CM CINNAMON MUELLER
A Professional Limited Liability Company

Barbara S. Esbin
Admitted in the District of Columbia

1333 New Hampshire Ave., NW, Fl 2
Washington, DC 20036
Telephone: (202) 872-6811
Facsimile: (202) 683-6791

Chicago Office
307 North Michigan Ave., Suite 1020
Chicago, Illinois 60601
Telephone: (312) 372-3930
Facsimile: (312) 372-3939

November 5, 2010

Via ECFS

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

Re: American Cable Association ("ACA") Notice of Ex Parte Presentation; *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:

On November 4, 2010, Matt Polka and Ross Lieberman, American Cable Association; Professor William P. Rogerson, Northwestern University; Tom Cohen, Kelley Drye & Warren LLP; and the undersigned, met with Krista Witanowski, legal advisor to Commissioner Baker. All of the participants, except Tom Cohen, met with Dave Grimaldi, Angela Kronenberg, and Louis Peraertz, legal advisors to Commissioner Clyburn. In the meetings, participants discussed the horizontal and vertical harms of the proposed Comcast-NBCU transaction and the safeguards ACA has proposed to protect consumers and competition described in ACA's Comments filed June 21, 2010, Response to Comments filed July 21, 2010, and Reply filed August 19, 2010 in the above-referenced proceeding.[1]

During the meeting, Professor Rogerson presented the information on the slides attached hereto as Exhibit 1. Specifically, Professor Rogerson described how the transaction will allow Comcast-NBCU to raise programming fees above levels they would be able to command without combining assets, and these fee increases will largely be passed through to subscribers in the form of higher subscription prices. This consumer harm will manifest itself in two ways: (1) vertical harm arising from the combination of NBCU key programming assets with Comcast's cable distribution assets permitting Comcast-NBCU to raise the fees it charges for NBUC programming to Comcast multichannel video distributor rivals (MVPDs); and (2) horizontal harm resulting from the increased

[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) ("ACA Comments"); Response to Comments of the American Cable Association (filed July 21, 2010); Reply of the American Cable Association (filed Aug. 19, 2010) ("ACA Reply"). In addition ACA's concerns are documented in ex parte letters filed on August 27, 2010, September 21, 2010 ("ACA September 21st Ex Parte"), September 22, 2010, October 12, 2010, and October 29, 2010 ("ACA October 29th Ex Parte").

market power derived from combining NBCU's key programming assets with Comcast's key programming assets that will allow Comcast-NBCU to raise the fees charged for programming to all MVPDs.[2]

The vertical harms threatened subscribers of rival MVPDs arise from the combination of Comcast cable distribution networks with must have NBCU national cable programming networks and NBC owned and operated (O&O) broadcast televisions stations.[3] The horizontal harms threatened subscribers of all MVPD programming purchasers arise from the combination of three blocks of must have programming, NBC broadcast stations, Comcast regional sports networks (RSNs) and the suite of highly-rated NBCU national cable programming networks.[4] Professor Rogerson explained the magnitude of yearly net consumer harms the proposed transaction poses for subscribers of the smaller MVPDs who purchase "must have" programming assets owned by the Applicants and for those MVPDs who both purchase Comcast-NBCU programming and compete in downstream distribution markets with Comcast. Professor Rogerson reported that:

- the combination will result in $2.4 billion in net consumer harms over a 9 year period;
- the quantifiable consumer harms of the transaction ($2.57 billion) are more than 10 times greater than the quantifiable consumer benefits ($204 million) claimed by the Applicants;
- the horizontal harm ($1.14 billion) is nearly as great as the vertical harm ($1.43 billion); failure to bring NBCU national cable programming networks within the scope of license transfer conditions would leave a sizeable portion of transaction-specific harms ($1.56 billion) unremedied; and
- the quantifiable consumer harms of the transaction will be felt by consumers across the county, but especially so in Philadelphia, PA, Chicago, IL, San Francisco, Washington, DC, and Hartford, CT, which are served by both an NBC O&O and Comcast RSN, and Comcast has a significant cable presence.

Finally, Professor Rogerson stressed the need for smaller MVPDs to have an effective remedy to address these harms, one comparable to the straightforward condition concerning access to Fox broadcast television station signals that the Commission imposed in News Corp.-DirecTV for MVPDs serving 5,000 or fewer subscribers.[5] In News Corp.-DirecTV, the Commission recognized that the "costs of arbitration may overwhelm MVPDs with fewer than 5000 subscribers, thereby providing them with little relief from the harms associated with this transaction."[6] Accordingly, the Commission required News Corp. to either elect "must carry" status or negotiate retransmission

[2] *See* ACA Comments at 17-37; ACA Reply at 7-25; ACA September 21st Ex Parte, Exhibit 1; ACA October 29th Ex Parte at 1-3. In two supporting studies, Rogerson I and II, Professor Rogerson explained how to calculate the magnitude of the programming fee increases that will result from each source of harm depending on the type of programming being purchased and the type of MVPD purchasing the program. These studies are attached as exhibits to ACA's June 21st Comments and August 19th Reply. *See* ACA Comments, Exhibit A, William P. Rogerson, "Economic Analysis of the Competitive Harms of the Proposed Comcast-NBCU Transaction" (Rogerson I); ACA Reply, Attachment A, William P. Rogerson, "A Further Economic Analysis of the Proposed Comcast-NBCU Transaction" (Rogerson II).

[3] *See* ACA Comments at 25-37; ACA Reply at 14-25. By implication, this same vertical harm would extend to any NBC broadcast affiliate on whose behalf Comcast-NBCU negotiates retransmission consent, as the Commission has previously noted in News Corp.-DirecTV. *See In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee*, MB Docket No. 03-124, Memorandum Opinion and Order, 19 FCC Rcd. 473, 572, ¶ 218 (2004) ("News Corp.-Hughes Order").

[4] ACA Comments at 18-25; ACA Reply at 7-14.

[5] *See* News Corp.-Hughes Order at 575, ¶ 224.

[6] *Id.*

consent for its owned and operated stations without any requirements for cash compensation or carriage of programming other than the broadcast signal.[7]

Professor Rogerson described how ACA's proposed special conditions for smaller MVPDs, who have found baseball-style commercial arbitration too expensive due to its high fixed costs and the small numbers of subscribers who could benefit from successful resolution of such cases, would achieve a similar level of clarity and effectiveness.[8] For MVPDs with 125,000 or fewer subscribers in the relevant market of the NBC broadcast station or Comcast RSN, ACA has recommended a simplified dispute resolution procedure that would enable these smaller operators to carry these networks on a similar basis to larger operators. This procedure is based upon ensuring access to comparable agreements, with a clearly defined limit on surcharges for negotiations with smaller operators.

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

Barbara S. Esbin

Enclosures

cc (*via email*): Krista Witanowski
Dave Grimaldi
Angela Kronenberg
Louis Peraertz

[7] *Id.*
[8] The complete set of conditions proposed by ACA is attached as Exhibit 2.

EXHIBIT 1

COMPETITIVE HARMS OF THE PROPOSED COMCAST-NBCU TRANSACTION AND CONDITIONS TO REMEDY THESE HARMS

American Cable Association

Overview of Presentation

- **Economic Harms of the Transaction**
  - Comcast and NBCU Key Assets
  - Horizontal Harm
  - Vertical Harm

- **Conditions**
  - Program Access Rules are Insufficient
  - Mandatory Binding Arbitration Conditions of Past Mergers are Insufficient
  - ACA's Proposed Conditions

Economic Harms of the Transaction

Comcast and NBCU Key Assets

- **NBCU Programming Services**
  - NBC Network with 10 O&O Stations
  - Suite of National Cable Networks
    - USA, Syfy, MSNBC, Bravo, mun2, Oxygen, & CNBC
  - Telemundo Network with 15 O&O Stations
  - Hulu Online Video Service

- **Comcast Programming Services**
  - 9 Comcast RSNs
  - Suite of National Cable Networks
    - E!, TV One, Versus, Style, Golf Channel, & G4
  - Fancast & TV Everywhere Online Video Service

- **Comcast MVPD Services**
  - Largest cable operator serving 23.8 M subs in 39 states
  - Largest residential broadband op serving 15.7 M subs

Economic Harms of the Transaction

Primary Issues FCC and DOJ are Examining

- **MVPD Matters:**
  - Horizontal Harms (in Programming Market)
  - Vertical Harm to Rival MVPDs
  - Vertical Harm to Rival Programmers

- **Online Matters:**
  - Will deal allow Comcast-NBCU to:
    - Withhold online programming from rival MVPDs?
    - Hinder development of Internet-only MVPDs?

- **ACA Mostly Focusing on Two MVPD Matters: Horizontal Harms (in Programming Market) and Vertical Harms to Rival MVPDs**

Horizontal Harm

Theory

- Combined ownership of NBCU and Comcast programming will increase the joint venture's market power over programming

- The best available evidence on the effect of combined ownership or control on programming fees suggests that the joint venture could increase programming fees by 22% or more

- Regions most affected by the transaction will be -- although harms could be more extensive:
  - Areas served by an NBC O&O and a Comcast RSN
  - Areas served by a Comcast RSN only

Horizontal Harm

Markets Affected

6 TV Markets with both an NBC O&O & a Comcast RSN

Rank	DMA	NBC O&O	Comcast RSN	TV HH
3	Chicago, IL	WMAQ	CSN Chicago	3,501,010
4	Philadelphia, PA	WCAU	CSN Philadelphia	2,955,190
6	San Francisco-Oakland-San Jose, CA	KNTV	CSN Bay Area & CSN California	2,503,400
9	Washington, DC (Hagerstown, MD)	WRC	CSN Mid-Atlantic	2,335,040
17	Miami-Fort Lauderdale, FL	WTVJ	CSN Southeast	1,538,090
30	Hartford and New Haven, CT	WVIT	CSN New England	1,010,630
			TOTAL	**13,843,360**

TV Markets Above Represent **12.1%** of 2010 Total US TV Households

Comcast Cable has a substantial presence in all 6 of these TV markets

Horizontal Harm

Markets Affected

54 TV Markets with Comcast RSN and without NBC O&O

Albany-Schenectady-Troy, NY
Atlanta, GA
Augusta, GA
Baltimore, MD
Bangor, ME
Bend, OR
Birmingham (Anniston and Tuscaloosa), AL
Boston, MA (Manchester, NH)
Champaign and Springfield-Decatur, IL
Charleston, SC
Charlottesville, VA
Chattanooga, TN
Chico-Redding, CA
Dothan, AL
Eugene, OR
Fresno-Visalia, CA
Ft. Myers-Naples, FL
Ft. Wayne, IN
Greenville-Spartanburg, SC-Asheville, NC-Anderson, SC
Harrisburg-Lancaster-Lebanon-York, PA
Harrisonburg, VA
Hattiesburg-Laurel, MS
Houston, TX
Huntsville-Decatur (Florence), AL
Jackson, MS
Jacksonville, FL
Knoxville, TN
Lafayette, IN
Little Rock-Pine Bluff, AR
Memphis, TN
Meridian, MS
Mobile, AL-Pensacola (Ft. Walton Beach), FL
Monroe-El Dorado, AR
Monterey-Salinas, CA
Myrtle Beach-Florence, SC
Nashville, TN
Paducah, KY-Cape Girardeau, MO-Harrisburg, IL
Panama City, FL
Peoria-Bloomington, IL
Portland, OR
Portland-Auburn, ME
Providence, RI-New Bedford, MA
Richmond-Petersburg, VA
Roanoke-Lynchburg, VA
Rockford, IL
Sacramento-Stockton-Modesto, CA
Salisbury, MD
Savannah, GA
Seattle-Tacoma, WA
South Bend-Elkhart, IN
Spokane, WA
Tampa-St. Petersburg (Sarasota), FL
West Palm Beach-Ft. Pierce, FL
Wilkes Barre-Scranton, PA

TV Markets Above Represent 32,064,500 Total TV Households or <u>27.9%</u> of 2010 Total US TV Households

Vertical Harm to Rival MVPDs

Theory

- Whenever NBCU sells programming to Comcast's rivals, this reduces Comcast's profit
- Pre-transaction, NBCU doesn't care about the profitability of Comcast's business
- Post-transaction, NBCU does care and will view Comcast's lost profit as an additional cost of providing its programming to Comcast's rivals
- This new opportunity cost of providing programming to Comcast's rivals will result in higher programming fees to Comcast's rivals

Vertical Harm to Rival MVPDs

Estimated Magnitude of Vertical Harm

- 1. Following the Nash Bargaining Model, the formula for calculating the increase in programming fees is given by:

$$\Delta P \quad = \quad \alpha\, d\, \pi\, /2$$

where the variables are defined as follows

ΔP,	increase in programming fees
π,	profit that affiliated MVPD earns per sub.
d,	fraction of unaffiliated MVPD's subs that will leave if programming is withdrawn
α,	fraction of leaving customers that switch to the affiliated MVPD

- 2. An illustrative calculation using plausible parameter values

$\pi =$ $40 per subscriber per month
$d =$ .05
$\alpha =$ .5

ΔP = $.50 per subscriber per month

Vertical Harm to Rival MVPDs

Markets Affected

- **DBS providers and national telcos**
  - 6 DMAs that both have an NBC O&O and are substantially served by Comcast
    - Approx. 12.1% of all US TV households reside in these DMAs
    - Plausibly, NBC O&O retrans fees will ↑ 100% for MVPDs here
  - Nationwide
    - Plausibly, NBCU's National Cable Nets fees will ↑ 18-20%

- **Regional cable overbuilders**
  - Plausibly, if Comcast passes all of an overbuilder's customers, its retrans fees will ↑ over 100% and its fees for NBCU's national cable networks will ↑ 44%.
  - An overbuilder will still experience significant price increases even if the share of its customers passed by Comcast drops to more modest levels

Conditions

Overview of Conditions Discussion

- **Existing program access rules are insufficient**
  - Expanding these rules to cover more types of programming will not remedy the vertical harm (and will obviously not remedy the horizontal harm either)
- **Binding arbitration conditions of the sort imposed in the News Corp-DIRECTV and Adelphia-TWC-Comcast transactions are insufficient because they are unaffordable for smaller MVPDs**
- **ACA's Proposed Conditions**

Conditions

Program Access Rules are Insufficient

- **Program access rules have 5 major problems:**

  1) They do not apply to broadcast stations, i.e. retransmission consent
  2) They do not constrain unjustifiable quantity discounts
  3) They do not restrict internal transfer pricing
  4) They do not provide an automatic right to carriage while a complaint is being investigated by the FCC
  5) It is unclear whether they apply to online services

- **The Program Access rules alone are not a sufficient remedy for the harms of the Comcast-NBCU transaction**

Conditions

Baseball-Style Arbitration is Insufficient

- **Baseball-style arbitration of the sort implemented by conditions in the News Corp.-DIRECTV and Adelphia-TW-Comcast transactions is unaffordable for smaller MVPDs**

- The economic problem
  - Cost of arbitration is relatively fixed regardless of the number of subscribers an MVPD has
  - Benefits of arbitration are directly proportional to the number of subscribers an MVPD has
  - Available evidence suggests that cost of arbitration is approximately $1 million
  - **For MVPDs with 125,000 or less subs for a particular type of programming, it is not financially viable to pursue even "reasonably strong" arbitration cases**

Conditions

ACA's Proposal

- **General Conditions Applicable to All MVPDs**
  - The program access rules will apply to all Comcast-NBCU broadcast stations and all other Comcast-NBCU affiliated programming, regardless of the platform in which it is delivered to consumers, including on-line
  - Comcast-NBCU must enter into stand-alone agreements for NBC O&Os and Comcast RSNs with all MVPDs
  - MVPDs shall have a right to baseball-style arbitration to resolve carriage disputes for (1) NBC O&Os; (2) Comcast RSNs; and (3) Comcast-NBCU National Cable Networks

Conditions

ACA's Proposal

- **Special Conditions Applicable to Smaller MVPDs***
  - Smaller MVPD negotiations involving NBC O&Os and Comcast RSNs
    - Comcast-NBCU may not charge smaller operators more than 5% higher than the lowest fee it charges to any other MVPD
    - Smaller MVPDs shall have a right to non-baseball-style arbitration to ensure Comcast-NBCU does not overcharge smaller MVPDs

    * A "Smaller MVPD" is an MVPD with 125,000 or less subs in the region/market served by a NBC O&O or Comcast RSN

Conditions

ACA's Proposal

- **Special Conditions Applicable to Smaller MVPDs**
  - "Bargaining Agent" negotiations involving Comcast-NBCU National Cable Networks and other programming, as applicable
    - Comcast-NBCU must negotiate fairly with a "Bargaining Agent," including the NCTC, based on its membership
    - A "Bargaining Agent," including NCTC, shall have a right to baseball-style arbitration to resolve carriage disputes on behalf of its members
- **Duration: ACA's Proposed Conditions shall last 9 years**

EXHIBIT 2

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.

[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.

Appendix A

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.