result, the parties and the arbitrator needed to spend a great deal of additional time and money to assess the agreements and the final offers and could only arrive at very rough approximations of values. The more opaque and costly arbitration became, the lower the value of the remedy as a tempering mechanism on the post-transaction market power of the programmer. Thus, baseball-style arbitration proved too complex and costly for MVPDs, especially smaller MVPDs, than anticipated by the Commission in either News Corp.-DirecTV or Adelphia-Time Warner-Comcast.

IV. ACA's Proposed Conditions Narrowly Target Flaws in Previous Remedies

[50] Gessner Declaration, at ¶ 20.

[51] ACA Reply at 56-57; Rogerson II at 42-43. As Professor Rogerson noted, this is just "one possible approach" that the Commission could use to determine the level of MVPD subscribership below which baseball-style arbitration becomes unaffordable. The Commission could well determine that an alternative method of calculating that threshold is appropriate.

ACA and its economic expert, Professor William Rogerson, have demonstrated that the transaction would generate two types of competitive harm – horizontal and vertical – each leading to higher programming costs to companies purchasing video programming from Comcast-NBCU. That is, the horizontal combination of NBCU's key programming assets (10 NBC owned & operated stations and its block of highly rated national cable programming networks) with Comcast's key programming assets (9 RSNs) will increase Comcast-NBCU's market power over programming and result in higher programming fees in many regional and local markets. Similarly, the vertical integration of NBCU's key programming assets with Comcast's cable distribution assets will permit Comcast-NBCU to charge higher programming fees to Comcast's MVPD rivals. According to Professor Rogerson's analysis, this vertical integration will result in higher carriage fees across the range of Comcast-NBCU programming for MVPDs and their customers.[52] As the Commission has previously found, and ACA and Professor Rogerson have demonstrated, the program access rules provide little if any protection with respect to uniform price increases and non-overt price discrimination.[53] The vertical harms of Comcast-NBCU are, therefore, similar to the vertical harms of News Corp.-DirecTV and Adelphia-Time Warner-Comcast, whereas the horizontal harms are unique to the instant transaction.

ACA's proposed conditions build upon the primary remedial measures the Commission has relied upon to address transaction-specific vertical harms as a base on which to build a far more robust and useful set of conditions narrowly tailored to provide useful redress for the harms of the transaction to all MVPDs, regardless of size.[54] Similar to the conditions imposed by the Commission in previous transactions, ACA has proposed both general conditions applicable to all MVPDs and specific conditions applicable to smaller MVPDs that would address both the public interest harms of the Comcast-NBCU transaction and the problems identified with the Commission's arbitration remedy.

ACA's proposed general conditions generally reflect those applied in previous transactions, including: (1) extension of the key protections of the program access rules to all covered programming, regardless of the means of distribution and (2) creating a regular baseball-style commercial arbitration remedy for MVPD use where marketplace negotiations for covered programming have failed to produce satisfactory results. To augment these traditional remedies for the benefit of all MVPDs, ACA has proposed a condition ensuring the availability of adequate comparables by requiring that when Comcast-NBCU enters into carriage agreements for NBC broadcast stations or RSNs with any MVPD, that it sign a separate "stand-alone" agreement for each NBC broadcast station and a separate stand-alone agreement for each RSN.

Additionally, for the benefit of smaller MVPDs (125,000 subscribers and under for the disputed programming), ACA has proposed that the Commission adopt special conditions requiring (1) that prices for carriage in stand-alone agreements for NBC broadcast stations

[52] Rogerson II at 35.
[53] *News Corp.-Hughes Order*, 19 FCC Rcd., at 513, ¶ 84; *Adelphia Order*, 21 FCC Rcd., at 8273, ¶155; ACA Reply at 27-28; Rogerson II at 38-39.
[54] ACA Reply at Attachment C, ACA's Proposed Comcast-NBCU License Transfer Conditions.

and RSNs be no greater than 5 percent higher than the lowest "Net Effective Rate" for such programming; (2) non-baseball-style arbitration for disputes; and (3) the use of bargaining agents with a set of enhanced negotiating rights.[55]

All of ACA's proposed conditions were designed with the aim of ensuring that post-transaction, smaller and competitive MVPDs are not forced to pay, as a result of Comcast-NBCU's increased market power, above-market prices for covered programming simply because they are small and/or directly competing with Comcast.[56] As discussed below, several parties to the proceeding have proposed similar remedies for the likely public interest harms of the proposed Comcast-NBCU transaction.

A. General Conditions Applicable to all MVPDs

1. Program Access Protections

The program access protections proposed by ACA are fully consistent with Commission precedent and build upon the voluntary commitments offered by the Applicants. In this case, Comcast and NBCU have proposed extending key components of the program access rules only to negotiations with MVPDs for the high-definition feeds of any network already subject to the program access rules and for retransmission consent for the signals of NBC and Telemundo stations for as long as the Commission's rules are in place.[57] Other parties to this proceeding have also suggested extending the reach of the program access rules to negotiations for retransmission consent and RSN carriage, and to the delivery of covered programming regardless of the means of delivery, including online and mobile video programming distribution.[58] Accordingly and consistent with Commission

[55] "Net Effective Rate" is defined in Section I of ACA's proposed conditions as "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) and 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 video-on-demand basis or via a high-definition format or interactive version or broadband technology." ACA Reply, ACA's Proposed Comcast-NBCU License Transfer Conditions at 1. This definition reflects an industry standard typically used to determine whether the terms of a programming contract "Most Favored Nation" clause is being met.

[56] ACA's proposed conditions are intended to apply to Comcast-NBCU, defined in Attachment C of ACA's Reply, as "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." ACA Reply at Attachment C, ACA's Proposed Comcast-NBCU License Transfer Conditions at 1. This definition encompasses cable properties in which Comcast has ownership interests, such as Midcontinent Communications, against whom ACA member companies compete.

[57] *See In the Matter of Applications for Consent to the Transfer of Control of* Licenses, Application and Public Interest Statement, MB Docket No. 10-56, Applicants' Voluntary Public Interest Commitments, app. 8, at 2, no. 14 & 15.

[58] *In the Matter of Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc., to Assign and Transfer Control of FCC Licenses,* MB Docket No. 10-56, Reply Comments of Dish at 24-27 (filed Aug. 19, 2010) (expanding program access rules to online content) ("Dish Reply Comments"); *In the Matter of Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc., to Assign and Transfer Control of FCC Licenses,* MB Docket No. 10-56, Comments of DIRECTV at

precedent and the harms demonstrated in the record, ACA's proposed program access condition would extend to all broadcast stations on whose behalf Comcast-NBCU negotiates retransmission consent, as well as all affiliated television broadcast stations, RSNs, and national cable programming networks, regardless of means of delivery to MVPDs.[59]

Moreover, ACA's conditions would extend application of the program access rules to all affiliated television broadcast stations, RSNs, and national cable programming networks, regardless of means of delivery to consumer, including online and mobile distribution platforms.[60] ACA and others have described how "must have" programming will not lose its "must have" qualities even where it is transmitted to subscribers over new, ancillary distribution platforms such as via online distribution.[61] All relevant indicators point to a rapidly growing market for viewing video programming online, and the need for MVPDs to offer online options to complement their existing video programming distribution offerings in order to attract and retain subscribers.[62] For this reason, DirecTV, Dish Network, and the FACT Coalition have also proposed that the program access protections be extended to cover all forms of programming distribution.[63] As the Commission recognized in Adelphia-Time Warner-Comcast, technological change can alter the economics of the various delivery modes, such that protections imposed to mitigate the anticompetitive behavior of vertically integrated programmers via traditional delivery modes must be extended to new delivery modes in order to fully protect MVPD competitors and consumers.[64]

Although extending the key components of the program access rules to cover all types of programming affected by the combination of Comcast and NBCU will not be sufficient alone to remedy the vertical harm (and will have *no* impact on the horizontal harm), the non-exclusivity and non-discrimination rules likely will have some beneficial impact in preventing vertically integrated Comcast-NBCU from refusing to sell its programming to rival MVPDs at any price, and limiting the extent to which the firm can discriminate against rival MVPDs. This is particularly true with respect to access to affiliated programming that may not be covered under ACA's proposed general and special arbitration remedies, and also

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34-36 (filed June 22, 2010) ("DirecTV Comments"); *In the Matter of Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc., to Assign and Transfer Control of FCC Licenses,* MB Docket No. 10-56, Reply Comments of DIRECTV, at 5-9 (filed Aug. 19, 2010).

[59] Any program access conditions imposed as conditions of the license transfers needed to effectuate this transaction should apply for the full duration of the period proposed by ACA, nine years, regardless of whether the Commission or courts decide that the exclusivity provisions of the general program access rules should be extended beyond 2012. See 47 C.F.R. § 76.1002(c) (prohibition on exclusive contracts sunsets on October 5, 2012 unless the Commission finds that the prohibition continues to be necessary to protect competition in the distribution of video programming).

[60] *See* ACA Reply at 46-48; ACA Reply at Attachment C, ACA's Proposed Comcast-NBCU License Transfer Conditions at 2.

[61] ACA Comments at 34-37; DirecTV Comments at 13-23; Dish Reply Comments at 3-10.

[62] ACA Comments at 34-35; Reply of Dish Network, Attachment A, Report of Professor Simon J. Wilkie, Competition and the Impact of the Proposed Comcast/NBCU Transaction, at 5-8.

[63] Comments of DirecTV at 34-36. *See Application* at 4, 88 (high-quality video content is increasingly being distributed online by traditional, new media and user generated sources; "Any relevant market(s) for online video distribution would share many characteristics with the market(s) for traditional video programming."); Reply to Opposition of FACT Coalition at 6; Reply of Dish Network at 24-27.

[64] *Adelphia Order*, 21 FCC Rcd., at 8275, ¶ 162.

true to the extent that the protections of the program access rules will apply to video programming, regardless of the distribution platform.

2. General Commercial Arbitration Remedy

ACA's proposed general arbitration remedy is designed to prevent Comcast-NBCU from charging fees for its "must have" programming higher than its fair market value, regardless of whether the problem originates with the horizontal or vertical aspect of the transaction.

The Commission has previously found Big 4 network-affiliated local broadcast station signals and RSNs to be "must-have" in the sense that their withdrawal from MVPD subscribers has been shown to cause subscriber losses.[65] In this case, the arbitration remedy should also extend to Comcast-NBCU's national cable networks. The Applicants' suite of national programming, including at a minimum its most popular networks, exhibit the same properties as RSNs and broadcast station signals – that is, withdrawal of the block of Comcast-NBCU national cable programming would impact the ability of the MVPD to compete against an incumbent. The Commission has recognized that satellite cable programming networks may also share this quality in its recent program access orders.[66] Additionally, Professor Rogerson has observed that the audience share for the top four NBCU cable networks is equal to or better than the audience share of the broadcast networks.[67] According to ACA's membership, NBCU's cable networks "constitute 'must have' programming" in the sense that customers expect to have access to them when they subscribe to their cable service, and, if absent from the channel line-up, "would have a significant impact" on a member's "competitive position in the market and hence its subscribership levels.[68]" Accordingly, it is entirely reasonable to assume that if these programming assets were withdrawn as a group, similar competitive harm to an MVPD would occur as withdrawal of an RSN or local broadcast station.

Consistent with the approach taken by the Commission in Adelphia-Time Warner-Comcast, ACA proposes extension of the scope of the arbitration remedy to cover all affiliated programming negotiations with all MVPDs, not only those competing head-to-head with Comcast. Absent this, the Applicants would have an incentive to raise fees for its affiliated programming to MVPDs not subject to the conditions simply to make it more

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[65] *News Corp.-Hughes Order*, 19 FCC Rcd., at 496-97, ¶ 44; *Adelphia Order*, 21 FCC Rcd., at 8257, ¶ 124.

[66] *In the Matter of Review of the Commission's Program Access Rules and Examination of Program Tying Arrangements,* First Report and Order, 25 FCC Rcd. 746, 770, ¶ 34 (2010); *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd. 17791, 17816, ¶ 38 (2007) (recognizing the principle that cable networks of comparable popularity to the Big 4 broadcast networks (ABC, CBS, Fox and NBC) and RSNs could also qualify as "must have" programming).

[67] ACA Comments at 14; Rogerson I at 10.

[68] ACA Comments at 15; ACA Comments, Exhibit B, Declaration of Steve Friedman, Chief Operating Officer, Wave Broadband, at 2 & 3 ¶¶ 5, 8; *see also* ACA Comments, Exhibit C, Declaration of Robert Gessner, President of Massillon Cable TV, Inc., at 1 & 2, ¶¶ 4,7.

difficult for aggrieved MVPDs and an arbitrator to determine an actual fair market value for the programming in dispute.

Extending the scope of the arbitration remedy to cover all programming negotiations beyond just those MVPDs who compete head-to-head with Comcast also takes on new importance in the current transaction. Post-transaction, Comcast-NBCU will have the incentive and ability to increase the cost of programming when they jointly negotiate carriage of Comcast RSNs with either NBC broadcast stations or NBCU national cable programming networks. As a result of this horizontal harm, whereby joint negotiations for a Comcast RSN together with either an NBC broadcast station or the block of NBCU national cable networks will lead to above-market price increases for *all* programming purchasers, all MVPDs must be brought within the scope of the conditions.

Thus, ACA's proposed conditions would cover all MVPD negotiations for the purchase of broadcast station signals, RSNs, and national cable programming networks. This is consistent with ACA's analysis of transaction-related harms showing that (1) the vertical integration will allow Comcast-NBCU to charge higher prices for this programming to other MVPDs; and (2) the risk that MVPDs will see higher programming fees for national cable programming networks due to the horizontal harm of Comcast-NBCU combining negotiations for Comcast RSNs with the block of NBCU national cable programming networks.[69]

3. Stand-Alone Carriage Agreements

ACA's proposed condition requires that all retransmission consent agreements entered into by Comcast-NBCU for covered NBC broadcast stations and RSNs be "stand-alone." This approach is consistent with the Commission's understanding of the need for adequate comparables and would address the problem discussed earlier that baseball-style arbitration proved too complex and costly for all MVPDs and especially for smaller operators due to the difficulty faced by the arbitrator in accurately determining fair market value by comparing bundled and wide-ranging programming agreements to the two stand-alone final offers for the disputed programming.

Under ACA's proposal, Comcast-NBCU would be required to offer and enter into separate agreements with MVPDs for each NBC broadcast station or RSN so that the price, terms, and conditions of the programming reflected in the agreement will represent only the economic value of carriage of the covered programming, without any linkage to carriage of any other programming or the exchange of any other items of value.[70] The stand-alone requirement would not prevent negotiations over terms and conditions directly related to carriage of the covered programming, such as multicast streams of a broadcast station, or

[69] ACA Comments at 19-20; Rogerson I at 11-12.
[70] ACA Reply at 52-53. The requirement that Comcast-NBCU sign separate agreements for broadcast station and RSN programming would not prevent negotiations from addressing carriage of other programming and related topics; it would merely require that Comcast-NBCU offer separate (or standalone) agreements for the carriage of broadcast station and RSN programming and that the executed agreement separately set forth the price and all related terms and conditions for the covered programming.

ancillary programming or services related to a regional sports network. It would simply act as a bar on linkage to carriage of unrelated programming or other items unrelated to the carriage of the programming in the executed agreement. The economic value of carriage agreements for "must have" programming thus will be more transparent. This, in turn, will make compliance with both the general and special arbitration conditions easier by facilitating the arbitrator's comparisons of values in other carriage agreements to the offered value for the covered programming for the purpose of determining a fair market value for the covered programming. Accordingly, whether Comcast does or does not force tying of networks in carriage negotiations is not the issue, but rather the issue is simply that agreements for carriage of multiple programming networks lead to higher arbitration costs for aggrieved MVPDs.[71]

The rationale behind ACA's stand-alone requirement for broadcast stations and RSNs is consistent with the rationale motivating the Commission's use of the submission of stand-alone "final offers" to the arbitrator in News Corp.-DirecTV and Adelphia-Time Warner-Comcast. Ensuring that the arbitration process provides an adequate remedy for MVPDs unable to negotiate satisfactory carriage agreements requires that (1) the process be a simple one; (2) that adequate comparable agreements are available to the arbitrator; and (3) that Comcast-NBCU cannot undermine the process by reaching agreements with other parties that would prevent their use as an adequate comparable for a fair market value determination.

Even a modest reduction in the cost of arbitration for large MVPDs would be of benefit, as it would make arbitration a far more credible deterrent to supra-competitive pricing on the part of Comcast-NBCU. As described below, in the case of smaller MVPDs, the increased visibility of Comcast-NBCU pricing to an arbitrator for carriage of each NBC broadcast station and each RSN will also be beneficial. Again, reducing costs will make arbitration a more credible threat to Comcast-NBCU, making it more likely that the programming will be offered at fair market value rather than at above-market rates. Nonetheless, the stand-alone requirement by itself will be insufficient to reduce the cost of baseball-style arbitration sufficiently to make it useful for smaller operators because fair market value depends on several sets of comparables, including what other programmers are charging for similar programming. For this reason, ACA has crafted a set of special conditions applicable to smaller MVPDs, as described below.

B. Special Conditions Applicable to Smaller MVPDs

In addition to its proposals aimed at lowering the complexity and cost (and thereby increasing the deterrent power of the arbitration remedy, ACA has proposed a set of special conditions for smaller operators (defined to include MVPDs with 125,000 or fewer subscribers) for the disputed programming. These conditions are specifically designed to address several practical problems that have prevented the Commission's arbitration remedy from providing the same level of relief for smaller MVPDs that the baseball-style

[71] *See In the Matter of Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licensees,* MB Docket No. 10-56, Comcast Reply to Responses, at 29.

arbitration process can provide for larger MVPDs. If adopted, they will permit smaller MVPDs to continue to negotiate on their own behalf, as they do today, carriage agreements for broadcast station signals and RSN programming, but with the added benefit of a useful "backstop mechanism" to counterbalance the increased market power that Comcast-NBCU will gain from the transaction.

ACA's proposals were developed to address the key economic problem that mandatory arbitration had previously proved unaffordable for smaller MVPDs.[72] Commercial arbitration proved unaffordable for the simple reason that the costs of arbitration are relatively fixed regardless of the number of subscribers an MVPD has, but the benefits of winning an arbitration award and receiving lower programming fees are directly proportional to the number of subscribers represented. That is, the smaller the MVPD, the less attractive the cost of engaging in an arbitration.[73] The first part of the special conditions for smaller operators are narrowly tailored to specifically address this economic problem by requiring that Comcast-NBCU enter into retransmission consent and RSN agreements with smaller operators that are no more than 5 percent higher than the best rate offered other MVPDs. A smaller MVPD who believes this condition is not being met may request arbitration under the special commercial arbitration remedy ACA proposes, with the scope of issues presented to an arbitrator reduced solely to whether the disputed rate is within 5 percent of Comcast-NBCU's best rates for that programming. Additionally, ACA proposes protecting the rights of bargaining agents to negotiate collectively on behalf of smaller MVPDs to obtain programming at fair market value, and enforcing that right by allowing a bargaining agent to avail itself of the baseball-style commercial arbitration remedy available to individual MVPDs.

Reducing the costs of arbitration by making it easier for the arbitrator to compare the price of the disputed programming to the prices in other agreements will be of value to all MVPDs by making the threat of bringing a programming dispute to an arbitrator more credible. For smaller MVPDs, additional refinements will mean the difference between having a useful remedy to fall back on if negotiations fail, and having no remedy at all.

1. Special Requirements for Stand-Alone Agreements with Smaller Operators for Television Broadcast Station Signals and RSNs

ACA has proposed conditions specifying that when Comcast-NBCU enters into carriage agreements with smaller MVPDs, as defined above, for NBC broadcast station retransmission consent or RSNs, that Comcast-NBCU may not require or receive programming fees that are more than 5 percent higher than the best rates made available to other MVPDs. This core condition is intended to work in tandem with the special arbitration remedy, described in more detail below, to mitigate the harms of the proposed transaction with respect to smaller MVPDs. To strengthen this remedy, ACA has also proposed that each principal executive and financial officer of Comcast-NBCU certify to the Commission on an annual basis that its agreements for the covered programming are not in violation of this requirement.

[72] ACA Reply at 39-41; Rogerson II at 40-43.
[73] ACA Reply at 56; Rogerson II at 40.

The purpose is to provide smaller MVPDs with the same protection from unjustified programming fee increases for carriage of NBC broadcast station signals and RSNs that larger MVPDs will receive from the regular stand-alone agreement requirement and arbitration process. A few points bear emphasis.

Definition of Smaller MVPDs. This condition would only apply to carriage negotiations for broadcast stations signals and RSNs involving MVPDs with 125,000 or fewer subscribers for such programming. ACA's expert, Professor Rogerson, detailed the methodology he used for determining at what level arbitration would simply become unaffordable to an MVPD and therefore of no value in addressing the harms threatened by the transaction, thus leaving the smaller MVPDs and their subscribers unprotected.[74] Professor Rogerson's calculations revealed that, at a cost of about $1 million per arbitration, the remedy would not be economically justifiable to MVPDs with 125,000 or fewer subscribers for the disputed programming – local Big 4 network-affiliated broadcast station signals and RSNs. The Commission, of course, may make its own calculation of a subscribership cut-off point. The class representing smaller operators comprises just a fraction of MVPD subscribers overall. There is little danger, therefore, of distorting effects in the overall market for carriage of Comcast-NBCU broadcast station signals and RSNs.

Permissible Differentials in Price. As Professor Rogerson has explained, the provision that rates for smaller MVPDs may be 5 percent higher than the best rates that Comcast-NBCU offers any MVPD is meant to allow for the fact that there may be some cost savings associated with contracting with larger MVPDs in the sense that the fixed cost of contracting can be spread over a larger number of subscribers.[75] ACA and Professor Rogerson believe that a 5 percent fee to cover reasonable transaction costs associated with negotiating with smaller MVPDs is a generous estimate. As was true of the calculation of the level of subscribership below which arbitration of any kind would be uneconomic, the Commission may wish to determine for itself whether 5 percent represents a fair transaction fee, or whether the transaction costs of dealing with smaller operators are in fact either higher or lower than 5 percent of the rate offered to larger MVPDs.[76] Similarly, the Commission may also wish to choose a benchmark other than the best rate that Comcast-NBCU offers any MVPD for the covered programming.

Whatever the ultimate measure of the benchmark rate offered to smaller MVPDs, or the negotiating markup appropriate to cover the transaction costs of negotiating with smaller MVPDs, or size of MVPDs that may avail themselves of the special contracting and arbitration conditions, the benefit of adopting ACA's special conditions for stand-alone carriage agreements for broadcast signals and RSNs are unmistakable. They will prevent Comcast-NBCU from extracting above-market rates from smaller MVPDs due to increased

[74] Rogerson II at 42-43.
[75] Rogerson II at 48.
[76] Rogerson II at 48 ("I believe 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 than their per subscriber costs of dealing with larger MVPDs. In the course of reviewing the transaction, the Commission may consider assessing for itself the magnitude of such cost differences and use this to determine the appropriate percentage.").

bargaining power that comes from the vertical and horizontal harms previously discussed. They will not significantly alter the way the marketplace operates today where smaller MVPDs negotiate retransmission consent and RSN carriage agreements on their own behalf. And, it will provide smaller MVPDs with comparable relief from the post-transaction increased bargaining leverage of Comcast-NBCU that the general conditions will provide larger MVPDs.

2. Enforcement via Special Arbitration Process

The special binding commercial arbitration process proposed by ACA for smaller operators is the means by which the stand-alone agreement requirement for small operators can be enforced in an affordable and expeditious manner. It is designed to allow an MVPD to file a request for dispute resolution if it believes the special condition for stand-alone broadcast station and RSN pricing for smaller MVPDs described above is not being met. The question presented to the arbitrator will be limited solely to whether the final offer made by Comcast-NBCU meets the 5 percent condition or not. This arbitration process is, accordingly, distinct from the more complicated 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, once the special arbitration remedy is invoked by a smaller MVPD, only Comcast-NBCU makes a final offer that is submitted to the arbitrator, and the arbitrator directly determines only if this offer meets the 5 percent condition or not. If the arbitrator concludes that Comcast-NBCU's final offer is within the permissible range, then Comcast-NBCU and the smaller MVPD would be bound by it. If the arbitrator decides otherwise, he or she will be authorized to unilaterally adjust the terms and conditions of the final offer to bring it into compliance, and both parties to the arbitration will be bound by that decision.

Thus, the special arbitration remedy utilizes both the general and the special stand-alone contracting conditions for NBC broadcast stations and RSNs to enable the arbitrator to make the relatively simple determination whether Comcast-NBCU's final offer is within 5 percent of the lowest "Net Effective Rate" of any carriage agreement for the programming. The condition requires that the arbitrator be provided access to all relevant Comcast-NBCU programming agreements and other data and information so that the arbitrator can make an independent interpretation of whether the rate in the final offer is no more than 5 percent higher than the best rate Comcast-NBCU offers any MVPD for the broadcast stations signal or RSN programming in question. Since the stand-alone contracting condition will mean that the arbitrator can more easily compare prices for each disputed carriage agreement, and the arbitrator will have access to all pertinent carriage agreements, it should be relatively easy for him or her to determine whether the offered price is within 5 percent of the best price offered to other MVPDs.

To the extent there are variations in particular terms and conditions of carriage of these forms of local and regional programming from MVPD to MVPD, ACA's proposed conditions further directs the arbitrator to use industry standard practice to calculate dollar equivalents for variations in terms and conditions to produce a "Net Effective Rate" for each contract, thus leaving the arbitrator with the relatively simplified task only of determining, in each case, whether the net effective rate being offered by Comcast-NBCU is no more than 5 percent higher than the lowest net effective rate received by any MVPD for the programming in question. Only the arbitrator overseeing the smaller MVPD arbitration would be granted access to the relevant agreements entered into by Comcast-NBCU with other MVPDs. Thus, consistent with industry practice, the confidentiality of programming agreements entered into by Comcast-NBCU with other MVPDs will be protected which should be particularly important to the Applicants with respect to their negotiations with MVPDs that cannot avail themselves of this special condition.

Finally, it is important to note that, in view of the information imbalance between smaller MVPDs and Comcast-NBCU/the arbitrator, the arbitration remedy is designed as traditional, rather than baseball style, where only Comcast-NBCU submits its final offer to the arbitrator, and the arbitrator determines only whether the offered rate is outside the permissible range under the specified formula. Because Comcast-NBCU will know that, under these circumstances, it will be relatively simple for the arbitrator to determine if a particular offer represents fair market value as opposed to an exercise of anticompetitive bargaining power, the combined entity will be less likely to try and use its increased leverage to extract supra-competitive prices and more likely to offer, on its own, programming at commercially reasonable rates.

Critically, both the general and special conditions endeavor to make commercial arbitration a true remedy for all aggrieved MVPDs by narrowing the scope of issues presented to the arbitrator and consequently reducing the costs of arbitration. For smaller MVPDs, the keys to cost reduction involve a two-step process: first, increasing the visibility to the arbitrator (and only to the arbitrator) of Comcast-NBCU's pricing arrangements for stand-alone NBC broadcast signals and RSNs; and, second, further reducing the scope of arbitration to determining whether the disputed programming is being offered at a price no greater than 5 percent higher than the best price offered to other MVPDs. Even so, the arbitration will not be entered into lightly by the smallest operators on their own for two reasons. The process will not be cost-free and for smaller operators any cost is a deterrent, and the arbitrator will have the authority to approve Comcast's final offer or adjust the offer to one that meets the requirements of the conditions and creates some amount of uncertainty. For these reasons, it is unlikely that use of even the simplified dispute resolution remedy for smaller operators will become the norm in carriage negotiations.

3. Special Rules for Bargaining Agents

Finally, ACA has proposed special rules for bargaining agents that are designed to provide smaller operators with comparable remedies as larger operators, especially for accessing Comcast-NBCU's national cable networks.[77] ACA's proposals do this in two

[77] Historically, smaller MVPDs have used a bargaining agent, such as the National Cable Television Cooperative ("NCTC") or National Rural Telecommunications Cooperative ("NRTC"), to collectively negotiate carriage agreements for national cable networks but not to collectively negotiate carriage agreements for RSNs or retransmission consent agreements for local broadcast stations. One possible explanation is that the fixed costs of collective negotiations can be spread over a much larger number of MVPDs in the case of widely purchased national programming versus more narrowly purchased regional programming. Therefore, although ACA's special conditions for bargaining agents have been written

ways: first, through imposition of a “good faith” negotiating requirement on Comcast-NBCU with respect to bargaining agents, and second, by granting bargaining agents comparable rights to the general commercial arbitration remedy as an aggrieved MVPD.

The ACA’s proposed obligations on Comcast-NBCU to bargain in good faith with agents, critically describe three specific actions that would violate this duty, including impeding an agent’s ability to bargain effectively on behalf of all of its membership or principals, interfering with an MVPD’s right to be represented by an agent, and refusals to put forth offers of conditional rate schedules geared to varying subscribership levels of MVPDs who could subsequently opt into agreements for the programming.

Under the proposed bargaining agent condition that restricts Comcast-NBCU from negotiating with a bargaining agent on behalf of all of its members or principals, it would be a breach of the good faith obligation for Comcast-NBCU to refuse to deal unless certain principals or members of the agent are not included in the class of MVPDs represented. For example, it would be a breach of this requirement for Comcast-NBCU to make a condition of negotiations with a bargaining agent that its members who are also direct rivals of Comcast, such as WOW! or RCN, or those that operate in markets where Comcast-NBCU owns or controls multiple blocks of “must have” programming to not be permitted to be represented, or seek to exclude certain members of the National Cable Television Cooperative ("NCTC") or the National Rural Telecommunications Cooperative (“NRTC”), for example, knowing that NCTC or NRTC would have less bargaining power, and thus its remaining members would end up with higher fees.

Moreover, since MVPDs have programming agreements with varying expiration dates, Comcast-NBCU must not prevent a bargaining agent from jointly representing its principals or members in a single negotiation on the grounds that individual MVPD's contracts for the programming under negotiation expire at different times. Otherwise Comcast-NBCU could effectively fragment the classes of those who could benefit from any given collective negotiation, severely undermining the economic benefit of collective bargaining.

ACA’s proposed conditions would also prohibit Comcast-NBCU from refusing to enter into a retransmission consent or carriage agreement with an MVPD unless the operator agrees to refrain from being represented by a bargaining agent or opting into an agreement subsequently reached by an agent. This good faith obligation seeks to address similar concerns to those discussed above, but with respect to Comcast-NBCU’s one-on-one negotiations with other MVPDs rather than bargaining agents. For instance, in its

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broadly so that they in principal would apply to collective negotiations over all types of programming, it seems likely in practice that they will have their greatest effect on national cable programming, since this may be the only type of programming in which it will be economic for MVPDs to actually engage in collective negotiations. As noted earlier, in News Corp.-DirecTV and Adelphia-Time Warner-Comcast, the Commission had granted small MVPDs (those with more than 5,000 but fewer than 400,000 subscribers) the ability to choose to appoint an agent to bargain collectively on their behalf in carriage negotiations for RSN and broadcast station programming. ACA’s proposed condition in the current transaction is distinct from that requirement, which had dubious value, in that this remedy is designed especially for use by a bargaining agent in negotiations for national cable programming networks.

negotiations with a rival MVPD for a retransmission consent agreement, Comcast-NBCU could not require the MVPD to commit to not using a bargaining agent for its negotiations for national cable networks as a condition to reaching an agreement to carry the local broadcast station.

Without such requirements, programmers would be permitted to severely limit the number of companies that could bargain collectively at any one time, and exclude certain operators from utilizing the bargaining agent provision at all. This would be wasteful and utterly defeat the benefit of collective use of a bargaining agent to counteract the increased bargaining power the transaction will provide Comcast-NBCU.

The last good faith requirement proposed by the ACA would prohibit Comcast-NBCU from refusing to put forth prices, terms, and conditions for any set of different subscriber levels requested by the bargaining agent, up to its full membership. This takes into account the fact that the bargaining agent remedy is most likely to be utilized by established cooperative bargaining agents, such as NCTC and NRTC, whose members are not bound in advance to accept the agreements reached by their agent, but instead opt in after a deal has been struck. In addition to ensuring that a bargaining agent and its members may seek to organize as they see fit in their best interests, a final good faith requirement is proposed that specifically obligates Comcast-NBCU to put forth offers based on the bargaining agent's full membership. For example, if the bargaining agent is representing a class of operators who have a total 5 million subscribers, Comcast-NBCU must not refuse to put forth an offer for serving more than 1 million subscribers.

In addition to the simple good faith bargaining requirements, under ACA's proposal, bargaining agents are to receive the same rights as any MVPD to request that the regular commercial arbitration process be used to determine the fair market value of the disputed programming, and the arbitration process may be used to determine a conditional rate schedule over the entire range of subscribership levels that an agent's membership could provide. The arbitrator is instructed to determine the fair market value of the programming at any subscribership level in accordance with the level appropriate for a single MVPD with that number of subscribers. ACA and Professor Rogerson have explained that this will make available to smaller MVPDs the regular arbitration process for resolving disputes involving programming networks (which would otherwise be unaffordable), thus ensuring parity of relief for them and their subscribers from the adverse affects of the transaction.[78]

For bargaining agents whose members are not bound by the terms reached by the agent (non-binding agents), the actual prices, terms, and conditions of the agreement entered into by the bargaining agent's members whether through agreement or arbitration is determined by the aggregate number of MVPD subscribers of the bargaining agent's members that subsequently opt into the agreement. It is critical that the bargaining agent provision must not permit Comcast-NBCU from precluding MVPDs from entering into agreements reached through a bargaining agent by requiring MVPDs to enter into such agreements within a set period of time, knowing that certain MVPDs, whose contracts are not up at the time, could not do so without breaching their existing contract. Taking into

[78] ACA Reply at 61-63; Rogerson II at 51-52.

account the potential disruption that allowing MVPDs to exit their existing multi-year programming contracts with the Applicants today to entering into new deals reached by a bargaining agent that utilizes this condition, the bargaining agent provision must simply allow MVPDs to enter into the agreements reached by their bargaining agent once their existing contract expires.

4. **Duration of Conditions**

ACA has proposed that its conditions remain in effect for nine years.[79] This period is based on several factors, including the severity of the competitive harms arising from the transaction and the need for the conditions to remain in effect through a series of negotiation cycles to take account of the fact that current program carriage agreements may not be renegotiated for some time, and rates tend to ratchet upward as subsequent agreements are negotiated. This is consistent with the approach taken in News Corp.-DirecTV, where the commission noted that the license conditions were designed to cover two full retransmission consent negotiation cycles.[80] Finally, this period is consistent with recently executed carriage agreements with other parties to the proceeding that have durations of 10 years.[81] Providing targeted and effective remedies for small and mid-size MVPD purchasers and competitive operators over a 9 year period will ensure that customers get the content they desire at reasonable charges, without interruption.

V. Conclusion

In conclusion, ACA's proposed conditions build upon and improve conditions the Commission has previously relied upon to address competitive harms of media transactions, thus rendering them useful for MVPDs of all sizes. At bottom, the proposed conditions seek to prevent Comcast-NBCU post-transaction from extracting programming prices above fair market value from all MVPDs, but particularly from small and competitive MVPDs simply because they serve smaller numbers of subscribers or directly compete with the programming supplier in the provision of MVPD services. Adoption of ACA's proposals as license conditions will permit the Commission to approve the Applicants' license transfer requests while at the same time ensuring that the public interest in a healthy and competitive media marketplace is fully and effectively protected.

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[79] ACA Reply at 64.

[80] *News Corp.-Hughes Order*, 19 FCC Rcd., at 555, 576 ¶ 179, 226 n. 628; *Adelphia Order*,21 FCC Rcd., at 8276 ¶ 164,

[81] *See* ACA Reply at 64, n.127; *see also* David P. Willis, *Cablevision and Fox are Duking it Out,* ASBURY PARK PRESS, Oct. 10, 2010, *available at* http://www.app.com/article/20101010/BUSINESS/10100326/Cablevision-and-Fox-are-duking-it-out ("In August, CBS Corp. and Comcast Corp., New Jersey's largest cable operator, signed a 10-year agreement to retransmit CBS television stations to 2020. 'In this time of rapidly changing technology and viewership interest, we were able to structure a deal that gives customers the content they want without any threat of disrupting their service,' Comcast Chairman and Chief Executive Officer Brian L. Roberts said at the time."); Brian Stetler, *CBS and Comcast* Reach a 10-Year Deal on Fees, N.Y. TIMES, Aug. 2, 2010, at B5, *available at* http://www.nytimes.com/2010/08/03/business/media/03cbs.html.

<u>ATTACHMENT B</u>

ACA'S PROPOSED COMCAST-NBCU LICENSE TRANSFER CONDITIONS

ACA's Proposed Comcast-NBCU License Transfer Conditions

I. Definitions

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.[1]

"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.

"Covered RSNs" means all regional sports networks ("RSNs") that are currently or in the future owned, controlled or managed by Comcast-NBCU.[2]

"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 video-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.

"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.

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[1] 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.
[2] "Regional Sports Network" shall have the same meaning as in the Adelphia-Time Warner-Comcast Order.

II. General Conditions Applicable to all MVPDs

A. Program Access Conditions

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 stations 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 its 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.

B. Requirements for 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.

C. Commercial Arbitration Remedy

1. When negotiations fail to produce a mutually acceptable set of prices, terms and conditions for (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.[3]

[3] 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.

III. Special Conditions Applicable to Smaller MVPDs

A. 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 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 Conditions III.A.1. or III.A.2.

B. Special Commercial Arbitration Remedy for Smaller MVPDs

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.A.1. or III.A.2.

2. The special commercial arbitration remedy for Smaller MVPDs shall be a traditional arbitration conducted in accordance with the Rules for the Special Commercial Arbitration Remedy for Smaller MVPDs contained in Appendix A, different from the “final offer” or “baseball” arbitration outlined in Condition II.C.1.

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

C. Special Rules for Bargaining Agents

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 for Covered Programming to commercial arbitration as an MVPD, pursuant to the rules outlined in Condition II.C.1, 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.[4]

IV. Duration of Conditions

A. 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.

[4] 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.

<u>**Appendix A**</u>

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.

B. Comcast-NBCU shall be obligated to make available to the arbitrator all relevant contracts and other data and information, including its calculations of the Net Effective Rate for all retransmission consent agreements for the Covered NBC Station or for all carriage agreements for the Covered RSN 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.

D. Comcast-NBC 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. 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.