Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Applications of Comcast Corporation,	)	MB Dkt No. 10-56
General Electric Company and NBC	)	
Universal, Inc. For Consent to Assign	)	
Licenses or Transfer Control of Licensees	)	

JOINT PETITION TO DENY OF
CONSUMER FEDERATION OF AMERICA
CONSUMERS UNION
FREE PRESS
AND MEDIA ACCESS PROJECT

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SUMMARY

The Federal Communications Commission ("Commission") should deny the Comcast/NBCU application in its entirety. Even a conditional authorization of Comcast's acquisition of control of NBCU would present too much harm to the public interest.

This is the first major media merger since the deployment of broadband technology capable of distributing video content. If consummated, Comcast and NBCU ("Applicants") would control two national broadcast networks, multiple local broadcast stations, a movie studio, cable networks, Internet properties, a cable operator, and a broadband service provider. Comcast is already the nation's largest cable operator, largest broadband service provider, and one of the leading providers of regional cable sports and news networks. Allowing it to acquire one of the nation's premier video content producers would enable Comcast to extend its existing market power, especially with respect to emerging platforms. The result would be higher prices, fewer programming and provider choices, and diminished media diversity. It would inhibit innovation in budding markets and encourage other similarly situated companies to follow suit.

This transaction is unprecedented in its scope. Approval would allow a single company to own a huge array of popular content and enable it to exert undue influence over how that content – and the content produced by competitors – is distributed over the airwaves, cable, and Internet. Control over any one of these elements would be sufficient to warrant rejection of the merger application. Taken together, they overwhelmingly require that result.

Applicants have attempted to gloss over the harms to competition, localism, and diversity that would result from the transaction. While they claim that the merger, if approved, will generate substantial public benefits, many of these purported benefits are vague and insubstantial. Other so-called benefits would actually diminish competition and diversity in the

programming available to consumers. Additionally, even though Applicants offer a number of voluntary "commitments" as part of their merger application, none of these offers even address, never mind remedy, the competitive harms presented by the merger.

Applicants mistakenly contend that combining the properties is essentially a vertical transaction which will have virtually no competitive impact. They disregard the significant horizontal concentration that would occur as a result of the merger, as well as the diminished competition in specific geographic and product markets: head-to-head competition in local video markets, head-to-head competition for programming viewers, and head-to-head competition for distribution platforms.

Applicants also discount the detrimental effects of the vertical aspects of the merger. The true competitive dangers lie where the Applicants' horizontal market power and vertical leverage intersect; Applicants' substantial market power will allow the combined company to exercise undue and anticompetitive control in both the existing and emerging distribution and programming markets.

Comcast emphasizes that it has "only" a 25 percent share of the nation's TV homes, but this sleight of hand ignores regional concentration; it is already, by far, the dominant video and broadband provider in the urbanized markets it serves. Post merger, it would control more than one in five TV viewing hours in those communities. Adding NBCU content to Comcast's regional sports networks content will give the combined companies substantial control over three critical areas of "must have" programming: sports, news, and women's programming. Allowance of this merger would allow Comcast to raise prices, foreclose and block competitive entry, force unwanted program "bundles" on other cable and DBS systems, and discriminate against competing programmers seeking carriage.

The transaction would also afford the Applicants vastly increased ability to restrain merging online video competitors. Indeed, Comcast is already using its "TV Everywhere" offering, Fancast Xfinity, to cut off the flow of programming to disruptive new entrants. Adding NBCU feature films and branded content, as well as an equity stake Hulu, would give Comcast a powerful weapon to kill off emerging Internet-based competition before it can ever get off the ground. Comcast's denials of such intent ring hollow in light of the disclosure that it long used deceptive practices to block lawful distribution of video files and then gave false statements to the FCC about its conduct.

NBCU's large stable of video content, if combined with Comcast's cable systems, would enable the combined company to wield awesome power to withhold content, raise costs for competing video providers, and force competitors to carry less desirable Comcast/NBCU networks. Retransmission consent rights would be an especially valuable weapon in this regard. Comcast disputes this, but the economic arguments it presents overlook how Comcast can target emerging and small competitors. Nor does Comcast assess less extreme tactics, such as delaying the availability of programming or raising the price of must-have content. While the Communications Act theoretically requires cable operators to share their programming with competitors, in practice it has proven ineffective in achieving this goal. Thus, Comcast's commitment to adhere to Commission "program access" rules for as long as "current" policies remain in effect rings hollow.

The proposed merger is not only anticompetitive, but it also threatens to undermine diversity and localism. By allowing Comcast to tie and bundle its programming networks, the transaction would deny carriage opportunities to minority and independent programmers. The FCC's existing program carriage rules offer no meaningful protection for unaffiliated

programmers, and Comcast's promise to add two channels annually to unspecified program tiers does little to remediate this harm.

The deal would have extremely negative impacts on the amount and diversity of consent in local markets. Even where Comcast would not have NBC owned and operated stations, it would be able to favor NBCU content. Post-merger, it could offer less favorable payment and channel placement to non-NBC stations. Moreover, its ability to cross-sell cable and TV advertising on NBC-owned stations (including Telemundo stations) would give it significant power over those markets, especially in Chicago, Miami, Philadelphia, San Francisco, and Washington, DC. Among other things, this could lead to an overall decline in the provision of local news and public affairs programming from diverse sources. The Applicants' claim that the merger will allow them to increase their own programming capacity is dubious to begin with, and even this would come at the expense of source diversity. It is especially telling in this regard that the Applicants do not make similar promises for Telemundo properties. Under NBCU, Telemundo's local operations have been significantly cut back, and it has failed to comply with an FCC directive to sell off its Los Angeles triopoly. There is every reason to doubt that Comcast will improve on this performance.

The Applicants' "voluntary" promises to improve on NBCU's performance do nothing to address the significant harms that would be caused by the merger. Many amount to little more than rhetorical flourish or are unenforceable and/or simply maintain the pre-merger *status quo*.

Accordingly, Public Interest Petitioners urge the Commission to carefully consider the detrimental affects of a Comcast/NBCU merger on competition and the public interest, and respectfully request that the Commission deny Applicants' merger application and attendant broadcast license transfers and grant all such other relief as may be just and proper.

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PETITION TO DENY

The Consumer Federation of America, Consumers Union, Free Press, and Media Access Project (jointly "Public Interest Petitioners") respectfully submit the foregoing Petition to Deny (the "Petition") *the Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses or Transfer Control of Licensees* (the "Application"). As the Petition and appended expert and citizen declarations demonstrate, the proposed transaction does not satisfy the high burden imposed by the public interest standard mandated by the Communications Act. As set forth below, Public Interest Petitioners believe that the harm inflicted by this proposed transaction would be so great that no conditions the Commission could impose would be sufficient to justify approval of the Application.

On December 3, 2009 Comcast Corporation (Comcast) and General Electric Company (GE), the parent company of NBC-Universal (NBCU) announced their intent to enter into a joint venture pursuant to which Comcast would acquire a majority stake in NBC.[1] The merger will combine NBCU's national broadcast television networks (NBC

[1] Joint Announcement by Comcast and General Electric Company, "Comcast and GE to Create Leading Entertainment Company," (Dec. 3, 2009) *available at* http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=938.

and Telemundo), the affiliated owned and operated NBC and Telemundo broadcast licenses, NBC cable networks, and the movie studio, Universal Motion Pictures, with Comcast's cable networks, regional sports networks, online content business, and Comcast's vast cable and Internet distribution operations. On January 28, 2010 Comcast and GE, and NBCU (together "Applicants") submitted a joint application to the Federal Communications Commission seeking consent to transfer control of GE's broadcast licenses to Comcast.[2] At the direction of the Commission staff, the Applicants have subsequently submitted additional information supposedly to correct insufficiencies in their showings. The Commission now seeks comment on the proposed merger and whether the transaction should be approved.[3]

Standard of Review

Under the Communications Act, to approve the proposed transaction, the FCC must find that proposed merger and attendant license transfers serve the public interest. Specifically, the Commission must deny the transfer of licenses if the Commission determines that the transfer is not in "public interest, convenience and necessity."[4] To make this finding, the FCC must weigh the potential public interest harms and benefits,[5]

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[2] *In the Matter of Applications of Comcast Corp., General Elec. Co. and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licenses*, filed MB Dkt 10-56 (Jan 28, 2010) (*Application*).

[3] *Notice*, Commission Seeks Comment on the Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc., to Assign and Transfer Control of FCC Licenses, MB Dkt 10-56 (rel. Mar. 18, 2010) (*FCC Notice*).

[4] Codified at 47 U.S.C. § 310(d).

[5] *In the Matter of General Motors Corp. and Hughes Elec. Corp. and the News Corp. Ltd., for Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd 473, ¶15 (2004) (*GM/News Corp Order*)..

and determine that, as threshold matter, the merger does not violate a statute or rule, or otherwise interfere with the objectives of the Communications Act.[6]

The Commission's consideration includes the merger's effect on competition, but its review is not limited by antitrust laws.[7] Indeed, the Commission's review must meet a higher standard than mere congruence with antitrust principles. The Commission has found that the public interest standard "necessarily encompasses the broad aims of the Communications Act."[8] Thus, in addition to competition, the Commission has determined that the public interest involves, among other things, diversity and localism.[9] Moreover, the Applicants seeking Commission approval of the proposed transaction "bear the burden of proving, by a preponderance of the evidence, that the proposed

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[6] *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., to AT&T Corp.*, Memorandum Opinion and Order, 15 FCC RCD 9816 ¶¶8,9 (2000); *GM/News Corp Order*, 19 FCC Rcd 473, ¶16.

[7] *See, e.g., Applications for Consent and transfer from Tele-Communications, Inc. to AT&T Corp*., 14 FCC Rcd 3160, 3168 (1999).

[8] *Applications Filed for the Transfer of Certain Spectrum Licenses and Section 214 Authorizations in the States of Maine, New Hampshire, and Vermont from Verizon Comm. Inc. and its Subsidiaries to FairPoint Comm., Inc*., 23 FCC Rcd 514, 520 ¶ 12 (2008); *In the Matter of AT&T and Bell South Corporation, Application for Transfer of Control*, 22 FCC Rcd 5662, 5673 ¶ 20 (2007) (*AT&T/Bell South Order*).

[9] For example, factors considered to be in the public interest may include, among other things, "a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private sector deployment of advanced services, promoting a diversity of license holdings, and generally managing the spectrum in the public interest." *See* 47 U.S.C. § 157 nt. (incorporating section 706 of the Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 56 (1996) (*1996 Act*), 254, 332(c)(7)); *1996 Act*, Preamble. *In the Matter of Applications Filed for the Transfer of Certain Spectrum Licenses and Section 214 Authorizations in the States of Maine, New Hampshire, and Vermont from Verizon Communications Inc. and its Subsidiaries to FairPoint Communications, Inc.*, 23 FCC Rcd 514, 520 ¶ 12 (2008);,*AT&T/Bell South Order*, 22 FCC Rcd 5662, 5673 ¶ 20 (2007).

transaction, on balance, will serve the public interest."[10] Accordingly, the Applicants bear the burden of demonstrating that the merger would enhance (rather than merely preserve) competition.[11]

The Applicants have failed to make this showing. Indeed, they cannot make this showing. Not only is this merger unprecedented in the history of the video marketplace in terms of its scope, it is also unprecedented in terms of the harms it will wreak on competition and potential innovation in existing and emerging video markets. If the Commission approves the proposed transaction, it will lay the groundwork for a single company to own a huge array of popular content and enable it to exert undue influence over how that content – and the content produced by competitors - is distributed over the airwaves, cable, and Internet. Control over any one of these elements would be sufficient to warrant rejection of the merger application. Taken together, they overwhelmingly require that result.

In their initial submissions, Applicants attempted to gloss over, or failed to address completely, the harms to competition, localism, and diversity that would result from the transaction. Even after the Commission staff required extensive supplementation, they have failed to show that grant is in the public interest. While the Applicants claim that the merger, if approved, will generate substantial public benefits,

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[10] *In the Matter of New Corp. and the DIRECTV Group, Inc., and Liberty Media Corp., For Authority to Transfer Control*, Memorandum Opinion and Order, 23 FCC Rcd 3265, 22 (2008) (*NewsCorp/DIRECTV Order*).

[11] *See Applications for Consent to the Transfer of Control of Licenses XM Satellite Radio Holdings Inc., Transferor to Sirius Satellite Radio, Inc., Transferee*, Memorandum Opinion and Order and Report and Order, 23 FCC Rcd 12348, ¶ 32 (2008);, *In the Applications of NYNEX Corporation Transferor, - and - Bell Atlantic Corporation Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, 12 FCC Rcd 19985, 19987, ¶ 2 (1997).

many of these purported benefits are vague and insubstantial. Other so-called benefits would actually diminish competition and diversity in the programming available to consumers. Additionally, even though Applicants offer a number of voluntary "commitments" as part of their merger application, none of these offers even address, never mind remedy, the competitive harms presented by the merger. A number of them are no more than promises to comply with existing legal requirements. Moreover, to the extent that any of these offerings provide any benefits at all, they are trivial and cannot be effectively monitored or enforced. Consequently, the Commission should reject the proposed merger as contrary to the public interest.

I. The Proposed Merger Is Unprecedented In Its Scope and Impact

This is the first major media merger since the deployment of broadband technology capable of distributing video content. As such, the merger of Comcast and NBCU is a hugely complex undertaking, unlike any other in the history of the video marketplace. If consummated, the Comcast/NBCU merger represents the first time that a single company would own two national broadcast networks, multiple local broadcast stations, a movie studio, cable networks, Internet properties, a cable operator, and a broadband service provider. In addition to the scope of the properties that would be housed under a single corporate roof, the size and power of the parties at stake is significant. Comcast is the nation's largest cable operator, largest broadband service provider, and one of the leading providers of regional cable sports and news networks.[12] NBCU has one of only four major national broadcast networks and one of two Spanish

[12] Comcast's cable systems currently serve 24.2 million subscribers. Comcast's broadband network passes more than 50 million homes and provides high speed Internet service to about 15 million households, making Comcast the largest residential broadband access provider.

language networks. It is the third-largest owner of local TV stations in terms of audience reach, a significant producer of local and national news, and the owner of major motion picture studio.

Given the massive consolidation in the media and telecommunications industries in the last fifteen years, it is easy to become inured to new mergers as a foregone conclusion, or to discount the impact of a particular merger on the market. But make no mistake, allowing the largest cable operator in history to acquire one of the nation's premier video content producers will radically alter the structure of the video marketplace. The merging parties are already among the dominant players in the current video market. This merger will give them the incentive and ability to not only preserve and exploit the worst aspects of the current market, but also to extend them to emerging markets. The merger will result in higher prices, fewer programming and provider choices, and diminished media diversity. It will inhibit innovation in budding markets and will encourage other similarly situated companies to follow suit or suffer diminished market power relative to what the Applicants will possess post-merger.

Applicants mistakenly contend that combining the properties will have virtually no competitive impact and that "[v]iewed from every angle, the transaction is pro-competitive."[13] Applicants' characterization of the proposed transaction is incomplete and inaccurate. First, Applicants disregard the significant horizontal concentration that would occur as a result of the merger, as well as the diminished competition that would be a consequence. Instead, they suggest that the transaction is entirely vertical in nature[14]

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[13] *Application*, at iii.

[14] "[I]t is clear that the proposed transaction is essentially a 'vertical' transaction." *Application*, at 103.

and does not present any horizontal competitive harm.[15] To the contrary, as demonstrated in this pleading and accompanying expert declaration, this merger will likely reduce competition in specific geographic and product markets: head-to-head competition in local video markets, head-to-head competition for programming viewers, and head-to-head competition for distribution platforms.[16]

Second, Applicants discount the detrimental effects of the vertical aspects of the merger, arguing generally that such combinations are positive developments since "vertical mergers may generate significant efficiencies, such as reducing transaction costs, limiting free riding by internalizing incentives, and taking advantage of technological economies."[17] Yet, vertical mergers may not prove as beneficial – or as innocuous – as Applicants assert. As former FTC Commissioner and current Assistant Attorney General of the Antitrust Division of the Department of Justice, Christine Varney has explained:

> Vertical mergers can create or raise entry barriers that lead to higher prices or lower quality or innovation for consumers. For example, in industries with extensive networks, many firms already have market power through their ownership of established networks or installed bases involving huge sunk costs. Vertical mergers can, in certain instances, increase those barriers to entry even more, raising costs and reducing innovation and quality for consumers.[18]

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[15] *Application*, at 89.

[16] Expert Declaration of Dr. Mark Cooper and Adam Lynn at I(A)(1) (hereafter "Cooper/Lynn Declaration").

[17] *Application*, at 103 (internal quotations omitted).

[18] *See* Christine A. Varney, Commissioner, Federal Trade Comm'n, Remarks before the PLI 36th Annual Antitrust Inst.: Vertical Merger Enforcement Challenges at the FTC (July 17, 1995) *available at* http://www.ftc.gov/speeches/varney/varta.shtm.

Not only can vertical mergers have adverse effects on competition, but the problems presented by this particular merger cannot be categorized as purely vertical or horizontal. *The true competitive dangers lie where the Applicants' horizontal market power and vertical leverage intersect.* In other words, the vertical leverage resulting from the combination of Applicants' substantial market power in each of their respective markets will allow the combined company to exercise undue and anticompetitive control in both the existing and emerging distribution and programming markets.[19]

A. Comcast Possesses Substantial Market Power as the Dominant Provider of Cable and Internet Access Services

In addition to mischaracterizing the nature of the merger, Applicants take great pains to undervalue their market power – particularly with regard to Comcast's domination in regional multi-channel video programming distribution (MVPD) and Internet access services. But the Commission's analysis of the proposed merger cannot be divorced from the realities of the market.

Applicants assert that that "Comcast currently accounts for less than 25 percent of MVPD subscribers nationwide," a claim repeated throughout the Application.[20] This myopic focus on national market share obscures an important market reality. Most cable companies are clustered in small geographic areas where they individually enjoy extremely high market shares, especially in highly urbanized markets such as those dominated by Comcast. The FCC has previously found that "cable operators serve discrete franchise areas and generally do not compete against each other within franchise

[19] *See also*, Cooper/Lynn Declaration at I(A)(2) for a discussion of anticompetitive vertical leverage created by this merger.

[20] *Application*, at 107.

areas."[21] While Comcast's national market share is 25 percent, its share of individual markets is well over 50 percent in every market in which it provides service, and an upwards of 60 percent in other markets, including Boston, Philadelphia, and Chicago.[22]

Comcast dominates cable distribution in many local markets, but its share of the broadband access market in areas where it offers this service is likely even higher. Generally speaking, cable has more market power in broadband market than it does in the MVPD market. Indeed, analysts predict that cable will have a virtually unchallenged position in the delivery of the high-speed data services necessary to support Internet TV in the vast majority of the nation.[23] Similarly, the National Broadband Plan found that "in areas that include 75 percent of the population, consumers will likely have only one service provider that can offer very high peak download speeds."[24] More recently, Comcast

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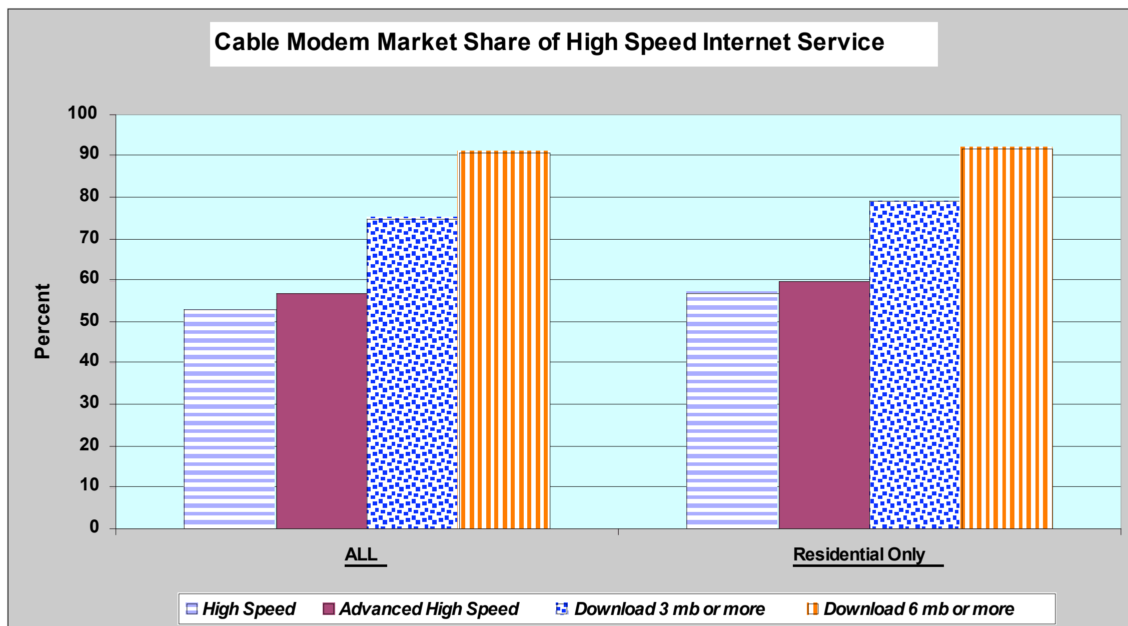
[21] *Applications for Consent to the Assignment and/or Transfer of Control of Licenses Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors to Time Warner Cable Inc. (subsidiaries), Assignees; Adelphia Communications Corporation, (and subsidiaries, debtors-in-possession), 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*, 21 FCC Rcd 8302, ¶120. *See also 2007 Program Access Order*, 22 FCC Rcd at 17830, ¶ 55 ("[I]n many cities where cable [multiple system operators ("MSOs")] have clusters, the market penetration of competitive MVPDs is much lower and cable market penetration is much higher than their nationwide penetration rates. . . . As a result, the cost to a cable-affiliated programmer of withholding regional programming is lower in many cases than the cost of withholding national programming. Moreover, the affiliated cable operator will obtain a substantial share of the benefits of a withholding strategy because its share of subscribers within the cluster is likely to be inordinately high.").

[22] The most appropriate level to conduct this analysis is solely within Comcast's service territory. However, presently we do not have access to data allowing us to perform that analysis. SNL Kagan, Video Market Share (Cable & DBS & Telco Video) by DMA - 4th Quarter 2009.

[23] Bernstein Research, *Web Video: Friend or Foe…And to Whom?,* p. 14 (October 2009).

[24] FEDERAL COMMUNICATIONS COMMISSION, *Connecting America: The National Broadband Plan* at 42 (2010).

itself has acknowledged its dominance in the majority of its footprint.[25] Moreover, wireline broadband competition is imperfect and may well never prove capable of disciplining the market even in areas where there may be two service providers. Recent news reports indicate that Verizon is "nearing the end of its program to replace copper phone lines with optical fibers that provide much higher Internet speeds," meaning that Verizon will leave such major population centers as the City of Baltimore, downtown Boston, and Alexandria, Virginia, without FiOS as a competitor to otherwise cable dominated markets.[26]



Source: Federal Communications Commission, *High-Speed Services for Internet Access: Status as of December 31, 2008*, February 2010

[25] Comcast Corporation, Q1 2010 Earnings Call Transcript, April 28, 2010.

[26] Peter Svensson, *Verizon winds down expensive FiOS expansion*, CED MAGAZINE.COM (Mar. 26, 2010), *available at* http://www.cedmagazine.com/News-Verizon-FiOS-expansion-032610.aspx. This development should be unsurprising, as "Verizon never committed to bringing FiOS to its entire local-phone service area"; while the company "has introduced FiOS in 16 states . . . the deployment is concentrated on the East Coast, and Verizon is selling off most of its service areas in the Midwest and on the WestCoast." *Id.*

This control of local cable and Internet distribution platforms is Comcast's present source of market power. Coupling this distribution power with NBCU's must-have programming and content production capacity will enable to solidify and expand this power in multiple markets.

B. The Merger Will Give Comcast/NBCU A Critical Mass of Control Over Must-Have Content.

The proposed merger seeks to pair Comcast's dominance of local cable and broadband access distribution markets with NBCU content. The equation is a simple one: Dominant Platform Distributor + Critical Programming Owner = Significant Power Across Multiple Markets. These common assets will enable the joint venture to expand and solidify its control at virtually every point up and down the chain of program production and distribution. It then can use this control as a lever to edge out existing and emerging competitors (other MVPDs, broadcasters, independent programmers, and online video providers) in nearly every facet of its business.

Comcast's dominance as a cable and Internet service provider in its local markets is irrefutable. The next step in the equation is the acquisition of marquee content. Applicants assert that neither Comcast nor NBCU has sufficient power in programming markets to engage in anticompetitive practices with regard to programming, and that Applicants' post-merger combined share of cable network advertising and affiliate revenue would total 12 percent.[27] However, this figure does not reflect Applicants' combined television programming share. Sanford Bernstein has estimated that post-merger Comcast/NBC would control one in five television viewing hours.[28]

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[27] *Application*, at 90-92.

[28] Bernstein Research, *Web Video,* at 9.

The crux of this merger is the consolidation of control over bundles of critical programming categories that distributors (be they traditional MVPDs or new competitors in the online video programming space) must have in order to attract viewers. As the operator of major broadcast and cable networks, NBCU has significant market share in several critical programming areas. Comcast also has amassed a significant amount of content that the FCC has acknowledged to be "must-have" programming – to wit, its sizeable and exclusive control over regional sports programming across the country. Together, Comcast and NBCU will exert substantial control over critical content categories – sports, news, Spanish language, and women's programming.

Sports Programming

Post-merger, Comcast/NBCU would command a significant share of the sports programming market, which is far and away the most valuable content in terms of per subscriber fees. Comcast controls a significant number of regional sports networks for which it commands fees that average almost ten times as much as the average fees paid for basic cable networks.[29] Consolidated ownership of these networks is particularly worrisome since the FCC has found RSNs to be prototypical must-have programming,[30] the type of popular programming without which an MVPD cannot effectively compete with others who control it.[31] Moreover, the merger will combine NBC's national sports

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[29] *See* Cooper/Lynn Declaration at II(B)(1) and Exhibit II-5.

[30] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Notice of Proposed Rulemaking 22 FCC Rcd 17791, ¶ 38 (2007) ("[N]umerous national programming networks, RSNs, premium programming networks, and VOD networks are cable-affiliated programming networks that are demanded by MVPD subscribers and for which there are no adequate substitutes")

[31] *Id.* at 17818, ¶ 39 ("[A]ccess to this non-substitutable programming is necessary for competition in the video distribution market to remain viable. An MVPD's ability to compete will be significantly harmed if denied access to popular vertically integrated

presence and exclusive rights to Olympic programming with Comcast's dominance of regional sports programming to create a bundle of "must have" programming. Comcast and NBCU allude to the combined power of their respective sports properties in their Application, stating:

> The transaction will allow for NBC sports programming to be distributed on Versus, Golf Channel, and Comcast's multiple RSNs. . . . [B]y combining the NBC network with Comcast's national sports cable networks, new opportunities will be created for the combined entity to negotiate for broader rights packages and to expand cross promotions of broadcast and cable sports.[32]

Applicants also cite the potential for similar "synergies' in their local sports properties, explaining that "Comcast RSNs could collaborate with NBC's O&Os to augment local and regional sport news programs and features."[33]

News Programming

The merger will also provide the combined company with a compelling block of news programming. NBC brings the key news assets to the merger – a strong presence in the cable news space and national leadership in broadcast news. NBC's national news is the leader among broadcast networks by far, accounting for 40 percent of viewers.[34]

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programming for which no good substitute exists."). *See also Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Commc'ns Corp., Assignors to Time Warner Cable, Inc., Assignees, et al.,* Memorandum Opinion and Order, 21 FCC Rcd 8203, 8287, ¶ 189 (2006) ("*Adelphia Order*") ("[A]n MVPD's ability to gain access to RSNs and the price and other terms of conditions of access can be important factors in its ability to compete with rivals."); *In the Matter of General Motors Corp. and Hughes Elec. Corp., Transferors and The News Corp. Ltd., Transferee*, Memorandum Opinion and Order, 19 FCC Rcd 473, 535, ¶ 133 (2004) ("RSNs typically purchase exclusive rights to show sporting events, and sports fans believe that there is no good substitute for watching their local and/or favorite team plan an important game").

[32] *Application*, at 50.

[33] *Id*, at 51.

[34] Cooper/Lynn Declaration at II (B)(2).

NBC is similarly strong in the provision of local news, while Comcast has specialized in regional news programming. Combining NBC local and national news content with Comcast's regional news channels would create a potentially powerful asset.

Hispanic Programming

Pursuant to this merger Comcast would acquire Telemundo, the number two Spanish language broadcast network in a product space where there are only two national networks. It would also acquire NBCU's cable property, mun2, in a sphere where there are only a handful of non-sports-oriented Hispanic cable networks available to most subscribers.[35] Thus, a substantial share of the Spanish language video market would be acquired by the dominant cable operator. This would create yet another point of concern about Comcast and NBCU's ability to leverage vertical control over horizontally concentrated markets.[36]

Women's Programming

The two merging parties will also garner a significant share of the women's programming space,[37] with NBC contributing assets like USA, Bravo, and Oxygen, and Comcast delivering E! and Style. Post-merger, Comcast and NBC would all but corner the market for women-oriented programming. As Comcast's COO Steve Burke recently remarked at a conference of the American Association of Advertising Agencies, he stated:

> One of the things we looked at when we analyzed the [Comcast/NBCU] deal is our ability to reach women and

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[35] *See* Adam Lynn and Mark Cooper, "Minority Programming: Still at the Back of the Bus," Presented at the 2008 International Communication Association Conference (May 24, 2008).

[36] Cooper/Lynn Declaration at II (B)(4).

[37] *Id.* at II(B)(3).

> combine Bravo and Oxygen, E!, *Today*, iVillage and DailyCandy. The ability to sit with one person and say we can speak for an entire group of assets for women of a certain age, or a certain profile, is unsurpassed.[38]

As Mr. Burke explains, the merger will create a company that controls an incredibly large quantity of women's programming. Moreover, Comcast and NBCU admit in their Application that the combined entity plans to "share programming, production facilities, reporting, and on-air talent among multiple women's oriented networks and websites and on multiple platforms,"[39] thus further concentrating market power and consolidating creative control over programming directed at female audiences.

II. The Merger Will Diminish Competition and Innovation in MVPD and Online Video Programming Markets

By combining these programming assets with local distribution dominance, this merger would dramatically increase the incentive and ability of the resulting entity to raise prices, foreclose and block competitive entry, force bundles on other cable systems, and discriminate in carriage of competing programmers. The merger would enhance Comcast's ability to preserve its position as the dominant local MVPD, reinforce its ability to exercise market power in specific cable or programming markets, and extend its business model to the Internet.

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[38] Claire Atkinson, *Comcast's Burke Touts One-Stop Shopping: Wants to offer cross-platform buys in entertainment, sports and women*, BROADCASTING AND CABLE, Mar. 8, 2010, *available at* http://www.broadcastingcable.com/article/449798. -

[39] *Application,* at 52.

A. The Combination of NBCU Content With Comcast's Cable and Internet Distribution Power Will Increase The Combined Company's Incentive and Ability to Foreclose Competing Online Video Providers' Access to Programming

Perhaps the most significant harm resulting from this merger is the threat it poses to innovation and competition in the emerging online video markets. Comcast would have the ability – and the incentive – to choke off in its infancy the first truly effective source of competition in the video marketplace.

The anticompetitive effects of this merger run both wide and deep across multiple sectors of content and distribution markets; however, the threat to the nascent online video market is what distinguishes this merger from previous transactions that have come before the Commission. Not only will the merger eliminate direct competition between Comcast and NBCU online video platforms, it will also increase Comcast's ability to engage in high-speed Internet and online content foreclosure strategies. Furthermore, the FCC currently does not have a regulatory regime in place to attend to the anticompetitive conduct that will arise in the online sphere if this merger is consummated.

1. Comcast Currently Engages in Foreclosure of Content and Distribution Online and This Practice Will Be Exacerbated by the Merger

The merger would reduce direct competition between NBCU and Comcast. NBCU content is available online in a variety of forms and on different websites and services. Most prominently, NBCU is a stakeholder in Hulu, an online video distribution portal that draws millions of viewers. Comcast has also launched its own online video model, "Fancast Xfinity," where consumers can view online content, provided they can demonstrate that they pay for access to a facilities-based MVPD. The merger eliminates

this nascent, head-to-head competition between NBCU and Comcast in the emerging online video market.

In addition to reducing competition between Comcast and NBCU, the merger will also give the combined company vastly increased power over the content that emerging online video competitors need to establish themselves. It also changes NBCU's incentive to make its programming available to platforms that compete with Comcast. Further, it will reduce the availability of content for consumers who do not subscribe to an MVPD TV service, because the combined company will have more content to capture in its Xfinity model.

Applicants argue that they have neither the incentive nor the market power to engage in content or distribution foreclosure online because their combined share of the online video distribution market is too small to make such a strategy successful.[40] But the issue of online video distribution share is beside the point. Comcast does not need a substantial online market share to engage in online content foreclosure. Even if Applicants combined market share were zero, Comcast need only leverage its bottleneck control of content (garnered from its position as a dominant MVPD) to erect barriers to entry in the online video distribution market. Indeed, Comcast is already pursuing such a strategy through its Fancast Xfinity platform, referred to in industry parlance as "TV Everywhere."

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[40] *Id.,* at 122-23.

In early 2010, public interest groups, including four signatories to this Petition, issued a white paper and requested an antitrust investigation into TV Everywhere.[41] TV Everywhere is a business model in which network programming that is available through an MVPD subscription is accessible online (for free) only to MVPD subscribers. TV Everywhere also creates a mechanism in which programmers and MVPDs enter into exclusive contracts to deny independent online video providers access to critical programming. While MVPDs currently deny seeking exclusive contracts with programmers, programmers could effectively submit to exclusive contracts by refusing to deal with competitors.[42] By limiting programmers' incentive to supply their programming to non-MVPD distributors, and by ensuring that consumers can only view the most desirable online video if they subscribe to a traditional cable provider, TV Everywhere cuts off the flow of programming to disruptive new entrants (and smaller

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[41] MARVIN AMMORI, FREE PRESS, TV COMPETITION NOWHERE: HOW THE CABLE INDUSTRY IS COLLUDING TO KILL ONLINE TV, (2010), http://www.freepress.net/files/TV-Nowhere.pdf (*TV Nowhere*).

[42] *See, e.g., An Examination of the Proposed Combination of Comcast and NBC Universal Before the House Subcommittee on Communications, Technology and the Internet*, 111th Cong. (2010) (statement of Colleen Abdoulah, President and CEO, WOW!) (*Abdoulah Testimony*). . Ms. Abdoulah delivered similar testimony before the Senate Committee on Commerce, Science, and Transportation, as well as the Senate Subcommittees on Antitrust, Competition Policy and Consumer Rights. This testimony highlighted the inability of traditional MVPD competitors to gain access to programming to create their own "TV Everywhere" type of service to remain competitive:

> MVPD has most recently experienced problems with initiating its own version of Comcast's Fancast XFinity TV service because it has been unable to obtain content from Comcast and other content providers with whom Comcast has struck deals. This despite the fact that Comcast claims the content used in its online service is non-exclusive. This highlights the fact that mere promises of non-exclusivity offer very little. An entity can obtain a de facto exclusive by slow-rolling negotiations or by offering the product at unreasonable rates, terms, and conditions.

competitors) in order to eliminate potential competition while preserving the lucrative cable TV revenue stream indefinitely.

As the dominant cable operator by far, Comcast is well-positioned to preserve the current rents and capture the future rents that digital technologies will make possible by lowering costs and increasing demand. This anticompetitive strategy alone is cause for significant concern. However, the danger is exacerbated significantly by the proposed merger. By adding control of NBCU feature films and other branded content, as well as its one-third interest in Hulu, Comcast will wield a powerful mechanism to retain its video services revenue stream by killing-off emerging Internet-based competition before it can even get off the ground.

Indeed, new on-line portals have had difficulty in emerging as a viable competitor to the traditional MVPDs due to the inability to access premium programming:

> Joost, for example, was a company started by the successful founders of Skype that raised over $50 million in capital. Joost aimed to provide TV programming directly to consumers, as an online virtual cable TV provider. But after years of gaining little traction, Joost announced it would become a technology provider, rather than a competitor, to incumbent cable TV distributors. In a detailed look at "what went wrong for Joost," telecommunications analyst Om Malik concluded, "it all boiled down to a lack of content." Other companies, like Vuze, similarly had cutting-edge technology for delivering high-definition TV online but lacked access to much premium content. After many years and more than $34 million raised in private equity, Vuze finally abandoned its first business model of competing with cable TV distributors.[43]

Applicants claim that they have no incentive to foreclose on video providers' access to content because online video is not a competitor to cable TV, and at most

[43] AMMORI, *TV Nowhere,* at 20-21 (internal citations excluded).

provides a "complementary" service.[44] And yet, Comcast's own filings, as well as statements by company executives, show that they fear growth of online video competition far more then they acknowledge in their Application. For example, in its Annual 10-K Report filed in 2010, Comcast asserts that "[o]ur cable services also may compete to some degree for customers with other companies, such as . . . online services that offer Internet video streaming, downloading and distribution of movies, television shows and other video programming."[45] Even taking Applicants at their word that online video services currently occupy a "complementary" role, it is clear that Comcast views these nascent services as its biggest future competitor. Comcast's Chief Operating Officer Stephen Burke has stated that "[t]he biggest risk is so much stuff gets on the Internet for free that we turn into the newspaper business," and that "[cable TV distributors] have the exact same interests that the content providers have in making sure that we get ahead of the steamroller that is the Internet."[46]

To support their contention that the combined company would have no incentive to engage in online video foreclosure, Applicants submit a study conducted by Drs. Israel and Katz reviewing the likelihood of online video content foreclosure post-merger.[47] It is notable that nowhere in this analysis of competitive incentives do the researchers discuss

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[44] *Application*, at 100.

[45] *See* COMCAST CORPORATION, ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(D) OF THE SECURITIES EXCHANGE ACT OF 1934 FOR THE FISCAL YEAR ENDED DECEMBER 31, 2009 (2010), http://files.shareholder.com/downloads/CMCSA/716386522x0xS1193125%2D10%2D37551/1166691/filing.pdf.

[46] Posting of Saul Hansell to the NEW YORK TIMES' Bits Blog, http://bits.blogs.nytimes.com/2009/04/06/tweaking-the-cable-model-to-avoid-newspapers-fate/, (Apr. 6, 2009, 18:10 EST).

[47] Dr. Mark Israel and Dr. Michael L. Katz, *The Comcast/NBCU Transaction and Online Video Distribution*, MB Dkt 10-56 (May 4, 2010) (*Israel/Katz Online Video Report*).

Fancast Xfinity or the TV Everywhere model. Such an omission is a critical flaw in any analysis purporting to assess the relative motives Comcast would have to withhold programming from online competitors. Furthermore, the study assumes only two scenarios: either that online video is a complement to traditional viewing or that an "online MVPD" has already experienced significant success in establishing market share. The study says nothing about the critical period between these two stages.[48] Nor does it acknowledge that Comcast's ability to withhold certain programming could "make or break" an online MVPD's ability to transition from "complement" to full-fledged "competitor."

The Cooper/Lynn Declaration demonstrates that, contrary to Applicants' assertion, the threat of a foreclosure strategy with regarding to nascent online video competition is very real.[49] There, Cooper and Lynn determine that:

> The fact that Comcast is a distribution conglomerate, with a dominant share of both broadband Internet and traditional MVPD service plays an important parting in reinforcing the market power that Comcast can bring to bear on the Internet TV platform. It can use its market power in the MVPD space to place potential competitors in the Internet space at a disadvantage. By tying the traditional MVPD service that it dominates to Internet delivery of TV programming, it can dramatically reduce the size of the audience new entrant will be able to capture. This interacts with the strategy of withholding programming to diminish the quality of the product that Internet competitors can offer.[50]

[48] Indeed, given that online video is still considered a nascent industry, this is the exact period in which many analysts believe we currently reside. *See, e.g*, Bernstein Research, *Web Video,* at 9; UBS Investment Research, *Can Pay TV Benefit From Online Video?,* at 24 (June 2009).
[49] Cooper/Lynn Declaration at III.
[50] *Id*., at II(A)(2).

2. Comcast Has Already Engaged In High-Speed Internet Foreclosure and This Merger Enhances Its Incentives to Do So Again

Comcast's acquisition of NBCU, coupled with its TV Everywhere strategy, will increase Comcast's incentive to degrade or block consumers' access to competing online video providers. This danger is amplified by the recent decision of the U.S. Court of Appeals for the District of Columbia which significantly hampers the FCC's ability to prevent or deal with such conduct should it occur.

Applicants argue that they lack incentive to pursue a High Speed Internet (HSI) foreclosure strategy.[51] Applicants also assert that "Comcast has never blocked HSI subscribers' access to lawful content."[52] These claims are false. In 2008, Comcast was the subject of a complaint submitted by public interest groups, including signatories to this Petition, alleging that Comcast was engaging in *de facto* blocking of lawful content in violation of the Commission's network neutrality principles.[53] In response to the complaint, the Commission determined that Comcast's "discriminatory and arbitrary practice unduly squelche[d] the dynamic benefits of an open and accessible Internet and d[id] not constitute reasonable network management."[54] Moreover, the FCC was quite clear in its determination that Comcast had indeed "blocked" and not merely degraded users' access to content:

> Comcast tries to avoid this result by arguing that it only delays peer-to-peer applications, and that the Internet

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[51] *Application*, at 126.

[52] *Id.* .

[53] *Formal Complaint of Free Press and Public Knowledge against Comcast Corp. for Secretly Degrading Peer to- Peer Applications*, File No. EB-08-IH-1518 (Nov. 1, 2007).

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

> Policy Statement, properly read, prohibits the blocking of user applications and content, but not mere delays. We do not agree with Comcast's characterization and instead find that the company has engaged in *blocking.*[55]

Comcast's claim that it has never blocked users' access to content is an exercise in revisionist history, especially since it did not challenge the Commission's fact finding on appeal. It is troubling that Comcast would continue to play fast-and-loose with facts given that, in the context of the proceeding at issue above, the Commission censured Comcast for its repeated lack of candor about its network management practices.[56]

Past conduct aside, Comcast's proposed takeover of NBCU now poses even greater dangers. Comcast's acquisition of NBCU would give it more content to favor and even more incentive to degrade consumer access to competing online video providers and content. Significantly, the U.S. Court of Appeals for the District of Columbia recently ruled that the Commission does not have the ability to regulate an Internet service provider's network management practices under its ancillary authority under Title I of the Communications Act.[57] The court's decision makes clear that should Comcast engage

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[55] *Id*. at ¶ 44 (emphasis added).

[56] *E.g.*, "[w]hen first confronted with these press reports, Comcast *misleadingly* disclaimed any responsibility for the customers' problems." *Id*. at ¶ 6. (emphasis added); "Following these tests, Comcast changed its account and admitted that it targets peer-to-peer traffic for interference." And "Confronted with this and other evidence, Comcast changed its story yet again, and admitted that its "current P2P management is triggered...regardless of the level of overall network congestion at th[e] time, and regardless of the time of day." *Id*. at ¶ 9. "Comcast's claim that it has always disclosed its network management practices to its customers is simply untrue." *Id.* "And although Comcast eventually disclosed some elements of its network management practices to customers, *Comcast's first reaction to allegations of discriminatory treatment was not honesty, but at best misdirection and obfuscation.*" *Id*. at ¶ 53 (emphasis added); "Comcast's statements in its comments and response to Free Press's complaint *raise troubling questions about Comcast's candor during this proceeding.*" *Id*. at n.31 (emphasis added).

[57] *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

network management practices that enhance access to Comcast-controlled NBCU content, or likewise degrade or block access to competing vendors, the FCC will have little recourse to address such behavior in the future. The absence of any rules stopping Comcast from slowing down competing video websites further illustrates why the FCC should not approve the merger.

B. The Proposed Merger Will Create Increased Incentive and Ability to Foreclose Competing MVPD Access to Programming

A critical competitive harm of the merger is the combined company's ability to engage in content foreclosure, and to raise costs for subscription video providers in local markets. More specifically, the increased power resulting from the consolidation of Comcast and NBCU programming, coupled with the increased anticompetitive incentive resulting from the vertical combination of programming and distribution, will be wielded against competing multichannel video distribution providers (MVPDs) and their customers in the form of higher rates, bigger bundles, and fewer choices in programming.

As discussed above, the combination of programming assets will significantly increase market power of Comcast/NBCU in programming markets. By controlling a much larger block of highly demanded programming, the combined company could gain substantial vertical leverage to use against its competitors in cable distribution markets. Once Comcast merges with NBCU, it will be able to charge competitors more for NBC content, as well as force competitors to pay for less desirable Comcast cable channels bundled with must-have NBC programming. For example, Comcast could condition the sale of popular NBC programming upon acceptance of less desirable cable channels which would never receive carriage in a competitive market. Similarly, it could tie the

carriage of more popular programming to the carriage, at favorable channel locations, of the least sought-after of its cable channels. Or Comcast could deny altogether competitors' access to non-substitutable programming. Additionally, because Universal Pictures is one of the NBCU properties at stake, post-merger, the combined company could withhold or delay access to the Universal film library from competing MVPDs, or demand vastly inflated licensing fees.

Perhaps most critically, in acquiring NBC broadcast stations, Comcast would also gain "retransmission consent rights," which allow stations to negotiate fees for cable carriage of broadcast signals.[58] Comcast's control over the NBC owned and operated stations would allow the combined entity to charge higher prices for broadcast and cable content to other MVPDs. Using retransmission consent contracts, Comcast could bundle cable network content with the broadcast signal to fetch higher prices for NBC and Telemundo broadcast and cable content, as well as Comcast cable content. These prices would be passed to the subscribers of Comcast's competitors. Not only would this increase the cost of cable and satellite programming to the public throughout the country, but this will also give Comcast a major advantage vis-à-vis local cable and DBS competitors and new entrants seeking to establish market share.

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[58] The Cable Television Consumer Protection and Competition Act of 1992 established a new property right for broadcast stations by setting carriage and compensation requirements for MVPDs to transmit the signals of free over the air broadcast signals. Pub. L. No. 102-385, 106 Stat. 1460 (1992) (1992 Cable Act), codified at 47 U.S.C. §§ 325 and 534. Every three years, each local commercial broadcast station must choose to negotiate a compensation agreement with each cable system operating in its service area to carry the broadcast signal; or requiring each cable system operating in its service area to carry its signal, but receiving no compensation for such carriage.

There has recently been an escalation of retransmission consent disputes, most notably between Sinclair Broadcasting and Mediacom Cable,[59] Fox and Time Warner Cable,[60] and ABC and Cablevision.[61] Public Interest Petitioners do not take a position on the merits of any one of these disputes. But, to the extent that these situations inject uncertainty or result in the pulling of programming that consumers have paid for and expect, we are concerned that this merger would give Comcast/NBCU both increased incentive and an unfair advantage to engage in heightened negotiations. A Comcast/NBCU union would aggravate the retransmission dispute trend because Comcast has a two-fold incentive to drive up retransmission rates for NBC content. First, higher retransmission consent rates for NBC broadcast stations will yield more revenues for Comcast. Even if Comcast also pays those higher rates, it is essentially charging itself. Second, Comcast has a strong incentive to raise rates on competitive MVPDs to force them either to absorb these costs or to pass them through to consumers. This is especially problematic in markets where Comcast is the cable provider because Comcast could raise prices or withhold programming in an effort to incentivize their competitors' subscribers to switch to Comcast.

Applicants dispute that the Comcast/NBCU joint venture would result in a significant threat of competitive harm. Instead, Applicants maintain that "market conditions, as well as Commission rules, will ensure that the combined company will

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[59] *See* John Eggerton, *Legislators Ask FCC To Intervene In Sinclair-Mediacom Dispute: Iowa, Alabama Lawmakers Fear Retrans Impasse Will Disrupt Bowl Broadcasts If Commission Doesn't Step In*, MULTICHANNEL NEWS, Dec. 22, 2009.

[60] *See* Joe Flint, *Deadline looms for Time Warner Cable and News Corp.*, LOS ANGELES TIMES, Dec. 31, 2009.

[61] *See* Cecilia Kang, *ABC goes dark for New York Cablevision subscribers*, WASHINGTON POST, Mar. 7, 2010.

have no enhanced ability or incentive to refuse to sell NBC content to competing MVPDs or to charge discriminatory prices for that content."[62] In support of this, Applicants' submit another study conducted by Drs. Israel and Katz analyzing the potential for foreclosure post-transaction of the NBC owned-and-operated ("O&O") stations' signals.[63] The study concludes that a Comcast/NBC combination is unlikely to completely withhold broadcast station signals from competing MVPDs because the loss in overall profits that would result from losing substantial audience share for the broadcast programming would not be offset by a profit gain from the number of subscribers that would switch to Comcast in order to access the withheld broadcast content. Thus, it assumes a Comcast/NBCU merger would not pose a significant anticompetitive threat.

The Israel/Katz broadcast foreclosure study is far too limited in both in its assumptions and its analysis. First, it does not adequately consider the impact of pricing and withholding on competitors and new entrants with small market shares. For these emerging competitors, the loss of even a small numbers of subscribers (or the failure to secure initial subscribers, in the case of new entrants) would be a death knell. In such cases, Comcast's short-term costs of withholding such content would be far outweighed by the ability to limit the growth of new entrants and competitors with minimal subscriber base.

Second, the study only considers whether Comcast has incentive to engage in *complete* withholding of programming. It does not assess whether Comcast and NBC have incentive to engage in less extreme tactics that would nonetheless have significant

[62] *Application*, at 113.
[63] Dr. Mark Israel and Dr. Michael Katz, *Application of the Commission Staff Model of Vertical Foreclosure to the Proposed Comcast-NBCU Transaction*, MB Dkt No. 10-56 (Feb. 26, 2010).

negative impacts on consumers and competition. For example, Comcast could simply delay the availability of programming, giving itself exclusivity for a month or two. The study also fails to address Comcast's incentives to raise rivals' costs for access to broadcast programming, or the probability that Comcast and NBC would exact unfair terms or conditions on rivals' access to their commonly-controlled bundle of broadcast and cable programming. Thus, the study significantly underestimates the competitive harms that will occur as result of the vertical integration of Comcast and NBCU and cannot be relied upon to demonstrate that market forces will prevent anticompetitive conduct.

1. The Commission's Program Access Rules are Insufficient to Address the Enhanced Anticompetitive Incentives and Power Resulting from the Proposed Transaction

Market forces alone will not curb Comcast's incentive to withhold critical programming from its MVPD competitors or to engage in discriminatory pricing and packaging of channels. Nevertheless, Applicants still assert that the FCC's program access regime will provide a backstop against anticompetitive conduct. This confidence is fundamentally misplaced. It ignores the reality that the FCC's program access process skews in favor of large incumbent carriers like Comcast and that the burden of proof and costs to complainant can be so prohibitive that many complaints are never brought or are dropped before any resolution is reached.

Section 628 of the Communications Act requires vertically-integrated cable operators and programmers to share their affiliated programming with competitors on

nondiscriminatory terms, conditions, and prices.[64] Applicants note correctly that Comcast has never been found in violation of the program access rules.[65] However, the fact that Comcast has not been found in violation of the FCC program access rules does not mean that Comcast has not been guilty of withholding affiliated programming from competing MVPDs, or that it has not engaged in anticompetitive bundling and price gouging. Rather it merely reinforces the point that the existing program access regime is not capable of preventing such tactics and will be even less so if this merger is approved.

Indeed, Comcast has a significant track record of engaging in these kinds of acts in the past, most notably by charging discriminatory prices or withholding access to popular regional sports programming.

- **Comcast SportsNet Philadelphia**: Comcast has withheld this RSN, which carries regional professional sports programming in Philadelphia, from Direct Broadcast Satellite (DBS) providers and was the of subject program access complaints, which were denied as a result of the "terrestrial loophole."[66] As the FCC has acknowledged, the impact on

[64] Section 628 provides, in relevant part, that "it shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers." 47 U.S.C. § 548(b).

[65] *Application*, at 117.

[66] *See DirecTV, Inc. v. Comcast Corp.*, 13 FCC Rcd 21822 (CSB, 1998) and *EchoStar Comm. Corp. v. Comcast Corp.*, 14 FCC Rcd 2089 (CSB, 1999), *aff'd.*, *DIRECTV, Inc. and EchoStar Comm. Corp. v. Comcast Corp. et al.*, 15 FCC Rcd 22802 (2000), *aff'd EchoStar Comm. Corp. v. FCC*, 292 F.3d 749 (D.C. Cir. 2002). The FCC has since adopted an Order to extend program access rules provisions to terrestrially-delivered programming, *Review of the Commission's Program Access Rules and Examination of*

market shares from withholding this type of programming is significant. According to the FCC's own statistical analysis, DirecTV saw a 40 percent reduction of subscribers in the Philadelphia market when it was denied access to the Philadelphia regional sports programming.[67]

- **California Sports Programming**: In 2009 small cable operators, Stanford University and the City of San Bruno, Calif. filed a formal complaint with the FCC alleging that Comcast and its affiliated regional sports network, CSN, engaged in unfair and anticompetitive practices by discriminating the pricing, terms, and conditions in the delivery of programming of CSN, and that Comcast unduly influenced CSN in the delivery of "must-have" sports programming in order to unfairly compete for cable subscribers.[68]
- **Regional News Networks**: The FCC has acknowledged claims that Comcast withheld its New England Cable News Network from RCN, and that Qwest has made similar claims regarding Comcast's CN8--The Comcast Network, a local news and information channel.[69]
- **iN DEMAND**: In 2005, DBS provider DirecTV filed a complaint alleging that iN DEMAND (a company primarily owned by Comcast in partnership with Cox Cable and Time Warner Cable) engaged in a discriminatory

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Programming Tying Arrangements, MB Dkt No. 07-198, First Report and Order, 25 FCC Rcd 746 (2010), although the order was recently challenged in court by Cablevision.

[67] *Adelphia Order*, 21 FCC Rcd at 8271, ¶ 148-149. DirectTV's own study, which the FCC also notes, places this percentage at 51 percent.

[68] *WaveDivision Holdings et al. v. Comcast Corp.*, File No. CSR-8257-P (Dec. 23, 2009).

[69] *Implementation of Cable Television Consumer Protection Act of 1992, Development of Competition and Diversity in Video Programming Distribution*, Report and Order and Notice of proposed Rulemaking, 22 FCC Rcd 17791, 17823-26 (2007).

pricing structure that effectively charged DirecTV as much as four-and-a-half times the rates iN DEMAND charges cable operators for the same programming.[70]

- **Children's programming**: In 2005, Comcast entered into a joint venture that gave it control over popular PBS Kids VOD programming, in order to launch the children's network "Sprout."[71] Comcast denied access to the PBS programming to RCN. In turn, RCN saw an astounding 83 percent reduction in viewership during the six-month period it was unable to offer the programming over its own network.[72]

Additionally, in sworn testimony before Congress on the proposed merger, the CEO of a smaller competitive MVPD identified a number of other anticompetitive practices that never even make it to the complaint stage because of loopholes in the rules and the burden of engaging in the program access complaint process.

> [The] program access remedies contain an enormous loophole that permits entities to justify discriminatory practices by claiming they are based on volume-rated cost differentials, although there is scant evidence of any cost-based rationale. Another loophole permits programming vendors to artificially establish a high market rate, which its affiliated distributor "kicksback" to the vendor. As for the program access complaint process, there is no prohibition on programmers requiring the distributor to remove the network upon expiration of an agreement while a program access complaint is pending. Further, the costs and time associated with pursuing a complaint are so prohibitive that they are beyond the reach of most small operators.[73]

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[70] *DirecTV Inc. v. iN DEMAND , LLC*, File No. CSR-6901-C (June 29, 2005).

[71] Comments of RCN, MB Dkt No. 05-192 (May 19, 2006) at 4.

[72] *Id.* (calling Comcast's use of its bargaining power of this must-have programming to leverage terms "onerous").

[73] *See Abdoulah Testimony, supra* note 42. .

In spite of these flaws, Applicants maintain the existing FCC program access regime is sufficient to prevent anticompetitive foreclosure tactics against competing MVPDs.[74] Applicants note that the FCC recently extended portions of the rules to programming that is delivered by terrestrial means, including regional sports programming.[75] However, the FCC's order has been challenged in court by members of the cable industry,[76] and the ultimate status of the rules remains uncertain while litigation is pending.

Even if the improvements adopted in the *Terrestrial Loophole Order* survive judicial scrutiny, the program access rules remain a largely hollow remedy because of easily exploitable loopholes, as well as the time and cost of the dispute process as identified above. What is more, a critical component of the rules, the ban on exclusive contracts between affiliated cable operators, will expire in 2012 – one year after this merger is likely to be consummated if approved.[77] Without the legal backstop of the exclusive contract ban, Comcast may withhold NBCU programming from competing MVPDs. Moreover, once the ban expires and Comcast may lawfully withhold such programming, the company will enjoy increased bargaining power in program access

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[74] *Application*, at 116.

[75] The "Terrestrial Loophole Order" adopts generic program access rules for terrestrially delivered programming. *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746 (2010).

[76] *Cablevision Systems Corp. v. FCC, et al.*, Case No. 10-1062 (D.C. Cir.).

[77] The exclusive contract ban is due to sunset in 2012, *see Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements,* 22 FCC Rcd 17791 (2007), despite being recently affirmed by a court of appeals. *Cablevision Systems Corp. et al v. FCC*, 597 F.3d 1306 (D.C. Cir. 2010). The FCC arguably has the authority to extend the provision again, though it would likely be subject to litigation, such as that above which emerged when it tried to extend the ban in 2007. *Id.*

negotiations with competitors. Thus, contrary to Applicants' assertions, existing Commission rules are not sufficient to prevent or remedy anticompetitive conduct that may arise as result of the merger.

2. Applicants' Voluntary Commitment to Extend Portions of the Program Access Regime to Retransmission Consent Negotiations Will Not Prevent or Remedy Discriminatory Practices

The examples above illustrate that the FCC's program access rules have not prevented discriminatory conduct in the past and will be ill-equipped to deal with increased anticompetitive incentives and power that will result from this merger. Despite the rules' failings, Comcast offers to "voluntarily extend key components of the FCC's program access rules to negotiations with MVPDs for retransmission consent rights to the signals of NBC and Telemundo O&O stations for as long as the Commission's *current* program access rules remain in place."[78] First, as discussed above, the FCC's current program access regime is insufficient to curb the unfair conduct, including discriminatory pricing and terms that are presently occurring with regard to vertically integrated cable operators and programmers and their MVPD competitors. As a result, the extension of the program access rule to retransmission consent negotiations will not remedy the competitive problems identified above. Second, Applicants are very careful to note that they intend to be bound by this commitment for only as long as the "current" program access rules remain in place. Applicants do not offer further explanation of what they mean by "current." However, because the exclusive contract ban is slated to expire in 2012, arguably the "current" regime will only be in place for an additional year and a

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[78] *Application*, at 121 (*Commitment #15*) (emphasis added).

half. Thus, even assuming *arguendo* that extension of the program access rules to retransmission consent negotiations could provide a substantive remedy, the duration of Applicants' voluntary obligation is so short that it cannot be considered a meaningful commitment.

III. The Proposed Merger Will Not Further the Commission's Goals of Localism and Diversity

As the foregoing analysis makes plain, any claim that a Comcast/NBCU combination will further competition (or will not damage existing competition) in the market for delivery of video programming is erroneous. However, the negative effects of this merger are not limited to competition and innovation. They also extend to diversity and localism. Specifically, the merger will reduce content diversity by increasing barriers for independent programmers and diminishing the quantity and quality of local news at the market level. Finally, the merger will adversely impact the Spanish-language community in terms of news and programming.

Nevertheless, Applicants assert that if approved, the transaction would not have any adverse effects on localism and diversity. To this end, Applicants submit the Expert Declaration of Professor Spitzer.[79] Public Interest Petitioners disagree with Professor Spitzer's assessment of the transaction's impact. For one, Professor Spitzer appears to suggest that because the proposed merger would not violate any of the Commission's multiple broadcast ownership rules, the proposed merger is unlikely to have any impact on localism or diversity.[80] In this regard, Professor Spitzer depicts the merger's impact,

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[79] *Declaration of Matthew L. Spitzer Concerning Diversity and Localism Issues Associated with the Proposed Comcast-NBCU Transaction*, *Application*, at app. 9 (*Spitzer Declaration*).

[80] *Id.,* at ¶ 12.

as well as the Commission's interest in promoting localism and diversity, far too narrowly. The Commission's analysis of a merger's effect on localism and diversity is not limited to whether the merger results in the consolidation of broadcast licenses or an explicit violation of Commission rules. Rather, such an assessment is only the starting point of the FCC's public interest determination.[81]

For example, the Commission's program carriage rules are designed to facilitate access to viewpoint diversity by attempting to limit a cable operator's incentive to favor its own programming over that of independent programmers. Yet, Professor Spitzer provides no evaluation of how the merger might affect of the availability of independent channels or the sufficiency of the program carriage rules to address any problems the merger might pose.

Professor Spitzer's analysis also overlooks significant negative consequences of the proposed transaction on localism. Professor Spitzer fails to consider the effect of consolidating the local and sports programming of the dominant cable operator with that of a local TV broadcaster. Nor does he assess what effect consolidation of the local advertising market will have on the provision of local news at the market level.

As Petitioners demonstrate below, the transaction is likely to enhance anticompetitive incentives to limit carriage and access to diverse programming, consolidation of local programming, and undue market power in specific local advertising markets.

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[81] *See* discussion *infra* at "Standard of Review."

A. The Proposed Merger Will Diminish Programming Diversity by Enhancing Incentives to Discriminate Against Independent Programmers

The acquisition will allow Comcast the ability to tie and bundle a greater number of networks, to the detriment of independent programmers. Additionally, the merger will provide greater incentive for Comcast to discriminate in favor of it own content and against competing independent programmers.

The tying of popular programming to less popular programming has enabled programmers to use their leverage to dominate an MVPD's bandwidth and channel positions with content that these systems do not want to carry, but must accept as a condition of being able to carry very popular programming. This practice of "tying" hurts minority and independent programmers that are vying for space on MVPDs since minority and independent programming is not included in the programming giants' "bundles."[82]

Indeed, tying arrangements have had a "devastating impact" on independent, stand-alone networks.[83] As the CEO of SiTV pointed out, from personal experience in carriage negotiations, "unrestrained tying practices, when combined with the current state of consolidation among both cable operators and programmers alike, have left American viewers without . . . rich and diverse content from a broad array of providers."[84] Jean Prewitt, President and CEO of the Independent Film and Television Alliance similarly testified recently that independent programmers have suffered greatly due to recent trends

[82] The majority of programming available on a MVPD is vertically integrated with either a broadcaster or a cable operator. However, without these relationships, independent programmers have faced, and could continue to face, difficulty in gaining carriage on a MVPD system.

[83] *See Letter from Michael Schwimmer, Chief Executive Officer, Si TV, Inc.*, MB Dkt No. 07-198 (Feb. 12, 2008).

[84] *Id*.

of consolidation and deregulation.[85] The combined entity of Comcast-NBC will have a greater amount of programming that it will be able to tie and bundle together, taking up additional capacity on its own systems and competing MVPDs.

Additionally, commonly-owned cable operators and programmers have strong incentives to shut out the independent voices of competing programmers and producers. This choice is not based on an objective assessment of the merits of the programming, but rather on the economic incentives that cable operators have to carry their own programming. In fact, Comcast has been the subject of multiple complaints at the FCC for favoring its own programming over the content produced by others or failing to negotiate in good faith.[86] Once it acquires the NBCU stable of programming Comcast will have a lot more content to favor – to the detriment of independent voices and, ultimately, consumers.

1. The Commission's Program Carriage Rules Are Insufficient to Address Discriminatory Conduct Resulting from the Merger

Comcast would argue that Section 616 of the Communications Act and the FCC program carriage rules would prevent discriminatory behavior. However, these rules have been ineffective, have not prevented discriminatory conduct in the past, and are ill-

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[85] *Competition in the Media and Entertainment Distribution Market: Hearing Before the House Committee on the Judiciary*, 111th Cong. (2010) (statement of Jean Prewitt, President and CEO, Independent Film & Television Alliance).
[86] John Eggerton, *Comcast, MASN Settle Carriage Dispute*, MULTICHANNEL NEWS, Dec. 23, 2009, http://www.multichannel.com/article/441670-Comcast_MASN_Settle_Carriage_Dispute.php?rssid=20527&q=masn; *NFL Network Files Complaint Against Cable Company Comcast*, ESPN, May 6, 2008, http://sports.espn.go.com/nfl/news/story?id=3384488; John Eggerton*, Wealth TV Asks FCC To Reopen Record On Carriage Complaint*, MULTICHANNEL NEWS, Mar. 4, 2010, http://www.multichannel.com/article/449708Wealth_TV_Asks_FCC_To_Reopen_Record_On_Carriage_Complaint.php.

equipped to deal with increased anticompetitive incentives and power that will result from this deal. For example, when programmers have sought redress at the Commission, their complaints have usually taken years to process. For instance, Mid-Atlantic Sports Network had to wait more than one year before the Commission processed an "emergency complaint." Moreover, cable incumbents have acted in unison to punish programmers who seek redress under the FCC's carriage complaint procedure.[87]

Former FCC Commissioner Tate noted in her concurrence in the *Adelphia Transaction Order* that the discrimination theoretically banned by section 616 is nonetheless a real and ongoing concern. During the Adelphia transaction, the National Hispanic Media Coalition (NHMC) noted repeatedly that Comcast had consistently refused to carry locally produced programming designed to meet the needs of the Latino community and instead favored affiliated programming produced in Mexico and elsewhere. The program carriage rules are intended to address this very type of discrimination, yet Commissioner Tate noted that "when Hispanic-focused channels have trouble getting carriage in Los Angeles and other large Hispanic markets – when I hear these and other similar reports I am far from convinced that cable providers are doing an adequate job in promoting a diversity of voices on television."[88]

Some of the signatories of this Petition previously have sought reform of the carriage complaint process to ensure that complaints get processed in a timely manner and that cable operators do not retaliate against programmers who pursue claims. These reforms have not taken place. Consequently, the current program carriage rules are

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[87] *See* S. Rep. No. 102-92, at 23-29 (1991).
[88] *Adelphia Transaction Order*, 21 FCC Rcd at 8374 (Concurring Statement of Commissioner Tate).

ineffective for dealing with any discriminatory behavior Comcast may engage in against independent programmers.

2. Applicants' Commitment to Increase Independently-Owned Channels Is Insignificant And Will Not Remedy the Harm to Diversity Posed by the Merger

As part of its company-wide digital migration, Comcast commits to adding "two new independently-owned and -operated channels to its digital line-up each year on customary terms and conditions."[89] While Public Interest Petitioners agree that any increase in programming diversity is better than none at all, this commitment is wholly insufficient to remedy the anticompetitive conduct that is likely to result from the merger.

First, this concession must be viewed in the context of the total amount of bandwidth Comcast will have available in an "all-digital" cable environment. Like broadcasting, cable is migrating to an "all-digital" environment. Through this migration, Comcast has stated it intends to recover at least 300 MHz of bandwidth – freeing-up space for well over 500 new channels.[90] Yet only six will be set aside for independent programmers. Second, Comcast makes no commitment to offering such channels on its most popular tiers. In this light, this is barely a concession at all.

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[89] *Application*, at 112 (*Commitment #13*). Comcast defines independent programmers as "networks that (1) are not currently carried by Comcast Cable, and (2) are unaffiliated with Comcast, NBCU, or any of the top 15 owners of networks as measured by revenues." *Id*. at 113.

[90] Jeff Baumgartner, *Comcast's $1B Bandwidth Plan*, CABLE DIGITAL NEWS, Apr. 30, 2009, http://www.lightreading.com/document.asp?doc_id=176164&site=cdn.

B. The Merger Is Likely to Diminish the Amount and Diversity of Local Content and News Production at the Market Level

The proposed transaction would likely have negative impacts on the amount and diversity of content availability at the local level because of new anticompetitive motives arising from Comcast's acquisition of a broadcast network and local broadcast television licenses. As Cooper and Lynn discuss in the accompanying expert declaration,

> [t]he direct ownership of both a dominant cable operation and a TV station raises the greatest concern, but even where NBC does not own the local station, the affiliate relations could dramatically alter the competitiveness of local broadcast markets, since the non-NBC affiliates are dependent on Comcast to reach the majority of TV households in the local area. In other words, Comcast is both a bottleneck provider of access to local audiences and a competitor for those audiences both as a cable operator and as the owners of a major broadcast network. In the past, it was indifferent between the broadcast networks. In the future, it will have an incentive to favor its own broadcast network.[91]

Applicants can use their combined assets to the detriment of competing broadcasters in a number of ways. First, post-merger, Comcast could be induced to use its position to as the dominant local cable provider to give less favorable carriage terms to NBC's broadcast competitors. It can also refuse carriage to non-affiliated broadcast multicast streams. Second, the proposed merger will decrease competition and increase concentration in local markets where Comcast is a dominant cable provider and an NBC-owned broadcast station signals fall within the footprint of Comcast's cable operations.

[91] Cooper/Lynn Declaration at II(C)(2).

1. The Merger Will Give Comcast the Incentive to Favor Local NBC Broadcast Signals Over Non-Affiliated Broadcasters

As demonstrated above, this merger would give the Applicants greater incentive and ability to discriminate against unaffiliated cable content and independent cable programmers.[92] Likewise, the merger will create similar dangers with unaffiliated local broadcasters. More specifically, post-merger Comcast could vertically leverage its position as the dominant cable operator in multiple markets to give favorable carriage to NBC broadcast signals and less favorable treatment to competing local broadcasters.

One way that this could be accomplished is by giving NBC broadcast signal prime placement and giving other broadcasters less favorable spot on the cable "dial." Or, as the trade press has noted, Comcast could give an NBC station the "the prettiest picture in town by not compressing its signal" or by carrying "[NBC] multicast channels in HD, even if they are not broadcast in HD."[93]

Comcast could also refuse to carry the multicast streams of competing local broadcasters, while granting carriage to all NBC multicast channels. While broadcasters may assert must carry rights with regard to carriage of their "primary signal," cable operators are not required to carry additional signals if the broadcaster decides to divide its signal in to multicast streams.[94] Thus, because cable operators are not obligated to carry all broadcast streams, Comcast could unfairly discriminate against competing broadcasters, while favoring NBC stations. As a consequence, this could limit Comcast's

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[92] *See infra* section III(A).

[93] Harry A. Jessell, *Comcast-NBCU Paranoia Pervades Affils*, TVNEWSCHECK, April 30 2010, *available at* http://www.tvnewscheck.com/articles/2010/04/30/daily.5/.

[94] *See Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Second Report and Order and First Order on Reconsideration, 20 FCC Rcd 4516 (2005).

subscribers' access to the multicast channels of non-NBC affiliated stations, and could disincentivize those broadcasters' development of their multicast capabilities and programming, thereby diminishing the overall amount and diversity of programming available in a market.

2. The Merger Will Diminish Competition in Local Advertising Markets and Will Adversely Impact the Provision of News at the Market Level

If this transaction is approved, considerable horizontal consolidation will occur in local advertising markets where Comcast cable operations overlap with NBC-owned broadcast stations. The combination of local cable advertising shares with local broadcast advertising shares of NBC O&Os will give Comcast and NBCU significant power in specific markets at issue in this transaction.

The Cooper/Lynn analysis at Exhibit II-8 shows a measure of the effect of consolidation by calculating the level and increase in the local video advertising market that would result from the merger.[95] Using figures provided by NBCU and the National Association of Broadcasters, Cooper and Lynn determine that in Chicago, Miami, Philadelphia, San Francisco/Bay Area, and Washington, D.C.,[96] the combination of local broadcast and cable advertising shares yields an HHI increase that is well above the acceptable threshold as established by Department of Justice guidelines. Specifically, Cooper and Lynn find that

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[95] Cooper/Lynn Declaration at II(C)(2), Exhibit II-8.

[96] Additionally, see the appended Citizen Declarations of Free Press members Ernest Aguilar, Brian Imus, Eian More, Monique LeBron, Mike Rhodes, Silvia Rivera, Tracy Rosenberg, Stan Santos, and Chancellor Williams attesting that the consolidation of Comcast cable systems and NBCU-controlled broadcast stations would aversely affect the diversity and quality of media sources available in their communities.

> [f]ive of the six markets would be highly concentrated post-merger according to the current DOJ/FTC *Merger Guidelines* (only Miami falls below the threshold for a highly concentrated market of 1800). All of the post-merger markets would be moderately concentrated according to the proposed, revised *Merger Guidelines.*
>
> In every case the increase in the market concentration exceeds the threshold that is a cause of concern under the *Merger Guidelines* by a wide margin. In moderately concentrated markets increases of 100 points in the concentration index are a cause for concern. In highly concentrated markets, increases of 50 points are a cause of concern. In the NBC O&O markets the merger raises the concentration index by five to ten times the threshold.[97]

Predictably, Applicants gloss over this problem and instead relegate their discussion of the merger's effect on local advertising markets to a footnote. There, they contend that "[w]hile the Applicants arguably compete in certain local advertising markets (geographic markets in which NBCU owns and operates and O&O station and Comcast owns a cable system or operates regional sports networks), the Applicants' services are not particularly close substitutes."[98] It is surprising that Applicants – and NBCU in particular – would so easily dismiss the existence of direct competition in local advertising markets. In fact, NBCU discussed the direct competition between cable operators and local broadcasters extensively in the Commission's most recent proceeding on media ownership limits.[99] In that filing NBC and Telemundo argued that local cable operators present the single biggest threat to broadcasters in terms of securing local advertising:

> Local television stations are facing intense and accelerating competition for advertising revenues from local cable

[97] Cooper/Lynn Declaration at II(C)(2).
[98] *Application*, at n.163.
[99] *NBC Media Ownership Comments*, filed FCC Dkt 06-121 (Oct. 2006).

> systems. In major markets, local advertising revenues on the cable system operated by the largest multiple system operator ("MSO") now surpass the ad revenues earned by the largest television station in the market.[100]

NBC focuses on competition from Comcast in Philadelphia and the Bay Area, in particular:

> Two major markets in which Comcast has long operated consolidated regional clusters illustrate this trend. In Philadelphia, where Comcast is the single dominant cable operator, Comcast's local cable revenues in 2005 exceeded the revenues earned by the number one station in the market, ABC's WPVI, by $26 million. This disparity is projected to increase to $91 million by 2009. The same pattern is reflected in San Francisco, but with an even greater disparity – $70 million – between the ad revenues earned in 2005 by Comcast's consolidated system and the revenues of the leading station, Fox's KTVU – a difference that is projected to nearly double by 2009.[101]

As NBC/Telemundo illustrate so effectively in their comments, as the sole sources of video programming that provide local advertising, broadcasters and cable operators compete directly for local advertiser dollars. The merger of the local Comcast cable operations with a top-4 local broadcaster, such as NBC, is likely to result in a significant decline competition in the local ad market and excessive domination by the merged company – to the detriment of other local broadcasters (particularly, smaller, independent ones) who are already facing ad revenue declines in an economic downturn.

Comcast/NBCU's advertising dominance will be further augmented by the combined power of both local and national broadcast and cable properties, and the ability offer package deals across all of their platforms. In a recent interview reported in the

[100] *Id.*, at 7.
[101] *Id.*, at 9

industry publication *Broadcasting and Cable*, Comcast COO Steven Burke demonstrated just how much advertising leverage the combined company will wield.

> After the deal closes, we'll be able to provide advertisers with very attractive packages from national to local, broadcast to cable, and even targeted through Comcast Spotlight that will make it simple for advertisers. . . . There will be opportunities to target in the areas of women's, sports and entertainment.[102]

Broadcasting and Cable further reported that "Burke went on to describe the big opportunity of creating a cross-platform sell with NBC Universal and Comcast's cable channels. "We'll have the ability to say whether you want cable or broadcast, national or local, local spot or cable spot."[103]

A stand-alone broadcaster will not be able to offer package deals and volume discounts for advertising across multiple channels the way that Comcast-NBCU would be able to do post-merger. Indeed, recently, trade press has highlighted in more detail just how much advertising power a Comcast/NBC union would wield:

> [T]he system and NBC station could join together in selling local spots, even going so far as to merge sales forces.
>
> Or, they could cross-promote. Comcast could use its bottomless well of local avails to promote the NBC station's programming -- local, syndicated and network.
>
> Or, the Comcast system could enable the NBC station to offer zone advertising so it could target different ads to different neighborhoods.

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[102] Claire Atkinson, *Comcast's Burke Touts One-Stop Shopping: Wants to offer cross-platform buys in entertainment, sports and women*, BROADCASTING AND CABLE, Mar. 8, 2010, *available at* http://www.broadcastingcable.com/article/449798-Comcast_s_Burke_Touts_One_Stop_Shopping.php.

[103] *Id.*

> Or, the Comcast system could enable the NBC station to offer interactive advertising by giving the station a return path through the set-top box.
>
> Or, the Comcast system could give the NBC station exclusive access to set-top box viewing data for use in sales.[104]

Of particular concern to Public Interest Petitioners is that this advertising dominance will lead to an overall decline in the provision of local news and public affair from diverse sources at the market level. The merged company's ability to divert ad revenues away from other local broadcasters will mean that competitors will have less money to support local news and hire staff. To compete, rival broadcasters will have to pursue two options: fire staff and/or reduce production of local news and information; or attempt to consolidate themselves to compensate for market share lost to the new media conglomerate. In either case, the public will suffer the consequences of decreased news production and diminished independent sources of local programming.

3. Applicants' Ability to Re-Purpose and Re-Package Local Programming Across Their Commonly Owned Platforms Will Not Increase the Provision of News from Diverse and Competing Sources or the Diversity of Local Program Content

Despite the significant concentration and vertical leverage discussed above, Applicants nonetheless suggest that the merger will increase the diversity of local programming[105] and will further the "Commission's core policy objective of facilitating robust democratic discourse in the media."[106] This claim is puzzling given that there is

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[104] Jessel, *supra* note 92.
[105] *Application*, at 40-41.
[106] *Id.*, at 41-42 (citing *2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202(h) of the*

nothing inherent to the structure of this merger that would increase the provision of local news from diverse and antagonistic sources. Nor would it increase the diversity of program content. To the contrary, this merger would result in fewer diverse sources of local news programming to the extent that presently Comcast's regional news networks and NBC local broadcast stations operate independently, but would no longer do so post-merger.

This merger will not increase the amount of diverse programming content. By acquiring NBCU, Comcast's incentive to develop new and independent programming for its own local and regional cable networks would be reduced, thus detrimentally affecting the choice and diversity of independent programming available to consumers. Instead of incurring production and staff expenses for creating its own programming for its cable networks, post-merger Comcast is far more likely to simply re-purpose local NBC news content for use on such cable channels.

Applicants admit as much in their filing. There they claim that the merger "creates significant opportunities to extend [NBC local news] programming to other outlets and platforms such as Comcast's local and regional cable networks."[107] Applicants try to construe this as increasing the amount of news available to the public. But the repetition of content across multiple platforms does not increase the amount of local news or increase the diversity of sources that provide it. More to the point, the re-cycling of programming is not a "public interest benefit" – it is a "re-run."

Telecommunications Act of 1996, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, ¶ 32 (2003)) (internal quotation markets omitted).
[107] *Application*, at 40-41.

4. Applicants' Local News Commitment Does Not Remedy the Threat Posed by the Merger and Cannot be Effectively Enforced by the Public or the FCC

Applicants commit that NBC O&Os will "collectively provide an additional 1,000 hours per year of local news and information programming."[108] On first blush, such a commitment appears considerable. However, a closer examination and some basic math reveal that the commitment is insubstantial both in the amount of time and quality of programming promised. Moreover, it does not assuage Petitioners' concerns regarding the combination's effect on the overall provision of local news at the market level.

First, 1,000 hours divided by the ten NBC owned and operated stations yields an increase of 100 hours per year, or roughly sixteen minutes per day, per station. While any increase in local programming is welcome, sixteen minutes a day is trivial, particularly considering the scope of the merger and the recourses of the merging parties. Moreover, Applicants are unclear as to exactly how much of this additional programming comprises *bona fide* local news.

Applicants state that the additional content "will consist of a range of local and regional content, including several general interest news and public affairs programming, weather, traffic, and other informational programming focused on community events, local lifestyle, fashion, arts, and multicultural features."[109] However, in a footnote, Applicants hint that they do not intend that this additional content will feature a significant amount of genuine news programming. Instead, Applicants stipulate that "viewpoint diversity and localism is furthered not only by diverse news and public affairs programming but also by content other than traditional newscasts, such as *newsmagazine*

[108] *Id.,* at 42.
[109] *Id*.

programs."[110] This caveat suggests that Applicants will not in fact provide the additional amount of the much needed local news programming that they appear to promise at the outset.

Even assuming that Applicants commit to providing more and better quality local news programming as a condition of the merger, this commitment could not be effectively monitored or enforced under the terms Applicants have proposed. The Commission currently has no mechanism to require broadcasters to list the amount and types of programming aired, and Applicants have not volunteered to report on such programming themselves.[111] As a consequence, neither consumers nor the Commission have the ability to determine the baseline amount of local news programming currently aired by NBC owned and operated stations, never mind whether Applicants are following through on their promise to increase local programming as a condition of the merger.

C. Comcast's Acquisition of Telemundo Will Adversely Affect the Provision of Local Spanish Language News

While Public Interest Petitioners are extremely skeptical of Comcast's promise to increase local programming for NBC owned and operated stations, it is both notable and curious that Applicants have not made a parallel promise to invest in local programming for Telemundo owned and operated stations. To the extent that Comcast's voluntary commitments regarding Telemundo are indicative of the amount of investment and

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[110] *Id.*, at n.75 (emphasis added).

[111] There is currently a court challenge of a Commission order which would have put in place an enhanced and standardized form for broadcasters to report on the amount types of public interest programming they provide. *National Association of Broadcasters v. FCC*, Nos. 08-1135 *et al.* (D.C. Cir.); *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, Report and Order, 23 FCC Rcd 1274 (2007). Such a form would enable the FCC to monitor Applicants' compliance with said voluntary commitment.

attention that Comcast will devote to Spanish language broadcasting, we believe it is further evidence of the merger's potential adverse impact on diversity and localism, and the underserved Spanish language community in particular.

Importantly, these concerns are not merely supposition, but are borne out by Telemundo's past experience with media consolidation. As attested to by the attached declaration of the National Association of Hispanic Journalists (NAHJ), rather than encouraging localism and service to the Spanish-language community, Telemundo's merger history has accomplished the very opposite.[112] When NBCU acquired Telemundo in 2002, it promised to improve the quality of Spanish-language news. Instead, NBC gutted local newscasts and jobs at Telemundo stations.[113]

The NBC/Telemundo merger was met with significant opposition from Latino organizations who expressed skepticism at NBC's promises, as well as concerns that the merger would result in "layoffs, hiring freezes, and cuts in critically important, but less lucrative, program areas such as news and public affairs. . . . fewer existing opportunities

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[112] Declaration of the National Association of Hispanic Journalists at Appendix B.

[113] *See Applications of Telemundo Inc. and TN Acquisition Corp. for Transfer of Control of Telemundo Communications Group. Inc. and Certain Subsidiaries, Licensees of KSTS(TV), San Jose, CA, et al.*, File Nos. BTCCT-20011101ABK, *et al.* NBC's commitments in acquiring Telemundo were as follows: 1) The merger will give Telemundo the resources to compete effectively with Univision, which is the dominant Spanish-language television broadcaster in the United States. 2) By raising the bar for competition, the merger will require both Univision and Telemundo to improve the quality of their programming and therefore their level of service to the Spanish-speaking Latino community. 3) The merger will result in an improvement in Telemundo's news and information programming, both at the network and local station level. 4) As members of the GE/NBC family, Telemundo's employees will have greater opportunities for career advancement and training. 5) The merger will also benefit NBC's English-only audience by creating new possibilities for the cross-fertilization of ideas and viewpoints between the Latino and English-speaking cultures.

in the industry and reduced services to Latino audiences and customers."[114] These groups were remarkably prescient in their concerns. NBC failed to follow through on its commitments to Telemundo audiences. Rather than funnel resources into serving the Spanish language community through the Telemundo owned and operated stations, NBC laid off 700 employees, many of them Telemundo staff, and eliminated local newscasts at five Telemundo stations in Houston, Dallas, Denver, San Jose and Phoenix, replacing them with a single "hubbed" newscast out of Fort Worth, Texas.[115]

Telemundo and its broadcast audience have already suffered the brunt of media consolidation in the form of reduced local news production. This experience demonstrates why the Commission and the public should be wary of self-serving and unenforceable promises made by companies seeking merger approval.

Telemundo is the second-largest Spanish language broadcaster in the country. Applicants claim that they remain committed to providing and sustaining free over-the-air television.[116] However, Applicants do not make any commitment to increasing the availability of free over-the-air news and local affairs programming for the underserved Spanish language community. As noted above, Comcast has made a promise to invest in local programming for NBC owned and operated stations. This promise, while insufficient and unenforceable, at the very least represents some gesture towards

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[114] Press Release, National Council of La Raza, National Latino Media Council Petitions FCC To Deny Approval Of Proposed NBC-Telemundo Merger (Dec. 4, 2001), *available at* http://www.nclr.org/content/news/detail/2222/.

[115] *See* Letter from the National Association of Hispanic Journalists to Bob Wright, Chairman and CEO, NBC Universal (Oct. 20, 2006) *available at* http://www.nahj.org/nahjnews/articles/2006/october/nbcuniversalletter.pdf; *see also* Press Release, National Association of Hispanic Journalists, NAHJ Board's Statement on NBC's Plans for Telemundo (Oct. 23, 2006), *available at* http://www.nahj.org/nahjnews/articles/2006/october/telemundo.shtml.

[116] *Application*, at 40 (*Commitment #1*).

supporting the provision of local news programming available to broadcast audiences. Starkly, in the Application, Comcast makes no such promise to invest in any new local news and public affairs programming for Telemundo stations. Instead, they make the following commitments:

- "Applicants will launch a new multicast channel on Telemundo's" digital broadcast spectrum, utilizing *library* programming that has limited exposure."[117]
- "Comcast will use its On Demand and On Demand Online platforms to Feature Telemundo programming."[118]
- Comcast intends to continue expanding the availability of mun2 on the Comcast Cable, On Demand, and On Demand Online platforms."[119]

With regard to the first commitment, while Petitioners support increased utilization of broadcast digital multicast streams, this promise amounts to little more than a proposal to launch a Telemundo "re-run" channel. Applicants do not commit to any invest in new programming for Telemundo, nor indeed, the production of local news and community affairs programming. Instead they only commit to launching a multicast channel comprising Telemundo's existing "library programming" (*i.e.,* re-runs) which Applicants say they "expect" that other MVPDs "will recognize the value of carrying."[120] Thus, upon closer scrutiny, this does not appear to be much of a commitment at all.

As for the other two proposals, they do not represent a meaningful commitment to serving Telemundo's broadcast audience. First, it must again be noted that neither of these promise include a commitment to invest in new programming, but merely to re-run existing programming on cable and On Demand platforms. That aside, these

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[117] *Id.*, at 48 (*Commitment #6*) (emphasis added).
[118] *Id.*, at 49 (*Commitment #7*).
[119] *Id.,* at 49 (*Commitment #8*).
[120] *Id.*, at 48.

commitments appear to be little more than a proposal to secure more cable subscribers, not to increase Telemundo's broadcast programming or better serve the Spanish language broadcast audience. Hispanic viewers make up about one-third of the U.S. households that rely on antennas to receive over-the-air broadcasts.[121] Thus, a significant number of people who watch Spanish language programming channels, such as Telemundo, do so via a broadcast antenna hooked-up to their home, and not through a pay TV service such as cable. In order to access the programming Applicants claim they will make available via cable and On Demand platforms, much of Telemundo's current broadcast audience would have to pay Comcast for a cable subscription – and an expensive one at that, given digital service is required in order to receive On Demand access. As a consequence, this appears to be a commitment to generate new cable subscriptions, not a meaningful commitment to Spanish language broadcast audiences.

Finally, while Comcast's commitments to Telemundo are wholly insufficient, even if they contained meaningful remedies, we remain skeptical that such promises would be followed though with and that they would be enforced by the Commission. Again, Telemundo's merger history is instructive here. When NBCU acquired Telemundo, it created an illegal triopoly in the Los Angeles market through the combination of Telemundo-owned stations KWHY and KVEA and NBC owned KNBC.

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[121] *See* Kim Hart, *Move to Digital TV Faces Language Barrier, Many Hispanics Unprepared for Switch*, WASHINGTON POST, July 19, 2008, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/07/18/AR2008071803345_pf.htm (citing a survey by Knowledge Networks/SRI Home Technology Monitor).

The FCC gave NBCU a waiver to operate all three stations under the condition that it divest one of the stations within twelve months of the merger.[122]

Though the FCC instructed, and NBCU promised, to divest one of the Los Angeles stations by 2003 as a condition of the NBC/Telemundo merger, it never did. NBCU has owned and operated all three broadcast stations in direct contravention of FCC rules and a Commission order for seven years *without penalty*. This has directly injured the public via diminished competition and diversity in the Los Angeles market. Indeed, only now that NBC must win approval for another merger has it started to make any efforts to divest the additional station. In a recent amendment to their FCC application, Comcast and NBC have promised to "(1) divest one of the stations to a third party prior to the consummation of the proposed joint venture transaction, or (2) place one of the stations in a divestiture trust at closing."[123]

NBCU has had seven years to sell the additional station and come into compliance with FCC regulations. Public Interest Petitioners support immediate divestiture to bring NBCU into compliance with the FCC's media ownership rules. However, we are perturbed that Applicants are only volunteering to do so now because it is the expedient course of action given the Commission's review of their transaction.

[122] *In the Matter of Telemundo Communications Group, Inc.*, 17 FCC Rcd 6958 (2002). The FCC granted a twelve- month waiver, as opposed to the more common six-month waiver, to operate all three stations stating, "*[w]hile we find that NBC's ability to find a potential buyer for one of the Telemundo stations is likely to be less of a problem in this case, given the location of the Telemundo stations in the number two television market*, we are nevertheless committed to permitting NBC a reasonable period of time to find a qualified buyer to encourage continued diversity of the media in Los Angeles." *Id.* at ¶ 51 (emphasis added). Nevertheless, it has been still been more than seven years since divestiture should have occurred.

[123] *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licensees*, Minor Amendments, filed MB Dkt No. 10-56 (May 4, 2010).

While NBCU certainly deserves the lion's share of the blame for failing to abide by FCC rules, the Commission itself must account for its own failure to enforce not only the conditions of the NBC/Telemundo merger, but also to enforce its rules of general applicability. Its failure to do so for the past seven years calls into question the Commission's ability to enforce its own mandates. Moreover, it bodes extremely ill for the interests of the public and consumers in the event the FCC decides to approve this merger.[124] If the Commission will not enforce, and companies will not abide by, mandatory merger conditions and applicable rules, there is very little to suggest that they will follow through on proposed voluntary commitments.

IV. None of Applicants Other Voluntary Commitments Address or Remedy the Harms Posed by this Merger

In previous sections of this document, Petitioners have addressed a number of the voluntary commitments proffered by Applicants and found them wanting both in terms of their ability to rectify the anticompetitive problems presented by the merger, as well as the ability to monitor and enforce such commitments. In addition to those already addressed in this filing, we acknowledge that Applicants have made several other voluntary commitments – however, these other commitments also fall far short of remedying harms posed by the merger, and do not themselves represent benefits created by the merger itself.

Many of these commitments amount to little more than rhetorical flourish or promises that are unenforceable and/or reflect commitment to maintain the pre-merger

[124] Regardless of the outcome of the merger proceeding, the FCC must force divestiture of the additional Los Angeles stations. Moreover, it should promptly initiate disciplinary hearings to review NBC's failure to come into compliance with a Commission Order and rules for seven years.

status quo. For example, Applicants promise that "NBCU content of the kind previously made available at per-episode charge on Comcast's On Demand service and currently made available at no additional charge to the consumer will continue to be made available at no additional charge for the three year period after closing."[125] This is no more than a promise to maintain the current rates charges for certain On Demand content; it is not a benefit to consumers generated by the merger.

Similarly, Applicants promise that the "combined entity remains committed to continuing to provide free over-the-air television through its O&O broadcast stations and local broadcast affiliates across the nation."[126] Frankly, this seems to be a somewhat token and hollow commitment given that Comcast has not made any meaningful promised to invest and expand free over-the-air programming. It is no doubt designed to assuage the very legitimate concerns voiced by NBC affiliates and policymakers that Comcast will migrate the most popular NBC broadcast content behind a pay wall.[127] However, a vague promise to do no harm should not be confused with a viable, legitimate public interest benefit.

Other commitments volunteered by the Applicants contain some potentially positive elements, though they, too, fail address any of the competitive harms inherent to the merger and suffer from enforceability deficiencies. For example, "in an effort to constantly improve the tools and information available to parents," Comcast promises to "expand its growing partnership with Common Sense Media (CSM)" and to "look for

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[125] *Application*, at app. 9 (*Commitment #10*).
[126] *Id.,* at app. 9 (*Commitment #1*).
[127] *See Notice of Ex Parte Communication filed by NBC Television Affiliates*, filed MB Dkt. 10-56 (June 9, 2010).

more opportunities for CSM to work with NBCU."[128] No doubt this relationship may generate some positive public benefits, and we encourage Comcast and NBC to work with consumer groups to make their products and services more consumer friendly – but Applicants certainly do not need to merge to do so.

Similarly, and though not a formal commitment, Applicants also suggest that the merger "will enable Comcast and NBCU to continue and expand their roles in serving and supporting the local communities in which they operate."[129] Applicants explain further by citing the various charitable organizations to which they contribute, and suggesting the "proposed transaction will only enhance the ability of NBCU and Comcast to serve local needs."[130] Additionally, Comcast and NBCU appear to have recruited letters of support from a multitude of organizations to which they provide financial support. Public Interest Petitioners commend Comcast and NBCU for their involvement with, and monetary contributions to, such groups. Charitable giving is an important component of good corporate citizenship. It is not, however, a relevant factor in the FCC's determination of whether a merger transaction serves the public interest. Nor is it a proxy for the types of merger-specific public interest benefits historically considered by the FCC.

To conclude, while Petitioners are supportive and encouraging of positive industry initiatives, these commitments represent nothing beyond what Applicants are already doing, likely to do, or should be doing anyway. They do not assuage any of the concerns raised about the merger regarding reduced competition in cable television,

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[128] *Application*, at app. 9 (*Commitment #5*).
[129] *Id.*, at 67.
[130] *Id*.

higher cable and broadband rates, and the prospect of anticompetitive practices that will stifle emerging new media markets. They certainly are not benefits that are specifically generated by this merger, and do not constitute relevant or sufficient grounds to approve this merger.

Conclusion

For the foregoing reasons Public Interest Petitioners urge the Commission to carefully consider the detrimental affects of a Comcast/NBCU merger on competition and the public interest, and respectfully request that the Commission deny Applicants' merger application and attendant broadcast license transfers, and grant all such other relief as may be just and proper.

Respectfully Submitted,

______/s/_____________

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June 21, 2010

Appendix A

Before the
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of	**)**	
	)	
Applications of Comcast Corporation,	**)**	
General Electric Company and NBC	**)**	
Universal, Inc. For Consent to Assign	**)**	**MB Docket No. 10-56**
Licenses or Transfer Control of,	**)**	
Licenses,	**)**	
	)	

Declaration of
Dr. Mark Cooper, Consumer Federation of America
and
Adam Lynn, Free Press

Prepared in Support of the Petition to Deny
of Consumer Federation of America, Consumers Union,
Free Press and Media Access Project

June 21, 2010

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QUALIFICATIONS

My name is Mark Cooper. I am Director of Research at the Consumer Federation of America. I am also a Fellow at the Center for Internet and Society at Stanford University, the Donald McGannon Center for Communications Research at Fordham University, the Columbia Institute for Tele-Information at Columbia University, and the Silicon Flatirons at the University of Colorado. I have thirty years experience in public policy analysis, much of it in the communications and media sectors, as my university affiliations suggest. I have testified approximately 400 times before Congress, and state legislatures as well as regulatory agencies in forty jurisdictions in the U.S. and Canada.

My name is Adam Lynn. I am Research Manager at Free Press. I have spent years monitoring and studying the industries at issue in this proceeding. I have submitted numerous filings to the FCC on the broadcast, cable and broadband industries. I also participated heavily in the Commission's investigation of Comcast's blocking of numerous peer-to-peer protocols.

We have been asked by the Consumer Federation of America, Free Press and Consumers Union to analyze the impact of the proposed Comcast-NBCU merger.

DATA ISSUES

Availability

Under the Communications Act, Comcast is obligated to show that the merger is in the public interest.[1] Comcast and GE/NBC-U application and public interest statement have failed to address the most important issues relating to what would be a merger of historic proportions. This will be the first ever merger of a major broadcaster and cable MSO. The

[1] The Communications Act requires the Commission to deny the transfer of licenses if the Commission determines that the transfer is not in "public interest, convenience and necessity" under §310(d). Codified at 47 U.S.C. §310(d).

FCC could have and should have summarily rejected the initial application as deficient. Instead the Commission sought additional studies from Applicants.[2] These studies were also deficient. In turn the Commission issued Applicants a lengthy series of interrogatories and document production requests.[3] Unfortunately, the FCC failed to adjust the pleadings cycle to afford the public adequate time to review the mountain of data it had requested before filing oppositions to the merger.[4] Having been denied adequate time to review this new data prior to this initial filing date, these comments are based on the inadequate filings of Applicants, as well as third party sources that provide some insight into the underlying market structure. These, however, are not substitutes for the precise data that Applicants should provide pursuant to the Commission's data request. Accordingly, after we have had an adequate time to digest the new data submissions, we will amend this declaration if required.

Confidentiality

Comcast has labeled thousands of pages of evidence confidential. However, with some of the most important evidence – the third party studies in particular – it has quoted freely from those documents. We thus intend to similarly quote from the documents and treat them in a similar fashion.

We have tried to obtain many of the documents independently, so as not to be dependent on Comcast's interpretation of its relationship to the vendors. In some cases, we have been successful in obtaining data directly. In other cases we have been unable to obtain

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[2] Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses or Transfer Control of Licensees, Order Suspending Pleadings Cycle, MB Dkt 10-56 (April 16, 2010)

[3] Request for Information Sent to Comcast Corporation, MB Dkt. 10-56 (May 21, 2010), Request for Information Sent to NBC Universal, Inc., MB Dkt 10-56 (May 21, 2010).

[4] Media Bureau Denial of Request for Extension of Time to File Petitions and Comments, MB Dkt 10-56 (June 17, 2010).

the data for a number of reasons: either because the data are cost-prohibitive or, in some cases, because the vendors would not sell certain data to us because (1) it is only provided as a subscription service, not a "one-off" report; (2) vendors do not want their data used in policy contexts (a restriction, we note, that they do not appear to have imposed on Comcast or NBC); or (3) they do not want to jeopardize their relationship to commercial customers by selling to public interest advocates. We will treat the data as Applicants have; quoting the text, but not presenting detailed tables or graphs.

In the interests of providing policy makers and the public a transparent and coherent analysis, we have built our argument on nonproprietary data. Rather than continually blacking out proprietary data, we have placed all such data in a single appendix composed of a series of specific analyses. The analyses are cited in footnotes to the text.

Summary of Findings

To assess the impact of the merger on the video market and the public interest, the review must follow the contours of the market power it will create. In the case of this merger, that means the analysis should start with high-speed data transmission service (broadband Internet access), in which Comcast has the greatest market power and where the future of video distribution lies. It must encompass traditional multichannel video program distribution, local TV markets and "must have" marquee content. Our analysis shows that Comcast has the incentive, ability and willingness to unleash a massive anticompetitive assault on video distribution that will raise prices, reduce choices and undermine the public interest.

THE HORIZONTAL AND VERTICAL ANTICOMPETITIVE EFFECTS OF THE COMCAST NBCU MERGER

I. THE ANTICOMPETITIVE EFFECTS OF THE COMCAST-NBC MERGER

A. FRAMING THE ISSUES IN THE MERGER REVIEW

A proper analysis of the merger must be based on a careful and complete review of both the horizontal and vertical effects of the merger. The merger of Comcast and NBC Universal (NBCU) is a hugely complex undertaking. Comcast is the nation's largest cable operator, largest broadband service provider and one of the leading providers of regional cable sports and news networks. NBCU has one of only four major national broadcast networks, the third largest major owner of local TV stations in terms of audience reach, an icon of local and national news production and the owner of one of a handful of major movies studios.

Allowing the largest cable operator in history to acquire one of the nation's premier video content producers will radically alter the structure of the video marketplace and result in higher prices and fewer choices for consumers. The merging parties are already among the dominant players in the current video market. This merger will give them the incentive and ability to not only preserve and exploit the worst aspects of the current market, but to extend them to future markets.

1. Head-To-Head Competition

First, there is substantial head-to-head (horizontal) competition between Comcast and NBCU (see Exhibit I-1). NBCU owns more than a two dozen television stations that distribute TV programming over-the-air and many of these stations exist in markets where

Comcast distributes TV programming through its cable infrastructure. Comcast and NBCU do compete in video distribution within many of the most important markets in the U.S. These markets represent over 40 percent of the geographic areas where Comcast sells cable TV service and about one-quarter of the TV households in the U.S.[5] Comcast owns national cable networks and produces regional programming that competes with NBC programming, especially in the women's and sports categories. Thus, there is horizontal or head-to-head competition between Comcast and NBC in these markets.

[5] SNL Kagan.

Exhibit I-1: Assets Involved In The Comcast-NBC Merger

HEAD-TO-HEAD COMPETITION | **OTHER DISTRIBUTION PROPERTIES**

DISTRIBUTION

NBCU STATIONS
New York/New Jersey - WNBC/WNJU
Chicago - WMAQ/WSNS
Philadelphia - WCAU
Boston – WNEU
San Francisco – KNTV/KSTS
Washington D.C. - WRC
Houston - KTMD
Miami - WTVJ/WSCV
Denver – KDEN
Fresno - KNSO
Hartford - WVIT

COMCAST CABLE SYSTEM
New York/New Jersey
Chicago
Philadelphia
Boston
San Francisco
Washington D.C.
Houston
Miami
Denver
Fresno
Hartford

NBCU INTERNET PORTALS
Hulu (partner)

COMCAST INTERNET PORTALS
Fancast (TV Everywhere)

NBC STATIONS:
KNBC
Los Angeles
KXAS
Dallas/Fort Worth
KNSD
San Diego

TELEMUNDO STATIONS:
KVEA
Los Angeles
KXTX
Dallas/Fort Worth
KVDA
San Antonio
KBLR
Las Vegas
KTAZ
Phoenix
KHRR
Tucson
WKAQ
Puerto Rico

INDEPENDENT STATION:
KWHY
Los Angeles

OTHER MAJOR COMCAST <u>Markets</u>
Detroit
Atlanta
Seattle
Portland
Baltimore
Sacramento
Pittsburgh
Orlando
Tampa
Indianapolis
Minneapolis
Jacksonville
Salt Lake City
Memphis
Albuquerque
West Palm Beach
Nashville
Knoxville
Colorado Springs
Peoria
Champaign
Chattanooga
Ft. Myers
Harrisburg
Richmond
Wilkes Barre
Providence
New Bedford
Grand Rapids
Springfield

CONTENT PRODUCTION

NBCU PRODUCTION
Universal Media Studios
Universal Cable Productions
Universal Pictures
Focus Features
Carnival

COMCAST PRODUCTION
(partial ownership)
MGM Pictures
United Artists Corporation

NBCU BROADCASTING
NBC
Telemundo
NBC Sports & Olympics

NBC CABLE NETWORKS

	Partial
USA Network	ShopNBC
Bravo	Weather Channel
SyFy	Universal Sports
Universal HD	A&E
CNBC	Biography
CNBC World	History
MSNBC	History International
Oxygen	History en Espanol
Chiller	Military History
Mun2	Lifetime
Sleuth	Lifetime Movie Network
	Lifetime Real Women
	Crime and Investigation

COMCAST CABLE NETWORKS
E!
Golf Channel
Style Network
Versus
G4
The Comcast Network
Exercise TV
New England Cable News
CSN California
CSN Mid-Atlantic
CSN New England
CSN Philadelphia
CSN Northwest
CSN Bay Area
CSS

<u>Partial</u>
FearNet
Sprout
CurrentTV
CSN Chicago
CSN MTN
SNY
NHL Network
MLB Network
Big Ten Network

2. Vertical Leverage that Affects Horizontal Competition

Second, content and distribution are located at different points in a supply chain; however, that does not mean that there are no competitive concerns about their integration into one firm. Vertical integration can have significant effects on horizontal competition, particularly when there is strong complementarity between the upstream (content) and the downstream (distribution) stage of the supply chain.[6] For example, if the seller of downstream services has market power, it can use that power to distort competition in the upstream market. Conversely, if the seller of content has market power, it can use that power to distort competition in the distribution market. In other words, leverage that results from vertical integration can be used to reduce horizontal competition.

Moreover, while vertical integration, as a general proposition, has received less attention from antitrust officials in recent years, there is a growing belief that this lack of attention has been a mistake -- especially in light of the growth of the digital economy.[7] In any event, in the video and film sector vertical integration has always received closer scrutiny than in other sectors. This is due in part because content and distribution are such strong complementary parts of the supply chain in this sector. It is also because this part of the

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[6] Comcast recognizes this by noting, "The incentive to create more content depends upon the availability of distribution to reach viewers, and the incentive to invest in distribution depends upon the availability of content. When content owners and distributors are not affiliated, the interdependence between investment incentives may impede efforts to expand programming. The proposed transaction will contribute to overcoming this impediment (Public Interest statement at 55)." Recognizing that there is a potential downside, Comcast hastens to add in a footnote that "the parties' programming transactions "will reflect marketplace terms and conditions…buttressed by the requirement that the new NBCU may only enter into a transaction, agreement, or arrangement with Comcast or any of its affiliates if the transaction is on arm's-length terms." *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses or Transfer Control of Licensees*, MB Dkt 10-56, p. 55 (filed Jan 28, 2010) ("Application").

[7] *See e.g.* Robert Pitofsky, *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust*, pp. 148-149, 2008: Oxford University Press. Daniel L. Rubinfeld & Hal. J. Singer, *Open Access to Broadband Networks: A Case Study of the AOL/Time Warner Merger*, 16 Berkeley Tech. L.J. 631 (2001).

media sector has important non-economic impacts that are deeply affected by vertical integration. The integration of content production and distribution has long been a concern in the video market. The ability of the owners of the distribution network, whether it is movie theaters, broadcast networks, cable television, or Internet access service raises antitrust and communications policy concerns. Because distribution is a bottleneck that controls access to the public, distributors can restrict competition and diversity in the production of content. They can determine which content succeeds or fails by controlling access to audiences. The symbiotic relationship of these complements makes the vertical integration important and potentially troubling.

Modern economic analysis has drawn the logical linkage between vertical foreclosure and market power. In particular, vertical mergers can lead to real foreclosure that increases market power in either the upstream or downstream market under certain identifiable circumstances. The circumstances under which competitive harm can result from vertical mergers fit the Comcast-NBCU merger quite precisely, as suggested by Salop's contribution to a recent volume on antitrust practice.

> A vertical merger can lead to market power in the downstream market...In these circumstances, the merged firm may have the incentive to raise prices or refuse to deal, and that conduct will raise the cost of their integrated rivals. If there is insufficient remaining competition in the downstream market among integrated firms or other un-integrated firms that have cost-effective alternative sources of supply, then the downstream price may increase leading to consumer injury....
>
> A vertical merger also can lead to make power in the upstream market. Suppose that after the merger, the downstream division of the integrated firm were to refuse to purchase from un-integrated input suppliers and instead began to purchase all of its input needs from the upstream division. If the downstream division of the integrated firm represents a large share of the market, withholding its purchases might drive one or more upstream competitors to exit from the market or be forced into a higher cost niche position. Either way, that might give the upstream division of the integrated

firm the power and incentive to raise the prices it charges its other competitors...

This vertical merger could also be anticompetitive by reducing or eliminating the potential for entry. Before the merger, each firm would have the incentive to cooperate with firms who were trying to enter the market of the other firm. Competition in the other market would lead to lower prices in the market and, therefore, higher demand and profits for the complementary product. Indeed, each firm might be a potential entrant into the market of the other firm. In contrast, this incentive to facilitate independent entry would disappear. As a result, entrants would need to enter both markets simultaneously. This requirement of two level entry may raise barriers to entry and lead to higher prices, even after taking the elimination of double marginalization benefit into account.[8]

One of the key weapons that facilitate the use of leverage is the opportunity to raise rivals' costs (RRC). This reduces the pressure on the entity exercising market power. This is precisely what a post-merger Comcast could do by bundling its large portfolio of programming and raising its cost. Competitors are squeezed, while Comcast profits. Again, Salop is instructive here:

RRC conduct is more likely to harm consumers than is traditional deep-pocket predatory pricing for several reasons. First, unlike predatory pricing, or at least the paradigmatic view of predatory pricing, successful RRC does not require a risky investment or associated profit sacrificing during an initial predatory period that may only be recouped at some later point in the future. Instead, recoupment often occurs simultaneously. Second, unlike predatory pricing, successful RRC does not require the exit of rivals, or even the permanent reduction in competitors' productive capacity. If the marginal costs of established competitors are raised, those rivals will have the incentive to raise their prices and reduce their output, even if they remain viable. Third, unlike paradigmatic predatory pricing, RRC is not necessarily more costly in the short run to the defendant than its victims. For a threat may not be very costly to the predator but could substantially raise the target firm's costs. This clearly could occur with respect to exclusionary vertical conduct. Fourth, unlike predatory pricing, successful RRC does not always involve a short-term consumer benefit that must be balanced against longer-term consumer harm, if any harm

[8] Steven Salop, Economic Analysis of Exclusionary Vertical Conduct: Where Chicago Has Overshot the Mark in Robert Pitofsky, *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust*, pp. 148-149, 2008: Oxford University Press.

occurs during the recoupment period. The consumer harm would occur immediately.[9]

To conclude, Applicants' efforts to avoid close scrutiny by claiming this is just a vertical merger is wrong because there are major horizontal elements. Moreover, the merger dramatically increases the possibility of the use of vertical leverage that can be brought to bear on horizontal competition, which is a perennial concern in the media sector. The merger will also have a major impact on the incipient competition between cable and the Internet as a platform for MVPD service.

B. THE ANTICOMPETITIVE ARSENAL OF THE POST-MERGER FIRM

The horizontally competitive and vertically integrated properties described in Exhibit I-1 constitute a package of assets that provide the company with an arsenal of weapons to unleash anticompetitive attacks on all of its potential rivals. The anticompetitive threat rests on the union of two bases of market power: (1) the pervasive market power that Comcast has in distribution in the areas that it serves and (2) the amplification of that market power with control over must have programming.

As large as Comcast is nationally, it is even more important as a local provider of video and Internet services. Comcast is a huge entity in specific product markets. It is the dominant multi-channel video programming distributor (MVPD) in those areas where it holds a cable franchise, accounting, on average for over half of the MVPD market. The same can be said for its dominance in the broadband Internet access arena. This dominance of local market distribution platforms is the source of its market power.

[9] Ibid at 143.

Broadcasters and cable operators are producers of goods and services that compete head-to-head, including local news, sports, and advertising. In addition, NBC and Comcast are also suppliers of content and distribution platforms, which are goods and services that complement one another. In both roles there is a clear competitive rivalry between them. For example, in providing complementary services, broadcasters and cable operators argue about the price, channel location and carriage of content. The merger will eliminate this natural rivalry between two of the most important players in the multi-channel video space, a space in which there are only a handful of large actors. The anticompetitive fallout of the merger comes as a mix of horizontal and vertical effects leveraged against direct competitors up and down the chain of content production and distribution, as shown in Exhibit I-2.

Exhibit I-2: The Impact of the Merger Within and Across Industries

Comcast/NBCU Post Merger Assets	Direct Competitor/s	Post Merger Horizontal Concentration	Post Merger Vertical Leverage	Market Impact
-- Comcast Multi-channel Video Distribution (CMVPD)	MVPDs (smaller cable operators, telco, DBS providers)	-- Consolidate NBC, Telemundo, & Comcast local & national programming assets	-- Bundle and increase costs of affiliated programming for competing MVPDs -- Withhold programming from MVPDs	-- Increased consumer cost --Decreased consumer choice -- Decreased competition --Increased incentive for further consolidation
-- Comcast Internet Multi-channel Video Distribution -- NBC Internet Multi-channel Video Distribution -- Comcast Multi-channel Video Distribution	IMVPDs (Vuze, Roku)	-- Consolidate Comcast & NBC IMPVD assets Tie online video access to CMVPD (TV Everywhere/ Xfinity)	-- Withhold programming from IMVPDs	-- Reduce IMVPD growth and innovation -- Reduce IMVPD Competition with CMVPD --Reduce consumer IMVPD choices -- Preserve CMVPD customer base
-- Comcast Cable Content -- NBC & Telemundo Cable Content	Independent Programmers (non- affiliated cable networks)	-- Consolidate NBC, Telemundo, & Comcast programming assets	-- Discriminate against unaffiliated programmers in CMVPD carriage & tier placement	--Reduce programmer competition -- Reduce diversity of program sources
-- NBC/Telemundo O&O's -- NBC Broadcast Network -- Telemundo Broadcast Network	Unaffiliated Local Television Broadcasters and networks (ABC, CBS, Fox, Univision, independent broadcasters)	-- Combine NBC/Telemundo & CMVPD local advertising	Discriminate against unaffiliated broadcasters in tier placement & signal quality -- Preferential carriage for NBC multicast streams	--Siphon off ad revenues for competing broadcasters -- Decreased local content -- Decreased sources of programming

C. Overview: Anticompetitive Tactics of the Post-Merger Firm

The horizontal concentration and vertical leverage that both Comcast and NBCU would gain from the merger would create the incentive and ability to exact competitive harms on their direct competitors in specific sectors of industry. This concentration is likely to reduce competition in specific local markets – head-to-head competition in local video markets, head-to-head competition for programming, head-to-head competition for distributions platforms. The merger will raise barriers to entry through denial and manipulation of access to programming and the need to engage in two-stage entry. The merger will increase the likelihood that existing market power is exercised within specific markets and the incentive and ability to raise the costs for consumers, content owners and advertisers alike. Specifically, our analysis shows that Comcast and NBC are likely to gain significant, and potentially, unfair advantage in the following sectors: (1) the traditional MVPD market, (2) the emerging online video market, (3) independent cable programming, and (4) local broadcast markets. Below, we briefly summarize these effects by market sector.

1. The Traditional MVPD Market

Comcast is already the dominant MVPD in its service territory, and the acquisition of NBCU would provide it with assets to cement and expand that dominance. Specifically, the merger will provide Applicants with greater incentive and means to deny rival MVPDs access to their commonly-owned programming.

Comcast already has incentive to undermine competing cable and satellite TV distributors by denying them access to critical, non-substitutable programming, or by extracting higher prices from competitors to induce subscribers to switch to Comcast. Outright denial of access is the most extreme form of vertical leverage that can be used to

place competing MVPDs at a competitive disadvantage. Less extreme forms of leverage, of which there are many, can have an important impact on the ability of unaffiliated programming to compete. Comcast has engaged in these anticompetitive acts in the past and by acquiring a major programmer like NBC it will have a great deal more content to use as an anticompetitive tool.

Through its takeover of local NBC broadcast stations, Comcast will also gain special "retransmission consent rights," which allow stations to negotiate fees for cable carriage of broadcast signals. These rights will enable Comcast to leverage control over must-have local and national programming and larger bundles of cable channels to charge competing cable, telco and satellite TV providers more money for content. Additionally, once Comcast acquires a broadcaster, it will have the means and incentive to raise retransmission rights payments for NBC-owned stations. This will be reinforced by two factors. First, as the owner of NBC, Comcast profits from the retransmission payments it receives and does not lose from the retransmission payments it makes. These payments will be passed through to consumers.

Second, Comcast can charge competitors more for local NBC programming, and will be able to exploit asymmetric information. Cable operators do not publish what they pay for retransmission; broadcasters do not publish what they get. Because of Comcast's superior bargaining power, it will ask for more and pay less. The higher prices that distributors are forced to pay to Comcast for NBC content, not only raises consumer costs, it squeezes competing MVPD service providers, who are forced to contribute to Comcast's higher profit margin and lower their own profit margins if they attempt to compete against Comcast on price.

2. The Emerging Market for Online Video (Internet MVPDs or "IMVPDs")

The incipient competition for MVPD service that is emerging on the Internet represent the greatest threat to cable market power in its history. Content producers and distribution companies view this threat from different points of view. Internet access providers also vary in their view of these developments depending on whether they are vertically integrated across content or horizontally conglomerated across distribution platforms. This variety of interests holds the promise of a variety of business models developing and broad loosening of the hold of incumbent traditional MVPD service providers on the video market. By integrating across the key distribution-content divide and being integrated across the traditional-Internet distribution divide, Comcast and NBCU assume a commanding position to resist the growth of the Internet as a competing MVPD platform.

Notably, the merger will eliminate competition between Comcast and NBCU in cyberspace. NBCU content is available online in a variety of forms and on different websites and services. Most prominently, NBCU is a stakeholder in Hulu – an online video distribution portal that draws millions of viewers. The website is widely viewed as one of the most promising avenues for the emergence of an over-the-top competitor to traditional multichannel video service. Following the merger, Comcast will gain an equity stake in the website and thus the ability to heavily influence its future. Meanwhile, Comcast has put resources into developing its own online video site - "Fancast Xfinity" – where consumers can find video content (albeit with some strings discussed further below). Thus, the merger eliminates this nascent, head-to-head competition between NBCU and Comcast's online video offerings.

Moreover, as the largest traditional MVPD, Comcast has a strong interest in preventing Internet TV from succeeding as a platform for delivery of content that competes with Comcast's distribution of content. The proposed merger strengthens Comcast's hand in this scheme by increasing its market power in both traditional and online video distribution with disastrous result for emerging online video competition. Comcast has already adopted a business model to accomplish this, through its Fancast Xfinity venture, referred to industry-wide as "TV Everywhere." TV Everywhere ties online video distribution of popular content to a facilities-based subscription and pressure content providers to restrict or refrain from online distribution outside of the portal. TV Everywhere is a blatant market division scheme intended to extend the cable "non-compete" regime from physical space to cyberspace, even though there is no technological reason why Comcast cannot offer its TV Everywhere outside of its cable service area.

By contrast, NBCU has exactly the opposite philosophy – or at least it did. Through Hulu, NBCU is competing for both Comcast and non-Comcast customers by selling video online that is not tied to cable. NBCU also has incentives to make its programming available in as many points of sale as possible. Merging with Comcast will put an end to that pro-competitive practice. Indeed, because the dangers to competition and innovation are significant, we have untaken a more in-depth market and behavioral analysis of the effect of a Comcast/NBCU merger on this emerging market in Section III of this declaration.

3. The Independent Programming Market

Comcast already has a strong incentive to favor, and significant track record of favoring, its own programming over the content produced by others with preferential carriage deals. Post-merger it will have a lot more content to favor. The magnitude of the change in

incentives is so large that it constitutes a fundamental transformation. The suite of programming that Comcast controls would span several major categories and be unique in the industry including a major national entertainment network, national sports, regional sports, national and local news, and women's programming, that will be combined with more local distribution than any other entity in the marketplace.

The current regulatory structure does not appear sufficient to remedy the existing problem and cannot be expected to address the resulting post-merger threat to independent programmers. The econometric analysis of program carriage indicates there is a great deal of discrimination occurring already. The fact that the FCC is continually trying to catch up with complaints of program carriage discrimination – an action that is clearly treated as a last resort by programmers- is testimony to the existence of the problem and the inability of the existing rules to correct it.

4. The Broadcast Industry

The merger would also enable Comcast and NBCU to leverage their combined assets against competing broadcast networks and licensees. NBCU and Comcast currently compete head-to-head as distributors of video content in local markets. This merger eliminates this competition in major markets where NBCU owns NBC and/or Telemundo broadcast stations and Comcast operates a cable franchise.

In each of these markets, Comcast and NBCU will concentrate their shares of audiences and advertising. These two companies also compete in the local video programming market, where Comcast's regional sports and news production compete with NBC's local news and sports production. By acquiring NBC, Comcast's incentive to develop new programming would be reduced. Furthermore, the merger will consolidate control over previously separate

cable and broadcast advertising sales. A stand-alone broadcaster will not be able to offer package deals and volume discounts for advertising across multiple channels the way that Comcast will be able to do post-merger.

The vertical effects in this space are also concerning. Comcast would have incentive to give unaffiliated local broadcasters less favorable carriage terms. For example, they could reduce the quality of the signal carriage or provide placement on less favorable tiers. At the same time, Comcast could provide Telemundo and NBC stations more favorable signal quality or tier placement. Or Comcast could offer carriage to NBC and Telemundo multicast signals, while denying carriage to the multicast signal of competing broadcasters. This could reduce the amount of overall broadcast content available to Comcast subscribers and decrease unaffiliated broadcasters' incentives to invest in multicast programming and technology.

Finally, this merger would stimulate a domino effect of concentration between distributors and programmers. The new combination will create a major asymmetry in the current cartel model in the cable industry. It brings together a large cable provider with a huge stable of must-have programming *and* the largest wireline broadband platform in the United States. Comcast's expanded assets and especially its new leverage over the online video market will give it a substantial edge against competitors in its service territory.

This will trigger more mergers and acquisitions because it changes the dynamics of the market as other companies to muscle up to try and offset Comcast's huge advantage. In other words, there is only one way to deal with a vertically integrated giant that has must-have content and control over two distribution platforms – you have to vertically integrate yourself. When that happens, it will be extremely difficult for any new entrants or companies that have remained merely a programmer or merely a distributor to get into the market. Barriers to

entry to challenge vertically integrated incumbents will be nearly unassailable. The only option may be a two-stage entry into both markets at the same time – which is an errand reserved only for the brave or the foolish.

II. THE STRUCUTRAL SOURCES OF MARKET POWER

This section describes the assets that Comcast would amass as a result of acquiring NBCU. These are the assets that could be brought to bear in implementing the anticompetitive strategies and tactics summarized in Sections I, and discussed in more depth in this Section and Section III of this declaration. There are three types of assets that are combined in the new company – bottleneck MVPD distribution and Internet access facilities, “must have” content, and local distribution and content.

A. CONTROL OVER THE DISTRIBUTION BOTTLENECKS

Wall Street analysts identify cable operators as the key actor in preventing digital disintermediation in the video space because they control the distribution platform that will dominate Internet delivery of video content. As the dominant cable operator by far, and with its proposal to acquire NBC Universal, Comcast is a strong position to preserve the current rents and capture the future rents that digital technologies will make possible by lowering costs and increasing demand. The Wall Street analysts place a premium on the ability to balance the conflicting interest of the video content owners and the video distributors and they see the acquisition of content by Comcast as a strong move in this direction.

Comcast has three primary strategies that it can use to leverage its market power in broadband Internet access to gain competitive advantage. It can withhold critical “must have” content from its distribution competitors, thereby reducing the quality of their product and undermining their ability to compete. In this same vein, it can influence the withholding of content from other programmers by nature of being the largest MVPD. It can deny or degrade the access that content producers have to Comcast’s distribution subscribers, thereby

undermining their ability to compete for audiences. It can tie the Internet access and video pieces together, thereby creating a barrier to entry for competitors who do not span both Internet distribution and content production. Comcast has been a leader in utilizing these practices in traditional video markets and shown its willingness to extend them to Internet TV.

1. Dominance of High Speed Data Distribution

Cable has more market power in the broadband market than it does in the MVPD market, although its market power in MVPD is considerable. With multiple members of a household exploring new uses for high-speed Internet, the offerings of DSL providers have become increasingly less useful.[10] This disparity exhibits direct effects in the broadband market. As DSL providers began to lose market share in 2008, they looked to capture new customers by lowering the monthly cost of DSL.[11] Despite these attempts, cable operators

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[10] This was recognized by Mark Israel and Michael Katz in *The Comcast/NBCU Transaction and Online Video Distribution* (May 4, 2010) ("Israel/Katz, Online Video") ("Today, telcos' standard DSL networks often face an additional constraint: many such networks can support download speeds into a single home of only six to seven Mbps") Katz and Israel's analysis suffers from fundamental flaws. The authors seem to believe only two worlds exist. One where Internet video will forever be a complement to traditional viewing and their self-described hypothetical about online video already having "a significant number of subscribers" (p. 49). No analysis is devoted to the environment between these two very different environments. An analysis of online video competition focusing on how much bandwidth cost savings Comcast would receive by having IMVPD subscribers move back to Comcast's video service through the withholding of content misses the mark entirely (p. 71). It is undoubtedly in Comcast's financial interest to ensure this competition never develops and they have already undertaken strategies to ensure that result, as we explain in Section III. Furthermore, the development of this competition will not occur overnight. Broadband providers will certainly not immediately go from a world where a very limited number of customers rely solely on Internet video to a world where 10 percent of HSI customers are using one hundred times their current amount of bandwidth (p. 33). If IMPVDs became a viable alternative it would undoubtedly be a gradual migration with Comcast engaging in a variety of strategies to stem the losses and respond to marketplace competitors. *See also* Comcast Corporation, Q1 2010 Earnings Call Transcript, April 28, 2010. ("And there's no question in our minds that we have plenty of capacity to continue to increase broadband speeds in advance, as we have been doing, in advance for the applications that are there for them. We're sort of – we have so much capacity right now we're actually looking for bandwidth intensive uses like 3-D video and high-def video and other kinds of things and do whatever we can to stimulate that markets.")

[11] *See, e.g.,* Grant Gross, "Verizon Offers Free DSL for up to Six Months," *IDG News Service*, Sept. 2, 2008.

steadily added customers. By the 2nd quarter of 2008, the three largest DSL providers had net additions of 130,000 customers, while the two largest cable operators added 479,000.[12] In the case of Comcast, a full two-thirds of their net additions came from DSL customers.[13] These changes were not due to price reductions on the part of cable operators. As Comcast noted "[a]verage monthly revenue per high-speed Internet customer has remained relatively stable, between $42 and $43 from 2006 to 2008."[14] For instance, Comcast stated that in response to DSL price-cutting, "[w]e never changed our price… That is product superiority."[15] Comcast congratulated its advertising team whose efforts were able "to change the perception"[16] The Company proudly stated "[m]oving customers away from a focus on price is enormously difficult, we've done it."[17]

This disparity in speed has only grown over time. For instance, the highest advertised downstream speed available for AT&T DSL is 6 Mbps.[18] Meanwhile, with the widespread use of "Powerboost" technology, cable operators have been routinely advertising base downstream speeds well in excess of 6 Mbps.[19] In early 2008, Comcast found that the "number of customers taking our Blast tier is outpacing the number of customer coming in on the economy tier. We see broadband speeds as a real differentiator in the market, and in areas where DSL simply can't compete."[20] These trends have only widened with increased

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[12] *See, e.g.,* Sean Buckley, "Cable broadband is beating DSL to a pulp," *Telecom Magazine*, Sept. 16, 2008.
[13] "Comcast Corporation Q2 2008 Earnings Call Transcript," July 20, 2008.
[14] Comcast Corporation, 2008 SEC Form 10-K, p. 26.
[15] Comcast Corporation, "Transcript of Comcast Investor Day A.M. Session," May 1, 2007.
[16] *Ibid.*
[17] *Ibid.*
[18] *See* http://www.att.com/gen/general?pid=10938.
[19] For instance in non-DOCSIS 3.0 markets, Comcast promotes downstream speeds "up to 12 Mbps" as their base offering. *See* http://www.comcast.com/customers/faq/FaqDetails.ashx?Id=4859. It is worth noting that multiple cable operators do *offer* an "economy" tier that typically offer less than 1 Mbps downstream but that it is rarely, if ever, promoted to potential customers.
[20] Comcast Corporation, Q4 2007 Earnings Call Transcript, Feb. 14, 2008.

consumer demand for bandwidth. By mid-2008, Comcast found that "new premium tier additions are outpacing those of our economy service by four to one."[21] Similarly, Time Warner Cable found that "[r]esidential high speed data subs grew nearly 11 percent with over 40 percent of HSD net ads choosing our turbo service."[22] More recent indications show this dominance perpetuating[23] with consumers continuing to migrate to cable's higher speeds.[24] In the first quarter of 2009, Comcast stated "one of the reasons we think it is so important is for the vast majority of our footprint -- maybe 75 percent to 80 percent of our footprint -- the RBOCs can't compete when we go up to 50 meg and beyond."[25]

The Commission's own data confirm these findings, as shown in Exhibit II-1. Using the Federal Communications Commission's weak definition of high-speed service, a mere 200K in one direction, cable has more than a 50 percent market share in the overall market and a 60 percent market share in the residential market. Using the FCC definition of advanced high-speed service – 200K in both directions – cable's market share rises to over 60 percent in the overall market and over 70 percent in the residential market. Narrowing the definition to more advanced systems with the ability to support 3-megabit download capacity (or an adequate amount for viewing video), cable's market share rises to almost 80 percent in the residential market. This is the cornerstone of cable market power.

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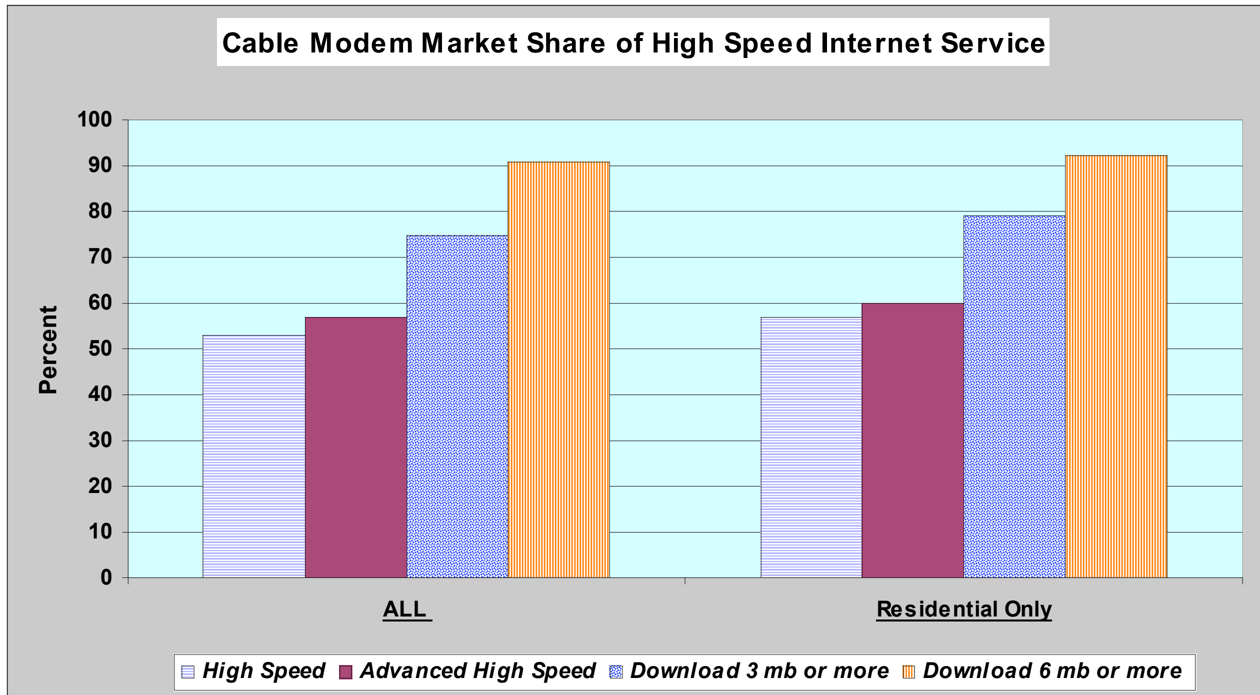
[21] Comcast Corporation, Q2 2008 Earnings Call Transcript, July 20, 2008.
[22] Time Warner Cable, Q4 2008, Earnings Call Transcript, Feb. 4, 2009.
[23] *See, e.g.*, Ed Gubbins, "Comcast broadband growth beats all Bells combined," *Connected Planet*, Nov. 4, 2009.
[24] "Our HSI customer mix also remains strong as we continue to add more than 2 1/2 times as many higher-tier customers than those on the economy level service." Comcast Corporation, Q1 2010 Earnings Call Transcript, April 28, 2010.
[25] Comcast Corporation, Q1 2009 Earnings Call Transcript, April 30, 2009.

Exhibit II-1:



Source: Federal Communications Commission, *High-Speed Services for Internet Access: Status as of December 31, 2008*, February 2010.

The bullish attitude expressed by the Wall Street analysts for cable's dominance of broadband is merely a restatement of conclusions that Comcast has reached. Comcast's recent earnings calls have provided the estimates for the large sections of the country where it would not face a competing technology with adequate capacity to deliver Internet TV:

> Deploying wideband gives us significant capacity to deliver higher Internet speeds that continue to differentiate our broadband product. It provides us an additional speed advantage, particularly in the 85% of the country without fiber based competition.[26]

In a later earnings call, Comcast further highlighted its dominance in this market:

> <Question from John Hodulik of UBS>: Okay, thanks. Good morning, guys. It looks like the strength in the broadband numbers were one of the highlights in the quarters and you appear to be taking market share and driving ARPU. In your guys' opinion, has broadband reached a tipping point where you're seeing

[26] Comcast Corporation, Q4 2009 Earnings Call Transcript, Feb. 3, 2010.

less competition or is it just the strength of the product is so far overshadowing DSL that you can expect to do both of those things for the foreseeable future? If you'd just comment on that, that would be great.

<Answer from Brian Roberts, CEO, Comcast>: Well, I think one of the real striking stories to me is after over a decade in the high-speed data business that our growth is accelerating and businesses normally don't do that. They reach a maturity level and your net adds slow down and that's what was happening with the high-speed data business until about a year ago and then we and other Cable companies, frankly, have started to reaccelerate our net adds, and I think in each of the last two quarters our net adds for Comcast alone were as much as the entire big RBOC footprint combined. We ask ourselves what's going on there. I think there's a bunch of different things. The most important one for me is the need for very, very large broadband capacity which is probably related to video consumption on the Internet but also related to gaming and other things seems to continue to grow steadily and we made our investment in DOCSIS 3.0 and really making sure that in the majority of the country something like 75% of the country our speed is just so significantly superior to DSL that that really shifts the competitive balance and I think we're -- there are a bunch of different factors that measure into our 399,000-subscriber high-speed data add for the quarter but I think there's something going on because we've noticed in previous quarters that the other Cable companies are seeing similar results and I think once these trends start to happen they tend to continue for a while and hopefully they will in this case.[27]

As one analyst put it, "cable modem service is looking more and more like it will be the only game in town… in the majority of America they will remain almost unchallenged."[28] Comcast's significant market power in the provision of broadband Internet access is itself potentially problematic. However, these concerns are amplified by Comcast's ability and past record of engaging in online content and application foreclosure through its control over customers' broadband Internet access. In May of 2005, Comcast secretly began using powerful deep packet inspection equipment to discriminate against several peer-to-peer protocols.[29] As these practices came to light, Comcast repeatedly denied that it was engaging

[27] Comcast Corporation, Q1 2010 Earnings Call Transcript, April 28, 2010.
[28] Eric Savitz, "Cable Vs. Wireless: Guess Which Is Growing Faster?" *Barrons Tech Trader Daily*, Aug. 21, 2009.
[29] Letter from Kathryn A. Zachem, Vice President, Regulatory Affairs, Comcast Corporation to Marlene Dortch, Secretary, Federal Communications Commission, In the Matter of *Formal Complaint of Free Press and*

the practice.[30] These misrepresentations became so apparent, Professor Jon Peha, now FCC Chief Technologist, felt "compelled" to submit a filing stating Comcast's claims that it was not blocking were "absurd."[31] Ultimately, the Commission stated "[w]e do not agree with Comcast's characterization and instead find that the company has engaged in *blocking.*"[32] Relevant to the transaction at issue here, the Commission also found that "Peer-to-peer applications, including those relying on BitTorrent, have become a competitive threat to cable operators such as Comcast because Internet users have the opportunity to view high-quality video with BitTorrent that they might otherwise watch (and pay for) on cable television."[33]

Indeed, numerous online video providers filed comments with the Commission. Vuze, Inc, described as "the leading destination for downloading and viewing licensed and self-published high-resolution video content online" even filed a petition with the Commission asking to ensure the blocking was ceased.[34] They stated "by degrading the high-quality video content by which Vuze differentiates itself in the marketplace, network operators can seek a competitive edge."[35] The company's general counsel stated Comcast's actions were similar to a horse race where your competitor owns one of the horses and the racetrack itself and slows

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Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, Broadband Industry Practices; Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management," File No. EB-08-IH-1518, WC Docket No. 07-52, Attachment A, p. 3 (Sept. 19, 2008). ("*Comcast Disclosure Filing")*

[30] *See e.g.* Marguerite Reardon, "Comcast Denies Monkeying with BitTorrent Traffic," *CNet*, August 21, 2007; Ryan Lawler, "Comcast Takes on TorrentFreak," Light Reading, August 21, 2007; Michael Calore, "Comcast Responds: 'We Don't Block BitTorrent,'" *Wired Blog*, August 30, 2007

[31] Comments of Professor Jon M. Peha, Carnagie Mellon University, In the Matter of *Broadband Industry Practices*, WC Docket No. 07-52, p. 2-3 (April 4, 2008) [Emphasis added].

[32] *Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications*, Memorandum Opinion and Order, WC Docket No. 07-52, File No. EB-08-IH-1518, para. 44 (2008).

[33] *Ibid* at 5.

[34] *Broadband Industry Practices*, WC Docket No. 07-52, Petition to Establish Rules Governing Network Management Practices by Broadband Network Operators of Vuze, Inc., p. 5 (Nov. 14, 2007).

[35] *Ibid* at 15.

down competing horses during the race, concluding, "which horse would you bet on in a race like that?"[36]

Comcast asserts that because the D.C. Circuit ruled that the Commission did not make use of the appropriate *legal authority*, "Comcast can appropriately assert that there is no finding against the company relating to the blocking of content on the Internet."[37] But the existence of a legal technicality cannot change the fact that Comcast was discriminating against emerging Internet video competitors for three years before public and Commission attention forced them to cease the practice.

2. The Multi-Channel Video Programming Distribution Market

The fact that Comcast is a distribution conglomerate, with a dominant share of both broadband Internet and traditional MVPD service, plays an important role in reinforcing the market power that Comcast can bring to bear on the Internet TV platform. It can use its market power in the MVPD space to place potential competitors in the Internet space at a disadvantage. By tying its dominant traditional MVPD service to Internet delivery of TV programming, it can dramatically reduce the potential customer base of a new entrant. This interacts with the strategy of withholding programming to diminish the quality of the product that Internet competitors can offer. Thus, while the anticompetitive impact of the merger on the traditional MVPD market is an important consideration, its impact on the ability of Internet TV to compete should also be considered.

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[36] Nate Anderson, "Vuze to Comcast: It's not a fair race when you own the track," *Ars Technica*, Feb. 14, 2008. ("Anderson, Race")

[37] Letter from Applicants to William T. Lake, Chief, Media Bureau, In the Matter of *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licensees*, MB Docket No. 10-56, p. 36.

The historical foundation of Comcast's market power and the primary source of the anticompetitive threat of this merger is its dominant position on local multi-channel video program distribution markets. The multi-channel video programming market is not only the most highly concentrated market in the video product space; it is one of the most highly concentrated markets in the entire U.S. economy. A recent analysis by Eli Noam provides a consistent comparison between various sectors within the overall media sector. It identifies eight different media distribution products and breaks out large cities. The ten large cities used for the analysis are made up of seven cities in which there is the greatest competitive overlap between Comcast and NBC in the sense that there are NBC O&O TV stations and Comcast cable systems, as well as Comcast sports networks. Two of the other three large cities are NBC O&O cities (Los Angeles and Phoenix), while the tenth city is a Comcast city (Atlanta). In short, these large cities are ground zero for the impact of the merger.[38]

As shown in Exhibit II-2, the MVPD sector is far and away the most concentrated of the local media markets with an HHI over 7000. The leading firms in these markets have shares in excess of 80 percent. Interestingly, the concentration ratios are higher in the larger cities than smaller cities. There are two likely explanations for this. First, the presence of large high rises restricts the number of people who can switch to satellite. Second, in these markets the cable operators have snapped up rights to marquee programming, like major league sports and made it difficult for competitors to gain access to that programming.

[38] Eli Noam, *Media Ownership and Concentration in America* (Oxford: Oxford University Press, 2009).

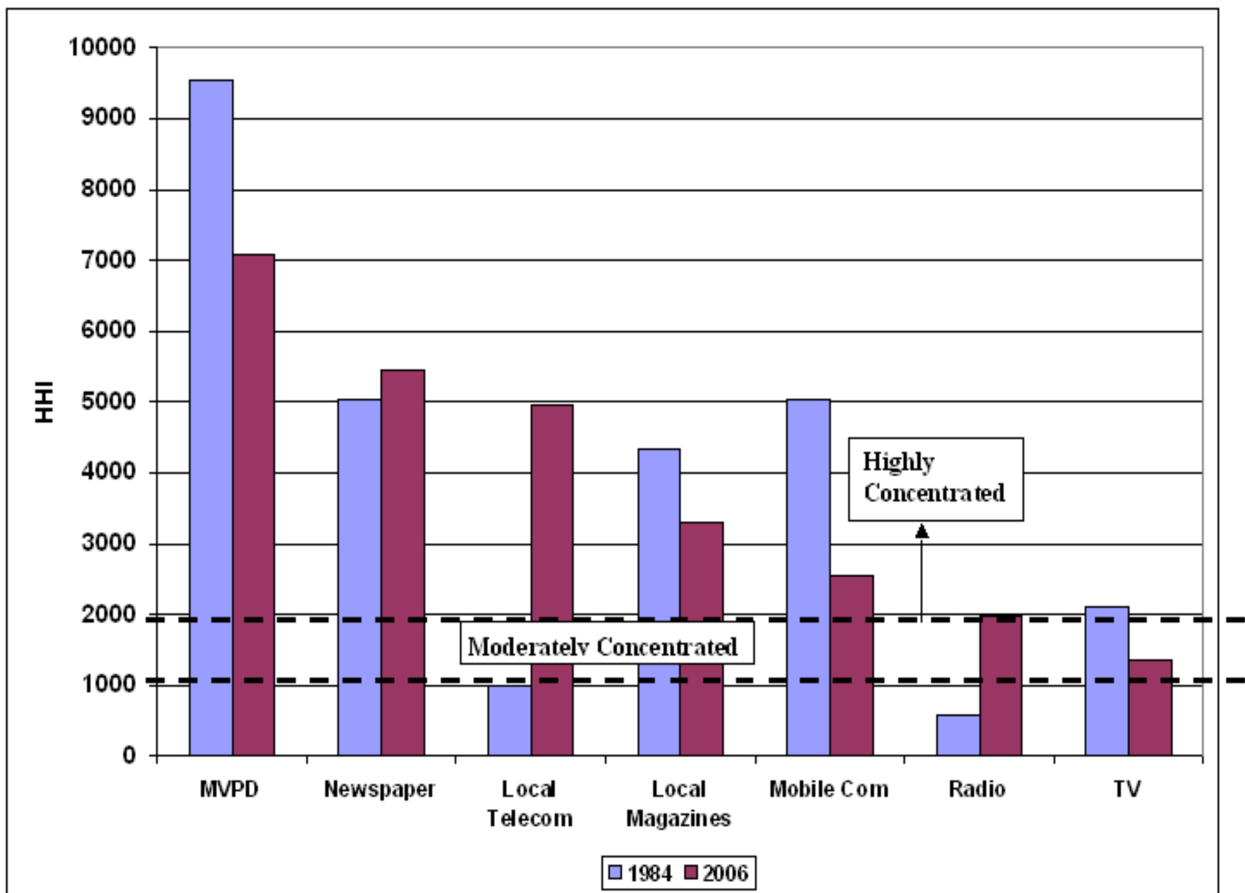
EXHIBIT II-2: CONCENTRATION OF VARIOUS MEDIA AND OTHER MARKETS

	HHI	CR4
LOCAL MEDIA DISTRIBUTION		
Large City MVPD	7090	99
Large City Local Newspapers	5464	96
Large City Local Telecom	4971	88
Large City Magazines	3291	98
Large City Mobile Com+A53	2564	92
Large City Radio	1989	79
Large City Local TV Station	1361	62
OTHER DISTRIBUTION		
Internet Search Engines	4185	94
Video Game Hardware	3630	100
Video Rental	3419	91
Internet Portal	2272	92
Home Video	1358	66
Theaters	653	45
MEDIA CONTENT		
Music Cable Nets	7073	85
Pay Cable	2282	74
Music Distribution	2226	87
B'cast nets	2177	91
Film	1419	66
Basic Cable nets	1260	66
Prime time	1223	62
OTHER CONTENT		
PC entertainment Software	1592	76
Video Game Software	609	43
OTHER MASS MARKET PRODUCTS		
Auto	2506	90
Breakfast Cereal	2253	85
Cigarettes	na	93
Microcomputers	1845	73
Fiber Optics	1517	67
Computers	1073	50
Poultry `	773	22
Beer and Malt Beverages	na	90
Women's Dresses	25	6

Sources: Eli Noam, W. Kip Viscusi, et al., *Economics of Regulation and Antitrust* (Cambridge: MIT Press, 2005), p. 148; John B. Taylor, *Economics* (Boston: Houghton Mifflin, 1988), p. 312.

Over the past two decades, the concentration of most media distribution markets has declined and that is true for the MVPD market as well (see Exhibit II-3). However, it is still a highly concentrated market. Moreover, while there has been a further reduction in the concentration of the MVPD market in the past few years, it remains the most concentrated of the media markets.

Exhibit II-3: Change in Media Distribution Market Concentration



Source: Eli Noam, *Media Ownership and Concentration in America* (Oxford: Oxford University Press, 2009).

Despite high level of concentration in the sector, Applicants assert that the MVPD

market is intensely competitive.[39] For example, they state "Verizon and AT&T…have emerged as strong MVPD competitors."[40] Yet recent data from Kagan shows that across the top 20 DMAs, the total telephone company multi-channel market share is only 6.3%.[41]

In their merger Application, Comcast and NBCU also overstate competition from DBS providers, stating that both "DirecTV and Dish Network continue to add new subscribers at a rapid pace."[42] But it is worth putting this "rapid pace" in perspective. DirecTV added 100,000 customers nationwide in the first quarter of 2010. Comcast has a nationwide service territory of 25 percent, which means that DirecTV added only 25,000 subscribers in Comcast's operational footprint, amounting to a meager 0.1 percent of Comcast's current video subscriber base.[43]

As a result of Comcast's continued dominance in the MVPD sphere, no company to date has been able to constrain cable price increases or consumers dissatisfaction with Comcast.[44] The Commission itself has found that DBS operators do not constrain cable price hikes.[45] New telephone entrants have also failed to discipline prices.[46] As a consequence,

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[39] Applicants' discussion of the current state of competition is entirely haphazard. Some markets are analyzed in the standard manner with the calculation of HHI indices based on market shares. Other markets are analyzed using the count of market participants, ignoring market shares. And some markets are never analyzed at all. Needless to say the omissions favor Comcast's position.

[40] Application at 79.

[41] SNL Kagan, Video Market Share (Cable & DBS Telco Video) by DMA -4th Quarter 2009.

[42] Application at 79,

[43] *See* Comcast Corp, Trending Schedule, April 28, 2010; DirecTV, "DirecTV announces First Quarter Results," Press Release, May 6, 2010.

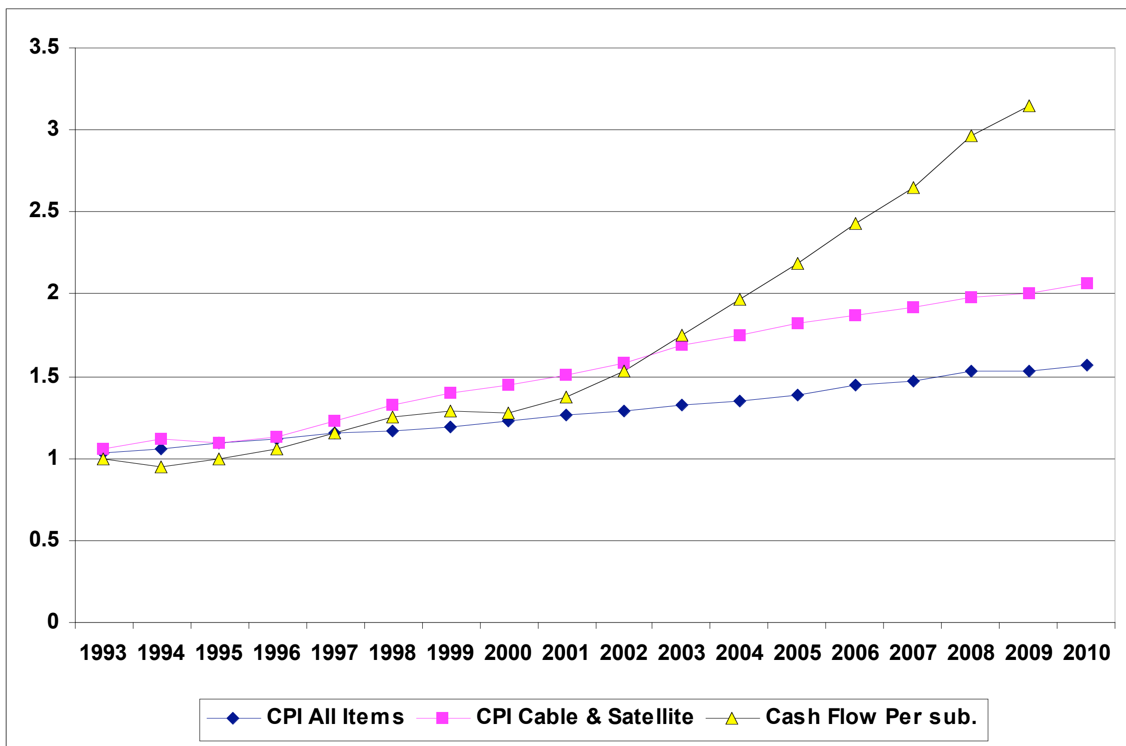
[44] The American Customer Satisfaction Index found Cable TV to be in last place of the 44 industries surveyed. Comcast was second to last in the industry. Furthermore, of the 221 individual companies covered in the survey, Comcast is tied for 216th worst in customer satisfaction.

[45] *See, e.g., Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992 – Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, Report on Cable Industry Prices, 24 FCC Rcd 259, at para. 3 (2009).

[46] *See, e.g.,* Ritsuko Ando, "Verizon raises price for FiOS TV service," *Reuters*, Nov. 20, 2007; Todd Spangler, "Verizon Plans Q2 Rate Hike For FiOS," *Multichannel News*, April 30, 2008; Jeff Richgels, "AT&T hikes U-Verse prices, adds packages," *The Capital Times*, Dec. 31, 2008; Todd Spangler, "AT&T Hiking U-verse TV, Internet, Voice Rates," *Multichannel News*, Dec. 21, 2009. Just last quarter Comcast minimized the any impact of telephone competitors stating their video subscribers declined a

cable prices have increased twice as fast as the rate of inflation since the 1996 (as shown Exhibit I-4, cable rates increased approximately 100%, while CPI increased about 50%). Furthermore, the operating cash flow of the cable operators – that is the cash left over after all operating expenses, including programming costs – has increased four times faster than the rate of inflation.

EXHIBIT II-4: INCREASES IN CONSUMER MONTHLY COST AND CABLE CASH FLOW COMPARED TO THE CONSUMER PRICE INDEX



Sources: Prices: Bureau of Labor Statistics, Cash Flow: Federal Communications Commission, Annual Video Competition Reports (1993-2006), Comcast Annual Report (2007-2009).

The fact is that while broadcast, telephone and DBS industries are all competitors, none of the three currently offer the capability to seriously encroach on cable's market power.

similar amount to the same quarter a year ago "even though the RBOCs added 5 million more homes to their footprint and last year's first quarter included a benefit from the broadcast digital transition." Comcast Corporation, Q1 2010 Earnings Call Transcript, April 28, 2010. Comcast is also quick to note that total ARPU (average revenue per user) for video customers continues to rise and that they had "590,000 total video, high-speed Internet and voice customer additions" in the first quarter. *Ibid*

Data from SNL Kagan shows that nationwide cable operators control nearly 60 percent of the MVPD market. As such, in the ten markets where NBCU owns fourteen broadcast stations (NBC and Telemundo affiliates), Comcast possesses an average market share well in excess of 50 percent – in Boston, Philadelphia and Chicago that level is in excess of 60 percent.[47] Cable operators as a whole have a market share of 62.5 percent in these ten markets, with Boston and Philadelphia in excess of 70 percent.[48]

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[47] The most appropriate level to conduct this analysis is solely within Comcast's service territory. However, we do not have access to data allowing us to perform that analysis but we remain hopeful the Commission's data request will produce the necessary information to do so. SNL Kagan, Video Market Share (Cable & DBS & Telco Video) by DMA - 4th Quarter 2009.

[48] *Ibid.*

B. “MUST HAVE” CONTENT

Bernstein notes that by acquiring NBC Universal, Comcast will “control one of every five viewers,” which it deems a substantial accomplishment.[49] However, Exhibit II-4 stresses that it will control a much larger share of key types of content that are considered to be “must have” or marquee content. These are key categories of content that are targeted at important market segments that distributors must have in order to attract viewers. Cable operators have recognized that much of the content controlled by the broadcast networks is “must-have”.[50] Exhibit II-4 identifies three such categories in which Comcast-NBC Universal will have a substantial market share – sports, news, women’s programming. Hispanic programming is a fourth area where it has a large market share.

1. Regional Sports

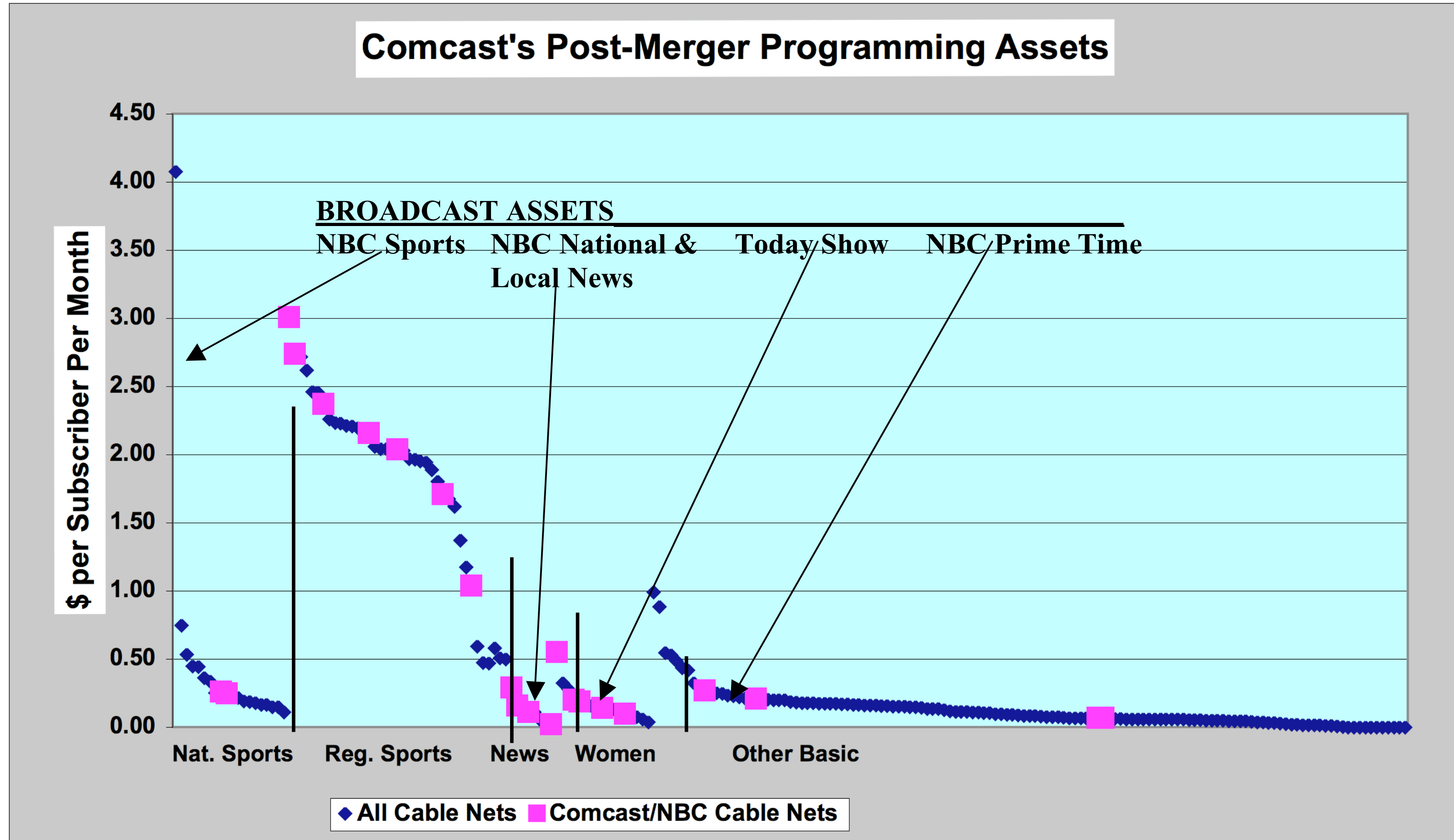
IDC identifies two types of content as potentially having a high impact on the Internet video market in the near term, news and sports. “News is conducive to advertising because it is largely brand safe… online is a big push for the industry, especially since news requires constant updates and the Internet best enables quick updates… Sports “can drive both advertising and subscription revenues.”[51]

The unique economic value of the regional sports networks can be readily seen in the both the high fees they receive (see Exhibit II-4) and the sustained, dramatic increase in those fees. Since the passage of the 1996 Act, fees for regional sports nets have increased three times as fast as fees for basic and HD networks. Sports networks are the most expensive

[49] Bernstein Research, *Web Video: Friend or Foe…And to Whom?,* p. 9 (October 2009).
[50] *See e.g.* Supplemental Submission of Joint Cable Commenters, In the Matter of *Inquiry on Rules Affecting Competition in the Television Marketplace*, MB Docket No. 05-28, p. 8-12, May 23, 2005.
[51] Elizabeth Curtis, et al, *U.S. Internet Video 2008-201: Forecast and Analysis: Revenue Boom or Bust? Or Something in Between?,* IDC, November 2008, p. 17.

programming on the dial and regional sports nets have an average cost that is several times higher than basic networks (see Exhibit II-5).

Exhibit II-5:

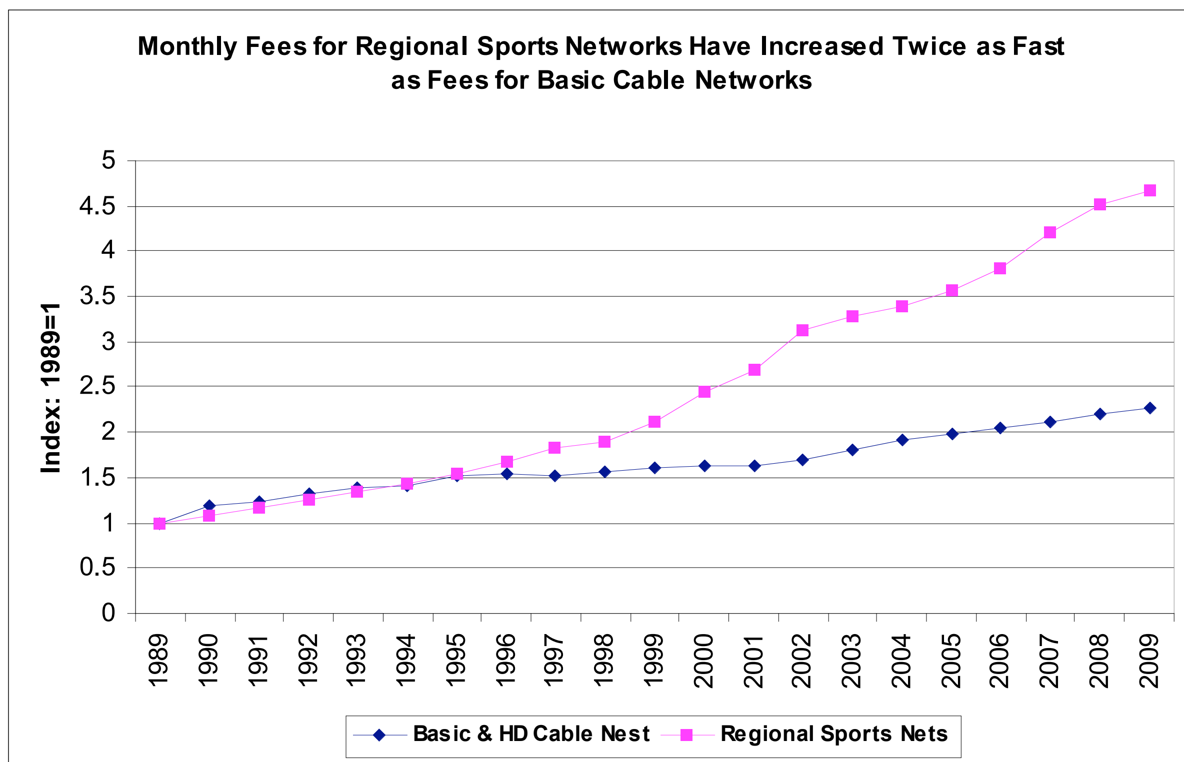


SOURCE: SNL KAGAN

Indeed, the least costly Comcast regional sports network receives a higher fee than the most costly basic network.

> As television has splintered into more and more channels, the average audience for shows has dropped. It has become so hard to draw big audiences that advertisers are prepared to pay more to reach them. Sport provides a growing portion of such events. And it reaches a particularly valuable and elusive group. Because they spend so much time at work, young men tend to watch less television than most people. Unless they are into sports, that is. None of those worries about the rise of online video and the danger that pay TV subscribers will "cut the cord" applies to sports fans… Sports thus tops up the entire TV industry."[52]

Exhibit II-6:



SOURCE: SNL KAGAN

The FCC has concluded that regional sports is a unique content category in which content owners have market power:

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[52] "The Killer App: Television Needs Sport almost as much as Sport Needs Television," *The Economist* April 29, 2010.

> At the outset, we agree with commenters that there are no reasonably available substitutes for News Corp.'s RSN programming and that News Corp. thus currently possesses significant market power in the geographic markets in which its RSNs are distributed. We base these conclusions, in part, on the limited number of teams and games of local interest that are available... and on our economic analysis, described below, of the effects of temporary withdrawals of such programming from MVPD subscribers. An additional feature of RSN programming that sets it apart from general entertainment programming is the time-sensitivity of the airing of important local professional sports events, such as opening days or playoffs. As we have previously observed, RSNs are comprised of assets of fixed or finite supply – exclusive rights to local professional sports teams and events – for which there are no acceptable readily available substitutes. These peculiar features of RSN programming give rise to somewhat unique competitive problems in terms of finding relatively close substitute programming in the event access that is foreclosed to rival MVPDs.[53]

More recently, the Commission addressed the issues of RSNs in its 2010 "Terrestrial Loophole Order:"

> We do identify one class of programming that, as shown by both Commission precedent and record evidence in this proceeding, is very likely to be both non-replicable and highly valued by consumers. In the Adelphia Order, the Commission analyzed the impact of the withholding of three terrestrially delivered, cable-affiliated RSNs on the market shares of DBS operators. In two cases, the Commission found a significant impact on predicted market share… Other evidence supports the conclusion that RSNs typically offer non-replicable content and are considered "must have" programming by MVPDs. [54]

Comcast's market power in this space is significant, and encompasses multiple assets and a firm hold on distribution market power. Furthermore, the company is reportedly in talks to add another RSN to its roster.[55] At least one Wall Street Analyst believes this type of Sports content will be critical in defining Internet TV business models.[56]

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[53] In the Matter of *General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, MB Docket No. 03-124, 19 FCC Rcd 473, 543 (2004).

[54] [54] In the Matter of *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, MB Docket No. 07-198, 25 FCC Rcd 746, 783 (2010).

[55] Mike Reynolds, "Comcast Eyes Regional Sports Network In Houston," *Multichannel News*, May 31, 2010.

[56] IDC Market Analysis, *U.S. Internet Video 2008-20102 Forecast Analysis: Revenue Boom or Bust? Or Something in Between* pp. 1…5, "Business Models: While much has been made about ad-supported content online, IDC finds that advertising will lose its status as the key revenue driver for Internet video. Subscription services will ultimately overtake advertising, on the strength of premium and sports related content, as the leading business model in 2011. IDC also expects to find hybrid business models, starting with sports,

2. News

News is another category of programming that is must have, although its value may be more oriented toward traditional MVPD distribution. While print content is all over the web, live video news content is not. There is little independent production of video news. The five major content producers (most of which own broadcast networks and movie studies and account for the vast majority of the TV audience) dominate TV news.[57] There is no long tail of independent professional video news content production. The paucity of live news content on the Internet is testimony not to its irrelevance, but to its potential value. NBC national news is described by Comcast as "a national treasure."[58] Meanwhile, the Project for Excellence in Journalism's 2010 State of the News Media notes that "despite their own drop in ratings, it is still news broadcasts that deliver the largest portion of station revenue."[59] NBC's position in the news space is as strong as Comcast's in the regional sports space. NBC national news is the leader among broadcast networks by far, accounting for 40 percent of viewers.[60] Comcast also produces regional news programming.[61]

These assets would be combined with Comcast's regional news assets to create a potentially powerful asset. The leaders in regional sports and cable news combined with the national leader in news and one of the three leading local broadcast news networks can use these assets to weaken competition from both traditional and Internet MVPD rivals. Placing the

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where users subscribe to video content but are still exposed to advertising either through product placement and overlays or because there are spots available for advertising. This category is well suited to the subscription model because it is already a common practice on legacy content distribution platforms such as cable and satellite television services."

[57] General Electric, Disney, News Corp, Time Warner and CBS/Viacom.

[58] Lorraine Woellert, "Comcast-NBC Deal Will Benefit Consumers, Roberts Tells Congress," *Bloomberg*, Feb. 25, 2010.

[59] Pew Project for Excellence in Journalism, "The State of the New Media 2010," Local TV, March 15, 2010.

[60] Television Bureau of Advertising, "Broadcast Networks Evening News Ratings Trend," 1st Quarter 2010.

[61] For instance, Comcast is not the sole owner of New England Cable News. *See, e.g.,* Johnny Diaz, "Comcast assumes full ownership of NECN," *Boston Globe,* June 18, 2009.

content behind pay walls and making them unavailable to competing distributors significantly diminishes the quality of the product they can offer to the public to win audience share, particularly in the areas where Comcast it the dominant MVPD provider.

3. Women's Programming

Another area where this transaction will result in Comcast-NBCU gaining a concerning level of market power is in "women's programming." Of course, this has not gone unnoticed by Comcast. In briefing investors on the merger, Comcast noted the reach they will have with women both through traditional and online distribution.[62] It told investors it is now the "#1" supplier of "Women/Lifestyle" professionally produced programming online. The company's COO, Stephen Burke, stated:

> "One of the things we looked at when we analyzed the deal was our ability to reach women. If you combined Bravo, Oxygen, E! Entertainment, *Today Show*, iVillage, Daily Candy, [you get] the ability to sit with one person and say ˜We can speak for an entire group of assets which target a certain age, or a certain profile.' It's unsurpassed."[63]

As Mr. Burke explains, the merger will create a company that controls an incredibly large quantity of women's programming. Comcast openly states that the combined entity plans to "share programming, production facilities, reporting, and on-air talent among multiple women's oriented networks and websites and on multiple platforms."[64] Furthermore, the company will also possess a sixteen percent stake in Lifetime, "the leader in women's television."[65] This only

[62] "[W]e reach the most women on cable and on online sites with Bravo, Oxygen, Style, iVillage and Daily Candy." Comcast Corporation, "Conference Call to Discuss NBC Joint Venture with General Electric," Transcript, Dec. 3, 2009, p. 9.
[63] Claire Atkinson, "Comcast's Burke Touts One-Stop Shopping," *Broadcasting & Cable*, March 8, 2010.
[64] Application at p 52.
[65] *See, e.g.,* Lifetime Television, "Lifetime Television Outranks All Cable and Broadcast Networks as Top Women's Television Brand in Major National Survey," Press Release, May 11, 2009.

further extends the reach of the merged entities over female audiences. The networks current subscribers are as follows:[66]

Lifetime – 99 million
E! Entertainment – 97 million
Bravo – 92 million
Oxygen – 75 million
Lifetime Movie Network – 72 million
Style – 64 million

These networks have all experienced significant success amongst women, a fact they are not reluctant to admit.[67] NBC has already been practicing "aggressive cross-promotion of all its women's brands."[68] Following the purchase of Oxygen in 2007, "one of the last independently owned cable networks," NBCU CEO Jeff Zucker stated, "when we go to market we'll be selling young women and affluent women in a way that virtually no one else can."[69] Oxygen now claims to have the "the youngest, most affluent viewers of any women's network" with the first quarter of 2010 being the network's "highest rated in history."[70] Bravo is "the fourth fastest growing top 20 ad-supported cable entertainment network in prime among adults 18-49, and year-to-date ranks No. 9 among women 18-34, up from No. 12 in 2008."[71] Indeed, in both 24 hour and prime-time, the combined rankings of Oxygen and Bravo surpassed Lifetime.[72] These considerable properties will now be combined with Comcast surging women's networks.

[66] *See* Comcast Investor Presentation, Slide 26, Dec. 3, 2009; The Walt Disney Company, "Fiscal Year 2009 - Annual Financial Report and Shareholder Letter", p. 3.
[67] Indeed, one of Comcast's studies notes, "the majority of viewers for these networks are adult women." Gregory L. Rosston, *An Economic Analysis of Competitive Benefits from the Comcast-NBCU Transaction,* May 4, 2010, p. 40.
[68] Bill Carter, "NBC Purchases Oxygen Cable TV Network for Women," *New York Times*, Oct. 10, 2007.
[69] Wayne Friedman, "NBCU to Acquire Oxygen, Extend Reach With Women Viewers," *MediaPost*, Oct. 10, 2007.
[70] Marisa Guthrie, "Upfronts 2010: Oxygen Turning Up The Volume," *Broadcasting & Cable*, April 6, 2010.
[71] Bravo, "Bravo Media Celebrates Fourth Consecutive Best Year Ever Across All Key Demos," Press Release, Dec. 17, 2009.
[72] SNL Kagan, "Nielsen Live Coverage for April 2010," May 17, 2010.

Comcast's Style network claims to be "the fastest growing women's network in the U.S."[73] In fact, in the past year, the network has seen a higher percentage increase in primetime ratings than all but one other major network[74] - at more than 42 percent.[75] Furthermore, Comcast's E! Entertainment recently had "the network's highest-rated quarter ever across all key measures including…women 18-34 [and] women 18-49."[76] The merged entity will also extend their reach online with two high-profile female-targeted websites in iVillage and Daily Candy. According to comScore, iVillage is the 26th most frequented online destination making it one of the most popular female-targeted destinations on the Internet.[77]

This creates both democratic and economic concerns. First, allowing a single company to dictate a substantial portion of the content for an entire segment of the population raises obvious concerns about an adequate diversity of viewpoints. Second, Applicants' consolidated control over women's oriented programming would further disadvantage independent and "upstart" cable networks seeking to enter this space. Applicants could deny independent programmers carriage on Comcast's systems. Additionally, given that advertisers focus on reaching specific demographics, the merged entity will retain the ability to exercise market power over advertisers of women's programming. As noted in a subsequent study performed at the behest of the Applicants, the transaction is "likely to lead to sharing of advertising resources to realize economies of scale and scope."[78] In any event, Comcast would have considerable motivation to deter advertisers from supporting other cable networks aimed at a similar audience.

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[73] *See* Comcast, "Comcast Cable Networks" 2010.
[74] The largest gain came from Comcast-owned Versus.
[75] SNL Kagan, "Nielsen Live Coverage for April 2010," May 17, 2010.
[76] "First Quarter 2010 Ratings," *Cable U*, TV Toolkit, *available at* https://www.cableu.tv/first-quarter-2010-ratings/.
[77] comScore, "comScore Media Matrix Ranks Top 50 U.S. Web Properties for October 2009," Press Release, Nov. 19, 2009.
[78] Rosston, *An Economics,* p. 40.

4. Hispanic Programming

Comcast would acquire the number two Hispanic broadcast network in a product space where there are only two national networks. It would also be acquiring NBC's Hispanic cable property where there are only a handful of non-sports, Hispanic cable networks. Thus, a large market share of the Spanish language video market – properly treated as its own distinct product market[79] -- would be acquired by the dominant cable operator. This creates yet another point of concern about the ability to leverage the vertical relationship created by this merger.

C. LOCAL TV MARKETS

1. Local Cable and Local Broadcasters Compete in Local Video Markets

Applicants have tried to downplay the significant impact the merger would have on competition in local video markets by suggesting that NBC and Comcast are not true competitors in these markets. To the contrary, we believe the evidence is overwhelming that cable competes with local broadcast and the merger would have a significant impact on the fabric of local video market competition.

[79] The Spanish language video market is a distinct product market. In his concurrence in Univision's 2007 license transfer request, Commissioner Copps noted that "the Commission has never formally decided whether Spanish-language programming constitutes a separate market segment that must be analyzed in isolation from English-speaking programming." *In the Matter of Shareholders of Univision Communications, Inc., and Broadcasting Media Partners*, Statement of Commissioner Michael J. Copps Approving in Part and Concurring in Part, 22 FCC Rcd. 5842, 5876. Nonetheless, Spanish-language broadcasting should be treated as a distinct market because it bears the "practical indicia" the Supreme Court used to define a submarket in *Brown Shoe Co. v. United States*: "peculiar characteristics," "public recognition of the submarket as a separate economic entity," "distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *See Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). For a more detailed discussion of Spanish-language broadcasting as a distinct market, see Amy Jo Coffey & Amy Kristin Sanders, *Defining a Product Market for Spanish-language Broadcast Media: Lessons from United States v. Univision Communications Inc. and Hispanic Broadcasting*, 15 COMM. L. & POL'Y 55 (2010). While market definition is more of an art than a science, the picture with respect to the Spanish language video market is quite clear. The market is defined by unique characteristics including Language, Culture, Religion, Taste, and Demographic changes. Moreover, the industry recognizes, refers to and treats it as a separate market. The industry incurs large costs to launch unique products to serve it and studies it as a separate market. Finally, the government identifies the Hispanic population as an important demographic subgroup. Clearly, the market is definitely large enough to treatment as a separate market under the antitrust laws and the Communications Act policies on localism and diversity and diversity and it is concentrated geographically, which makes it easier to address.

In their Application, Comcast and NBC-Universal suggest that the broadcasters and cable operators do not compete because they "are *not* part of the same product market."[80] The claim is has been rejected by FCC. The Commission has repeatedly found that "[b]roadcast networks and stations are competitors to MVPDs."[81] In a 2007 *Order* on Multicast Must-Carry, the Commission found that the broadcast and cable industry compete for advertising, relying on an NBC filing stating, "cable operators are encroaching on broadcasters' advertising base."[82] The Commission's three most recent MVPD Competition Reports all noted cable's continually increasing revenues for "local advertising."[83] This is in line with the Courts and Congress, which have both noted that the two industries "compete for television advertising revenues."[84]

Applicants themselves have repeatedly told the Commission that they compete for advertising.[85] Just last year NBC stated. "with the continued growth of cable, DBS, video by telephone companies, the Internet and other video providers, the broadcast networks now face even

[80] Application at 83 [emphasis in original]

[81] *See, e.g.* Annual Assessment of the Status o f Competition in Markets for the Delivery of Video Programming, CS Docket No. 97-141, Fourth Annual Report, 13 FCC Rcd 1034 (1998) para. 90; Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CS Docket No. 98-102, Fifth Annual Report, 13 FCC Rcd 24284, para. 95 (1998); Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CS Docket No. 99-230, Sixth Annual Report, 15 FCC Rcd 978, para. 101 (2000); Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 00-132, Seventh Annual Report, 16 FCC Rcd 6005, para. 98 (2001); Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 01-129, Eighth Annual Report, 17 FCC Rcd 1244, para. 78 (2002).

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

[83] Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Thirteenth Annual Report, 24 FCC Rcd 542, p. 23 (2009); Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Twelfth Annual Report, 21 FCC Rcd 2503, p. 19 (2006); Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eleventh Annual Report, 20 FCC Rcd 2755, p. 20 (2005).

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

[85] In their application to merge with AT&T, Comcast stated post-merger it would have "a better chance to compete with broadcasters." Of course, the entity assured the Commission that the merged entity would still "have a small share of this market compared to broadcasters." Applications and Public Interest Statement of AT&T Corp. and Comcast Corporation, In the Matter of *Applications for Consent to the Transfer of Control of Licenses, Comcast Corporation and AT&T Corp., Transferors, To AT&T Comcast Corporation, Transferee*, Docket 02-70, pp. 45-47 (Feb. 28, 2002).

greater competition from an array of programming alternatives.[86] NBC has made similar assertions in other proceedings. In 2006, NBC told the Commission in the multicast must-carry proceeding "cable's competition with broadcasters for local advertising revenues has increased many-fold."[87] In 2005, in discussing retransmission consent, NBC stated that retransmission consent "simply ensures that local stations do not have to give away their most valuable private asset – their programming – to their MVPD competitors (who then can use that programming to attract customers away from the station and the station's advertisers)."[88] In 2004, NBC affiliates stated the market is "skewed by cable's bottleneck position and anti-competitive incentives."[89]

2. Concerns about Anticompetitive Effects Apply to O&Os and Affiliates

Exhibit II-6: identifies five types of local relationships resulting from the merger that create significant competitive and public policy concerns. Post-merger, Comcast would be the dominant cable operator in 55 Designated Market Areas where it would also have other local video distribution assets. There would be two types of non-cable distribution assets – direct ownership of local broadcast stations (O&Os) or affiliate relationships with local broadcast stations (Affil.). These relationships would affect two distinct local markets – the general video market and the Spanish language market.

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[86] Reply Comments of NBC Universal, In the Matter of *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 07-269, p. 10 (2009).

[87] Supplement of CBS Television Network Affiliates Association & NBC Affiliates, In the Matter of *Carriage of Digital Television Broadcast Signals*, CS Docket No. 98-120, p. 7 (June 8, 2006). NBC also made this case to Congress. *See* Letter from Marci Burdick, President, NBC Television Affiliates and Doreen Wade, President, CBS Television Affiliates Association to Chairman Stevens, Senator Inouye, Chairman Barton, Congressman Dingell, Chairman Upton and Congressman Markey, Cable's Stripping of Broadcasters' Free Multicast Services, June 8, 2006.

[88] Comments of NBC Universal, In the Matter of *Inquiry Required by the Satellite Home Viewer Extension and Reauthorization Act on Rules Affecting Competition in the Television Marketplace*, MB Docket No. 05-28, p. 2 (March 1, 2005).

[89] Special Factual Submission of NBC Television Affiliates Association, In the Matter of *Carriage of Digital Television Broadcast Signals* et al., CS Docket Nos. 98-120, 00-2, 00-96, p. 12 (Jan. 8, 2004).

Exhibit II-7: Post-Merger Local Market Assets

DMA	Comcast Cable Share	Cable Ad Rev Share	NBC/Tel O&O PT Aud. Share	NBC Affil PT Aud. Share	Competitive Threat Cat.*	MSO Dom.	NBC O&O	Tel O&O	NBC Afill.	Tel Afill.
Chicago	0.94	0.27	0.16		5	1	1	1		
Miami	0.95	0.21	0.18		5	1	1	1		
Hartford	0.56	0.24	0.19		4	1	1			1
Philadelphia	0.80	0.24	0.18		4	1	1			1
San Francisco	0.93	0.24	0.17		4	1	1			1
Washington, DC (Hagerstown)	0.78	0.20	0.22		4	1	1			
Boston	0.86	0.30	0.01	0.17	3	1		1	1	
Denver	0.89	0.23	0.02	0.22	3	1		1	1	
Fresno	0.86	0.18	0.05	0.11	3	1		1	1	
Houston	0.69	0.21	0.05	0.11	3	1		1	1	
Albuquerque	0.83	0.19		0.17	2	1			1	1
Chico	0.57	0.15		0.18	2	1			1	1
Monterey	0.65	0.21		0.32	2	1			1	1
Sacramento	0.76	0.21		0.2	2	1			1	1
Atlanta	0.81	0.22		0.15	1	1			1	
Augusta	0.64	0.22		0.15	1	1			1	
Baltimore	0.85	0.20		0.23	1	1			1	
Burlington	0.63	0.17		0.29	1	1			1	
Charleston	0.54	0.18		0.19	1	1			1	
Charlottesville	0.93			0.43	1	1			1	
Chattanooga	0.65	0.21		0.18	1	1			1	
Colo-Springs	0.73	0.19		0.2	1	1			1	
Columbus Tupelo	0.89	0.17		0.36	1	1			1	
Detroit	0.82	0.22		0.18	1	1			1	
Eugene	0.65	0.15		0.2	1	1			1	
FT Myers	0.98	0.21		0.19	1	1			1	
FT Wayne	0.67	0.18		0.19	1	1			1	
Harrisburg	0.90			0.64	1	1			1	
Hattiesburg	0.59	0.25		0.24	1	1			1	
Indianapolis	0.61	0.21		0.27	1				1	
Jackson	0.65	0.20		0.27	1	1			1	
Jacksonville	0.94	0.22		0.2	1	1			1	
Johnston	0.58	0.21		0.2	1	1			1	
Knoxville	0.61	0.25		0.23	1	1			1	
Lansing	0.71	0.15		0.22	1	1			1	
Memphis	0.79	0.21		0.21	1	1			1	
Minneapolis	0.66	0.24		0.17	1	1			1	

Monroe	0.62	0.13		0.16	1	1			1	
Nashville	0.75	0.21		0.23	1	1			1	
Peoria-Bloomington	0.88	0.18		0.25	1				1	
Pitt	0.83	0.27		0.18	1	1			1	
Portland	0.87	0.20		0.21	1	1			1	
Richmond	0.66	0.19		0.26	1	1			1	
Roanoke	0.80	0.20		0.2	1	1			1	
Rockford	0.84	0.20		0.2	1				1	
Salt Lake	0.93	0.20		0.21	1	1			1	
Savannah	0.88	0.15		0.18	1	1			1	
Seattle	0.37	0.21		0.21	1	1			1	
Shreveport	0.76	0.17		0.15	1	1			1	
South Bend	0.54	0.18		0.22	1	1			1	
Spokane	0.77	0.17		0.21	1	1			1	
Springfield-Holy	0.68	0.20		0.29	1	1			1	
Tallahassee	0.78	0.15		0.12	1	1			1	
West Palm	0.76	0.21		0.21	1	1			1	
Wheeling	0.76	0.18		0.49	1	1			1	

* 5= MSO + NBC O&O + Telemundo O&O
4= MSO + NBC O&O
3= MSO + Telemundo O&O
2= MSO + NBC Affiliate + Telemundo Affiliate
1= MSO + NBC affiliate

Sources: National Association of Broadcasters, *The Television Industry: A Market-by-Market Review: 2010* (2010); SNL Kagan Database.

The direct ownership of both a dominant cable operation and a TV station raises the greatest concern, but even where NBC does not own the local station, the affiliate relations could dramatically alter the competitiveness of local broadcast markets, since the non-NBC affiliates are dependent on Comcast to reach the majority of TV households in the local area. In other words, Comcast is both a bottleneck provider of access to local audiences and a competitor for those audiences both as a cable operator and as the owners of a major broadcast network. In the past, it was indifferent between the broadcast networks. In the future, it will have an incentive to favor its own broadcast network. The incentive to favor its own could be expressed in variety of ways.

- Comcast controls the set top box, the channel location and picture quality through compression or HD delivery, all of which can be used in a discriminatory manner to place the non-NBC affiliates at a disadvantage. Moreover, Comcast could deny carriage to non-affiliated digital multi-cast streams, giving carriage to NBCU-affiliated multicast streams
- A second set of advantages that the NBC affiliates could gain flows from the cable technology, such as targeted or interactive advertising. In theory, these functionalities could be used by all affiliates, but Comcast would have an incentive to advantage its affiliates at the expense of non-NBC affiliates.
- A third set of business practices that Comcast could use to advantage its affiliates would be bundling advertising spots and cross promoting the affiliate's programming.

Having concluded that cable competes with local broadcasting, the question remaining is whether the merger will have a sufficient impact on local competition to raise concerns. In the markets where the post merger company would be the dominant cable operator and the owner of an NBC station, there is no doubt that it does. Exhibit II-7 shows one classic measure of the effect of consolidation. It calculates the level and increase in the local video advertising market that would result from the merger. For Philadelphia and San Francisco, it shows a calculation based on estimates for 2009 advertising presented to the Commission by NBC. This is compared to estimates of the impact of the merger we have made based on data from the National

Association of Broadcasters for 2008. Our methodology yields somewhat smaller effect, so we think it is a conservative estimate of the impact of the merger. Five of the six markets would be highly concentrated post-merger according to the current DOJ/FTC *Merger Guidelines* (only Miami falls below the threshold for a highly concentrated market of 1800). All of the post-merger markets would be moderately concentrated according to the proposed, revised *Merger Guidelines.*

Exhibit II-8: Impact of the Merger on Local Video Advertising Markets

Designated Market Area	NBC 2009 Projection		NAB 2008 Actual	
	Post-Merger HHI	Merger Related Increase	Post-Merger HHI	Merger Related Increase
San Francisco	2394	914	2193	6620
Philadelphia	2767	971	2332	655
Chicago			2205	625
Miami			1750	593
Hartford			2693	683
Washington			2286	704

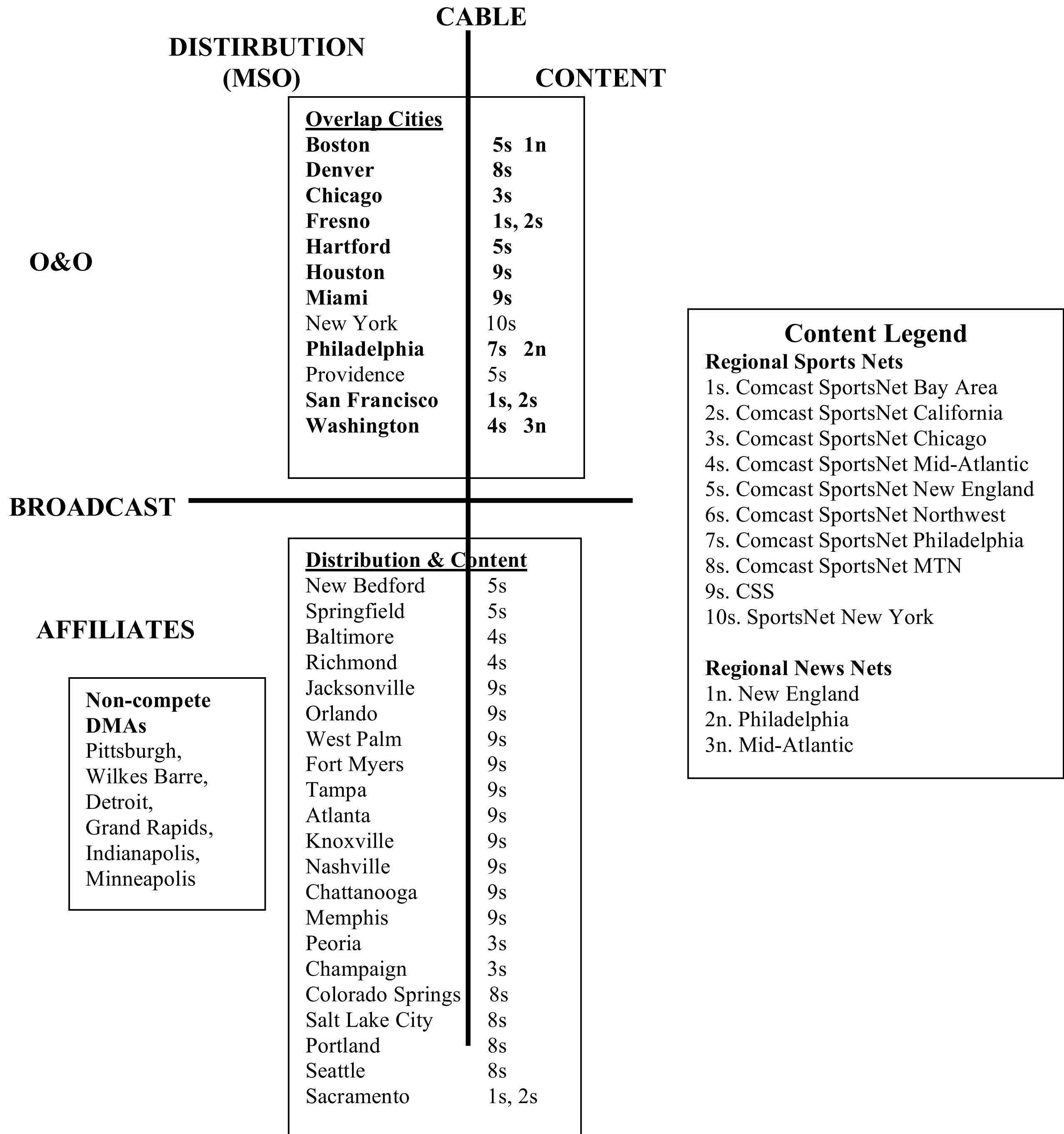
Sources: NBC: Comments of NBC Universal and NBC Telemundo License Co., In the Matter of *2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al.*, MB Docket Nos. 06-121, 02-277, MM Docket Nos. 01-317, 01-235, 00-244, Appendix, (2006); National Association of Broadcasters, *The Television Industry: A Market-by-Market Review: 2010* (2010). Attributes all cable revenue to the dominant cable operators and apportions broadcaster advertising revenue to broadcasters according to prime-time market share.

In every case the increase in the market concentration exceeds the threshold that is a cause of concern under the *Merger Guidelines* by a wide margin. In moderately concentrated markets increases of 100 points in the concentration index are a cause for concern. In highly concentrated markets, increases of 50 points are a cause of concern. In the NBC O&O markets the merger raises the concentration index by five to ten times the threshold.

Exhibit II-9: overlays the content aspect of the merger on the local competition aspect by identifying those markets where there are regional news and sports assets combined with local

distribution assets. The ten markets in bold in the top center of the graph are the markets in which the TV licenses should not be transferred because the combination would result in undue concentration and adverse effects on diversity.

Exhibit II-9. Multiple Layers of Overlap



III. THE THREAT TO INTERNET TV

The threat that this merger poses to potential competition from Internet delivered video deserves special attention in the merger review for several reasons.

First, the incipient growth of competition on the Internet holds the greatest promise for breaking the stranglehold of traditional MVPD service providers on the video market that has presented itself in decades.[90] Over the past quarter century there have been a few moments when a technology comes along that holds the possibility of breaking the chokehold that cable has on the multi-channel video programming market, but on each occasion policy mistakes were made that allowed the cable industry to strangle competition. This is the first big policy moment for determining whether the Internet will function as an alternative platform to compete with cable. If policymakers allow this merger to go forward without fundamental reform of the underlying industry structure, the prospects for a more competition-friendly, consumer-friendly multi-channel video marketplace will be dealt a severe setback.

It is only by taking the approach we have outlined that Federal authorities can do more than just preserve the current industry structure, which is riddled with anticompetitive and anti-consumer institutions and practices. Instead, they can improve the terrain of the American video marketplace. This merger is an opportunity to jump-start the industry reform process.

Second, control over broadband Internet access is the cornerstone of the anticompetitive response to the growth of Internet competition and it is the market in which cable operators have

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[90] The Commission has recognized the Internet as an emerging competitor to traditional MVPDs on numerous occasions. *See e.g. Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, MB Docket No. 06-189, Thirteenth Annual Report, 24 FCC Rcd 542, 614 (2009); Dissenting Statement of Commissioner Robert M. McDowell, In the Matter of *The Commission's Cable Horizontal and Vertical Ownership Limits et al.,* Fourth Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-264, 23 FCC Rcd 2134 (2008); Remarks by Omnibus Broadband Initiative Executive Director Blair Levin, "Owning the Inevitable," American Cable Association's 17th Summit, April 20, 2010. ("Over-the-Top Video will eventually emerge as a challenge to the current model of multi-channel distribution of large and increasingly expensive bundles of linear programming.")

the greatest market power. While the technology is new, the tactics being used to prevent it from breaking the market power of a tight oligopoly that control the choke point of distribution are well-known and recognized – concentration, conglomeration, vertical integration. The linking and leveraging of broadband access replicates past moments when policymakers were forced to grapple with how to promote competition, localism and diversity in the video product space.

Third, the anticompetitive harm that the merger could do to the Internet as a competitive platform for MVPD service is a perfect example of the use of vertical leverage that has horizontal effects. Starting here is the perfect antidote to the erroneous claim that because the merger is largely a vertical merger there are no merger related competition issues to be analyzed. The rehabilitation of vertical analysis in antitrust, which has long been overdue, can start in the review of this merger.

A. Digital Distribution

Wall Street analysts who have been examining the growing competition between Internet video and traditional video distribution[91] frequently begin by discussing the impact of digital distribution on the music labels and the determination of video content producers to avoid that fate.[92] Or as Comcast puts it, outside its Application,[93] they need to make "sure that we get ahead

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[91] Piper Jaffray, *Internet Video: Field of Dreams or Nightmare on Elm Street?,* November, 2009, p. 5.

[92] For example, the opening section of the Piper Jaffray analysis is entitled "Music v. Video: Why These Markets are Traveling Down Different Paths." Similarly, the Title page of Bernstein's *Web Video: Friend or Foe. and to Whom* (October 7, 2009), starts with an observation about the difference between music and video and links that difference to the proactive behavior of Comcast. *See also* Tim Arango, "Cable TV's Big Worry: Taming the Web," *New York Times*, June 23, 2009 ("What is at stake is perhaps the last remaining pillar of the old media business that has not been severely affected by the Internet: cable television. Aware of how print, music and broadcast television have suffered severe business erosion, the chief executives of the major media conglomerates…have made protecting cable TV from the ravages of the Internet perhaps their top priority.") ("Arango, Taming the Web")

[93] The Application claims "[c]urrently, online video content does not compete directly with MVPD service…. Indeed, online video distribution is presently incremental and complementary to Comcast's cable business" (at 99). Yet earlier in the Application, online video is referenced as an alternate choice for consumers (at 4). Comcast's recent SEC 10-K, filed after the Application, lists "online services that Internet video streaming, downloading and distribution" as a competitor. *See* Comcast Corp., SEC 10-K, p. 6, Feb. 23, 2010. Similar revelations were offered in a previous SEC filing: Comcast Corp. SEC 8-K, p. 16, Dec. 22, 2009. NBC is

of the steamroller that is the Internet."[94] The time frame in which this steamroller is projected to arrive is relatively short and the extent of the potential competition is pervasive.[95] The music labels have suffered a major reduction in the revenues and margins as a result of digital distribution and the concern of the Wall Street analysts is the ability of the video content producers to maintain their rate of profit. This paramount Wall Street concern is only part of a proper economic analysis. Rather, the following key elements (which are given short shrift in these analyses) must also be considered:

- **Consumer Welfare**: In the Wall Street analyses, the question of how consumers have fared is at best given cursory treatment. While the convenience of digital distribution is frequently noted, the direct impact on the consumer pocketbook, consumer surplus in economic terms, receives little attention.
- **Super-Profit Protectionism**: The possibility that the profit margins the music labels were trying to defend with their war against digital distribution were excessive never enters the analysis.
- **Efficiency Gains to Industry**: The efficiency gains in the industry also do not receive the attention they deserve.

Since it is the job of Wall Street analysts to advise investors about the prospect for (preferably supra-normal) profits, these blind spots in their analysis are understandable, but policy makers must have a broader and more complete view. The consumer and public interest impact of technological change, market structure, and alternative business models must be taken into account by policy makers. The investor view must be balanced against the consumer view to ensure a market structure that is efficient, stable and equitable.

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no different, telling the Commission in 2009 that "The Internet as a distributor of high-quality video programming has reached the tipping point " Reply Comments of NBC Universal, Inc In the Matter of *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 07-269, p. 2 (Aug. 28, 2009).

[94] Jeff Baumgartner, "Comcast Nears 'TV Everywhere' Launch," *Light Reading*, Sept. 9, 2009.

[95] UBS Investment Research, *Can Pay TV Benefit from Online Video?,* p. 9. NBC recently stated that "[t]he Internet as a distributor of high-quality video programming has reached the tipping point." Reply Comments of NBC Universal, In the Matter of *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, MB Docket No. 07-269, Aug. 28, 2009.

1. Avoiding the Nightmare on Elm Street

The juxtaposition of the music and video industry approaches to digital distribution provides the launching point for one recent study entitled *Internet Video: Field of Dreams or Nightmare on Elm Street?* Needless to say, the music sector is seen as the nightmare on Elm Street. The music industry fate is depicted as follows.[96] Faced with a consumer rebellion, the music labels tried to lock down content and slow alternative distribution. Finally realizing that they needed a digital distribution model, they ended up the captives of a high tech company (Apple), whose primary interest was in selling hardware and other peripherals. Pricing content to promote penetration, a strategy well known and effective in the Internet space, meant usage charges were kept low and the margins for the record labels were squeezed. An industry that was focused on high margins driven by the "value" of the product had difficulty viewing the world through a low margin, penetration-promoting lens.

The analysts' buzzwords for what must be avoided by the incumbents in the video industry structure are *arbitrage*, *cannibalization*, and *disintermediation*.[97] As used in this context, each of the terms indicates a shifting in the flow of commerce through a distribution channel that yields high profits to the incumbent to a channel that yields a lower rate of profit, or the removal of the flow of commerce from the incumbent's channel entirely. Each of the players who have leverage in the current supply chain is at risk of having their control over distribution

[96] Piper Jaffray, *Internet Video,* p. 4. *See also* Ronald Grover, Tom Lowry and Cliff Edwards, "Revenge of the Cable Guys," *BusinessWeek*, March 11, 2010 ("Jeff Bewkes and Brian Roberts, the CEOs of Time Warner and Comcast…took a lesson from the music labels, which looked up one day to find that Steve Jobs and Apple had taken control of their inventory.") ("Grover, Revenge").

[97] Bernstein, *Web TV,* p. 15. UBS Investment Research, *Can Pay TV,* p. 3, 10. Dawn C. Chmielewski and Meg James, "Hulu's tug of war with TV," *Los Angeles Times*, May 11, 2009 ("We have to be mindful of the fact that we have a good business that works for all the players," said Andrew Heller, domestic distribution president for Turner Broadcasting. "We have to find ways to advance the business rather than cannibalize it.") ("Chmielewski, tug of war"); Deborah Yao, "Cable companies want a way to win with online TV," *Associated Press*, Feb. 24, 2009 ("There's pressure on all of us," [Jeff Gaspin, President of NBC's Universal Television Group] said, referring to TV networks. "We get paid quite a bit of money from cable operators...It's important we find ways to do business that protects that business model.")

diminished. This is particularly true for the two sectors involved in the Comcast-NBC Universal merger, video content production and multichannel video distribution. For the content owners, the risk is "leakage" of their content into channels that command lower revenues.[98] For distributors, it is the potential loss of subscribers, who "cut the cord," reduce their payments for premium content, or resist price increases because they have alternative distributors available to them.[99]

Another motivating factor in reacting to the potential for digital distribution is the potential for piracy of content. Wall Street analysts are divided on the question of piracy. Some see avoiding piracy of content as a primary motivator for developing business models that allow consumers convenient access to content.[100] Others think the piracy concern is overblown.[101]

When Wall Street analysts are contemplating the array of concerns for the participants in the video product space, they see diversity among the players in the traditional MVPD product space, content firms whose interests are defined by primarily ad-supported (over-the-air) networks versus content firms whose interests are primarily defined by fee supported (cable) networks,[102] incumbent cable operators versus new entrants,[103] and cable MSO/broadband ISPs

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[98] UBS, Investment Research, *Can Pay TV* p. 15. Arango, Taming the Web ("Unlike broadcast television, which relies solely on advertising, cable networks have another revenue stream: fees paid by cable operators… "That stream is so important to every entertainment company that everybody is looking at that and saying, if we are not careful we could start to harm that model," Mr. Burke [President of Comcast Cable] said.)

[99] UBS Investment Research, *Can Pay TV,* p. 4. Chmielewski, tug of war ("The appetite for full-length TV shows online was larger than anyone thought or expected," said Bobby Tulsiani, Forrester Research media analyst. "And now people are starting to wonder, do we even need the cable connections?") Deborah Yao, "Cable Companies See Customers Cutting Back: 'The Beginning Of Cord Cutting,' " Associated Press, Feb. 8, 2009. (Time Warner Cable CEO Glenn Britt stated in 2009 "We are starting to see the beginning of cord cutting,")

[100] Piper Jaffray, *Internet Video,* p. 12. Chmielewski, tug of war ("Hulu was launched in March 2008 as a way of keeping TV programming safely in the hands of its creators and distributors. And by making it free, it could short-circuit piracy.")

[101] Bernstein, *Web TV,* p. 12.

[102] Bernstein, *Web TV,* pp. 9-10. Arango, Taming the Web ("Unlike broadcast television, which relies solely on advertising, cable networks have another revenue stream: fees paid by cable operators").

[103] UBS Investment Research, *Can Pay TV,* p. 15. George Szalai, "Opinion: Online Video's Impact Remains Unclear," *AdWeek*, July 3, 2009 ("'This is a way to stem concern about cable infrastructure being bypassed by free online viewing,' Collins Stewart analyst Thomas Eagan says.") Grover, Revenge ("The new attack

versus content companies,[104] as well as several other sets of players who have little role in the traditional MVPD market.[105] The different attitudes toward Internet TV among the various players and the likely longer-term strategies is evident in the availability of content online –

> Complete episodes of about 90% of prime-time network television shows and roughly 20% of cable shows are now available online... The online selection of live sports games is spotty as well. This season for example, the National Football League will make Sunday night games available live on the Net, but those amount to only 7% of all regular-season NFL match-ups. Cable and broadcast news shows typically aren't streamed live on the Internet, unless there's breaking news even like Hurricane Katrina.[106]

Each of the parties is likely to leverage its strategic assets to defend its current share of revenues and rents in video distribution, as well as try to capture part of the efficiency gains flowing from digital distribution. Accordingly, the compromise is to replicate the traditional relations in the new product space. Note the distinction between broadcasters, who are more likely to make content available than cable, with the exception of sports and news content, which are marquee must-have categories that provide leverage to attract audiences.

The potential efficiency gains from digital distribution deserve attention because a new technological approach to distribution has a powerful effect on a business in which distribution

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from Silicon Valley was the most serious yet, because it threatened to permanently cut the coaxial connecting the cable companies and their subscribers. "We wake up every day and there is some new competitor out there—a Roku or a Boxee," says Melinda Witmer, Time Warner Cable's programming chief."). Daniel Roth, "Netflix Everywhere: Sorry Cable, You're History," *Wired*, Sept. 21, 2009 ("Our goal is to have everyone cancel their cable subscription.' Roku's Wood says.")

[104] UBS Investment Research, *Can Pay TV,* p. 28. Arango, Taming ("Last month, Comcast agreed to pay Disney a monthly fee to offer its Internet subscribers ESPN 360, the sports network's online channel. One analyst, Richard Greenfield of Pali Research, has called that deal "a watershed event for content owners in a broadband world, albeit that event occurred with little to no fanfare."). *See also* Comments of the American Cable Association, In the Matter of *A National Broadband Plan for Our Future*, GN Docket No. 09-51, pp. 5-6 (June 8, 2009).

[105] Most notably the technology sector and device vendors, where massive amounts of storage open up prospects for a new form of distribution of content. UBS Investment Research, *Can Pay TV,* p. 10; Piper Jaffray. *Internet TV,* p. 24.

[106] Nick Wingfield, "Turn On, Tune Out, Click Here," *Wall Street Journal*, October 3, 2008.

has been a substantial part of the cost. There are supply-side and demand-side gains.[107] Advertising can become more efficient.[108] Physical costs are reduced as redundancy of devices[109] is eliminated and economies of scale and scope combine with technological progress to dramatically lower costs.[110]

2. Organizing to Prevent Disintermediation

The plight of the music labels plays another ironic role in the Wall Street analysts that highlight one of the key aspects of antitrust analysis. Music labels certainly had an economic interest in preventing the disintermediation that eroded their rents. They reacted slowly and lacked the market power to prevent it. In the video business, content owners and cable operators are reacting more quickly. Content producers can leverage their libraries and "must have" content in a sector that is highly concentrated,[111] a situation that is not unlike the one that existed in the music sector in the late 1990s. However, the real difference is in the market power of the cable operators, who are also the dominant broadband Internet access providers. This is the fundamental difference between the music and video industries. The owners of the dominant distribution network have a direct interest in preventing the disintermediation, and have powerful tools to prevent it.

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[107] Various efficiency gains are mentioned primarily from the point of view of increasing profit. Piper Jaffray, *Internet Video,* p. 12, identifies two classical opportunities – expanding supply in the long-tail and increasing demand through greater convenience.

[108] UBS Investment Research, *Can Pay TV Benefit from Online Video?,* p. 10. *See e.g.* Mike Shields, "MTVN, Quantcast to Laser-Target Web Video Ads, " *Mediaweek*, Feb. 16, 2010.

[109] Bernstein, *Web TV,* p. 17. Declining technology costs run the gamut from bandwidth and multicasting to caching and routers, optical systems and storage.

[110] *Ibid*. *See e.g.* Saul Hansell, " The Cost of Downloading All Those Videos," *New York Times Bits Blog*, April 20, 2009. ("The Comcast presentation said that the effect of this is that Docsis 3 will reduce the cost of the C.M.T.S. hardware, which had been about $20 per home passed, by 70 percent, for customers at current speeds. And it will allow 100-Mbps service at a lower hardware cost than the company had been paying for its then current 6-Mbps service.")

[111] Piper Jaffray, *Internet Video,* p. 10, 31. Bernstein, *Web TV,* p. 12.See also Jason Kilar, "Doing Hard Things," Hulu Blog, Feb. 18, 2009; Jim O'Neill, "Hillcrest confirms Hulu blocking Kyle Web TV browser from its online video content," *Fierce Online Video*, March 22, 2010.

Indeed, one analyst argues that cable's market power is so much greater in the broadband Internet access business that it should abandon the traditional cable video business altogether and leverage its market power over broadband to the maximum extent possible.[112] It can shed all of the costs of video service, but preserve its share of the rents of video distribution by increasing the price of broadband access service.[113] This economic analysis can be summarized as follows:

> Think of a Comcast that no longer allocates billions to manufacture set-top boxes. Bernstein Research took this thought a step further and actually crunched numbers. Turns out a dumb-pipe Comcast would do just fine competing only in broadband.
>
> That is because the real advantage of cable isn't video, where in each market it competes against two satellite broadcasters and often a telco. It is broadband, where in some markets it has a monopoly and in others a telco competitor. The price a cabler could charge for "raw connectivity" in such a duopoly is determined by the operator with the higher costs. And in this case, it's the telco. Bernstein Research puts the "telco minimum" at $85 per month, which compares with Comcast's projected 2013 average revenue per user, or ARPU of $133 per month.
>
> Matching the telco minimum in a dump-pipe scenario would lower Comcast's Arpu by 36%. This, in turn, would boost subscription counts by a conservatively estimated 20%. Costs would drop faster than revenue, however, widening margins and reducing the EBITDA [Earnings before Interest, Tax, Depreciation and Amortization] falloff caused by the abandonment of video.
>
> Meanwhile, once out of the set-top-box and video-on-demand business, Comcast could cut the $5.2 billion it budgeted for capital expenditures in 2008 by at least half. "Given the reduced capital spending," Bernstein Research concludes, "free cash flow -- the ultimate litmus test of value creation -- would soar. By our estimates, free cash flow would rise by 30% in a dumb pipe scenario.[114]

The key to the astronomical rate of profit is the market power of the cable operators, who face little competition. The $85 per month "dumb pipe-only" price for broadband is substantially more than Comcast charges for broadband today and the increase is twice what it charges for set-top boxes. The increase in the cable margins means that cable operators would

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[112] Bernstein, *Web TV,* p. 14. JP Morgan Analyst, Jonathan Chaplin, "The broadband market is a duopoly" "Providers Face Slowing Growth For Broadband," *Investor's Business Daily*, Feb. 20, 2008,

[113] Bernstein, p. 15. *See also* Saul Hansell, "The Problem With Cable Is Television," *New York Times*, May 1, 2009.

[114] Richard Morgan, Why Hulu Matters," *The Deal Magazine,* December 11, 2009.

capture all of the efficiency gains from the digital disintermediation (if the costs that cable shed are not incurred and recovered by the sellers of video products) or the cost to the consumer would rise substantially (if those costs are recovered from the consumer).[115]

This Wall Street analysis does not expect the cable operators to actually go down this path. For one, it is too radical,[116] and involves an exercise of market power that would attract a great deal of attention.[117] However, the analysts do expect cable operators to leverage their market power in other ways.[118] Cable operators are expected to stay in both businesses, but capture a significant part of the efficiency gains that make larger rents available by increasing prices for Internet access and reducing the opportunity for Internet TV to undermine traditional MVPD market power,[119] with tools such as

*usage based pricing[120]

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[115] Comcast's latest rate card for the Washington DC area reveals non-promotional monthly rates for standard level services as follows – a double play bundle at $128.35 per month, stand alone cable rate $56.95 per month and high speed Internet at $59.95. If Comcast's dumb pipe broadband service is priced at $85 per month, then even if the set top box costs disappear (or are transferred directly to consumers), it is unlikely that the margins of the video content sellers would not be squeezed, putting severe upward pressure on video monthly fees.

[116] Another analyst points out that video is the primary source of revenue between the two businesses (UBS Investment Research, *Can Pay TV,* p. 10 ("Video revenues per user (ARPU) are far higher for many platforms than voice or data revenues and that gap is growing.") Nonetheless, profit margins are far lower on video services. *See e.g.* Michelle Ow, "Time Warner Cable Q1 margins led by broadband," SNL Kagan, May 6, 2010 ("Time Warner Cable Inc. continued to reap the benefits of its strong broadband performance in the first quarter as the historically high-margin broadband business ended the period with an estimated 62.8% margin, outpacing phone and video margins by more than twofold.")

[117] The dramatic increase in the cable operators' rate of profit would attract attention, as would dramatically increasing the price of data only service, which in the case of Comcast is already $59.95 per month.

[118] Bernstein, *Web TV,* p. 15: "Cable operators won't just stand by and watch – they'll take actions that affect this evolution." Andrew Hampp, "MSOs Fight to Keep TV on the TV, Not the Net," *Ad Age*, June 16, 2008. ("Alexander Dudley, a spokesperson for Time Warner Cable, told Ad Age the company is prepared to go as far as withholding some of the subscriber revenue upon which networks like Comedy Central have built the bulk of their business model.") ("Hampp, Fight")

[119] Ironically, Apple, which is the central player in digital disintermediation in the music space, sees the stranglehold on the set-top box as a barrier to entry, Will Richmond, "Why Apple Still Doesn't Have a TV Strategy," *VideoNuze*, June 7, 2010.

[120] Bernstein, *Web TV,* p. 15. Wachovia Analysts Marci Ryvicker stated "We view usage-based billing, or bandwidth consumption caps, as a significant impediment to not only ZillionTV but also to true over-the-top video providers" Comm Daily, April 15, 2009. Dave Burstein, DSL Prime, Jan. 21, 2008 ("I believe Time Warner's interest in bandwidth caps has little to do with its own costs and a lot to do with the emergence of

*tying traditional video to Internet video,[121]

*locking down content.[122]

Estimates of how fast the competitive threat will grow vary from a few years to more than a decade,[123] as do estimates of the magnitude of the threat, which reach as high as one in eight subscribers cutting the cord within a year.[124] However, there is unanimity on one proposition: that the cable operators will actively resist and seek to undermine that competition.

> Of course, if they didn't create obstacles to this sort of disintermediation, cablers wouldn't be cablers. Some easy ways to forestall IP video's ascendancy include charging consumers for their Hulu use and increasing the number of commercials embedded in each Hulu episode. Only by taking control of NBCU can Comcast influence such decisions. Comcast's embracing "TV Everywhere," which allows paying subscribers to receive IP video as well as cable video, can be seen as another means to impede the same inexorable end. So, too, is the concept of usage-based pricing -- the objective of which would be to price broadband consumption for downloading IP video in ways that make both the cable company and its customers indifferent to disintermediation.[125]

If cable/broadband access providers have market power and are not inclined to abandon the video business in exchange for a dump pipe, strategies to deal with the tensions are needed. The strategy that emerges to prevent the dissipation of rents through disintermediation is to

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movie downloads and streaming television programs over the Internet. The smart people at Time Warner are scared of people watching TV directly over the Internet.")

[121] Bernstein, *Web TV,* p. 15. *See also* Grover, Revenge; George Szalai, "Opinion: Online Video's Impact Remains Unclear," *Adweek*, July 3, 2009. ("The lack of focus on such offers proves that TV Everywhere is mainly defensive for now. "This is a way to stem concern about cable infrastructure being bypassed by free online viewing," Collins Stewart analyst Thomas Eagan says.").

[122] Bernstein, *Web TV,* p. 12. *See also* Hampp, Fight, Chmielewski, tug of war,

[123] Contrast Piper Jaffray, *Internet Video,* p. 4, and Richard Morgan, "Why Hulu Matters," *The Deal Magazine,* December 11, 2009 ("Morgan, Why Hulu").

[124] Contrast *Yankee Group Says 1 in 8 Consumes will Ax Their Coax this Year,* April 27, 2010, and Convergence Consulting, *The Battle for the North America (US/Canada) Couch Potato: New Challenges and Opportunities in the Content Market ,* April 2010, which puts the number at one in 30 by year-end 2011. *See also* Mike Robuck, "Report: OTT eating into video market share pie," *CedMagazine.com*, Oct. 9, 2009 ("SNL Kagan's latest report forecasts that over-the-top providers, such as Hulu, will account for 7.1 million homes by 2013, and for more than twice that number in 10 years."). For his part, Comcast's Stephen Burke, President of Comcast cable, states "We don't think that it's a problem now, but we do feel a sense of urgency," Arango, Taming.

[125] Morgan, Why Hulu.

discipline the sector. This requires complex collaboration and "leadership"[126] during a crucial moment for action.[127] The largest cable/broadband operator acquiring one of the leading video content suppliers is an obvious candidate to exercise that leadership. The Wall Street analysts identify the combination of the Comcast-NBC Universal merger and Comcast's Fancast Xfinity-branded "TV Everywhere" initiative as perfect examples of the key strategies.[128] Vertical integration becomes pivotal to block the effects of digital disintermediation, and the emergence of a large firm straddling the production and distribution stages is a critical step in achieving the necessary spirit of collaboration.

> With Comcast and Time-Warner moving forward with video paywalls, are the cable companies doing what Hollywood and the music industry couldn't do? That reality is coming sooner than you think…This ain't the music business, apparently… there's still life in old dinosaur methods of content delivery when it comes to movies and teevee shows, and the conglomerates and CEO's that control them aren't too keen on giving up their domination of content delivery just yet… It's simply a browser bound way of locking you out of live streamed or stored content based on a verification ID… namely your cable account's user name and password… It is almost impossible to stop the Comcast juggernaut from taking over NBC and removing content from Hulu and other currently free broadband streaming services or aggregators. TV Everywhere, which has been tested for over a year, can be seen as simply a way for cable companies to continue with the old model of doing business.[129]

The most direct and obvious way to prevent disintermediation is maintain the flow of content in channels that can be controlled, which is the obvious intent of TV Everywhere: "While a lot is

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[126] UBS Investment Research, *Can Pay TV,* p. 7.
[127] UBS Investment Research, *Can Pay TV,* p. 24. *See also* Grover, Revenge; Arango, Taming.
[128] Bernstein, *Web* Video, p. 9. Yinka Adegoke, "Web TV could come with a price tag after Comcast-NBC," *Reuters*, Oct. 4, 2009. (""We suspect Comcast believes it needs content to protect its landline distribution platform," Richard Greenfield, analyst at Pali Research, wrote in a note to investors on Friday. "It wants to mitigate the risk of becoming that scary 'dumb' pipe…Hulu was started by NBC and Fox so they could compete with Comcast. So this is a defensive move to some extent by Comcast," said Kaufman Bros. analyst Todd Mitchell. "Hulu will just become another choice of Comcast's pay-TV buffet."). *See also* Comments of Netflix, Inc, In the Matter of *Preserving the Open Internet, Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Jan 14, 2010. ("the recent announcement of the proposed merger of Comcast and NBC Universal serves to exacerbate the growing concern that MVPDs will use their control over programming networks to stifle competition, including the growing competition from online video providers like Netflix").
[129] Christian Hokenson, "TV Everywhere Leave VOD Nowhere," *HD Report*, March 18, 2010.

happening on the convergence front (e.g. Google TV, Roku, etc.), with the advent of TV Everywhere, the likelihood that cable programs will not leak out onto the open Internet is lower than ever."[130]

B. CUTTING OFF THE AIR SUPPLY OF INTERNET VIDEO COMPETITION

An easy way to understand the threat to the Internet platform for multi-channel video programming distribution (IMVPD) posed by the Comcast-NBC Merger is to recall the Department of Justice case against Microsoft.[131] The case grew out of what was known as the "browser wars" between Microsoft's Internet Explorer and Netscape's Navigator. Navigator had entered the new market for web access and grown rapidly as the leading browser. Combining a ubiquitous middleware platform that was indifferent to operating systems with a JAVA programming environment that encouraged developers to "write once, run anywhere," threatened to commoditize the operating system. Bill Gates, Microsoft CEO, declared "a threat is born on the Internet." The threat was the possibility that browsers could provide a platform for accessing the Internet that would work with any operating system, thereby rendering Microsoft's near monopoly over operating systems much less important. "A new competitor 'born' on the Internet is Netscape… They are pursing a multi-platform strategy… to commoditize the underlying operating system."[132]

The strategy Microsoft used to undercut this threat was described with the colorful phrase "we will cut of their air supply."[133] Microsoft set out to saturate the market with its own

[130] Will Richmond, "Yankee Group Cord-Cutting Research Download Available," *VideoNuze,* May 27, 2010.
[131] *See United States v. Microsoft Corp*., 84 F.Supp. 2d 9 (D.D.C. 1999).
[132] Government Exhibit #20.
[133] Rajiv Chandrasekaran, "Microsoft Attacks Credibility of Intel Exec," *Washington Post,*
Friday, November 13, 1998; Page B1, The Microsoft antitrust trial turned into a tense sparring match over the credibility of a witness from Intel Corp. yesterday, with a lawyer for Microsoft accusing the executive of concocting some of his most colorful testimony and the government producing several documents to support the witness's claims. On the witness stand was Steven McGeady, an Intel vice president called by

browsers by bundling them with the operating system software and giving them away for free. It took steps to undermine the quality of the competing browser and reinforced this strategy by offering a number of inducements to computer manufacturers (known as original equipment manufacturers or OEMs), who decide which software to put onto the computer, to pre-load only Internet Explorer. With access to low cost distribution through the OEM channel secured for Internet Explorer and free distribution, Navigator would be denied revenues and forced to use more expensive ways to try to distribute its product. Starved of cash, Navigator would shrivel.

> Microsoft could still defray the massive costs it was undertaking to maximize usage share with the vast profits earned licensing Windows. Because Netscape did not have that luxury, it could ill afford the dramatic drop in revenues from Navigator, much less to pay for the inefficient modes of distribution to which Microsoft consigned it. The financial constraints also deterred Netscape from undertaking technical innovations that it might otherwise have implemented in Navigator.[134]

Free browsers might seem like a good deal for consumers in the short run, but in the long run this strategy of eliminating competition has a heavy cost.[135] It preserves and extends the Microsoft monopoly in the operating system market and undermines innovation and development in browsers or other products that might compete with Microsoft's core products, keeping the cost of Microsoft's core product far higher than it should be. It denies consumers alternatives that better suit their needs, and forces consumers to buy products in inconvenient ways, thereby imposing high costs on consumers.

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the government. He testified earlier this week that Microsoft Corp. had threatened to withhold crucial technical support from Intel if the chipmaker did not stop developing software that would compete with Microsoft's products. He also made the dramatic allegation that a senior executive at Microsoft told him of an intent to "extinguish" rival Netscape Communications Corp. and to "cut off Netscape's air supply…With McGeady's credibility hanging in the balance, Justice Department lawyer David Boies set out to rehabilitate his image in the afternoon. On a large screen in the courtroom, he played several segments of a videotaped deposition by McGeady's boss, Ron Whittier. On the tape, Whittier said that he recalled the term "smother" being used to describe Microsoft's strategy at the meeting in question.

[134] *United v. Microsoft Corp*., 84 F Supp. 2d 9, 103 (D.D.C. 1999).

[135] Mark Cooper, "Antitrust as Consumer Protection in the New Economy: Lessons from the Microsoft Case," *Hastings Law Journal,* 52:4) April 2001.

Comcast's current strategy is to cut off the air supply of the Internet as a platform for competing with Comcast's core franchise business, multi-channel video programming distribution (see Exhibit III-1). This strategy, which is being deployed by other subscription television providers in addition to Comcast, would impose the similar costs on consumers, allowing Comcast to continue to raise cable prices and retarding the ability of the Internet to support alternative distribution models.

- Comcast is proposing to bundle online video with physical space video by requiring physical, facilities-based, subscription to get access to online video.
- As the greatest contributor to the revenue of cable programmers, Comcast can leverage this fact in influencing how and where their content is made available online without a physical, facilities-based, subscription.[136]
- The acquisition of NBCU will give it a new set of immensely powerful weapons to strengthen the attack on the Internet.
- Comcast-NBCU will have a much more valuable set of marquee content to raise the cost of and squeeze the profits of content available on the Internet platform.
- Comcast has demonstrated the ability to degrade the quality of service of specific applications. This could make it far more difficult for an alternative MVPD to enter the market, as it would have to build its audience on broadband subscribers who are not Comcast subscribers.

The combination of these five strategies, pursued by the largest broadband Internet access provider and the largest cable provider, will suck the air out of the space available for the Internet multi-channel video program distribution. Indeed, as demonstrated in Exhibit III-1 below, there are clear parallels between the "Browser Wars" strategies and that of incumbent MVPDs to prevent cannibalization of their product by online video.

[136] Comcast Corp, "Adjustments to Comcast's Central California Market Prices," Press Release, 2009 ("The company spends about $6 billion a year on programming").

Exhibit III-1: Strategies to Undermine Nascent Competition on the Internet

Browser Wars Strategy	Attack Internet MVPD Platform
Bundle IE browser and operating system	Bundle online video with physical space video by requiring physical subscription to get access to online video
	Keep set top box closed, forcing IMVPD to find non-Comcast hardware
Raise entry costs through incompatibility	Keep set top box closed, forcing IMVPD to find non-Comcast hardware
Incent OEMs to preload IE not Navigator	Pressure incumbent MVPDs to participate in TV Everywhere, shrinking the market of competing platforms
Degrade the quality of Navigator	Withhold valuable marquee content to undermine the quality or raise the cost of content available on the Internet platform.
	Pressure content providers to not make their product available on the Internet by offering favorable conditions for physical space distribution to those who deny Internet access to content
Make using Nav. a "jolting experience"	Use the ability to block or degrade the quality of service of specific application and Internet Service Providers, forcing IMVPD to rely on non-Comcast broadband ISP

Some of the elements of this anticompetitive strategy are already being applied by Comcast to the Internet; all have been used by the company in various forms in the past. Moreover, merger review requires the Department of Justice to make reasonable projections about the potential and likely abuse of market power. Unlike a monopolization case, which must prove past bad behavior and seek to remedy it, merger review is prophylactic, seeking to prevent future abuse.

Comcast's strong interest in preventing multi-channel Internet video programming distribution from competing with cable distribution, its leadership role in organizing business models to undermine that competition, its contracting practices to deny content to Internet distribution, and the incentives it has to leverage Comcast-NBCU marquee content in pursuit of

these anticompetitive goals requires the Department of Justice to take action to prevent this threat to competition from materializing. Stopping the merger is part of the solution, but the Department of Justice must also address the anticompetitive practices that exist separately from the merger.

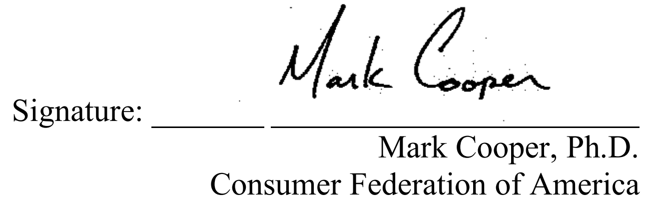
IV. CONCLUSION

Our analysis shows that, post-merger, Comcast-NBC Universal would have the incentive, ability and willingness to exercise it new found market power to diminish competition by leveraging it control over key choke points in the video supply chain. It would be strategically positioned to lead and coordinate the attack on the Internet as a potential competitor to traditional MVPD service. No other combination of assets would pose the same threat because it involves the union of the nation's largest cable MSO/Broadband Internet access provider already possessing critical "must have" regional sports with a broadcaster that has "must have" content that is ideally suited to be used as leverage against traditional and Internet MVPD competition and who has shown its willingness to experiment with alternative distribution models that would disintermediate the cable companies.

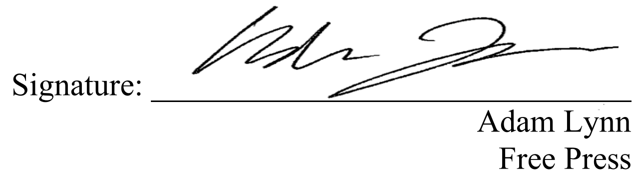
Over the past quarter century there have been a few moments when a technology comes along that holds the possibility of breaking the chokehold that cable has on the multi-channel video programming market, but on each occasion policy mistakes were made that allowed the cable industry to strangle competition. This is a critical policy moment for determining whether the Internet will function as an alternative platform to compete with cable. If policymakers allow this merger to go forward without fundamental reform of the underlying industry structure, the prospects for a more competition-friendly, consumer-friendly, citizen-friendly multi-channel video marketplace will be dealt a severe setback. For these reasons, the merger does not meet the public interest test in the Communications Act and should not be allowed to go forward.

This Declaration has been prepared in support of the foregoing Petition to Deny the merger of Comcast and NBC-Universal. I declare under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge.

Executed this 21st day June 2010.

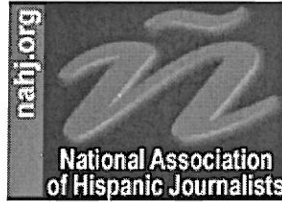


Signature: _______ ______________________
Mark Cooper, Ph.D.
Consumer Federation of America



Signature: ______________________________
Adam Lynn
Free Press

Appendix B



June 14, 2010

Declaration of the National Association of Hispanic Journalists

1. I, Iván Román, am Executive Director for the National Association of Hispanic Journalists (NAHJ). NAHJ is governed by an 18-member board of directors that consists of executive officers and regional directors who represent geographic areas of the United States and the Caribbean. NAHJ's national office is located at 1000 National Press Building 529 14th Street, NW Washington, DC 20045.

2. Established in April 1984, NAHJ's core mission is to promote the recognition and professional advancement of Hispanics in journalism and the news industry.

3. NAHJ has approximately 2,300 members, including working journalists, journalism students, other media-related professionals and journalism educators. NAHJ also represents scores of professional journalists employed by Telemundo and the Telemundo owned and operated stations that would be acquired by Comcast as part of its proposed merger with NBC-Universal.

4. NAHJ opposes the merger of Comcast and NBC-Universal and the transfer of Telemundo owned and operated broadcast television licenses. NAHJ members employed by these stations would be harmed by the merger of Comcast and NBC-Universal because the transaction would adversely impact employment of our members and investment in news coverage at those stations.

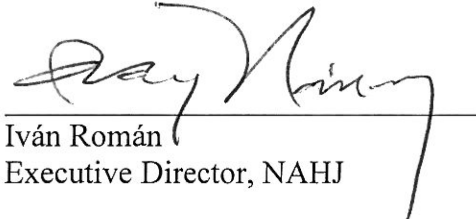
5. In NAHJ's experience, media consolidation leads to lay-offs and decreased investment in local news as the merged companies engage in cost-cutting to service the debt created by the transaction. When NBC acquired Telemundo in 2002, it committed to investing in Telemundo stations and to increasing the amount and quality of news coverage for the Spanish language communities served by those stations. Instead of investing in local news that would have benefited the Latino community and jobs that would have benefited NAHJ members, NBC did the exact opposite. Not long after the NBC/Telemundo merger was consummated, NBC eliminated Telemundo's local newscasts in six of the top 10 Hispanic markets – Houston, Dallas, Denver, San Antonio, San Jose and Phoenix – and replaced them with a regionally-produced newscast hubbed-out of Fort Worth, TX. In the process NBC laid off 700 employees, including NAHJ members. *See Letter from the National Association of Hispanic Journalists to Bob Wright, Chairman and CEO, NBC Universal* (Oct. 20, 2006).

The livelihoods of NAHJ members were adversely impacted by the merger of NBC and Telemundo. Comcast's acquisition of NBC-Universal and Telemundo would put NAHJ member jobs in further jeopardy

6. NAHJ also questions the benefits and enforceability of the so-called "public interest" commitments volunteered by Comcast and NBC as part of its merger application. None of these commitments suggest any intent by the parties to meaningfully invest in journalism and jobs for the Spanish language community. More importantly, NAHJ's past experience with NBC's acquisition of Telemundo suggests that companies seeking merger approval often make promises to federal agencies, employees, and impacted communities, but those promises are rarely kept or enforced.

7. This statement has been prepared in support of the foregoing Petition to Deny.

This statement is true to the best of my personal knowledge and is made under penalty of perjury of the laws of the United States of America.



Iván Román
Executive Director, NAHJ

Date executed: June 16, 2010

Appendix C

Declaration of Silvia Rivera

1) My name is Silvia Rivera and I am a member of Free Press. I am a resident of Chicago, Illinois.

2) I reside at 1933 South Jefferson Street Chicago, IL 60616, which falls within the Chicago designated market area.

3) I reside within the service area of Comcast' cable operations and until recently was a subscriber to Comcast's cable and Internet services. I cancelled my Comcast cable services subscription in May of 2010 because I was dissatisfied with my service. I am currently in search of new cable provider, however, Comcast is the dominant operator in Chicago and it has been difficult to locate another cable operator that serves my zip code. Additionally, I am unable to cancel my internet service because Comcast is the only provider in my zip code.

4) I am regular viewer of the television stations within the Chicago designated market area, including the local NBC and Telemundo affiliates, WSNS and WMAQ.

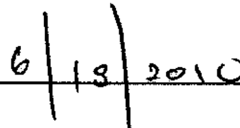
5) As a resident of Chicago, I would be harmed by a merger of Comcast and NBC-Universal because it would further reduce competition and diversity of media sources and access in my community. Comcast is already the dominant cable and Internet access provider in my city and faces very little competition from other providers. If this merger is approved Comcast will not only control access to cable and internet services, but also my local NBC and Telemundo affiliates, as well as a suite of cable channels. Comcast's control of access and content would make it more difficult for other cable and internet service providers to serve my area and compete with Comcast, thereby further limiting the choices I have for Internet and cable providers. Additionally, given my negative experience as a former Comcast subscriber, I am concerned that Comcast's takeover of two of my local broadcast stations would adversely affect the quality of content and service of WSNS and WMAQ.

6) In 2001, NBC-Universal purchased Telemundo Chicago. The merger was originally presented as an opportunity to increase the resources of the Spanish-language broadcaster, however as resources "merged", there was a significant reduction in staffing for Telemundo, and thus less opportunities to truly service the Latino community. The consolidation of Comcast and NBC-Universal will repeat the same cycle. It will lead to loss of localism and divestment in the public service needs of the Latino community.

7) This Declaration has been prepared in support of the foregoing Petition to Deny the merger of Comcast and NBC-Universal, including the transfer of the WSNS and WMAQ broadcast television licenses.

I declare under penalty of perjury under the laws of the United States of American that the foregoing statements are true and correct to the best of my knowledge.

Signature:

Date executed: 

Declaration of Brian Imus

1) My name is Brian Imus and I am a member of Free Press. I am a resident of Chicago, Illinois.

2) I reside at Reta Street, Chicago, IL 6065, which falls within the Chicago designated market area.

3) I reside within the service area of Comcast' cable operations and I am a subscriber to Comcast's cable and Internet services.

4) I am regular viewer of the television stations within the Chicago designated market area, including the local NBC affiliate WSNS.

5) As a resident of Chicago, I would be harmed by a merger of Comcast and NBC-Universal because it would reduce competition and diversity of media sources and access in my community. The merger would enable Comcast to control much of the content that I regularly watch, as well as control the means I use to access it. The merger would result in Comcast and NBC controlling significant portion of the commercial channels in my cable package and limit the diversity of sources for the television channels I pay to watch. Comcast is the largest cable operator in my area. Its acquisition of broadcast television and cable channels would give it more consolidated control over both media content and delivery, and would further prevent new companies from offering media, cable, and internet services to the Chicago area.

6) This Declaration has been prepared in support of the foregoing Petition to Deny the merger of Comcast and NBC-Universal, including the transfer of the WSNS broadcast license.

I declare under penalty of perjury under the laws of the United States of America that the foregoing statements are true and correct to the best of my knowledge.

Signature: [signature]

Date executed: 6/18/2010

Declaration of Monique Lebron

1) My name is Monique Lebron and I am a member of Free Press. I am a resident of Miami, FL.

2) I reside at, 12106 S.W. 140 Terrace, Miami, FL 33186, which falls within the Miami designated market area

3) I reside within the service area of Comcast' cable operations and I subscribe to Comcast's cable and internet services.

4) I am a viewer of the television stations serving the Miami designated market area, including WTVJ, which is my local NBC owned-and-operated affiliate.

5) As a resident of Miami, FL, I would be harmed by a merger of Comcast and NBC-Universal. Comcast's acquisition of the NBC network would reduce the diversity and amount of independent television content available to me. Post-merger, Comcast and NBC would control 20 percent of the commercial channels in my cable package, including many of the channels that I view regularly. This would allow Comcast to shape the perspectives and editorial decisions of a significant number of news and entertainment channels, including my local NBC broadcast TV station. Additionally, as the dominant cable provider in Miami, Comcast's control over broadcast and cable content, as well as the provision of cable and internet access, would increase Comcast's market power and diminish competition and choice for these services in my community.

6) This Declaration has been prepared in support of the foregoing Petition to Deny the merger of Comcast and NBC-Universal, including the transfer of the WTVJ broadcast license.

I declare under penalty of perjury under the laws of the United States of America that the foregoing statements are true and correct to the best of my knowledge.

Signature: [signature]

Date executed: 6/17/2010

Declaration of Eian More

1) My name is Eian More and I am a member of Free Press. I am a resident of Philadelphia, PA.

2) I reside at 1730 N 5th St, Philadelphia, PA 19122, which falls within the Philadelphia designated market area.

3) I reside within the service area of Comcast' cable operations and I am a subscriber to Comcast's cable and Internet services. I have not been pleased with my service. Several times I have found erroneous charges on my account and was told they were put there "by accident." Additionally, my Internet connection was dropped from my account for 5-7 consecutive days in which I had to call in to have it restored everyday only to see it drop the next day. However, because Comcast is the leading cable operator in Philadelphia and there is very little competition, I have few alternative choices in cable and internet service providers.

4) I am regular viewer of the television stations within the Philadelphia designated market area, including the local NBC affiliate, WCAU.

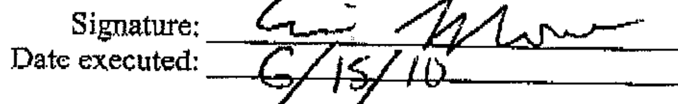
5) The merger of Comcast and NBC-Universal negatively impact me because it would reduce competition and diversity of media sources and access in my community. The merger would result in Comcast/NBC controlling 13 of the 64 channels, or 22 percent, of the commercial television channels to which I subscribe. This would adversely affect the diversity of content I see. Comcast is already the dominant cable provider in Philadelphia and Comcast's control over additional content will make it harder for competing companies to provider cable services in Philadelphia and would further diminish my choice for cable and internet service providers.

6) Due to the monopolistic power Comcast wields, customers have no practical alternative choice when they are dissatisfied with their service and Comcast capitalizes on this by not improving their services to satisfactory levels. The recent "customer satisfaction" promotion they are running only masks the fact that their services are corrupt to begin with. Comcast is obviously aware of their tarnished public image and have attempted to hide behind a new brand by calling their services XFINITIY. In addition to the reasons outlined above, if the merger goes through we will continue to see Comcast's monopolistic practices spread to addition content and outlets such as the varied holdings of NBC-Universal.

7) This Declaration has been prepared in support of the foregoing Petition to Deny the merger of Comcast and NBC-Universal, including the transfer of the broadcast license of WCAU.

I declare under penalty of perjury under the laws of the United States of America that the foregoing statements are true and correct to the best of my knowledge.

Signature:
Date executed:



Declaration of Tracy Rosenberg

1) My name is Tracy Rosenberg and I am a member of Free Press.

2) I reside at 826 Adams Street, Albany, CA 94706, which falls within the San Francisco designated market area

3) I reside within the service area of Comcast' cable operations and I am a former subscriber to Comcast's cable services, which I cancelled in the Fall of 2009. I canceled my subscription to Comcast basic cable service because I felt that I received little-to-no additional value from the channels included in the package and after the digital television transition no longer suffered from reception problems for the free over-the-air broadcast channels.

4) I am regular viewer of the television stations serving the San Francisco designated market area, including KNTV, which is my local NBC owned-and-operated affiliate.

5) As a resident of Albany, CA, I would be harmed by a merger of Comcast and NBC-Universal because it would reduce competition and diversity of media sources and access in my community. This would adversely affect the diversity of content I see, and how much I must pay for access to such content via television, cable, and Internet.

6) As a Comcast subscriber at this address for more than five years, I experienced frequent price increases, unhelpful customer service, and consistent reductions in the amount of channels and worthwhile content available in my price bracket. Several channels I watched consistently were removed from the tier of channels I could access and re-classified into a digital cable package that cost twice what I paid in monthly fees. I was constantly harassed by Comcast sales reps to sign up for Triple Play packages consolidating my Internet and landline phone service with my cable provider, sometimes receiving 3-4 sales calls a month. I believe that under Comcast ownership that the free-over-the-air broadcast content available to me currently on KNTV will become degraded and less available without premium up charges, based on the Comcast business practices I have observed to date. In addition I believe this will impact the millions of cable and cable Internet subscribers in my region adversely in terms of the quantity and range of media content they can access freely without paying ever-increasing proprietary fees.

7) This Declaration has been prepared in support of the foregoing Petition to Deny the merger of Comcast and NBC-Universal, including the transfer of the KNTV broadcast license.

Declaration of Tracy Rosenberg

I declare under penalty of perjury under the law of the United States of America that the foregoing statements are true and correct to the best of my knowledge.

Signature: [signature]

Date executed: 6/18/10

Declaration of Chancellar Williams

1) My name is Chancellar Williams and I am a member of Free Press.

2) I reside at 2445 15th Street, NW, Unit 112, Washington, DC 20009, which falls within the Washington, DC designated market area

3) I subscribe to RCN internet services. RCN is a competitor to Comcast's cable and internet services in Washington, DC. I do not subscribe to Comcast's cable or internet services because they are too expensive and Comcast has a poor reputation for customer service.

4) I am a viewer of the television stations serving the Washington, DC designated market area, including WRC, my local NBC owned-and-operated affiliate. I also watch NBC-controlled and other programming online, via Hulu.com.

5) As a resident of Washington, DC, I would be harmed by a merger of Comcast and NBC-Universal. Comcast's control of my local NBC affiliate would diminish the diversity of local content available to me, and will adversely affect the quality of content offered by my local NBC broadcast station.

6) By acquiring NBC, Comcast would gain an ownership stake in Hulu.com and control over other NBC-controlled websites that offer free, ad-supported video content. As a regular viewer of online video, I am concerned that post-merger Comcast will limit the availability of NBC programming online to only those who can prove that they also subscribe to cable. Comcast already has an incentive to prevent viewers from "cutting the cable cord" and accessing video programming online-only. Comcast has recently launched its Xfinity platform which forces internet customers to buy cable packages in order to view popular television shows online. Acquiring NBC will give Comcast the incentive and ability to limit online distribution of NBC content, or to charge non-Comcast cable subscribers to access such content. Because I am neither a cable or Comcast subscriber, my ability to view internet video, including local NBC content, could be negatively affected if Comcast acquires NBC and requires a cable subscription to view NBC-controlled-content online.

7) This Declaration has been prepared in support of the foregoing Petition to Deny the merger of Comcast and NBC-Universal, including the transfer of the WRC broadcast license

I declare under penalty of perjury under the laws of the United States of America that the foregoing statements are true and correct to the best of my knowledge.

Signature:

Date executed: 6·11·10

Declaration of Ernesto Aguilar

1) My name is Ernesto Aguilar and I am a member of Free Press.

2) I live and work in Houston, TX. My address is 419 Lovett, Houston, Texas 77006.

3) I reside within the service area of Comcast' cable operations and I am a subscriber to Comcast's cable services.

4) I am regular viewer of the television stations within the Houston designated market area, including KTMD, the local Telemundo affiliate which is owned and operated by NBC-Universal.

5) I would be harmed by a merger of Comcast and NBC-Universal because Comcast's takeover of my local Telemundo broadcast station would negatively affect the quality the local programming produced by the station. The merger would also give Comcast even further advantage over competing cable TV providers in an area where Comcast is already the dominant cable provider. Furthermore, the merger would diminish the diversity of programming sources available to me. The merger would result in Comcast/NBC controlling nearly a fifth of the commercial cable and broadcast channels I subscribe to in my cable package.

6) This Declaration has been prepared in support of the foregoing Petition to Deny the merger of Comcast and NBC-Universal, including the transfer of KTMD.

I declare under penalty of perjury under the laws of the United States of America that the foregoing statements are true and correct to the best of my knowledge.

Signature: E Aguilar

Date executed: 16 June 2010

Declaration of Stan Santos

1) My name is Stan Santos and I am a member of Free Press.

2) I reside at 4353 Kenmore Drive South, Fresno, California 93703, which falls within the Fresno designated market area

3) I reside within the service area of Comcast' cable operations and I am formerly a subscriber to Comcast's cable services. Aside from monthly rates which crept up until they became unaffordable, as a customer, I was shocked when the Comcast Technicians informed me of their working conditions and the quotas that they had to meet each day. I now subscribe to Dish Network for my television service.

4) I am a viewer of the television stations serving the Fresno designated market area, including Spanish language programming on KNSO, my local Telemundo affiliate, which is owned-and-operated by NBC-Universal. KNSO has a history of national programming with no inclusion of local events and programming oriented to the community. They are now undertaking local news coverage after a lengthy blackout. If the priorities are dictated by the network, we do not anticipate any improvement in programming which serves the local community.

5) I oppose the merger because I believe that Comcast's acquisition of my local Telemundo affiliate would damage the quality of the station by diminishing investment in local news programming for the Spanish language community in Fresno. I am also concerned that the merger will result in higher prices for consumers, such as myself, who do not subscribe to Comcast's services. By consolidating NBC broadcast and cable channels with Comcast's power and incentives as the largest cable operator in my community, the combined company will charge competing subscription services, such as Dish Network, more money to offer the programming that is controlled by Comcast/NBCU. These higher costs will be forced onto me, and consumers like me, who choose not to subscribe to Comcast.

6) This Declaration has been prepared in support of the foregoing Petition to Deny the merger of Comcast and NBC-Universal, including the transfer of the KNSO broadcast license.

I declare under penalty of perjury under the laws of the United States of America that the foregoing statements are true and correct to the best of my knowledge.

Signature: Stan Santos

Date executed: 6-16-2010

Declaration of Mike Rhodes

1) My name is Mike Rhodes and I am a member of Free Press.

2) I reside at, 4773 N Arthur, Fresno Ca 93705, which falls within the Fresno designated market area

3) I reside within the service area of Comcast' cable operations and I subscribe to Comcast's cable and internet services.

4) I am a viewer of the television stations serving the Fresno designated market area, including KNSO, which is my local Telemundo owned-and-operated affiliate.

5) As a resident of Fresno, CA, I would be harmed by a merger of Comcast and NBC-Universal because it would reduce the diversity of local media sources and access in my local market. Post-merger, Comcast and NBC would control a substantial number of the commercial channels in my cable package. The merger would give control over not only a local broadcast station, but also a suite of cable channels. As the primary cable operator in the Fresno area, the control Comcast would gain over popular NBC cable content, as well as my local Telemundo broadcast station, would further enhance Comcast's dominance and prevent competitors from providing cable and internet services to my community.

6) Rather than increased media consolidation in the Fresno area, I would prefer more independent channels that offer alternative points of view. The merger of Comcast & NBC-Universal would, in my opinion, be a step in the wrong direction.

7) This Declaration has been prepared in support of the foregoing Petition to Deny the merger of Comcast and NBC-Universal, including the transfer of the KNSO broadcast license.

I declare under penalty of perjury under the laws of the United States of America that the foregoing statements are true and correct to the best of my knowledge.

Signature: Mike Rhodes

Date executed: 6-14-10