



June 21, 2010

VIA ELECTRONIC FILING AND HAND DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-A325
Washington, DC 20554

Re: **REDACTED — FOR PUBLIC INSPECTION**
*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*

Dear Ms. Dortch:

Enclosed please find redacted copies of DIRECTV's comments in the above-captioned proceeding, including an expert economic report by Dr. Kevin Murphy entitled *Economic Analysis of the Impact of the Proposed Comcast/NBCU Transaction on the Cost to MVPDs of Obtaining Access to NBCU Programming*. Please note that redacted Confidential Information and Highly Confidential Information are designated by the symbols [[]] and {{ }}, respectively.

As required by the Protective Orders in this proceeding, we are also hand delivering unredacted copies of this filing, along with a highly confidential computer disk containing backup data to Dr. Murphy's report, under separate cover.

Respectfully submitted,

/s/

William Wiltshire
Counsel for DIRECTV

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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COMCAST CORPORATION,)
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GENERAL ELECTRIC COMPANY,)
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and)
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NBC UNIVERSAL, INC.)
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For Consent to Assign Licenses and/or)
Transfer Control of Licensees)
_____)

MB Docket No 10-56

COMMENTS OF DIRECTV, INC.

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OVERVIEW AND SUMMARY

The transaction proposed in this proceeding would combine the nation's largest cable operator and largest Internet service provider with two broadcast networks, over two dozen network-affiliated broadcast stations, some of the most popular cable programming available, the film library and production capabilities of Universal Studios, and many of the most important online content sites. It would create a concentration of media assets on a scope and scale previously unknown. Left unchecked, this unprecedented array of assets would give Comcast new opportunities to gain unfair leverage over rivals to the detriment of consumers – as it has done in the past.

Comcast and NBCU must demonstrate that the potential harms arising from this transaction are outweighed by the verifiable and transaction-specific benefits. They have not met that burden. DIRECTV nonetheless could support the proposed transaction – but only if the Commission achieves the proper balance by imposing targeted, pro-competitive conditions on its approval.

POTENTIAL HARMS

The integration of Comcast's and NBCU's assets will materially change the bargaining dynamic for programming controlled by the new conglomerate. As the Commission has found repeatedly, a vertically integrated programmer can much more credibly threaten to withhold programming from rival MVPDs than can a non-integrated programmer. Accordingly, the proposed transaction would enable Comcast/NBCU to use such threats to demand higher prices and more favorable terms – and withhold programming from any MVPD that failed to acquiesce. In addition, alternative delivery

mechanisms (including the Internet) would give Comcast/NBCU the option to make this programming available in ways that circumvent the Commission’s existing safeguards.

The proposed transaction would create anticompetitive incentives for Comcast/NBCU in three primary areas: broadcast programming, online programming, and national network programming.

Broadcast Programming. As the Commission has found, network broadcast stations control “must have” programming that is critical to an MVPD service. When affiliated with an MVPD, such stations gain bargaining leverage because of their more credible threat to withhold programming – a threat on which Comcast has delivered in the past, as it has withheld Comcast SportsNet Philadelphia (home of the Phillies, Flyers, and 76ers) from rival MVPDs for over a decade. In order to prevent such anticompetitive conduct, the Commission has required commercial arbitration of retransmission consent disputes (with continued carriage pending resolution) as a condition in both recent transactions that involved a combination of broadcast and MVPD assets – even though one of those cases involved only two broadcast stations and neither involved a dominant MVPD such as Comcast.

Comcast argues that it should be treated differently, claiming that NBC (which televises the Olympic Games, Sunday Night NFL Football (and the 2012 Super Bowl), the NHL’s Stanley Cup Finals, and Saturday Night Live) and Telemundo (the nation’s second most popular Spanish-language network) do not offer “must have” programming. This claim is belied by nearly a decade of consistent Commission findings. It is also based on an economic analysis that (among other deficiencies) would capture only one of

the two primary effects of vertical integration on NBCU's bargaining position. As the Commission has observed in the past, by focusing only on the benefits to Comcast's subscription revenues that could be achieved by withholding broadcast programming from MVPD rivals, the analysis ignores the much larger effect of vertical integration – the ability to extract higher retransmission consent rates for years going forward. Using a methodology that captures this second effect, DIRECTV demonstrates that the proposed transaction would enable Comcast to impose a significant increase in retransmission consent fees – especially in those areas where Comcast has a dominant share of the market.

Accordingly, the Commission should adopt the same condition it has twice previously imposed on broadcast/MVPD combinations, which is also similar to the condition imposed on Comcast's regional sports networks ("RSNs"):

When negotiations fail to produce a mutually acceptable set of price, terms and conditions for a retransmission consent agreement with a local broadcast television station that Comcast/NBCU owns, controls, or manages, or on whose behalf it negotiates retransmission consent, an MVPD may choose to submit a dispute to commercial arbitration and continue carriage of the broadcast signal during the pendency of such arbitration.

This will establish a neutral third party to resolve disputes regarding the fair market value of the programming at issue, and ensure that consumers will not be denied local broadcast news and entertainment while a dispute is being resolved.

Online Video Programming. The proposed transaction will also increase Comcast/NBCU's ability to deliver programming via broadband and other alternative distribution methods as a way to circumvent the protections of the Commission's program access rules. For over a decade, Comcast has used the "terrestrial loophole" to

deny RSN programming to DIRECTV and others. Now that the Commission has adopted rules intended to close that loophole, Comcast could achieve similar results by, for example, migrating programming to the Internet or to mobile or on demand platforms, where Comcast could then deny it to competitors or restrict access for consumers. Broadband, in particular, has increasingly become a vehicle for “over-the-top” content delivery, a process likely to accelerate through implementation of the National Broadband Plan. The proposed transaction will give Comcast numerous new assets that could be used to exploit an “online loophole” to disadvantage its MVPD rivals and consumers.

Comcast asserts that it would have no economic motive to withhold online programming. Given Comcast’s historical conduct with linear programming, this claim is disingenuous at best. The Commission cannot allow Comcast the opportunity to substitute one anticompetitive loophole for another. Accordingly, it should impose the following condition to extend its program access principles to these new media:

Comcast/NBCU may not offer any programming or programming-related service on an exclusive basis to any MVPD and will make such programming and services available to all MVPDs and/or their subscribers on a non-exclusive basis and on non-discriminatory terms and conditions consistent with the Commission’s program access rules within each medium or method used for delivery of such programming. Comcast also will not require any programmer to grant exclusive online rights as a condition of carriage on a Comcast cable system.

National Network Programming. The proposed transaction will give Comcast control over a wide variety of popular national programming networks. Comcast and its economists argue that this is not problematic, but here again, the Applicants’ economic analysis ignores the substantial increases in price likely to result from the proposed

transaction. Moreover, even if depriving a rival MVPD of any single one of these networks might not lead to large subscriber movements, withholding several of them at once is an entirely different matter. Comcast would be able to wield its new stable of national network assets in the same manner as broadcast or RSN programming to secure higher prices or carriage of less popular programming. In light of these facts, the Commission should impose the following condition to ensure uninterrupted access to such programming on fair market terms:

When negotiations fail to produce a mutually acceptable set of price, terms and conditions for carriage of a national programming network that Comcast/NBCU owns, controls or manages, an MVPD may choose to submit a dispute to commercial arbitration and continue carriage of the network during the pendency of such arbitration.

With respect to implementation of the proposed conditions, DIRECTV believes that the sort of arbitration regime imposed by the Commission on Comcast's RSNs provides vital protections against the abuse of market power. The three key aspects of this regime are (1) "baseball style" arbitration, which should incent the parties to submit market-based offers, (2) stand-alone offers, which preclude coercive bundling of programming, and (3) continued carriage during the arbitration process, so that viewers are not harmed (and forced switching of subscribers does not occur) while disputes are resolved. This regime generally produces positive results – not the least of which is to achieve agreement in the first place. DIRECTV has nonetheless identified areas for improvement during its recent experience in arbitrating carriage disputes with Comcast. Accordingly, DIRECTV proposes several revisions to the arbitration procedures, including more targeted discovery and a model protective order, to streamline the process

and better implement the Commission's original vision. These changes will make arbitration a more practical option for MVPDs facing the vertically integrated joint venture. In addition, DIRECTV proposes that existing RSN conditions be extended and finally made applicable to the Philadelphia RSN that Comcast has denied to rivals for years.

ALLEGED PUBLIC INTEREST BENEFITS

Comcast and NBCU discuss a number of benefits that they assert would result from the proposed transaction. Many of those benefits, if realized, would flow to Comcast rather than the public. Moreover, the alleged benefits are not cognizable in the Commission's public interest analysis. For example,

- Comcast promises to increase news and public affairs programming on its broadcast stations by 1000 hours per year. This constitutes an increase of less than 1% over what those stations are already doing.
- Comcast promises to carry six more channels of unaffiliated programming once it converts its cable systems from analog to digital technology. This constitutes about 1% of the increased capacity Comcast will realize through its digital conversion.
- Comcast promises to increase its carriage of Spanish-language programming. But it will do so only by carrying more of its own affiliated content.
- Comcast claims that vertical integration will allow it to secure earlier release windows for Universal Studios movies. Yet Universal Studios joined a petition by the Motion Picture Association of America two years ago designed to achieve this same result, which the Commission granted last month.

The claimed benefits of the transaction are not sufficient to offset the harms to consumers and competition that would result from the proposed transaction absent the imposition of the narrowly-tailored, pro-competitive safeguards proposed by DIRECTV. And none of the claimed benefits would be affected by those safeguards.

* * *

Comcast and NBCU assert that “past is prologue.” Accordingly, as the Commission considers the proposed transaction, it should bear in mind Comcast’s historic willingness to withhold programming to further its own interests. It should also take account of Comcast’s assertion that a vertically integrated firm (such as the new Comcast-owned NBCU) should be allowed to refuse to deal with a rival MVPD or favor its own affiliates. This amounts to an announcement that, left unchecked, Comcast will take advantage of the opportunities to further leverage its dominant position. It is yet more evidence that the public interest would be best served by conditioning any grant of the Application in the manner DIRECTV proposes.

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MB Docket No 10-56

COMMENTS OF DIRECTV, INC.

INTRODUCTION

In this proceeding, Comcast Corporation (“Comcast”) – the nation’s largest cable operator and largest Internet service provider (“ISP”) – proposes to acquire the assets of NBC Universal, Inc. (“NBCU”) from General Electric Company (“GE”, and together with Comcast and NBCU, “Applicants”). These assets include the NBC and Telemundo broadcast networks, 26 owned and operated television stations (“O&Os”) in major metropolitan markets, a host of the nation’s most popular cable channels, the movie library and ongoing production capabilities of Universal Studios, and a growing array of online destinations. The proposed transaction would consolidate under Comcast’s control the dominant multichannel video programming distributor (“MVPD” and Internet service provider (“ISP”), the regional sports network (“RSN”), and one or more network

television stations in major markets such as Washington, Chicago, Philadelphia, and San Francisco – to say nothing of the additional national networks and online assets Comcast would control.

Added to Comcast’s existing national cable programming and “new media” distribution capabilities, such a conglomeration of assets would be unprecedented, enhancing Comcast’s already considerable market power and increasing its already formidable advantages over competing MVPDs. Moreover, all of this comes at a critical juncture in the media industry, as the Internet is reaching the capacity and ubiquity necessary to support robust video services as an alternative to or enhancement of traditional MVPD networks. The proposed transaction would give Comcast a unique capability to shape the development of this new online ecosystem – one in which neither Congress nor the Commission has yet clearly established safeguards to prevent the types of anticompetitive strategies that were familiar in more established media contexts.

Applicants assert that “past is prologue.”¹ That is exactly what the Commission should recognize in considering the proposed transaction. Comcast has withheld programming from MVPD rivals in the past, and has either pursued court challenges to, or found creative ways to sidestep, rules designed to prevent anticompetitive activity. Comcast’s track record demonstrates that it will aggressively exploit any gray area in the rules where doing so would create an advantage. If the Commission is to grant the pending applications, it must do so with sufficient safeguards to preclude Comcast from

¹ Applications and Public Interest Statement, MB Docket No. 10-56, at 6, 55 (filed Jan. 28, 2010) (“Application”).

using the unprecedented aggregation of media assets that will come under its control to harm consumers and competition.

STANDARD OF REVIEW

Section 310(d) of the Communications Act requires the Commission to determine whether a proposed transfer of a radio license would serve the public interest, convenience, and necessity.² In making this determination, the Commission must weigh the potential harms to competition³ of a transaction against the unique public interest benefits that the transaction will create.⁴ Applicants must prove by a preponderance of the evidence that the probable benefits of the transaction outweigh the potential harms.⁵ In particular, “[t]o find that a [transaction] is in the public interest, . . . the Commission must ‘be convinced that it will enhance competition.’”⁶ If Applicants cannot carry this burden, the Application must be denied or granted only with appropriate conditions.⁷

² 47 U.S.C. § 310(d).

³ Among these harms are the enhancement of market power or slowing the decline of market power. See *NYNEX Corp. and Bell Atlantic Corp.*, 12 FCC Rcd. 19985, ¶ 2 (1997) (“*Bell Atlantic/NYNEX*”).

⁴ See, e.g., *Adelphia Communications Corp., Time Warner Cable Inc., and Comcast Corp.*, 21 FCC Rcd. 8203, ¶ 243 (2006) (“*Adelphia/Comcast/TWC*”); *EchoStar Communications Corp., General Motors Corp., and Hughes Electronics Corp.*, Hearing Designation Order, 17 FCC Rcd. 20559, ¶ 25 (2002) (“*EchoStar HDO*”); *VoiceStream Wireless Corp., Powertel, Inc., and Deutsche Telekom AG*, 16 FCC Rcd. 9779, ¶ 16 (2001).

⁵ See *Adelphia/Comcast/TWC*, ¶ 23; *EchoStar HDO*, ¶ 24; see also *Media One Group, Inc. and AT&T Corp.*, 15 FCC Rcd. 9816, ¶ 8 (2000) (“*AT&T/Media One*”).

⁶ *Time Warner Inc. and America Online, Inc.*, 16 FCC Rcd. 6547, ¶ 21 (2001) (quoting *Bell Atlantic/NYNEX*, ¶ 2).

⁷ See *Bell Atlantic/NYNEX*, ¶ 2.

The Commission must first examine potential harms from the transaction.⁸ That examination extends beyond traditional antitrust analysis and must consider a transaction’s effect on the broader public interest.⁹ In conducting this analysis, the Commission may consider technological and market changes, and the nature, complexity, and speed of change of, as well as trends within, the communications industry.¹⁰ The Commission must also determine whether the transaction could frustrate implementation or enforcement of the Communications Act and federal communications policy.¹¹

Where, as here, a proposed transaction demonstrably raises concerns of harm to consumers and competition, it will not suffice for the Commission merely to ensure compliance with its various structural ownership and program access rules.¹² Indeed, the Commission concluded in both the *News/Hughes* and the *Adelphia/Comcast/TWC*

⁸ DIRECTV generally agrees with Comcast’s assertion that the Commission should adopt the same product market definitions used in *News/Hughes*. See Application at 86 (“There is no need for the Commission to define video programming markets any differently” than it did in the *News-Hughes* order.) DIRECTV also agrees that the relevant geographic market is national for national networks and regional for regional networks, and that the market for broadcast stations is the local Designated Market Area in which a broadcast station operates. See *id.* at 87. However, DIRECTV also believes that the Commission should consider the emerging market for online programming and distribution in addition to the traditional MVPD and cable programming markets.

⁹ See *EchoStar HDO*, ¶¶ 26-27 (citing *Satellite Business Systems*, 62 F.C.C.2d 997, 1088 (1977), *aff’d sub nom United States v. FCC*, 652 F.2d 72 (D.C. Cir. 1980) (*en banc*), and *Northern Utilities Service Co. v. FERC*, 993 F.2d 937, 947-48 (1st Cir. 1993)).

¹⁰ *Adelphia/Comcast/TWC*, ¶ 24.

¹¹ See *General Motors Corp., Hughes Electronics Corp. and The News Corporation Ltd.*, 19 FCC Rcd. 473, ¶¶ 14-16 (2004) (“*News/Hughes*”).

¹² See, e.g., *News Corp., The DIRECTV Group, Inc., and Liberty Media Corp.*, 23 FCC Rcd. 3265, Appendix B, Section I (2008) (requiring severing of attributable links between DBS and cable operators in Puerto Rico despite absence of DBS/cable cross ownership rule) (“*Liberty Media/DIRECTV*”); *AT&T/MediaOne*, 15 FCC Rcd. at 9845 (rejecting the applicants’ argument that their compliance with “Commission rules, such as program access, program carriage, must carry, leased access, and the channel occupancy rules [would] foreclose their ability to exert excessive programming market power”).

proceedings that neither the Commission’s program access rules nor the applicants’ related commitments were sufficient to protect against the potential harms to consumers and competition that may result from exclusive or discriminatory programming arrangements.¹³

The Commission’s legal standard is equally exacting with respect to asserted public interest benefits. The Applicants have presented a list of the “efficiencies” that they assert will be created by the transaction as well as commitments they promise to implement if the transaction is approved. The Commission must rigorously analyze the merits of these claims and the evidence proffered to support them to determine whether they are transaction-specific, verifiable, and likely to flow through to consumers.¹⁴

Efficiencies that could be achieved by more competitively neutral means or that will occur regardless of the transaction cannot be considered pro-competitive benefits in this proceeding. Because much of the information relating to the asserted benefits is in the sole possession of the Applicants, they are required to provide sufficient supporting evidence so that the Commission can verify the likelihood and magnitude of each claim.¹⁵ In addition, the Commission applies a “sliding scale approach” to its ultimate evaluation of benefit claims such that, where potential harms appear both substantial and likely, the Applicants’ demonstration of claimed benefits also must reveal a higher degree of magnitude and likelihood than the Commission would otherwise demand.¹⁶

¹³ See *News/Hughes*, ¶¶ 147-49; *Adelphia/Comcast/TWC*, ¶ 140.

¹⁴ See *Adelphia/Comcast/TWC*, ¶ 244; *EchoStar HDO*, ¶¶ 189-90.

¹⁵ See *Adelphia-Comcast-TWC*, ¶ 244.

¹⁶ See *id.*, ¶ 245.

DISCUSSION

As the Commission has documented on many occasions, vertical integration of programming and distribution can, if left unchecked, give the integrated entity the incentive and ability to gain an unfair advantage over its rivals. This ultimately results in higher prices and lower quality service for consumers. Comcast's own behavior with its existing programming networks confirms the Commission's findings. The vertical integration proposed here, if left unchecked, would result in three principal categories of harms.

- First, by combining Comcast's dominant cable and broadband distribution assets with NBCU's broadcast stations, the transaction would change the bargaining dynamic, giving Comcast-owned NBCU the incentive and ability to demand greater compensation for retransmission consent. This in turn would result in higher prices and potential service disruptions for consumers.
- Second, the transaction would increase Comcast's incentive and ability to use the "online loophole" to avoid existing non-discrimination and non-exclusivity requirements by delivering programming and programming-related enhancements via new media (such as the Internet or video on demand ("VOD")) – enabling it to raise prices for programming or deny it altogether to MVPD rivals or other emerging "new media" competitors.
- Third, the change in bargaining position combined with the increased horizontal concentration in national programming services would enable Comcast to secure higher prices for such services.

Applicants fail even to acknowledge some of these issues, much less address them. As for the issues they do address, Applicants largely rely on existing rules and corporate formalities to constrain anticompetitive conduct – an approach that has been recognized by the Commission as insufficient to address such concerns in previous transactions. Applicants also proffer three economic analyses. The first addresses the economics of vertical integration generally. Even putting aside its other flaws, this study focuses only on the benefits of withholding in terms of actual subscriber switching, and therefore misses the much larger effect of vertical integration – the ability to extract higher rates for years going forward based on the threat of such switching. The second discusses online programming but fails to address Comcast’s ability to exploit an “online loophole” in the Commission’s pro-competitive rules. And the third overstates the likelihood and significance of alleged efficiencies, which are either not verifiable, not transaction specific, or insubstantial, and therefore must be heavily discounted or ignored completely. At the same time, public interest commitments proffered by Comcast in an effort to give content to these efficiencies are insufficient to counter the harms that would result from the proposed transaction. Accordingly, if the Commission is to approve the transaction, it should – as it has in past transactions – impose behavioral constraints on Comcast/NBCU to address its increased incentive and ability to act anticompetitively. Such conditions should remain in effect until Comcast/NBCU can demonstrate that market conditions have changed in a manner that makes them no longer necessary.¹⁷

¹⁷ As Commissioner Copps has explained, the public interest is not served where the Commission finds that a transaction will give the merged entity the incentive and ability to act anticompetitively, but then imposes conditions for only a specified term of years. The “inescapable logic” of such an approach is that in a few short years, the merged entity will be able to impose precisely those burdens on the public

In the remainder of these comments, we first discuss Comcast’s history of using programming to gain a competitive advantage over its rivals. We then demonstrate the harms that would arise from the proposed transaction, as well as conditions to address those harms. We also propose slight modifications to streamline the arbitration regime established by the Commission in prior transactions. Lastly, we demonstrate that the efficiencies claimed by Comcast are neither cognizable nor sufficient to offset the harm to consumers and competition that would result from the proposed transaction.

I. COMCAST HAS DEMONSTRATED ITS WILLINGNESS TO USE PROGRAMMING UNDER ITS CONTROL TO DISADVANTAGE OTHER MVPDS.

A standard assumption in modern economics is that firms seek to maximize profits. Consistent with that premise, the evidence shows that for more than a decade, Comcast has aggressively exploited loopholes and other opportunities to maximize its own value at the expense of other firms by, for example, denying them key programming or raising the prices they pay for it. While such strategies have maximized profits for Comcast, they have also raised prices and decreased competition, thereby harming consumers. As a result, Comcast’s actions have regularly been cited as justification for efforts to strengthen the Commission’s pro-competitive rules. It is in this context that the Commission must examine Comcast’s request to control even more programming in even more distribution formats with little to no regulatory oversight.

Any such discussion must begin with Philadelphia sports programming. For over a decade, Comcast has refused to sell Comcast SportsNet-Philadelphia (“CSN-Philly”)

that the Commission has identified. *See XM Satellite Radio Holdings, Inc. and Sirius Satellite Radio Inc.*, Dissenting Statement of Commissioner Michael J. Copps, 23 FCC Rcd. 12348 (2008).

programming to DIRECTV and DISH Network. It has done so openly and unapologetically, claiming that this “must have” RSN programming is exempt from the program access regime established by Congress and the Commission because it is delivered terrestrially rather than via satellite. Satellite operators repeatedly challenged the legality of this terrestrial loophole.¹⁸ But it was not until this year – after compiling a ten-year record of severe anticompetitive effects resulting from this withholding – that their challenge was finally successful.¹⁹

Nothing forced Comcast to withhold Philadelphia sports programming. Comcast could have sold CSN-Philly to satellite competitors at any time, but refused to even consider doing so. As a result, DBS penetration in the Philadelphia market has been shown to be 40% lower than it would have been absent such withholding.²⁰ By using its RSN to weaken its chief competitors in this way, Comcast enjoyed a huge (and unfair) advantage for years. Given the integral role RSNs have played in its strategy for competing against other MVPDs, it is perhaps not surprising that Comcast consolidates

¹⁸ See, e.g., *DIRECTV, Inc. and EchoStar Commc'ns Corp. v. Comcast Corp.*, 15 FCC Rcd. 22802, ¶ 12 (2000), *aff'd sub nom. EchoStar Commc'ns Corp. v. FCC*, 292 F.3d 749 (D.C. Cir. 2002); see also *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Sunset of Exclusive Contract Prohibition*, 22 FCC Rcd. 17791, ¶ 78 and Appendix B (2007) (“2007 Exclusivity Extension Order”), *aff'd sub nom. Cablevision Systems Corp. v. FCC*, 597 F.3d 1306 (D.C. Cir. 2010); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Sunset of Exclusive Contract Prohibition*, 17 FCC Rcd. 12124, ¶ 73 (2002) (“2002 Exclusivity Extension Order”).

¹⁹ See *Review of the Commission's Program Access Rules and Examination of Program Tying Arrangements*, 25 FCC Rcd. 746, ¶¶ 25-35 (2010) (“Terrestrial Loophole Order”).

²⁰ See *Adelphia-Comcast-TWC*, ¶ 149 and Appendix D; *2007 Exclusivity Extension Order*, ¶¶ 39-40 and Appendix B.

the financial performance of its RSNs with its cable systems rather than with its other programming assets.²¹

Comcast has also employed other means over the years to disadvantage rival MVPDs. It has, for example, attempted to skirt the Commission’s nondiscrimination rules²² by devising pricing strategies that are facially neutral but inevitably have discriminatory effects²³ and by requiring satellite (but not cable) operators to carry RSN programming in areas where the RSN did not have rights to show professional games.²⁴ Most recently, it moved teams from one RSN to another in order to increase fees.²⁵

²¹ See, e.g., Comcast Corp., 2009 Annual Report on Form 10-K, at 1 (“Our Cable segment also includes the operations of our regional sports networks.”) (“2009 Comcast 10-K”) (available at <http://www.cmcsk.com/secfiling.cfm?filingID=1193125-10-37551>).

²² 47 U.S.C. § 548.

²³ One example is the pricing of its affiliated iNHD channel. Comcast sought to charge a single price for each MVPD’s “digital” subscribers, knowing that *all* satellite subscribers were digital subscribers, while only a fraction of cable subscribers were digital subscribers. See Complaint, DIRECTV, Inc. v. iN Demand, LLC, File No. CSR-6901-P (filed June 29, 2005). Under this scheme, DIRECTV was to have paid many times what Comcast itself paid for the programming. The discriminatory impact of this pricing scheme was straightforwardly stated by iNHD’s logo, which used the tag line “Only on Cable.” (iNHD abandoned this discriminatory pricing structure only after DIRECTV brought a program access complaint to challenge it, before ultimately discontinuing the service in December 2008.)

²⁴ The evolution of one such RSN, Comcast SportsNet West (“CSN-West”), is particularly instructive. When launched in 2004, the RSN carried only one men’s professional sports team, the NBA’s Sacramento Kings. When DIRECTV expressed interest in negotiating a carriage agreement, CSN-West responded with a proposal under which DIRECTV would be required to carry this RSN in a very expansive area, in much of which *the RSN did not have the rights to show the Kings games*. Thus, DIRECTV would have to pay a monthly carriage fee for subscribers who could not see the one professional team featured by the RSN – and such subscribers outnumbered those who could see the Kings games by two to one. As a result, the effective rate for those who could actually watch those games was shockingly high – higher than the rate DIRECTV paid for the neighboring RSN, Comcast SportsNet Bay Area (“CSN-BA”), which carried four professional teams throughout its territory.

²⁵ Last year, Comcast unilaterally decided to migrate two teams (the San Jose Sharks and Oakland A’s) from CSN-BA to CSN-West (which was then renamed CSN-California). Thus, an MVPD competing with Comcast in the San Francisco Bay area that formerly carried and paid for a single RSN to provide fans all four teams of interest now had to carry and pay for two RSNs to give fans the same sports coverage. Four small MVPDs in the Bay Area have brought a program access complaint against Comcast to challenge the effective doubling of their rates that resulted from this strategy. See

DIRECTV raises these issues here not to re-litigate stale claims or litigate new ones. But in a proceeding where Comcast cites its past conduct as a reason to approve the proposed transaction, it seems only reasonable to examine that conduct to predict how Comcast will act going forward. Doing so leads to two inescapable conclusions. First, to the extent the anticompetitive consequences of the proposed transaction turn on the credibility of a threat to withhold programming, no one could be more credible in that regard than Comcast. Second, if the Commission leaves a loophole for Comcast to exploit using assets newly acquired from NBCU, Comcast will surely exploit it. Indeed, Comcast practically announces that it will continue to engage in such tactics by arguing that a vertically integrated firm should be allowed to refuse to deal with a rival MVPD or favor its own affiliates if that decision is driven by efficiency considerations – defined by Comcast to include the ability of the company’s different divisions to coordinate and cooperate more closely than they would if not integrated.²⁶ This so-called “efficiency” is exactly what Congress and the Commission put the program access regime in place to prevent. And this is the context in which the Commission must examine the specific harms that would arise from the proposed transaction.

II. ABSENT CONDITIONS, THE PROPOSED TRANSACTION WOULD GIVE COMCAST ADDITIONAL OPPORTUNITIES TO HARM CONSUMERS AND COMPETITION.

The Commission has repeatedly considered the economics of vertical integration and how such integration changes the bargaining position vis-à-vis unaffiliated MVPDs.

WaveDivision Holdings, LLC, et al. v. Comcast Corp., et al., Program Access Complaint, File No. CSR-8257-P (filed Dec. 23, 2009).

²⁶ Application at 106 n.231.

Once integrated, a programmer’s potential losses from a bargaining impasse are offset to the extent subscribers lost by the foreclosed MVPD migrate to the affiliated MVPD. In extreme cases, this effect may be sufficient to allow the programmer to profitably deny the programming to the rival MVPD permanently, as Comcast has done with CSN-Philly. But in most cases, withholding is threatened or used for only a very short period, as a means to pressure the rival MVPD. The Commission has found that such temporary withholding (or even just the threat of such withholding) can be used as a tactic for securing higher prices, which is the primary goal of the programmer.²⁷ Moreover, an integrated programmer may only need to *threaten* to withhold programming,²⁸ or actually do so on very few occasions,²⁹ to achieve this benefit.

As discussed more fully below, the proposed transaction will change the bargaining dynamic in a way that will enable Comcast-owned NBCU to present Comcast’s competitors with the no-win choice of either acceding to higher prices (which are likely to be passed along to consumers) or losing access to broadcast programming, online video, and national networks (depriving viewers of popular programming and the full benefits of MVPD competition). If the Commission is to approve the proposed

²⁷ *News/Hughes*, ¶ 80 (“Specifically, by temporarily foreclosing supply of the input to a downstream competitor or by threatening to engage in temporary foreclosure, the integrated firm may improve its bargaining position so as to be able to extract a higher input price from the downstream competitor than it could have negotiated if it were a non-integrated input supplier.”).

²⁸ The Commission found that brinkmanship alone can be sufficient to cause harm. *See, e.g., id.*, App. D, ¶ 21 (finding that an MVPD experienced a statistically significant increase in growth rate in areas “where consumers were continually being told that they were likely to be losing access to the ABC affiliate on the incumbent local cable operator”).

²⁹ *Id.*, ¶ 80 (“[B]y temporarily foreclosing certain competitors, the vertically integrated firm may signal to other downstream competitors its willingness to foreclose, which may cause other downstream competitors to agree to a higher price without the vertically integrated firm’s having to actually engage in repeated foreclosures.”).

transaction, it must – as it has done with Comcast before³⁰ – impose substantial conditions to preclude anticompetitive conduct.

A. The Proposed Transaction Would Likely Result in Substantially Higher Prices for Retransmission Consent of NBCU Stations.

Comcast proposes to acquire control over two national broadcast networks and over two dozen O&O stations in major markets across the country. These stations and networks control programming that MVPDs simply “must have” in order to compete in the local markets where the stations operate, which (as the Commission has found) confers market power on the broadcast station owner.³¹ The Commission has repeatedly concluded that combining “must have” broadcast stations with MVPD distribution enables the vertically integrated entity to raise prices and withhold (or threaten to withhold) programming, and thereby harm competition and the public interest.³² Comcast

³⁰ See *Adelphia/Comcast/TWC*, App. B.

³¹ See, e.g., *News/Hughes*, ¶ 202 (“At the outset, we agree with commenters who contend that carriage of local television broadcast station signals is critical to MVPD offerings.”). Indeed, the Commission has found that a broadcast network operator “possesses significant market power in the DMAs in which it has the ability to negotiate retransmission consent agreements on behalf of local broadcast television stations.” *Id.*, ¶ 201. That is because (1) the signals of local television broadcast stations are without close substitutes, and (2) entry into this segment of the video programming market is highly restricted due to the extremely limited availability of new television broadcast licenses. *Id.*, ¶ 202.

³² Vertical integration can allow the integrated entity “to extract more compensation for its broadcast station signals from competing MVPDs than it could reasonably expect to achieve absent the transaction” by lowering the risks and costs of engaging in such foreclosure. *Id.*, ¶ 209. The Commission concluded that, when affiliated with an MVPD, “the ability of a television broadcast station to threaten to withhold its signal, even if it does not actually do so, changes its bargaining position with respect to MVPDs, and could allow it to extract higher prices, which ultimately are passed on to consumers.” *Id.*, ¶ 204. Such conduct results in “substantial” public interest harms, from increasing costs for rivals which are then passed along to consumers in the form of higher subscription rates, to obtaining carriage for less popular affiliated programming that crowds out content viewers would prefer to see. *Id.*, ¶ 209. In the long term, “use of market power to extract artificially high levels of compensation from MVPD rivals, or other carriage concessions, could make rival MVPDs less viable options for consumers, thus limiting consumer choice.” *Id.* Moreover, to the extent a station carries through on its threat to withhold, the local television broadcast signal would become unavailable to the subscribers of competing MVPDs, which is in itself a significant public loss as

nevertheless contends that NBC and Telemundo network fare is not “must have” programming at all and therefore should not be subject to even the arbitration remedies that the Commission has applied to every other recent MVPD/broadcast combination.³³

This is simply not credible. NBC controls the rights to the 2012 Super Bowl and the Olympic Games through 2012, and has such popular shows as 30 Rock, Sunday Night NFL Football, The Stanley Cup Finals, Law and Order, The Today Show, NBC Nightly News, The Tonight Show, The Office, Celebrity Apprentice, and Saturday Night Live.³⁴ For its part, Telemundo is the second largest producer of Spanish-language programming in the world and the nation’s second most popular Spanish-language network, with a significant following in the Hispanic community.³⁵ The Commission has consistently found exactly this kind of programming to be critical to the success of any MVPD – a finding with which Applicants’ own expert, Michael Katz, recently agreed.³⁶

“local broadcast station signals play a very important role in terms of viewpoint diversity and localism, two of our most important Communications Act goals and policies.” *Id.*, ¶ 210.

³³ Application at 118.

³⁴ A recent survey found that 52% of current pay TV subscribers would consider switching to a different MVPD if NBC broadcast programming were no longer offered by their current MVPD – the highest figure found in the survey. See J.P. Morgan, “J.P. Morgan Consumer Survey: Identifying ‘Must Carry’ Networks and Consumer Appetite For Channels A La Carte” (Apr. 20, 2010).

³⁵ Telemundo also owns O&O stations in key Hispanic markets: just the top nine markets account for over 50% of the total Hispanic television households in the U.S., and such households comprise up to 45% of total households in those DMAs. See Television Bureau of Advertising Online, Market Track: Hispanic Markets (available at http://www.tvb.org/rcentral/markettrack/Top_25_Hispanic_Markets.asp).

³⁶ Michael L. Katz, Jonathan Orszag, & Theresa Sullivan, *An Economic Analysis of Consumer Harm from the Current Retransmission Consent Regime*, at 2-3 (Nov. 12, 2009), attached to Letter from Neal M. Goldberg, National Cable & Telecommunications Association, to Blair Levin, Federal Communications Commission, GN Docket No. 09-47 (Dec. 16, 2009) (“Katz 2009 RTC Analysis”) (stating that “[a]n MVPD that fails to obtain carriage of leading broadcast networks is at a significant competitive disadvantage relative to its MVPD rivals serving the same area” and that loss of the rights

Even so, the Commission need not make fine distinctions about the desirability of NBC and Telemundo programming here. The question in this proceeding is simply whether that programming is sufficiently important that, if Comcast were to control it, prices would go up substantially. As demonstrated below, the answer is clearly “yes.”

1. The most significant impact of the proposed transaction would be higher prices, not foreclosure.

In *News/Hughes*, the Commission recognized that bargaining dynamics and changes in bargaining position are the key to determining the incentives created by vertical integration.³⁷ The Commission identified two factors that might change a vertically-integrated broadcaster’s bargaining position: (1) the profits generated from subscribers who switch from the foreclosed MVPD to the affiliated MVPD (in this case, Comcast); and (2) increased compensation for retransmission consent. However, its economic analysis could only measure the effect of switching.³⁸ It found the effect of the increased compensation for retransmission consent to be “difficult to quantify,” and concluded that there was insufficient evidence in the record to do so. Accordingly, it was “unable to estimate the full magnitude of the increase in the incentive and ability to obtain additional compensation in return for granting retransmission consent.”³⁹ Nonetheless, the Commission performed an analysis based solely on the first factor (*i.e.*, subscriber gains from foreclosure), which it described as “an estimate of the *minimum*

to carry a major broadcaster results in “a very significant reduction in consumer demand for the MVPD’s service as consumers turn to MVPD competitors that have carriage rights”).

³⁷ See, e.g., *News/Hughes*, ¶¶ 180, 204.

³⁸ See *id.*, Appendix D, ¶ 12.

³⁹ *Id.*

increase in incentive and ability to obtain additional compensation from MVPDs.”⁴⁰

Thus, the Commission recognized that the methodology used in *News/Hughes* would systematically understate the effects of vertical integration, capturing only the effects of the short-term strategy (causing subscribers to switch) rather than the long-term goal (raising prices).⁴¹

Applicants’ experts present an analysis similar to that used in *News/Hughes*.⁴²

But the Commission need not accept the limitations of that methodology again here. As demonstrated in the attached report prepared by Professor Kevin Murphy, George J. Stigler Distinguished Service Professor of Economics at the University of the Chicago Booth School of Business, a standard bargaining model can be used to determining the likely increase in price that would result from vertical integration.⁴³ His calculations show quite powerfully the extent to which this transaction would allow Comcast to raise prices for NBCU broadcast programming.

Professor Murphy demonstrates that it is possible to quantify the likely increase in retransmission consent fees resulting from vertical integration by looking at the fees negotiated between the parties in the absence of vertical integration. As explained in his report, the impact of the proposed transaction on the retransmission consent rate that

⁴⁰ *Id.* (emphasis in original).

⁴¹ *Id.*, ¶ 81 (“The underlying purpose of temporary foreclosure generally is to extract a higher price for the integrated firm’s upstream input and thus raise its downstream rivals’ costs.”).

⁴² See Mark Israel and Michael Katz, “Application of the Commission Staff Model of Vertical Foreclosure to the Proposed Comcast-NBCU Transaction,” MB Docket No. 10-56 (Feb. 26, 2010) (“Israel/Katz Report”).

⁴³ See Kevin M. Murphy, “Economic Analysis of the Impact of the Proposed Comcast/NBCU Transaction on the Cost to MVPDs of Obtaining Access to NBCU Programming” (June 21, 2010) (“Murphy Report”) (attached hereto as Exhibit A).

competing MVPDs pay to an integrated Comcast/NBCU depends on several factors, including: (1) the “departure rate,” or the percentage loss of the MVPD’s subscribers when it does not carry the NBCU O&Os; (2) the profitability to the MVPD of each of those lost subscribers; (3) the fraction of the MVPD’s lost subscribers that switches to Comcast; and (4) the advertising revenues (or other benefits) that NBCU loses if the MVPD does not carry the NBC programming.⁴⁴ Some of these factors can be observed directly, while others can be discerned from the outcomes in a substantial number of real-world negotiations over retransmission consent rights. By combining this empirical evidence with a standard Nash bargaining model, Professor Murphy is able to infer the extent to which retransmission consent rates would likely change as a result of the proposed transaction. His methodology is described in greater detail below.

Bargaining Power and Fallback Payoffs. A standard economic analysis of bargaining – one endorsed by, among others, Applicants’ own economist⁴⁵ – identifies factors that influence the outcome of bilateral negotiations. Consider a simple model of negotiation over retransmission consent between an MVPD and a station owner. The retransmission of the broadcaster’s signal over the MVPD’s system creates a valuable service to which both sides of the negotiation contribute and from which both potentially benefit. The station owner contributes the signal, and the MVPD contributes its distribution system. The distribution of the broadcaster’s programming over an extended

⁴⁴ *Id.* at 2.

⁴⁵ See Katz 2009 RTC Analysis at 11-19.

area served by the MVPD creates incremental profits derived from additional advertising fees and subscriber fees.

If a station owner has elected retransmission consent, then its signal will be distributed by the MVPD if and only if both parties agree to that arrangement. Thus, an agreement will be reached only if each side finds such an agreement to be in its commercial self-interest.⁴⁶ In essence, then, a negotiation over retransmission rights is a bilateral negotiation over how to split the joint gains from trade – *i.e.*, the pool of incremental profits created by the retransmission of the broadcaster’s signal to the MVPD’s subscribers.⁴⁷ The resulting fee allocates those joint gains, relative to a split where the station and the MVPD each keeps what it collects for itself.

Mainstream economic models of bargaining, including the well-known Nash bargaining model, are based on the premise that the agreement reached between two parties depends on how they would fare if there were no agreement at all.⁴⁸ More specifically, the agreement that is reached will reflect a split of the joint benefits from the transaction such that each party obtains what it could get in its next best alternative, plus some share of the incremental gain generated jointly. Accordingly, a party’s share of the overall value of the transaction depends on its “fallback payoff,” which is the payoff

⁴⁶ A broadcast station owner could elect must carry rather than retransmission consent. As Professor Murphy explains, the fact that NBC stations do not do so implies that the “departure rate” cannot be zero or extremely low, because DIRECTV would not pay a fee for carriage in that situation. *See* Murphy Report at 2-3.

⁴⁷ *Id.* at 4-7. Bargaining situations are commonly described as negotiations to divide some fixed amount of surplus. *See, e.g.*, A. Rubinstein, “Perfect Equilibrium in a Bargaining Model,” 50 *ECONOMETRICA* 1, 97-109 (Jan. 1982).

⁴⁸ *See* Murphy Report at 5-7.

(*e.g.*, profits) that the party would obtain in the absence of agreement.⁴⁹ Clearly, it would be economically irrational for either party to accept an agreement that resulted in profits for that party that were lower than its fallback payoff because that party would be better off without any agreement. Thus, the negotiations will be over how the two parties divide the gains from working together, but will depend on the consequences to each party of failing to agree. That is, under the negotiated agreement, each party will receive an amount equal to its fallback payoff plus some share of the gains from cooperation.

Professor Murphy’s presentation of this bargaining model illustrates an important implication of the Nash bargaining solution: that a firm’s realized payoff increases as its fallback payoff improves relative to its bargaining partner.⁵⁰ Using this insight, it is possible to infer how a change in one firm’s fallback payoff caused by a change in its operations will affect how the parties split the gains from trade.

The Transaction Would Substantially Change NBCU’s Fallback Payoff. As Professor Murphy explains, Comcast’s acquisition of NBCU would significantly increase NBCU’s fallback payoff, and thereby result in significantly higher retransmission consent fees, because the integrated entity would gain from subscriber movements to Comcast (while the current ownership of NBCU does not).⁵¹ Although the equations in Professor Murphy’s economic analysis are somewhat complex, the intuition behind them is fairly

⁴⁹ The consequences of disagreement matter even if the bargaining parties never actually walk away from each other because even the potential consequences of failing to reach an agreement will affect negotiating behavior. *See, e.g., News/Hughes*, ¶ 204 (“the *ability* of a television broadcast station to threaten to withhold its signal, even if it does not actually do so, changes its bargaining position with respect to MVPDs” (emphasis in original)).

⁵⁰ *See* Murphy Report at 6-7.

⁵¹ *See id.* at 8-13.

straightforward. If one knows what both the broadcaster and MVPD stand to gain and lose by coming to a retransmission consent agreement, and also knows the transfer price they ultimately agree upon, one can infer the departure rate they anticipate should there be no such agreement. With that departure rate, one can then determine the likely increase in prices resulting from vertical integration, stated as a function of the percentage of subscribers lost by the foreclosed MVPD that go to Comcast.

Professor Murphy explains that using data on negotiated retransmission rates in this way provides many advantages over the approach taken by Israel/Katz. For example, this approach is fairly robust because it is based on a large amount of data on retransmission rates negotiated in the market rather than the relatively few instances of temporary withholding of broadcast signals in general, and of NBC signals in particular. It also obviates the need to consider separately the possibility of temporary and permanent withholding, as the observed rates reflect the implicit ability of each party to deny the other access to its assets. Moreover, this bargaining framework provides a direct way to estimate how retransmission fees would change as a result of the proposed transaction, and does not rely upon a translation of “critical departure rates” to determine that effect.⁵²

Applying this bargaining framework, and using empirical data provided by Applicants and public sources, Professor Murphy calculates that the implied departure

⁵² *Id.* at 24-25.

rate is approximately {{ }} percent.⁵³ In other words, the rate paid for retransmission consent reflects the anticipation that, if an MVPD did not carry the local NBC O&O, approximately {{ }} percent of its subscribers would switch to another MVPD. To test his conclusion, Professor Murphy considers two analyses of subscriber movements observed by DBS operators – one in which the local signal was withheld, and another in which it was newly introduced – which use very different methodology and evidence to reach departure rates consistent with his own estimates.⁵⁴ From this, Professor Murphy finds further support for his conclusion that departure rates associated with the loss of NBC programming from an MVPD’s lineup are economically substantial and much greater than Israel/Katz claim.

Using this implied departure rate, and assuming (as the Commission and Israel/Katz do⁵⁵) that subscribers would switch to alternative MVPDs in proportion to those competitors’ market shares, he further estimates that retransmission consent rates would change after Comcast’s acquisition of NBCU by approximately \${{ }} per subscriber times the share of the MVPD’s lost subscribers that switch to Comcast.⁵⁶ Assuming an MVPD with a 10 percent market share in each DMA where Comcast

⁵³ *Id.* at 15-16. This figure applies if one assumes that the MVPD’s price to subscribers change in response to the loss of the station’s signal. If instead that price is held constant, the departure rate is approximately {{ }} percent.

⁵⁴ *Id.* at 17-21 (discussing analysis of retransmission dispute between DISH Network and Fisher Communications, which resulted in {{ }}, and analysis of DIRECTV’s introduction of local-into-local service for all four major networks, which {{ } })).

⁵⁵ *See* Israel/Katz Report at 30-31.

⁵⁶ Murphy Report at 21-22.

overlaps with an NBC O&O, this estimate translates to an increase in retransmission consent fees resulting from the transaction that could range from \${{ }} per subscriber in New York to \${{ }} per subscriber in Philadelphia.⁵⁷ The increases forecast to result from vertical integration are clearly substantial.

In *Adelphia/Comcast/TWC*, the Commission determined that it will deem a price increase of five percent or greater to be significant and therefore worthy of regulatory intervention.⁵⁸ It chose this threshold both because it is consistent with the merger guidelines developed by the Department of Justice, and because “price increases of five percent or more would likely harm rival MVPDs’ ability to compete and/or be passed on to consumers in some form, such as increased rates or reductions in quality or customer service.”⁵⁹ As demonstrated by Professor Murphy, {{ }}.

While the Murphy Report focuses on the effects experienced in the markets where NBCU has O&O stations, there is good reason to believe that the impact will be felt more broadly. To the extent NBCU {{ }}⁶⁰ or holds a veto over its affiliates’ retransmission consent agreements,⁶¹ it extends Comcast’s ability to apply this bargaining dynamic in

⁵⁷ *See id.*

⁵⁸ *See Adelphia/Comcast/TWC*, ¶ 143.

⁵⁹ *Id.*

⁶⁰ *See Israel/Katz Report* at 51 ({{ }}).

⁶¹ The FOX network apparently has such veto power with respect to at least some of its affiliated stations. *See Ex Parte Comments of Time Warner Cable Inc. in Support of Mediacom*

every market in the country where it has a cable system. Moreover, even were NBCU only entitled to take a share of its affiliates’ retransmission consent fees, it could have the same practical effect by ensuring that local stations demand higher prices in order to make up the resulting shortfall.⁶² Accordingly, the Commission must apply uniform, nationwide safeguards to address this issue.

2. Applicants’ more limited and flawed analysis does not address price increases.

Applicants have submitted their own economic analysis of retransmission consent issues based on a methodology similar to that employed by the Commission in *News/Hughes*.⁶³ That analysis examines whether the likelihood of foreclosure would change as a result of the transaction *holding retransmission rates fixed*. Accordingly, for the very reasons identified by the Commission in that proceeding, Applicants’ version of that analysis fails to capture one of the two primary effects of vertical integration on

Communications Corporation’s Retransmission Consent Complaint, CSR Nos. 8233-C and 8234-M, at 1-6 (Dec. 8, 2009) (discussing role of FOX Broadcasting in retransmission consent negotiation of non-O&O affiliates).

⁶² Comcast has committed to engage in a dialogue with the NBCU affiliates toward a new business model, but gives no hint what such a model might include. See Application at 40. The Commission has acknowledged that the “public interest may be harmed if networks possess sufficient bargaining power over their affiliates such that exercise of this bargaining power would result in reduction of affiliate advertising revenues significant enough to inhibit the affiliates’ ability to present programming that best serves its community.” *Review of the Commission’s Regulations Governing Broadcast Television Advertising*, 10 FCC Rcd. 11853, ¶ 17 (1995). A similar harm would arise if Comcast were allowed to take a portion of the local affiliates’ retransmission consent revenue – both because it would reduce funds available for the stations’ local programming and because it would virtually force the stations to demand higher fees from MVPDs, which would then be passed along to consumers. MVPDs and their customers would pay higher prices, but the benefit would bypass the local station – and go directly to the network operator.

⁶³ See Israel/Katz Report, *supra* note 53.

bargaining – and the more important factor at that – by assuming it away.⁶⁴ By focusing on the means (withholding) and not the goal (higher retransmission consent rates), the Israel/Katz Report systematically understates the likely impact of the proposed transaction.⁶⁵ As Professor Murphy concludes, “[e]conomic logic shows that if an NBCU-Comcast merger were to affect parties’ incentives in the way that the Israel and Katz analysis suggests, and if the joint gains from trade are as large as Israel and Katz’ assumptions imply, then it is likely that retransmission fees would increase whether or not withholding becomes more frequent.”⁶⁶

Indeed, Applicants’ analysis is inconsistent on this score with the conclusions reached by Professor Katz (with co-authors Jonathan Orszag and Theresa Sullivan) in another declaration submitted to the Commission just last year. In that November 2009 report, Katz analyzes the effect of increased competition among MVPDs in local markets on the outcomes of retransmission consent negotiations.⁶⁷ In doing so, he offers a bargaining framework (similar to the one used here by Professor Murphy) to explain why

⁶⁴ Moreover, Comcast can gain the benefit of increased retransmission rates while bearing *no* cost to the extent it threatens to withhold programming but does not have to follow through. Indeed, it can even impose costs on the MVPD by publicizing the possibility of foreclosure in advance, which may lead the MVPD’s subscribers to switch in order to avoid a disruption.

⁶⁵ As the Commission recognized, threatening to withhold programming can be a likely outcome of vertical integration even if actually doing so might not be profitable in the short run. First, “the effect of this increased credibility can have a substantial effect on compensation, even when the profits that accrue from switching subscribers cannot compensate for the advertising revenues lost due to foreclosure.” *News/Hughes*, App. D. ¶ 12. Second, “[w]here downstream competitors have incomplete information about the integrated firm’s revenues and costs, the integrated firm may have an incentive to engage in temporary foreclosure even where it is not profitable, because it will send a signal to downstream purchasers of the input.” *Id.*, ¶ 80 n.244.

⁶⁶ Murphy Report at 23.

⁶⁷ See Katz 2009 RTC Analysis, *supra* note 36.

retransmission rates would increase as competition among MVPDs increases. Specifically, Professor Katz argues that competition among MVPDs improves a broadcaster's "disagreement point" (*i.e.*, what Murphy refers to as the "fallback payoff") because subscribers are better able to substitute across the larger number of competing MVPDs, which reduces the broadcaster's potential lost profits from failing to reach agreement with a lone MVPD.⁶⁸ Raising the broadcaster's "disagreement point" increases the amount it is able to command when negotiating with each individual MVPD. In support of this argument, Katz demonstrated that the departure rates associated with the inability to carry a local network station's signal are significant.⁶⁹

In this proceeding, however, Professor Katz (with Israel) now claims that he finds no empirical evidence of departure. If departure rates were as low as he now claims, then Katz' earlier conclusion that increases in competition among MVPDs have caused retransmission consent negotiations to become more favorable to broadcasters would not hold.⁷⁰ By contrast, his earlier submission is consistent with Murphy's analysis and the empirical departure rate analyses underlying it.

Israel/Katz do attempt to estimate empirically the departure rate associated with loss of an NBC station from an MVPD's line-up. To do so, they analyze a small number of short-term events in which an MVPD lost retransmission consent rights for broadcast signals, to determine how many of the MVPD's subscribers switched to Comcast.⁷¹ As

⁶⁸ *See id.* at 22-25.

⁶⁹ *Id.* at 26-27.

⁷⁰ *See* Murphy Report at 26-28.

⁷¹ *See* Israel/Katz Report at 56-64.

noted above, this approach is far less robust than the approach used by Professor Murphy, which draws upon a much larger sample of retransmission consent agreements to determine market dynamics. Moreover, while an increase in Comcast's share of MVPD subscribership in the target DMAs would indicate a positive departure rate, it is only an indirect measure of the relevant departure rate, which is associated with the foreclosed MVPD. The limitations of this approach are demonstrated by the fact that {{

}}.⁷²

Given these limitations, it is perhaps not surprising that these analyses are not powerful enough to produce a reliable estimate. For example, Israel/Katz found {{

}}.⁷³ The analysis of this same episode submitted by DISH Network demonstrates that {{

⁷² See Declaration of Vincent Kunz at 1-2 (submitted as an exhibit to Letter from Pantelis Michalopoulos to Marlene H. Dortch, MB Docket No. 10-56 (June 7, 2010)) ({{

}}).

⁷³ See Murphy Report at 28-29.

}} This disconnect demonstrates the principal problem with the Israel/Katz analysis: their data and methodology may not offer sufficient power to uncover {{ }}.⁷⁴

Lastly, the Israel/Katz report defies common sense. If the Israel/Katz model were correct and the required departure rate were too high to be achieved, no vertically-integrated broadcaster would ever withhold programming. Yet there are several examples of withholding in just the last few months – all of which occurred in the *absence* of vertical integration.⁷⁵ Adding the advantages of vertical integration can only make the threat to withhold more credible – especially if the threat comes from an entity with Comcast’s track record.⁷⁶

3. Conditions imposed in prior MVPD/broadcast consolidations must serve as the minimum baseline for this transaction.

As demonstrated above, the Commission’s well-documented concern over the potential anticompetitive effects of combining MVPD distribution with broadcast programming are likely to be borne out if the proposed transaction is consummated.

⁷⁴ See *id.* at 29-31. In a second empirical analysis, {{

}}. This suggests that other factors must be driving the empirical results found by Israel/Katz. *Id.*

⁷⁵ R. Huff and C. Boyle, “Channel 7 ABC Flashes Angry Message, Then Goes Black for Cablevision Customers at Midnight,” NY DAILY NEWS (Mar. 7, 2010); M. Farrell, “Down to the Wire, Time Warner Cable, Fox Battle Over Retrans to Year-End,” MULTICHANNEL NEWS (Jan. 4, 2010); Joint Reply Comments of Mediacom and Suddenlink, MB Docket No. 10-71 at 13 (filed June 4, 2010) (describing dispute with Sinclair).

⁷⁶ The Commission has recognized that the elimination of double marginalization and other efficiencies increase profit margins on each additional customer, and therefore enhance the incentives to engage in foreclosure strategies. See *News/Hughes*, ¶ 156. There is no indication that the Israel/Katz analysis in any way accounted for this phenomenon with respect to the efficiencies asserted by the Applicants.

Accordingly, there is every reason for the Commission to conclude in this proceeding exactly what it has concluded in previous proceedings: that the combination of broadcast and MVPD assets must be conditioned to avoid anticompetitive outcomes. DIRECTV submits that the Commission should adopt a condition similar to the one it has twice previously imposed:

When negotiations fail to produce a mutually acceptable set of price, terms and conditions for a retransmission consent agreement with a local broadcast television station that Comcast/NBCU owns, controls, or manages, or on whose behalf it negotiates or holds veto power over retransmission consent, an MVPD may choose to submit a dispute to commercial arbitration and continue carriage of the broadcast signal during the pendency of such arbitration.

The fundamental rules related to this condition – *i.e.*, “baseball style” arbitration, stand-alone offers, and interim carriage – should also be the same as formulated in prior conditions. As discussed in Section II.F, however, DIRECTV suggests some fine tuning to make sure that this regime is implemented in a way that makes it the meaningful option for MVPDs that the Commission originally envisioned.

B. The Proposed Transaction Would Enable Comcast to Use the “Online Loophole” to Discriminate With Respect to Programming Delivered Via Broadband and Other New Media.

1. The prospect of an “online loophole.”

As described above, the Commission has only recently closed the “terrestrial loophole” used by Comcast to withhold RSN programming for nearly a decade. As soon as the new rules take effect, Comcast will no longer be able to exploit the terrestrial

loophole to deny its competitors “must have” sports programming – though Comcast has publicly vowed to continue to defend its advantage for as long as possible.⁷⁷

Having just closed one loophole, the Commission must not allow another one to emerge in its place. The Commission’s program access rules clearly apply to “linear” programming – *i.e.*, channels of programming delivered over the closed facilities of traditional MVPDs.⁷⁸ Yet the Commission has never directly addressed the question of whether VOD programming and programming distributed over the Internet are subject to the non-exclusivity, non-discrimination, and other safeguards of its program access regime.⁷⁹

Absent clear rules for online video, Comcast could exploit a brand new loophole. For example, NBCU controls a vast amount of popular sports programming, including the Olympics, NFL football, NHL hockey, PGA Tour golf, The Ryder Cup, Wimbledon,

⁷⁷ See, e.g., B. Fernandez, “Comcast to fight FCC ruling on sports telecasts,” THE PHILADELPHIA INQUIRER (Jan. 22, 2010) (available at http://www.philly.com/inquirer/business/20100122_Comcast_to_fight_FCC_ruling_on_sports_telecast_s.html). DIRECTV would also note that the cable industry’s trade association recently filed comments before the Office of Management and Budget, which must approve the collection of information associated with the new rules, seeking to delay implementation of those rules pending further public comment. See Paperwork Reduction Act Comments of the National Cable and Telecommunications Association, OMB Control No. 3060-0888 (filed May 4, 2010).

⁷⁸ The term “linear programming” is generally understood to refer to video programming that is prescheduled by the programming provider. See *Implementation of Section 304 of the Telecommunications Act of 1996*, 25 FCC Rcd. 4303, ¶ 14 n.34 (2010). Cf. 47 U.S.C. § 522(12) (defining “interactive on-demand services” to exclude “services providing video programming prescheduled by the programming provider”).

⁷⁹ One form of this issue is presented in program access complaints filed by online distributors against programmers that refuse to sell to them. See *VDC Corp. v. Turner Network Sales, Inc., et al.*, Program Access Complaint (filed Jan. 18, 2007); *SkyAngel U.S., LLC v. Discovery Commc’ns, LLC*, Program Access Complaint (filed Mar. 24, 2010). The Commission has not resolved either complaint, although it did deny interim relief in the latter proceeding based in part on the fact that the complainant had not proven that it was an MVPD, and only MVPDs are protected by the program access rules. See *Sky Angel U.S., LLC*, 25 FCC Rcd. 3879, ¶ 7 (MB 2010).

The French Open, The Kentucky Derby, The Preakness Stakes, and the U.S. Figure Skating Championship. Comcast could migrate a portion of this programming to the Internet, where it would be available only to authenticated subscribers – and then deny authentication to DIRECTV and other rival MVPDs or charge exorbitantly high prices for access by their subscribers. Alternatively, Comcast could place additional episodes of a popular NBC series (or commentary tracks, “behind the scenes” outtakes, and interviews related thereto) online – and again deny authentication to or discriminate against rivals.⁸⁰

Such scenarios are not mere conjecture. Just this winter, Comcast transmitted Philadelphia 76ers games online, but did not make that programming available to DIRECTV subscribers.⁸¹ Similarly, NBCU made some of its Olympics coverage available online, but limited access to those who subscribed to certain MVPDs.⁸² This will only increase. The industry is at an inflection point in the development of alternative media for delivery of programming – especially so-called “over-the-top” video services

⁸⁰ Moreover, online programming delivered via broadband connection would offer the additional advantage of escaping other regulatory requirements. For example, it would not be subject to the Commission’s closed captioning rules. *See* 47 C.F.R. §§ 76.606, 79.1. Similarly, it would not be subject to the Commission’s encoding rules and output control regulations. Those rules – which codify a private regime devised by the cable industry – do not apply to “distribution of any content over the Internet” or to operations via cable modem or DSL. *See id.* § 76.1901(b) and (c). DIRECTV noted this anomaly and petitioned to have it corrected in 2003. *See* Petition for Reconsideration of DIRECTV, Inc., CS Docket No. 97-80 and PP Docket No. 00-67 (filed Dec. 29, 2003). The Commission has not yet acted on that petition. Here again, if Comcast chooses to provide programming via the Internet – even using the same facilities that are used to deliver its linear programming – it would circumvent regulation and thereby achieve an unfair advantage over other MVPDs.

⁸¹ *See* “Philadelphia 76ers Live Streaming FAQ” at 1 (“if you are able to watch the 76ers game on Comcast SportsNet on your TV, then you are qualified to subscribe to watch it on your computer”) (available at www.csnphilly.com/pages/streaming_faq).

⁸² *See, e.g.*, R. Sandomir, “Senator Asks NBC to Explain Internet Restrictions,” *NEW YORK TIMES* (Feb. 26, 2010) (available at <http://vancouver2010.blogs.nytimes.com/2010/02/26/senator-asks-nbc-to-explain-internet-restrictions/?ref=sports>). DIRECTV subscribers had access to this programming.

provided via the Internet. Broadband networks (both wireline and wireless) are rapidly gaining the speed and quality-of-service capabilities necessary to support the delivery of high-quality online video programming. One analyst estimates that the number of U.S. broadband households regularly viewing professional TV programs from an online service will be about 59.0 million in 2013, and that the price for advertising on these services will basically double by that time.⁸³ Another forecasts that revenue from the delivery of Internet video to the television will grow nearly six-fold in the next five years (to \$5.6 billion), as broadband-enabled TVs and ancillary web-enabled platforms (such as video game consoles and Blu-ray players) become more prevalent.⁸⁴

NBC programming (including additional features not available over the air) is already available online at the NBC web site and through Hulu. Just this year, the ESPN360 website – the first website to charge broadband providers a per-subscriber fee for access to programming for their subscribers – rebranded itself as ESPN3, which is more in keeping with the linear programming it aspires to offer.⁸⁵ Comcast itself launched its FearNet horror movie network, not as a linear channel, but solely using VOD and online access – a strategy that Comcast’s President of Emerging Networks described as “a new model.”⁸⁶ Comcast also is forging ahead with its Fancast Xfinity TV initiative

⁸³ G. Kaufhold, The Diffusion Group, “The Digital Entertainment Revolution,” at 10-11 (Feb. 2010) (available at http://www.instat.com/promos/10/dl/IN1004828WHT_nacha3Ra.pdf).

⁸⁴ See Press Release, “Over-the-Top TV Revenue to Top \$5.6 Billion in 2014” (Sept. 14, 2009) (available at <http://tdgresearch.com/blogs/press-releases/archive/2009/09/14/over-the-top-tv-revenue-to-top-5-6-billion-by-2014.aspx>).

⁸⁵ See Press Release, “ESPN360.com to Become ESPN3.com in April” (Feb. 10, 2010) (available at <http://www.espnmediazone3.com/us/2010/02/espn360-com-to-become-espn3-com-in-april>).

⁸⁶ See Comments of Comcast Corporation, MB Docket No. 06-189, at 63 (filed Nov. 29, 2006).

that promotes online programming, which its subscribers access through Fancast and other online properties Comcast controls.⁸⁷

Several elements of the Commission’s National Broadband Plan will likely accelerate these developments. By encouraging the deployment of more capable and more ubiquitous broadband systems,⁸⁸ the initiatives developed under that plan will ensure that broadband networks capable of supporting streaming video (even in HD format) will be available to a large percentage of American television viewers. Indeed, the Commission is even exploring the development of “smart video” devices capable of combining MVPD and online content for display on the viewer’s television.⁸⁹ Yet even this Commission initiative has likely been overtaken by events in the market. For example, the RVU Alliance, a consortium of over two dozen distributors and manufacturers, has developed protocols that will enable customer premises equipment to seamlessly display video programming from MVPDs and video from Internet web sites on a single device.⁹⁰ Similarly, a consortium led by Google has announced the launch of

⁸⁷ See S. McNulty, “Fancast XFINITY TV National Beta Launch: A Guide to Get Started” (Dec. 15, 2009) (available at <http://blog.comcast.com/2009/12/fancast-xfinity-tv-national-beta-launch-a-guide-to-get-started.html>).

⁸⁸ Omnibus Broadband Initiative, Federal Communications Commission, *Connecting America: The National Broadband Plan*, at xiv (2010) (discussing long-term goals of at least 100 million homes with 100 Mbps download speeds and ensuring that every American has affordable access to robust broadband service) (available at <http://download.broadband.gov/plan/national-broadband-plan.pdf>).

⁸⁹ See *Video Device Competition: Implementation of Section 304 of the Telecommunications Act of 1996*, 25 FCC Rcd. 4275 (2010).

⁹⁰ See generally RVU Alliance Home Page (available at <http://www.rvualliance.org>).

Google TV, a built-in search capability that enables viewers to navigate to linear channels, web sites, apps, individual shows, and movies.⁹¹

As linear and online content converge, programmers will enjoy more freedom to use either form of delivery. And because the Internet is available virtually everywhere, Comcast can use it as a medium to reach viewers even where it does not provide traditional cable service – extending its ability to affect and attract the subscribers of rival MVPDs across the entire country.

2. To the extent relevant, Applicants’ economic analysis confirms these concerns.

Applicants have submitted an economic analysis of the joint venture’s incentive and ability to withhold programming from online video programming distributors. Specifically, Israel and Katz “discuss those characteristics most relevant to analyzing whether the proposed joint venture is likely to have the incentive and ability to disadvantage a hypothetical rival online distributor.”⁹² This is an important issue given the nascent state of the online programming industry, and the Commission should certainly consider the potential effects of the proposed transaction in that sphere.⁹³

However, the Commission should not overlook the wholly separate concern that Comcast would harm not rival *online distributors* but *rival MVPDs* instead. The

⁹¹ See “Announcing Google TV: TV Meets Web. Web Meets TV,” THE OFFICIAL GOOGLE BLOG (May 20, 2010) (available at <http://googleblog.blogspot.com/2010/05/announcing-google-tv-tv-meets-web-web.html>).

⁹² M. Israel and M. Katz, “The Comcast/NBCU Transaction and Online Video Distribution,” MB Docket No. 10-56, at 2 (filed May 4, 2010) (“Israel/Katz Online Report”).

⁹³ DIRECTV expresses no views on that analysis, except to note that because it applies much the same approach for online content as it did for standard linear content, the criticism discussed above would likely apply here as well.

Israel/Katz Online Report says nothing about this scenario, and therefore is largely inapposite to the issue. Given Comcast's history of exploiting loopholes in the Commission's pro-competitive rules, its failure to address this concern is notable.

There is one aspect of the Israel/Katz analysis, however, that is relevant to this issue. They conclude that, because "online video distribution services are currently complementary to Comcast's cable services and NBCU's programming services, both Comcast and NBCU benefit from online video distribution services and have incentives to promote them, not attempt to undermine them."⁹⁴ For example, "the additional demand for broadband access services that would be created by such viewing would very likely enhance the profits earned by Comcast," and thus a proper analysis of Comcast's incentives cannot ignore this complementarity.⁹⁵ Thus, withholding online content would present Comcast with a win-win scenario: it could strengthen its broadband business at the same time it weakened its MVPD rivals.

3. The Commission should extend its program access regime to content Comcast places online.

The program access regime enacted by Congress and implemented by the Commission is designed to promote competition by ensuring that vertically integrated programmers make their services available to all MVPDs on a non-discriminatory basis. That regime fostered the development of new distributors, including satellite operators such as DIRECTV, that have given consumers greater choice for the consumption of video programming. Just as those rules were necessary in 1992 to protect the

⁹⁴ Israel/Katz Online Report at 3.

⁹⁵ *Id.* at 37.

development of competitive MVPD alternatives, so too is there a need today to protect the development of the nascent market for online and other alternative video distribution methods, including as a complement to traditional MVPD services. By extending its program access principles to these new media, the Commission can ensure that they develop without the distorting influence of market power enjoyed in other aspects of the video marketplace.

Accordingly, the Commission should impose the following condition to extend its program access principles to these new media:

Comcast/NBCU will not offer any programming or programming-related service on an exclusive basis to any MVPD and will make such programming and services available to all MVPDs and/or their subscribers on a non-exclusive basis and on non-discriminatory terms and conditions consistent with the Commission's program access rules, regardless of the medium or method used for delivery of such programming or service. Comcast also will not require any programmer to grant exclusive online rights as a condition of carriage on a Comcast cable system.

Through this condition, the Commission will ensure that the pro-competitive principles that Congress established for linear programming also apply to programming delivered via broadband and other alternative means (e.g., mobile).⁹⁶ Such a proactive step will

⁹⁶ Mobile video services, like wireline broadband content, are gaining momentum. For example, an alliance of broadcasters formed the Open Mobile Video Coalition “to accelerate the development and rollout of mobile DTV products and services” (<http://www.openmobilevideo.com>); Fox Mobile Group recently unveiled Bitbop, “a wireless subscription service that brings ‘premium’ video content to your smartphone” (<http://www.prnewswire.com/news-releases/new-bitbop-mobile-video-subscription-service-delivers-a-wealth-of-premium-content-to-the-smartphone-88991657.html>); and Onstream Media announced the launch of its live mobile video streaming service for iPhone and Blackberry users (<http://www.prnewswire.com/news-releases/onstream-media-launches-live-mobile-video-streaming-service-for-iphone-and-blackberry-85059267.html>).

preclude development of an online loophole to replace the terrestrial loophole just recently closed.⁹⁷

C. The Proposed Transaction Would Likely Result in Substantially Higher Prices for NBCU’s National Cable Network Programming.

Comcast currently controls five national programming networks, and proposes to acquire control over 11 more from NBCU. Comcast argues, however, that this array of national networks does not constitute the kind of “must have” programming that could be profitably withheld from rivals.⁹⁸ In support of this argument, Comcast asserts that it would have but a small share of the national programming networks currently available to MVPDs.⁹⁹ It cites earlier transactions for the proposition that withholding of national programming would not likely be a profitable strategy as a result of vertical integration, and argues that the same conclusion must apply in this proceeding.¹⁰⁰

Of course, the Commission has repeatedly found that the relevant question is not how many channels Comcast will control. Rather, the question is whether Comcast will control popular programming that affects consumer choice of which MVPD to subscribe to – *i.e.*, programming for which Comcast can raise prices substantially through the threat

⁹⁷ As before, the Commission should include in this condition a prohibition on Comcast entering into an exclusive agreement with an Affiliated Program Rights Holder or exercising undue influence over such an entity’s decisions regarding the terms and conditions on which it will offer its programming to other MVPDs. *See, e.g., News/Hughes*, App. F, Section II. For this purpose, an Affiliated Program Rights Holder is a programmer in which Comcast holds a non-controlling attributable interest, or which itself holds a non-controlling attributable interest in Comcast. This condition should continue to apply whether or not the program access rules remain in force.

⁹⁸ Application at 114-15.

⁹⁹ *Id.* at 90-92.

¹⁰⁰ *See id.* at 114-15.

of withholding.¹⁰¹ Indeed, the Commission has acknowledged that national programming can be used just like other “must have” programming, concluding that “a competitive MVPD’s lack of access to popular non-RSN networks would not have a materially different impact on the MVPD’s subscribership than would lack of access to an RSN.”¹⁰²

Applicants assert that the proposed transaction would provide Comcast neither the incentive nor ability to withhold national programming from rival MVPDs.¹⁰³ Yet this claim is belied by Comcast’s past behavior in withholding Versus from DIRECTV.¹⁰⁴ Moreover, here again, Applicants’ analysis suffers from the same underlying flaw as their economic analysis of retransmission consent – it ignores the fact that the chief benefit of temporary withholding is not gaining subscribers for Comcast but securing higher prices for years of carriage to come.¹⁰⁵ As Professor Murphy explains, the same bargaining

¹⁰¹ “The availability of new, non-integrated networks does not mitigate the adverse impact on competition of a competitive MVPD’s inability to access popular vertically integrated programming.” *2007 Exclusivity Extension Order*, ¶ 38. The Commission explained that cable programming “is not akin to so many widgets,” such that, for example, when an MVPD “loses access to a popular national news channel, there is little competitive solace that there is a music channel or children’s programming channel to replace it. Even when there is another news channel available, an MVPD may not be made whole because viewers desire the programming and personalities packaged by the unavailable news channel. Moreover, even if an acceptable substitute is found, the competitive MVPD is still harmed because its competitor can likely offer to subscribers both the unavailable programming and its substitute.” *Id.* (citation omitted).

¹⁰² *Id.*, ¶ 39. The Commission reasoned that “[a] number of networks receive ratings higher than or equal to those of RSNs that are currently withheld from DBS providers. While ratings are not a perfect predictor of consumer response to the withholding of a network, they do provide us with sufficient evidence to conclude that some nationally distributed networks are sufficiently valuable to viewers such that some viewers may switch to an alternative MVPD if the popular programming were not made available on their current MVPD.” *Id.* (citation omitted).

¹⁰³ *See* Application at 114-16.

¹⁰⁴ *See, e.g.*, M. Hiestand, “Versus does disappearing act after dispute with DIRECTV,” USA TODAY (Sep. 1, 2009) (available at http://www.usatoday.com/sports/columnist/hiestand-tv/2009-09-01-versus-directv_N.htm).

¹⁰⁵ *See News/Hughes*, ¶ 81 (“The underlying purpose of temporary foreclosure generally is to extract a higher price for the integrated firm’s upstream input and thus raise its downstream rivals’ costs.”).

framework discussed above for retransmission consent can be applied to NBCU’s national programming networks as well.¹⁰⁶

Moreover, in examining the effect of the proposed transaction on Comcast/NBCU’s combined national networks, the Commission should look at those networks in the aggregate. Comcast would gain control over some of the most popular national programming on cable today – including highly-rated general entertainment fare (*e.g.*, USA, the highest rated cable network in prime time) as well as a stable of more targeted programming that attracts large and devoted audiences (*e.g.*, Syfy, Bravo, CNBC, MSNBC).¹⁰⁷ Even if losing any one of these networks alone might be insufficient to drive large-scale subscriber movements,¹⁰⁸ the loss of multiple networks is a very different matter. For example, a subscriber that would not change its MVPD due to the loss of Syfy might decide to migrate if it lost Syfy, USA, Bravo, and MSNBC at the same time. The combined effect of losing this programming could be truly devastating to an MVPD, effectively allowing Comcast to augment its bargaining leverage still further by using several networks to amplify the loss of the others.¹⁰⁹ Thus,

¹⁰⁶ See Murphy Report at 22.

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¹⁰⁸ The Commission has found that the loss of a single national network may be “sufficiently valuable to viewers such that some viewers may switch to an alternative MVPD if the popular programming were not made available on their current MVPD.” *2007 Exclusivity Extension Order*, ¶ 39. See also *2002 Exclusivity Extension Order*, ¶ 69 (recognizing that certain “marquee programming” may be essential for an MVPD service).

¹⁰⁹ The Commission did not consider this strategy in prior cases because those cases did not involve an increase in horizontal concentration of video programming assets such as is presented here. As noted by Applicants’ expert, Greg Rosston, “the NBCU content is not merely a substitute for current Comcast content. Comcast only has limited programming and does not have the variety of attractive

Comcast’s incentive and ability to withhold or threaten to withhold multiple national networks to secure higher prices would be essentially the same as it is for RSN and broadcast programming – and should be subject to the same safeguards.

Comcast also argues that, because its cable systems cover a limited geography, it cannot gain the benefit of subscribers who choose to leave an MVPD that has been deprived of national programming but operates outside of Comcast’s territory.¹¹⁰ Thus, according to Comcast, withholding of national programming could never generate enough “switchers” to make such a strategy profitable (or a threat to withhold credible). But Comcast passes nearly half of all television households nationwide, allowing it to capture a very significant portion of switching subscribers,¹¹¹ and has the potential to reach every consumer with a broadband service through “over-the-top” distribution. Moreover, Comcast’s incentives extend beyond its service areas. As the Commission has explained, “[a] cable operator may gain by weakening a current or potential rival (such as a DBS operator) even in markets that the cable operator itself does not serve” because “[r]educing the rival’s customer base in other markets would raise the rival’s average cost

programming that NBCU can provide.” Gregory L. Rosston, “An Economic Analysis of Competitive Benefits from the Comcast-NBCU Transaction,” MB Docket No. 10-56, at 35 (filed May 4, 2010) (“Rosston Report”).

¹¹⁰ Application at 115-16.

¹¹¹ Comcast’s cable systems passed 51.2 million homes as of December 31, 2009. *See* 2009 Comcast 10-K at 2. Nielsen Media estimates that there are approximately 114.9 million U.S. television households for the 2009-10 broadcast season. *See* Nielsenwire, “114.9 Million U.S. Television Households Estimated for 2009-10 Season” (Aug. 28, 2009) (available at http://blog.nielsen.com/nielsenwire/media_entertainment/1149-million-us-television-homes-estimated-for-2009-2010-season/). However, there are fewer than 100 million pay TV households nationwide, which would be the relevant targets for subscriber switching. *See, e.g., Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 24 FCC Rcd. 542, ¶ 8 (2009) (95.8 million pay TV subscribers as of June 2006).

of serving customers in the cable operator's own market(s), and thereby reduce the rival's competitive strength."¹¹²

Finally, DIRECTV notes that the Commission's ban on exclusive arrangements for cable-affiliated programming expires in 2012.¹¹³ The back-stop of the program access rules was a significant factor in the Commission's conclusion that no conditions need be placed on national programming networks in both *News/Hughes* and *Adelphia/Comcast/TWC*.¹¹⁴ At this point, there is no guarantee that this important safeguard will extend beyond the next two years.

Accordingly, the Commission should impose a condition with respect to national programming similar to that it has imposed in the past with respect to broadcast and RSN programming.

When negotiations fail to produce a mutually acceptable set of price, terms and conditions for carriage of a national programming network that Comcast/NBCU owns, controls or manages, an MVPD may choose to submit a dispute to commercial arbitration and continue carriage of the network during the pendency of such arbitration.

¹¹² 2007 *Exclusivity Extension Order*, ¶ 72; 2002 *Exclusivity Extension Order*, ¶ 37 n.108. This concern is well recognized and longstanding. For example, Congress was concerned about cable operators withholding programming outside their franchise areas. Accordingly, the 1992 Cable Act did not bar exclusive contracts only in areas served by the particular cable operator affiliated with a programming network, but instead barred exclusive contacts in areas served by *any* cable operator. See 47 U.S.C. § 548(c)(2)(D). Indeed, Congress was so concerned with cable operators' refusal to deal with MVPDs operating outside of their service areas that it prohibited cable operators and cable-affiliated programmers from entering into exclusive contracts for distribution in areas *not* served by *any* cable operator.

¹¹³ See 2007 *Exclusivity Extension Order*, ¶ 1.

¹¹⁴ See *Adelphia/Comcast/TWC*, ¶ 168; *News/Hughes*, ¶ 124.

Applying this condition will harmonize the treatment of Comcast-controlled linear programming and provide MVPDs with an effective safeguard against anticompetitive tactics.

D. The Commission Should Extend the Existing Conditions on Comcast’s RSN Programming.

Comcast controls nine RSNs, and has been active in pursuing additional networks as they become available. In the *Adelphia/Comcast/TWC* proceeding, the Commission found that Comcast would have the incentive and ability to demand higher prices for that “must have” programming.¹¹⁵ Accordingly, the Commission imposed an arbitration condition very similar to those DIRECTV has proposed for the additional programming Comcast will acquire through the proposed transaction. That condition is set to expire in 2012, though the Commission has announced that it will issue a report on RSN access issues six months prior to expiration and may determine that further action is warranted at that time.¹¹⁶

Comcast asserts that there is no reason to revisit the RSN condition because nothing about the proposed transaction would change its incentive and ability to foreclose rival MVPDs.¹¹⁷ This is not so. The proposed transaction would give Comcast additional national networks that could be tied as a condition of gaining access to RSN programming if Comcast were not required to give stand-alone offers in arbitration. Moreover, the transaction would allow Comcast to repurpose some of the programming

¹¹⁵ See *Adelphia/Comcast/TWC*, ¶ 140.

¹¹⁶ *Id.*, ¶¶ 157, 165.

¹¹⁷ Application at 122.

currently controlled by NBC Sports to further enhance its RSN market power. Indeed, its own expert argues that such content sharing would be a potential synergy arising from the proposed transaction.¹¹⁸ By giving Comcast control over both the RSN and one or more local broadcast stations in key markets nationwide – including Philadelphia – the proposed transaction would result in a concentration of programming never before seen, which would be essential for any MVPD service.

These enhanced capabilities will have an effect on the ways in which Comcast can use its RSN programming going forward, and thus necessitate further action to address the potential effects of the proposed transaction. Accordingly, the Commission should extend this condition until such time as Comcast/NBCU can show that changed market conditions make it no longer necessary. Such an extension would be consistent with the Commission’s stated intention to review the condition prior to expiration to determine whether further action is warranted. It would also align the term for all of the conditions imposed in this proceeding, ensuring that safeguards applicable to some types of programming are not undermined by the lack of such safeguards on Comcast’s RSNs.

The Commission should also, at long last, extend the RSN condition to include CSN-Philly. The Commission exempted CSN-Philly from the access and arbitration conditions imposed in the *Adelphia/Comcast/TWC* proceeding, on the grounds that it presented a “unique case” because terrestrial delivery was not chosen for the purpose of evading the Commission’s rules.¹¹⁹ But the Commission has since recognized that the

¹¹⁸ See Rosston Report at 39-40 (discussing “synergies between Comcast’s RSNs and NBC’s O&O stations”).

¹¹⁹ See *Adelphia/Comcast/TWC*, ¶ 163.

congressionally-mandated program access regime prohibits acts that have the purpose *or effect* of significantly hindering or preventing competition.¹²⁰ In light of that conclusion, the Commission recently established a presumption that withholding terrestrially delivered, cable-affiliated RSN programming has just such an effect – based in part on evidence of the effect withholding of CSN-Philly has had on DBS rivals.¹²¹

This transaction would plainly increase Comcast’s ability to disadvantage rivals in the Philadelphia market. It would add Philadelphia’s only NBC station to Comcast’s other Philadelphia assets. Having thwarted competition for nearly a decade by withholding local sports programming, Comcast could now withhold local sports *and* NBC programming from satellite carriers. Or it could engage in “program and resource sharing” among its assets that could further undermine a competitive marketplace – by, for example, moving programming from the local broadcast station (which is now carried by Comcast’s rivals) to the RSN (which is not).

For over a decade, Comcast has held Philadelphia sports fans hostage, thereby reducing consumer choice and MVPD competition substantially. The time has come for the Commission to resolve this long-running issue by revoking the exemption that allows CSN-Philly to operate outside the competitive safeguards that govern all other RSNs owned, controlled, or managed by Comcast.

¹²⁰ See 47 U.S.C. § 548(b).

¹²¹ See *Terrestrial Loophole Order*, ¶ 52.

E. Existing Constraints Are Not Sufficient to Preclude Anticompetitive Conduct Arising From the Proposed Transaction.

Applicants also argue that the Commission need not be concerned about price increases and withholding because anticompetitive conduct is precluded by existing regulatory safeguards, fiduciary duties, and the minority protections GE enjoys under its contract with Comcast.¹²² But the Commission has repeatedly determined that such constraints are not sufficient to prevent anticompetitive behavior. Moreover, many of the Commission’s pro-competitive rules are set to expire over the next several years, while “the protections afforded by corporate law are neither absolute nor omniscient.”¹²³

The applicants in the *News/Hughes* transaction made essentially the same argument Comcast makes here, suggesting that regulatory obligations would prevent broadcast stations from withholding programming in order to gain an anticompetitive advantage. But the Commission rejected that argument. It found that, while the Communications Act and Commission rules require good faith negotiation with MVPDs and prohibit exclusive retransmission consent agreements, “these statutory and rule provisions do not prevent broadcasters from withholding their signals while retransmission consent negotiations are in progress, nor do they require that access be provided on non-discriminatory terms and conditions.”¹²⁴

¹²² See Application at 15-16, 116-17; Israel/Katz Report at 8-9; Rosston Report at 34. Applicants even commit to bolster those constraints by applying unspecified “key components” of the Commission’s program access rules to retransmission consent negotiations. See Application at 121.

¹²³ *News/Hughes*, ¶ 83.

¹²⁴ *Id.*, ¶ 211.

Reliance on existing regulatory obligations is even less plausible here. The program access rules' prohibition on exclusive contracts expires in less than two years,¹²⁵ and the good faith negotiation requirement for retransmission consent expires in less than four,¹²⁶ so neither Applicants nor the Commission can assume that these safeguards will remain in place beyond that limited period. Moreover, even if a non-discrimination requirement were imposed – as Comcast appears to invite – nothing would prevent Comcast from raising prices to all MVPDs, including itself¹²⁷ – a price increase that Comcast would partially recoup now and perhaps fully recoup in the future through its ownership of NBCU.

Nor would fiduciary duties imposed by contract and by state corporation law preclude Comcast's use of these assets for anticompetitive ends. The Commission has previously considered and rejected the argument that “corporate governance, corporate law or securities laws in general may be relied upon to adequately protect MVPD and video programming competitors from potential anti-competitive vertical foreclosure behavior on the part of Applicants.”¹²⁸

There is no reason to reach a different result here. For example, nothing about GE's minority rights would be implicated to the extent Comcast agreed to pay a *higher*

¹²⁵ See *2007 Exclusivity Extension Order*, ¶ 1 (expires October 5, 2012).

¹²⁶ See Pub. L. No. 111-175 § 107 (expires December 31, 2014.).

¹²⁷ *2007 Exclusivity Extension Order*, ¶ 1.

¹²⁸ *News/Hughes*, ¶ 100.

price for NBCU programming as part of a uniform price increase strategy.¹²⁹ Nor would those rights be triggered were Comcast to implement a strategy of threatening to withhold programming in order to demand *higher* rates from its MVPD rivals. Even if there were some class of activity that might implicate GE's contractual protections, Comcast could circumvent the problem by making "side payments" to NBCU as compensation that would allow GE to share in the incremental profits of Comcast's actions.¹³⁰ Moreover, because Comcast has a contractual glide path to acquiring 100% of the joint venture within the next several years, there is no reason to believe that any fiduciary constraints would even arguably apply in the near future.

As in prior vertical combinations, the Commission cannot rely solely upon existing regulatory and corporate constraints to prevent anticompetitive outcomes from the proposed transaction. Additional safeguards are clearly warranted.

F. The Commission Should Make Modest Revisions to Streamline Implementation of Its Arbitration Regime.

The conditions proposed herein would extend the arbitration regime established in prior transactions to some of the programming assets Comcast proposes to acquire in this transaction. That arbitration regime has proven a useful backstop to the Commission's other rules in several respects. Most importantly, it ensures continued carriage while disputes are under arbitration, prevents bundling of unpopular programming with "must

¹²⁹ As the Commission has recognized, a vertically integrated entity can avoid running afoul of the non-discrimination requirements of the program access rules by charging itself the same inflated rate for carriage as it charges other distributors. *See, e.g., id.*, ¶¶ 82-84.

¹³⁰ *Id.*, ¶ 83. *See also* Murphy Report at 31 ("It is in GE's interest to agree to foreclosure strategies that are jointly profitable for NBCU and Comcast, and then share in the incremental profits").

have” content, and provides a neutral third party to determine the fair market value of the programming at issue independent of the effects of vertical integration.

While these attributes of the arbitration regime are laudable, there remains room to improve the process to better conform to the Commission’s vision of a rapid and affordable means of redress. The Commission originally envisioned a process that could be completed in 30 days under AAA’s expedited procedures.¹³¹ However, it also left open the possibility that the arbitrator could consider a wide-ranging list of evidence to determine fair market value.¹³² Therein lies the problem. Wide-ranging discovery is both inconsistent with a rapid and streamlined arbitration proceeding and burdensome on the parties involved.

DIRECTV believes it is possible to reconcile the need for quick, affordable resolution with the need to permit reasonable discovery. Based on its recent experience with arbitrations involving Comcast, DIRECTV has found that some categories of evidence are extremely burdensome to collect and produce, but are of little (if any) probative value. By narrowing the categories of material subject to discovery and establishing the framework for exchanging those materials, the Commission could greatly increase the efficiency of arbitration with no detrimental effect on the availability of relevant evidence.

Accordingly, DIRECTV submits that the rules for arbitration should be revised in order to streamline the process by focusing on information that is most relevant to the fair

¹³¹ See, e.g., *News/Hughes*, Appendix F, Section IV; *Adelphia-Comcast-TWC*, Appendix B, Section B.3.a.

¹³² See, e.g., *News/Hughes*, Appendix F, Section IV; *Adelphia-Comcast-TWC*, Appendix B, Section B.3.e.

market value inquiry and not unduly burdensome to produce. The four substantive modifications proposed by DIRECTV are explained below.

First, as the Commission has found, “the best and most persuasive evidence of fair market value is the objective price that [] programming yields in the marketplace.”¹³³ Accordingly, the centerpiece of any such analysis must be the carriage contracts actually agreed to between programmers and MVPDs. Yet in prior orders establishing an arbitration remedy, the Commission has identified offers made in carriage negotiations as well as internal analyses of the value of the programming involved as relevant to the discussion. Once parties have reached an actual carriage agreement, negotiations and analyses that came before are no longer relevant to market value question as they are superseded by the objective evidence of the agreement itself. Conversely, having to search for internal e-mails, analyses, and multiple drafts of proposed agreements is highly burdensome in both time and expense. There is no reason to require parties to take on such a burden for information of little relevance to the fair market value inquiry.

Accordingly, DIRECTV submits that the Commission should establish a presumption that carriage agreements are relevant evidence of fair market value, and require any party seeking additional evidence from the other party to demonstrate that the likely probative value of such evidence clearly outweighs the burden of searching for and producing it.

Second, the Commission should ensure that discovery of such carriage agreements is tailored to the issue at hand. Specifically, national sports programming

¹³³ *TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, 23 FCC Rcd. 15783, ¶ 46 (M.B. 2008).

contracts are not relevant to determination of fair market value for regional sports networks, as confirmed by the ruling of at least one arbitrator.¹³⁴ Similarly, where the arbitration involves national programming, contracts for regional programming are not relevant. Comcast itself recognized this distinction in the ongoing program access proceeding initiated by The Tennis Channel.¹³⁵

Third, the Commission should revise the rules for financial information in two respects.

- The Commission has forbidden arbitrators from selecting an MVPD's offer that does not allow the programmer to recover its costs. By setting this pricing floor, the rules remove important incentives for RSN cost containment. For example, if an RSN operator knows that it will at least recover its costs, it has less incentive to negotiate aggressively with team owners for sports rights and a greater incentive to build out expensive studios and other facilities where more modest ones would serve just as well.¹³⁶

Ultimately, the current rule ensures that all such costs can be passed along to MVPDs, which likely will pass them along in turn to consumers. The

¹³⁴ See *National Cable Television Cooperative, Inc. v. The News Corp. c/o Fox Cable Networks Group*, AAA File No. 57 472 E 00011 07, Rulings on Discovery Issues, at 3 (May 23, 2007) (finding that “national sports network agreements are not relevant to the issue presented relating to a determination of fair market value of regional sports networks programming under FCC Order”).

¹³⁵ See *The Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC*, Reply in Support of Comcast's Motion for Acceptance of Surreply, FCC File No. CSR-8258-P, at 2 n.3 (May 3, 2010) (countering the argument that Comcast's RSNs compete with a national sports programmer such as Tennis Channel).

¹³⁶ In this respect, it creates a system not unlike the outdated rate-of-return rules for the monopoly telephone network, which can result in the phenomenon of “gold plating.” See, e.g., H. Averch and L. Johnson, “Behavior of the Firm Under Regulatory Constraint,” 52 AM. ECON. REV. 1052 (1962).

Commission's arbitration regime should not act as guarantor for RSN profitability.

- To the extent a programmer's cost structure may be relevant to the fair market value of its programming, it is only so for special circumstances unique to that programmer. Accordingly, evidence of programmer's costs and related financial information should be limited to such extraordinary items. In addition, the programmer should be required to announce in the early stages of the arbitration whether it intends to present such evidence. If so, discovery of financial information should be commensurate with the limited nature of the evidence. For example, the only financial information that is relevant is that of the programmer at issue,¹³⁷ not its affiliates (unless a showing can be made that costs are spread across affiliates) or other unaffiliated programmers. Such financial information is highly sensitive and therefore calls for targeted disclosure. Participating in arbitration should not be tantamount to obtaining a license for a financial fishing expedition.

Fourth, carriage agreements and other contracts often involve parties other than those participating in the arbitration. Given the nature of the competitive information contained in such agreements, they often contain provisions that give the parties contractual rights ensuring confidentiality. When third parties assert those rights, the discovery process can become bogged down pending resolution of a multi-party

¹³⁷ Such financial information would include the books and records of the programmer as well as its contracts with key suppliers (e.g., affiliation and syndication contracts for a broadcaster, sports rights contracts for an RSN).

negotiation for some form of protective order. In order to facilitate this process, the Commission should adopt a default Confidentiality Agreement and Protective Order that would apply whenever the production of documents may involve the rights of third parties. Attached as Exhibit B hereto is a form of such an order, based upon the one negotiated among Comcast, DIRECTV, and eight RSN operators over the course of several months (and subsequently adopted by the arbitrator). The form can be modified to the extent a third party that seeks further enhanced protection of documents to be produced in the arbitration proceeding can demonstrate good cause why specific additional safeguards are warranted.

DIRECTV believes the modifications discussed above will streamline the arbitration process and thereby make it a more efficient and cost-effective means of redress to offset the effects of Comcast/NBCU's vertical integration.

III. COMCAST DOES NOT OFFER PUBLIC INTEREST BENEFITS OF SUFFICIENT MAGNITUDE TO OVERCOME THE ANTICOMPETITIVE EFFECTS OF THE PROPOSED TRANSACTION.

Where a proposed transaction demonstrably raises concerns of competitive harm, the Commission must proceed to an analysis of asserted public interest benefits that the transaction would create in order to determine whether the Applicants have proven by a preponderance of the evidence that the probable benefits outweigh the potential harms.¹³⁸ Here, Comcast claims that the proposed transaction will create incentives that will result in a variety of benefits, from increasing the availability of specific types of programming

¹³⁸ See, e.g., *News/Hughes*, ¶ 23.

to accelerating the introduction of “new media” services, to cost savings and synergies.¹³⁹ Yet the benefits described in its Application are so uncertain and non-transaction-specific that they are not cognizable under the Commission’s standard. Even Applicants’ proffer of a series of commitments, including specified quotas for carriage of additional types of programming, and the submission of an economic analysis of these asserted benefits is insufficient to give them substance.

The asserted benefits of the proposed transaction cannot offset the likely public interest harms the transaction would generate. Accordingly, only by conditioning any approval in this proceeding as requested by DIRECTV can the Commission place the benefits and harms of the proposed transaction in the appropriate balance.

A. Comcast’s Claimed Efficiencies Are Not Cognizable.

Applicants assert that the proposed transaction will increase consumer choice by expanding national and local programming across multiple platforms; accelerate the development of new media; and result in cost savings and synergies. Applicants have submitted an economic analysis of these claims by Gregory L. Rosston, whose principal findings are that: (1) Comcast’s acquisition of a controlling interest in NBCU will facilitate and accelerate negotiations to make content available on a variety of different platforms and thereby lead to the development of new business models; (2) Comcast plans to make substantial investments in NBCU programming; and (3) the proposed transaction will result in additional efficiencies, such as the elimination of double

¹³⁹ Application at 36-71.

marginalization, that will benefit consumers.¹⁴⁰ We examine each of these claims in turn below, and demonstrate that none of them can withstand scrutiny.

Claim 1: The transaction will facilitate and accelerate negotiations and thereby lead to development of new business models. The Application and the Rosston Report discuss negotiating “friction” and other “challenges” faced by Comcast in its attempts to develop new products and services, and conclude that the proposed transaction would ameliorate those issues and pave the way for advancement. These purported efficiencies are speculative and/or not transaction specific, and therefore are non-cognizable.

For example, Comcast claims that the proposed transaction would overcome current difficulties in obtaining access to NBC and Universal Studios content for distribution on new platforms.¹⁴¹ Yet in another portion of its application, Comcast essentially denies that such difficulties exist. It asserts that “[s]everal online video distributors have reached agreements to license broadcast programming content and library content for online distribution,” and that there is no reason to believe that even Internet start-up companies would be unable to negotiate effectively for content.¹⁴² If Comcast believes that even new entrants can gain access to programming for distribution on non-traditional platforms, it is hard to imagine how it could also believe that the country’s largest MVPD and ISP cannot gain such access absent this transaction. Moreover, to the extent negotiations for new media content do present a challenge, one

¹⁴⁰ See Rosston Report at 3-4.

¹⁴¹ Application at 65-66.

¹⁴² *Id.* at 98-99.

would expect that Comcast's MVPD rivals would have even more difficulties obtaining access to NBC and Universal Studios content if those programmers were affiliated with Comcast. In other words, Comcast's gain would be a loss for the rest of the industry, and for the broader public interest as well.

Professor Rosston asserts that it took Comcast several years to get sufficient quality and variety of content to achieve widespread adoption of VOD by consumers, as evidenced by the fact that VOD content choices and content views have grown significantly over the past several years after a slow start.¹⁴³ However, the facts do not support Rosston's thesis that lack of content delayed Comcast's roll-out of VOD service. For example, Rosston notes that in late 2004, Comcast "gained access to more than 35,000 television episodes from Sony and 10,000 television episodes from MGM."¹⁴⁴ Yet according to Exhibit 2 of his report, Comcast offered only 3,500 VOD content choices in 2005 and 9,000 in 2006 – far short of the 35,000 episodes available to Comcast from Sony and MGM alone. Clearly, something other than the availability of content – such as limitations in Comcast's own facilities – was responsible.

Moreover, the growth in VOD views presented in Exhibit 3 is also misleading. While the number of views per month has grown considerably, that growth largely reflects the growth in the number of Comcast digital subscribers (*i.e.*, the only ones who have access to VOD) from 7.7 million in December 2003 to 18.4 million in December

¹⁴³ See Rosston Report at 13-16.

¹⁴⁴ *Id.* at 14-15.

2009.¹⁴⁵ Indeed, while Rosston touts the fact that there were “about 17 VOD views per home per month” in 2009,¹⁴⁶ Comcast reported that subscribers watched an average of 30 VOD programs per month in 2005.¹⁴⁷ In other words, although the growth in programs viewed per month looks impressive, each Comcast subscriber actually watched only about half as much VOD content in 2009 as in 2005 – despite having thousands more titles to choose from.

Citing another potential benefit, Comcast asserts that its affiliation with Universal Studios would facilitate its “pioneering” negotiation of “day-and-date release” of movies for MVPD carriage at the same time they become available on DVD.¹⁴⁸ Professor Rosston similarly speculates that common ownership may enable Comcast to “encourage” Universal to offer more day-and-date titles.¹⁴⁹ Yet over two years ago, the Motion Picture Association of America – on behalf of its members, specifically including Universal City Studios LLLP – filed a petition seeking Commission approval for a new business model under which the studios would partner with MVPDs “to provide high value, high definition content to consumers *prior to* the normal release date of

¹⁴⁵ See Comcast Corp. Form 10-K for the period ending 12/31/03, at 2 (available at <http://files.shareholder.com/downloads/CMCSA/725460497x0xS950159-04-281/1166691/filing.pdf>); Comcast 2009 10-K at 2.

¹⁴⁶ Rosston Report at 15.

¹⁴⁷ Comcast 2005 Annual Report at 11 (available at <http://files.shareholder.com/downloads/CMCSA/725460497x0xS1193125-06-36698/1166691/filing.pdf>).

¹⁴⁸ Application at 57-58.

¹⁴⁹ See Rosston Report at 22.

prerecorded media (*e.g.*, DVDs) for general in-home viewing.”¹⁵⁰ The Commission granted that petition last month, setting the stage for ever-earlier release windows for VOD content.¹⁵¹

In addition, the nation’s major studios (including Universal) and cable operators (including Comcast) recently launched a \$30 million national campaign to promote movies on demand, including day-and-date releases.¹⁵² Indeed, the announcement of that campaign included a statement by the President of Warner Bros Home Entertainment Group that its experience has been “so positive that nearly all of our titles will be Day-and-Date this year.”¹⁵³ Not only are studios (including Universal) already intensely interested in and working toward early release windows with a variety of MVPDs, but such windows could come even earlier than the day-and-date release Comcast claims to be “pioneering.” This purported efficiency will likely happen even if the proposed transaction is never consummated, and thus it is not the type of transaction specific benefit cognizable in the Commission’s analysis.

Comcast and Professor Rosston similarly claim that Fancast Xfinity TV, Comcast’s “TV Everywhere” platform, would make more content available online if it

¹⁵⁰ Motion Picture Association of America, Petition for Expedited Special Relief, MB Docket No. 08-82, at i (filed May 9, 2008) (emphasis added).

¹⁵¹ See *Motion Picture Association of America*, 25 FCC Rcd. 4799 (MB 2010).

¹⁵² See Press Release, “Major Hollywood Studios and Cable Companies Launch \$30 Million National Campaign to Promote Movies on Demand,” ENHANCED ONLINE NEWS (Mar. 17, 2010) (available at http://eon.businesswire.com/portal/site/eon/permalink/?ndmViewId=news_view&newsId=20100317005555&newsLang=en).

¹⁵³ *Id.*

could obtain sufficient rights.¹⁵⁴ Yet it is not at all clear that the “friction” cited by Comcast in securing content is actually observed by its personnel in the field. Just recently, in announcing that online video publishing solutions now have the ability to preserve Nielsen’s ratings capabilities, the CEO of Comcast’s wholly-owned online media management and publishing company, thePlatform, said that “[m]edia companies are now wholeheartedly embracing multi-platform video distribution.”¹⁵⁵ Such an embrace belies any “friction” Comcast may wish to claim.

Professor Rosston also discusses Comcast’s efforts to implement advanced advertising services, which have “the potential to provide greater value – to consumers and advertisers – than traditional cable and broadcast advertising.”¹⁵⁶ He posits that the proposed transaction will likely increase the participation of NBCU’s networks in advanced advertising initiatives, including Project Canoe (the cable industry’s advanced advertising vehicle).¹⁵⁷ Yet Canoe Ventures recently announced that four major programming partners – including NBCU – will begin rolling out its interactive advertising application before the end of the second quarter.¹⁵⁸ Accordingly, there is no reason to believe that vertical integration with Comcast would result in any greater level

¹⁵⁴ See Application at 59-61; Rosston Report at 23.

¹⁵⁵ “Comcast Media Center and thePlatform Announce Validation of Their Online Video Publishing Capabilities in Preserving Nielsen’s Audio Watermarks,” THEPLATFORM (May 20, 2010) (available at http://theplatform.com/about/details/cmcc_theplatform_nielsen_c3_announcement).

¹⁵⁶ Rosston Report at 25.

¹⁵⁷ *Id.* at 27.

¹⁵⁸ See, e.g., A. Crupi, “Canoe Lands Four Network Partners With ITV in Sight,” MEDIaweek (May 17, 2010) (available at http://www.mediaweek.com/mw/content_display/news/cable-tv/e3i7278144fcfbad6f7348e730121f9ffbf).

of participation by NBCU. In addition, other cable operators have not waited for Canoe to bear fruit. For example, Cablevision launched its Optimum Select advanced advertising initiative in October 2009, apparently with great success.¹⁵⁹ Nothing would prevent Comcast from pursuing a similar path in the absence of integration with NBCU. Here again, the efficiency claimed by the Applicants simply cannot withstand scrutiny.

Claim 2: Comcast will increase investment in NBCU programming. Professor Rosston documents Comcast’s investment over the past several years in programming networks it currently owns, such as E!, Style, Versus, and Golf Channel, and from this he argues that Comcast will do the same with respect to NBCU programming.¹⁶⁰ But Professor Rosston nowhere attempts to demonstrate that the NBCU networks are at all similarly situated to these Comcast networks. Each of the Comcast networks had very modest programming budgets at the beginning of the period examined by Professor Rosston, which were reflected in their generally poor ratings performance.¹⁶¹ Comcast had to increase their programming budgets to enable these underperforming assets to become more viable. The analysis does not show how such investments compared to the large increase in rights fees experienced industry-wide. More importantly, Professor Roston provides no evidence that the NBCU networks, which include some of the most highly rated cable programming available, have similarly been underperforming for lack

¹⁵⁹ See, e.g., T. Swedlow, “Cablevision Trumpets Success of First Batch of Optimum Select Interactive TV Advertising Campaigns,” INTERACTIVETV TODAY (Jan. 13, 2010) (available at <http://www.itvt.com/story/6355/cablevision-trumpets-success-first-batch-optimum-select-interactive-tv-advertising-campai>).

¹⁶⁰ Rosston Report at 5-6.

¹⁶¹ See *id.* (annual programming expense in initial year considered was \${{ }} for Style, \${{ }} for E!, \${{ }} for Versus, and \${{ }} for Golf Channel).

of investment. Nor does Rosston consider whether the additional \$9.1 billion in debt that the proposed transaction would place on the joint venture to buy out GE would constrain investment in programming.¹⁶² Applicants provide no basis upon which to conclude that Comcast would make the additional investments in NBCU programming that Rosston postulates.

Both the Applicants and Professor Rosston also contend that the proposed transaction will enable the new entity to increase programming quality by competing more effectively in purchasing rights for additional sports programming.¹⁶³ However, NBCU already has broadcast and cable properties to spread costs, and has used that strategy in its Olympics coverage. It is not clear how the addition of more cable properties will help in this regard. Even if this efficiency were real, there is every reason to believe it could be achieved by arrangements less potentially detrimental to the public interest. For example, CBS and Turner Broadcasting pooled their resources to secure the rights to carry the NCAA men’s basketball tournament from 2011 to 2024, including “digital and other new media rights,” for more than \$11 billion.¹⁶⁴ NBCU could follow a similar strategy by partnering with other cable networks, including those owned by Comcast. For its part, Comcast could achieve similar results by partnering its cable networks with NBC or any other broadcaster to pursue sports programming *without*

¹⁶² See Application at 12.

¹⁶³ See *id.* at 50; Rosston Report at 7.

¹⁶⁴ See, e.g., S. Wieberg and M. Hiestand, “NCAA reaches 14-year deal with CBS/Turner for men’s basketball tournament,” USA TODAY (Apr. 22, 2010) (available at <http://content.usatoday.com/communities/campusrivalry/post/2010/04/ncaa-reaches-14-year-deal-with-cbturner/1>).

taking a controlling stake in its partner. Accordingly, this asserted benefit is not transaction specific.

Claim 3: The transaction would lead to other efficiencies, such as the elimination of double marginalization. Double marginalization arises whenever there is a margin between price and marginal cost at both vertical levels prior to a merger. Elimination of double marginalization occurs when the upstream division of an integrated firm reduces the price that it charges its downstream affiliate and thus reduces one of the two markups in the vertical chain. Professor Rosston asserts that, by eliminating double marginalization, the transaction will enable Comcast to internalize some or all of the per-subscriber fees paid for NBCU programming, allowing Comcast to either pass through the savings to its cable subscribers or invest them in higher-quality packages.¹⁶⁵ Yet Professor Rosston fails to substantiate this theoretical possibility with real-world evidence. For example, although Comcast has acquired an interest in any number of programming entities over the years, Rosston does not present any evidence that Comcast passed along any savings from the elimination of double marginalization to consumers or invested to improve its service – which consumers have annually given poor ratings.¹⁶⁶

In prior proceedings, the Commission has severely discounted the theoretical effect of a reduction in double marginalization. In particular, it found that the failure to

¹⁶⁵ Rosston Report at 44-46.

¹⁶⁶ See, e.g., Consumer Reports, 2010 TV Service Ratings (available at <http://www.consumerreports.org/cro/magazine-archive/2010/february/electronics-and-computers/bundling/february-2010-ratings-tv/bundling-tv-ratings.htm>); J.D. Power & Assocs., 2009 Residential Television Service Customer Satisfaction Study (available at <http://businesscenter.jdpower.com/JDPACContent/CorpComm/News/content/Releases/pdf/2009219-retv.pdf>); J.D. Power & Assocs., 2008 Residential Television Service Satisfaction Study (available at <http://businesscenter.jdpower.com/JDPACContent/CorpComm/News/content/Releases/pdf/2008204.pdf>).

present sufficient information concerning the marginal costs of producing various types of programming and the relevant demand elasticities for different types of programming made it impossible to develop a reliable estimate of the magnitude of this asserted benefit.¹⁶⁷ The Rosston Report suffers the same infirmities. Professor Rosston provides the affiliate fees for certain NBCU networks but not the marginal costs of production, and uses a single estimated pass-through rate for all four networks rather than determining the demand elasticities for each type of programming involved.¹⁶⁸ Moreover, as noted above, to the extent the elimination of double marginalization increases Comcast’s profit margin on each additional subscriber, the incentives to engage in foreclosure would be enhanced, not reduced.¹⁶⁹ As the Commission previously concluded, “[i]n the absence of any estimates of the impact of the elimination of double marginalization on the prices of [integrated] programming to other MVPDs and how this interacts with the increased incentives to withhold when [the integrated MVPD’s] profit margin increases due to lower programming costs, we can only conclude that the claimed economic efficiencies are insufficient to mitigate the harms we have identified.”¹⁷⁰

¹⁶⁷ See *News/Hughes*, ¶ 155.

¹⁶⁸ See Rosston Report at 45-46.

¹⁶⁹ See *News/Hughes*, ¶ 156.

¹⁷⁰ *Id.*

B. Comcast’s Voluntary Commitments Are Not Substantial.

The commitments Comcast sets forth in the Application similarly add little on the benefits side of the analysis.¹⁷¹ Some of them are amorphous, such as commitments to “continue its cooperative dialogue” with affiliated broadcast stations and “work to creatively incorporate” Common Sense Media information in its emerging platforms.¹⁷² Others seek credit for existing initiatives, such as Comcast “reaffirm[ing] its commitment” to provide on-screen TV ratings information.¹⁷³ Yet even where the Application provides greater specificity with respect to proposals for new undertakings, its commitments are not substantial. For example:

News and informational programming. Comcast promises to serve the public interest by increasing local news and informational programming on NBCU O&O’s by 1000 hours per year.¹⁷⁴ This would not be a material addition to those stations’ existing programming. According to a 2008 filing by NBCU, each of its O&O’s on average “airs in excess of 90 hours per week of news and public affairs programming.”¹⁷⁵ Annualizing that figure over all 26 O&O’s yields a total of 121,680 hours per year of news and informational programming currently offered by those stations.¹⁷⁶ The additional 1000

¹⁷¹ Professor Rosston does not attempt to analyze these commitments or quantify their costs and benefits. See Rosston Report at 3.

¹⁷² Application at 40, 46.

¹⁷³ *Id.* at 45.

¹⁷⁴ *Id.* at 42.

¹⁷⁵ See Comments of NBC Universal, Inc. and NBC Telemundo License Co., MB Docket No. 04-233, at 20 (filed Apr. 28, 2008).

¹⁷⁶ The calculation is 90 hours x 26 O&O’s x 52 weeks = 121,680 hours per year.

hours promised by Comcast as a benefit of the proposed transaction would constitute an increase of just 0.8 percent per year. Moreover, that figure almost certainly overstates this claimed benefit, as Comcast retains the flexibility to relegate this programming to its VOD or online offerings rather than actually broadcasting it.

Non-affiliated programming carriage. Comcast promises to add two non-affiliated channels per year for three years (a total of six channels) once it has completed digital conversion of its cable systems, which it forecasts to occur in 2011.¹⁷⁷ In a different part of its Application, Comcast reveals that digital conversion will allow “the recapture of (typically) several hundred megahertz of bandwidth” in each system.¹⁷⁸ According to Comcast’s web site, every 6 MHz of converted analog spectrum can deliver 10-15 digital channels¹⁷⁹ – meaning that each digital channel takes about 0.5 MHz of capacity. Obviously, if Comcast recaptures “several hundred megahertz of bandwidth” through digital conversion, that process would create capacity for several hundred new digital channels. Offering to allocate just six of those myriad channels to non-affiliated programming – approximately 1% of reclaimed analog capacity – is hardly the concession to the public interest that Comcast makes it out to be.

Moreover, according to Comcast’s most recent earnings release presentation, the all-digital transition is already active in approximately 70% of its cable system

¹⁷⁷ Application at 112-13.

¹⁷⁸ *Id.* at 76 n.144.

¹⁷⁹ See D. Harrar, “Going ‘All-Digital’ – Tons More HD and Faster Internet,” COMCASTVOICES (May 1, 2009) (available at blog.comcast.com/2009/05/going-all-digital-tons-more-hd-and-a-faster-internet.html).

footprint.¹⁸⁰ Comcast has not explained why it cannot roll out the new unaffiliated channels in the converted systems immediately, rather than waiting until at least 2011 and then taking three years to complete the process.

Spanish-language programming. Comcast promises to carry more programming of Telemundo and mun2, NBCU’s two Spanish-language networks. Specifically, Comcast says that it will increase the number of Telemundo and mun2 VOD programming choices on its central VOD storage facilities to a total of 300 over the next three years, and will also make such programming available online to subscribers to the extent that it has the rights to do so.¹⁸¹ In other words, Comcast commits to make available more of what would then be its own affiliated programming. If it really wanted to address a shortfall in Spanish-language programming, it could contract for the Telemundo and mun2 VOD rights today, without acquiring NBCU. Or if it wanted to do so in a less self-serving way after the transaction is consummated, there are certainly a number of other Spanish-language programming sources to choose from – including Univision, Galavisión, TV Azteca, Sur, and VME. Indeed, a Comcast subsidiary is currently managing distribution of the “Univision on Demand” service, an extensive library of Spanish-language content from its three linear networks (Univision, TeleFutura, and Galavisión).¹⁸² Promising to increase the amount of affiliated

¹⁸⁰ See Comcast 1st Quarter 2010 Results, at 3 (Apr. 28, 2010) (available at http://files.shareholder.com/downloads/CMCSA/725460497x0x369473/9e41603b-149b-4c6b-b5d8-a83ea0b26fe1/Comcast_Q110Slides_4.27.10.pdf).

¹⁸¹ Application at 49-50.

¹⁸² See “Univision Selects Comcast Media Center for Distribution of its Univision on Demand VOD Service,” COMCAST MEDIA CENTER (Oct. 13, 2009) (available at http://www.comcastmediacenter.com/media/news-releases-detail.html?content_item_id=160).

programming carried by Comcast systems should not be viewed as a public interest concession.

Applicants have, in other words, offered no cognizable public benefit to offset the very real public interest harms that would flow from the proposed transaction. Had they wanted to make meaningful commitments with real-world significance, they could easily have done so. For example, Comcast could have committed to make Philadelphia sports programming available to all MVPDs, ending over a decade in which many viewers were disenfranchised and competition suffered. Similarly, NBCU could have committed to offer other MVPDs the same agreement it negotiated with Comcast for free VOD programming, expanding output and making more content available to more viewers nationwide.¹⁸³ In the absence of substantial commitments such as these, the case for substantial conditions is all the stronger.

¹⁸³ Application at 54.

CONCLUSION

For the foregoing reasons, DIRECTV respectfully submits that the public interest would be served by approving the proposed transaction only if the Commission imposes narrowly tailored conditions to safeguard competition and consumers. Accordingly, DIRECTV requests that the conditions discussed herein be included in any grant issued in this proceeding.

Respectfully submitted,

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I hereby certify that, on this 21st day of June, 2010, a copy of the foregoing Comments of

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EXHIBIT A

**ECONOMIC ANALYSIS OF THE IMPACT OF THE PROPOSED
COMCAST/NBCU TRANSACTION ON THE COST TO MVPDs OF
OBTAINING ACCESS TO NBCU PROGRAMMING**

June 21, 2010

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1. I have been asked by Counsel for DIRECTV to consider the likely economic impact on Multichannel Video Programming Distributors (“MVPDs”) of the proposed creation of a joint venture by Comcast Corporation (“Comcast”) and General Electric (“GE”) (collectively, the “Applicants”) to combine the companies’ entertainment businesses. In particular, I have been asked to consider how combining ownership of Comcast’s cable operations – both its distribution (cable systems) and content (cable networks) – with the broadcast and cable programming business of GE’s subsidiary NBC-Universal (“NBCU”) could affect the cost to MVPDs of obtaining access to NBCU programming.

2. I have reviewed the submission to the Federal Communications Commission (“FCC”) by Mark Israel and Michael L. Katz on behalf of the Applicants titled *Application of the Commission Staff Model of Vertical Foreclosure to the Proposed Compact-NBCU Transaction*. Israel and Katz apply a revised version of the framework previously developed by the FCC “to analyze the issue of vertical foreclosure in the News Corp./DirecTV transaction.”² In their report, Israel and Katz conclude that “[s]trategies involving permanent foreclosure or repeated temporary foreclosure against multiple MVPDs would run a very significant risk of severely damaging the economic value of the NBC broadcast network—a risk that very likely would outweigh any potential benefits of foreclosure.”³ They also conclude that there is “no evidence of any positive effect on Comcast’s penetration rate resulting from the disruptions affecting DISH Network”⁴ when DISH lost retransmission rights for certain broadcast signals.

3. I discuss later several specific concerns about both the framework and implementation of the Israel-Katz analysis. However, the main issue I address in my report is the likely impact of the transaction on the cost of licensing NBCU programming. This is related to, but not the same as, the issue that Israel-Katz address; in particular, it is possible that MVPDs that compete with Comcast will pay higher retransmission rates for NBC stations and other programming after the

² *Application of the Commission Staff Model of Vertical Foreclosure to the Proposed Comcast-NBCU Transaction*, February 26, 2010 (hereafter, “Israel-Katz Report”) ¶ 2.

³ Israel-Katz Report ¶ 10.

⁴ Israel-Katz Report ¶ 102.

joint venture is formed, even if the likelihood of observing temporary or permanent foreclosure were not to have changed meaningfully.

4. I focus in particular on the impact of the proposed transaction on the retransmission rate that NBCU obtains for the right to carry NBC owned and operated stations (“O&Os”), although that same framework also could apply to other programming controlled by the merged firm that, if denied to an MVPD that competes with Comcast, could reduce the MVPD’s subscribership. As I explain, the impact of the proposed transaction on Comcast’s MVPD competitors depends on several factors including: (1) the “departure rate,” or the percentage loss of an MVPD’s subscribers when the MVPD does not carry NBC O&Os; (2) the profitability to the MVPD of each of those lost subscribers; (3) the fraction of the MVPD’s lost subscribers that switches to Comcast; and (4) the advertising revenues (or other benefits) that NBC loses if the MVPD does not carry the NBC programming. These factors affect the parties’ bargaining positions when they negotiate retransmission fees, and thus the terms to which they ultimately agree. Comcast’s vertical integration into ownership of the NBC network and NBC O&Os reduces the loss to the owner of NBC assets from an outcome where a competing MVPD does not carry these stations. This shifts bargaining power to the programming owner and away from competing MVPDs.

5. My analysis follows as a matter of economic logic from the observation that NBC currently chooses to negotiate retransmission fees with MVPDs for O&Os, rather than invoke “must carry” status and force them to carry these stations.⁵ DIRECTV and other MVPDs currently compensate NBC for the right to carry NBC’s O&Os.⁶ This fact alone implies that the “departure rate” cannot be zero or extremely low – MVPDs would only pay NBC for the right to retransmit NBC broadcast stations if they would lose a non-negligible share of their subscribers (or equivalently have to reduce subscriber fees) if they did not carry NBC stations.⁷ If the

⁵ See 47 C.F.R. § 76.64 (describing interaction of must-carry and retransmission consent regimes); 47 C.F.R. § 76.66 (same for satellite)

⁶ As Israel-Katz note, “[i]t is important to be clear ... that the empirical analysis reported in this section is not testing whether broadcast stations’ retransmission rights are valuable to MVPDs and their subscribers. They clearly are.” (Israel-Katz Report at ¶ 92).

⁷ The Congressional Research Service reported a 72.8 percent average weekly cumulative market reach for NBC in the first quarter of 2007 (CRS Report for Congress, “Retransmission Consent and Other Federal Rules Affecting

“departure rate” were zero, meaning that MVPDs would lose no subscribers if they did not carry NBC stations, then economics predicts that negotiated retransmission fees (absent a must-carry option) would be *negative*: NBC would pay MVPDs to carry NBC stations (otherwise, NBC would not earn the associated advertising revenue). In this case, NBC would invoke “must carry” status to force MVPDs to carry its O&O stations for free. The economic framework developed below allows me to infer the departure rate associated with NBC stations, using values from Israel and Katz’ analysis. I conclude that observed retransmission fees are consistent with a departure rate of about {{ }} percent.⁸

6. Using this same framework, I then estimate the potential impact of the proposed transaction on negotiated retransmission rates for NBC O&Os. Using the Israel-Katz estimates as inputs, I find that in the seven DMAs where NBC has O&Os and Comcast has a cable system, retransmission fees (if unrestrained by other forces) could increase by between {{ }}. Post-transaction, retransmission fees for NBC owned and operated stations in these markets may be higher than the license fees that MVPDs pay for all but the most expensive cable networks.

7. The rest of my report is organized as follows. First, I present the economic framework and theory that forms the basis of my analysis. Second, I use data observed in the marketplace to quantify the expected impact of the proposed transaction on fees for retransmission rights to NBC programming. Third, I explain why the Israel-Katz framework and resulting conclusions are inconsistent with observed marketplace outcomes.

I. The General Approach

8. My general approach is to use real-world evidence on the outcomes of negotiations over retransmission rights, combined with other economic evidence such as NBC advertising

Programmer-Distributor Negotiations: Issues for Congress” (Order Code RL34078), July 9, 2007). This suggests the importance of NBC programming to MVPD subscribers.

⁸ I estimate that a loss of NBC’s O&Os would result in a {{ }} percent decline in subscriber demand for an individual MVPD. I estimate that this would result in a loss of {{ }} percent of its subscribers, with the remaining demand loss absorbed by a decline in the prices charged to its remaining subscribers.

revenues and MVPD margins, to infer how retransmission rates could change with the proposed transaction. I do this by combining empirical evidence with an economic model where NBC and MVPDs bargain over retransmission fees.

9. My approach is motivated by several observations about the economic context. One observation is that NBC stations and MVPDs' distribution-related assets are complementary, and thus there are gains from trade when the MVPD carries an NBC station. More viewers have access to an NBC station when it is carried by MVPDs than when it is not, and an MVPD's subscribers' willingness to pay for subscriptions is higher when the MVPD carries the NBC station than when it does not. Evidence regarding the gains from trade in this context is that DIRECTV has offered an NBC broadcast station in every DMA where it has found it economical to offer "Local-Into-Local" ("LIL"), or to make local broadcast stations available to subscribers.

10. A second observation is that retransmission rates are determined through bilateral negotiations between NBC and MVPDs, which suggests that neither NBC nor MVPDs are price-takers. Rather, each has some degree of power to negotiate price. On the programming side, this is true for affiliates of the other major networks, and even for stations affiliated with minor networks. At the same time, the ability to negotiate terms is likely to vary across owners of programming and across MVPDs – for example, smaller MVPDs may have less ability to negotiate favorable terms.

11. Third, the joint gains from trade between NBC and MVPDs are manifested in two revenue streams: advertising revenues and MVPD subscription revenues. NBC collects the former from advertisers, while MVPDs collect the latter from subscribers.⁹

12. Fourth, retransmission fees are transfers between MVPDs and NBC. These fees allocate the joint gains from trade, relative to a split where NBC and the MVPD each keeps what it collects itself from advertisers and subscribers. In principle, these transfers could flow in either direction; an MVPD could pay NBC for the right to carry NBC stations or NBC could pay an MVPD to carry NBC stations. In other words, negotiated retransmission fees could be either

⁹ MVPDs also collect some advertising revenue, but I ignore that revenue stream here.

positive or negative, with a large potential range bounded by a fee structure under which NBC pays the MVPD all the incremental broadcast revenues it collects from advertisers associated with access to the MVPD's subscribers and a fee structure under which the MVPD pays NBC all of the incremental profit it gains from carrying NBC programming.

13. Fifth, whether NBC chooses to negotiate retransmission fees or chooses "must carry" provides important evidence: NBC would only choose to negotiate retransmission fees in circumstances where it expects these fees to be positive, flowing from an MVPD to NBC. This is useful because the terms upon which NBC and MVPDs agree are sometimes complicated, involving for example agreements to carry cable networks on specific tiers in lieu of a cash fee. In such cases, it can be hard to assess the value of these or other non-pecuniary provisions. However, the fact that NBC chooses to negotiate retransmission fees indicates that, whatever the terms of the agreement, value is flowing from the MVPD to NBC – the retransmission fee is effectively at least zero.

14. These observations lead me to use an economic model of bargaining to help interpret current economic outcomes in this market with respect to retransmission, and what they imply for how the proposed transaction might affect the fees that MVPDs pay for the right to carry NBC stations.

II. Nash Bargaining

15. Retransmission consent negotiations are an example of a situation where two parties benefit from transacting with each other relative to their next best alternative. In such situations, the terms of trade tend to be determined through bilateral negotiation. Economists use bargaining models to analyze what terms of trade result in such situations. These terms of trade (e.g., a price or license fee) determine how the joint benefits from the transaction are split between the two parties. Bargaining models have been used to explain outcomes in recent retransmission fee negotiations.¹⁰ The best-known is the "Nash bargaining model."¹¹

¹⁰ William P. Rogerson, "An Economic Analysis of the Competitive Effects of the Takeover of DIRECTV by News Corp." MB Docket No. 03-124 (June 13, 2003) (e.g., pp. 17-21).; Katz, Michael L. et. al. "An Economic Analysis

16. The basic idea of bargaining models is that the two parties in a bilateral negotiation split the joint benefits from their transaction such that each obtains what it could get in its next best alternative (e.g., buying from or selling to another party), plus some share of the incremental gain that the two parties jointly generate from the transaction. A common assumption is that the parties split the incremental surplus equally, with each getting one half.¹² A key feature of these models is that a party receives a greater share of the overall value, the better its “bargaining position” or “fallback payoff” – what it would receive in its next best alternative (i.e., without the transaction) – relative to the other party. This provides the economic logic, which I explain below, for why a merger with Comcast would lead NBCU to do better when negotiating retransmission fees with Comcast’s MVPD competitors than when NBCU was not owned by an MVPD. NBCU likely will improve its bargaining position through the merger, because a breakdown of negotiations that resulted in NBCU stations becoming unavailable on Comcast’s MVPD competitors would lead benefits to flow to the owner of NBCU-Comcast if it resulted in subscribers of other MVPDs switching to Comcast. Before the merger, these benefits would not accrue to the owner of NBCU, because its financial interests were separate from Comcast’s.

17. Below I describe and apply a bargaining model to estimate how much retransmission fees for NBC’s owned and operated stations could increase after an NBCU-Comcast merger. I begin by describing the economics underlying a Nash bargaining model, and then apply the framework to evaluate the impact of the proposed transaction.

18. Assume that a transaction between two companies can generate gains from trade, meaning that each party can do better than its fallback position. I assume that the joint value generated by an agreement between the two parties is T (i.e., that there is some price at which the parties would jointly benefit from reaching an agreement). The firms then negotiate how to split

of Consumer Harm from the Current Retransmission Consent Regime,” GN Docket Nos. 09-47, 09-51 and 09-137 (November 12, 2009) (hereafter, “Katz 2009 RTC Report”) (e.g., ¶¶ 16-29).

¹¹ In economic jargon, the Nash bargaining solution has several attractive properties: it is the unique solution that is Pareto efficient, satisfies independence of irrelevant alternatives, and where the agents’ payoffs are invariant to affine transformations.

¹² The assumption that each party receives half of the incremental surplus may not hold for all transactions. In particular, smaller MVPDs may be more like price takers and receive a smaller fraction of the surplus.

these gains from trade. Each firm knows its “fallback payoff” – the profits that the firm would earn if trade did not occur. I refer to this fallback payoff for the first party as F_A , and the fallback payoff of the second party as F_B . The Nash bargaining solution (when the firms split the gains equally) implies that the firms receive payoffs P_A and P_B , which can be represented as:

$$(1) \text{ Payoff}_A = F_A + \frac{1}{2} * (T - F_A - F_B)$$

$$(2) \text{ Payoff}_B = F_B + \frac{1}{2} * (T - F_A - F_B).$$

19. Firm A’s realized payoff equals its fallback payoff plus half of the gains from trade, $(T - F_A - F_B)$. Firm B’s payoff is the equivalent. The gains from trade equal the joint payoff when trade occurs, T , minus the sum of the firms’ fallback payoffs.

20. A simple numerical example illustrates the Nash bargaining solution. Assume that two parties, Firm A and Firm B, negotiate an agreement. Assume that, absent agreement, Firm A receives a payoff of 100 and Firm B receives a payoff of 200, but if they reach an agreement their joint payoff is 320. This means the gains from trade – or the joint benefit to reaching agreement – is 20 $(= 320 - (100 + 200))$. Nash bargaining implies that the parties will share equally in the gain of 20: the payoff to Firm A will be 110 $(= 100 + \frac{1}{2}(20))$ and the payoff to Firm B will be 210 $(= \frac{1}{2}(20) + 200)$. Both clearly are better off from reaching agreement.

21. It is useful to rewrite equations (1) and (2) as:

$$(3) \text{ Payoff}_A = \frac{1}{2} * (T + F_A - F_B)$$

$$(4) \text{ Payoff}_B = \frac{1}{2} * (T + F_B - F_A).$$

These equations illustrate an important implication of the Nash bargaining solution: that a firm’s payoff is greater the better its fallback payoff relative to its bargaining partner. Data on (1) the value of the joint gains from trade and (2) evidence of how those gains are split between the parties permit an inference about $F_A - F_B$ – the difference in the firms’ “fallback payoffs.” It also is possible to infer how a change in one firm’s “fallback payoff” caused by a change in its operations will affect how the parties split the gains from trade.

III. Application of Nash Bargaining to Negotiations over Retransmission Fees

A. Applying the Framework

22. The Nash bargaining framework described above can be applied to understand negotiations between NBC and an MVPD for retransmission rights, and to infer current departure rates from NBC's decision to elect retransmission consent (rather than "must carry" status) and observed levels of retransmission fees.¹³ Using the example above, the predicted distribution of the gains from trade from reaching agreement between NBC and an MVPD can be illustrated as follows. Assume, as above, that the gains from trade are 20. Assume the following:

NBC's profits if it does not reach a deal with the MVPD = 100

NBC's profits (exclusive of the retransmission fee received from the MVPD) if it reaches a deal with the MVPD = 105

MVPD's profits if it does not reach a deal with NBC = 200

MVPD's profits if it reaches a deal with NBC = 215

Gains from trade in this case are equal to the combined payoffs from agreement, $105 + 215$, minus total payoffs without agreement, $100 + 200$, so that the net gains from trade are $(105 + 215) - (100 + 200) = 20$. Nash bargaining results in each party receiving \$10 more than its fallback payoff. This implies a value of 110 ($= 100 + 10$) for NBC and 210 ($= 200 + 10$) for the MVPD. In equilibrium the MVPD will pay NBC 5 for the programming (in the form of a retransmission fee), because that provides NBC with the required payoff of 110 ($= 105 + 5$) and the MVPD with the required payoff of 210 ($= 215 - 5$). This also can be seen by noting that, absent a payment from the MVPD, NBC would gain 5 from the deal, while the MVPD would gain 15.

¹³ The framework is not specific to negotiations between NBC O&Os and MVPDs, but could apply generally in understanding licensing agreements between broadcast stations or cable networks and MVPDs, or indeed between any licensors of "content" and content distributors.

23. I now provide a more general model of the outcome of negotiations over a license to carry an NBC owned-and-operated station in a given local market. I assume there are three MVPDs – MVPD₁, MVPD₂, and Comcast, (which I designate with the subscripts “1,” “2,” and “c,” respectively). I represent the outcome where MVPD₁ carries the NBC station by “N=1” and where MVPD₁ does not carry the NBC station by “N=0.” I focus on the terms upon which MVPD₁ carries the NBC station, and assume that both Comcast and MVPD₂ have chosen to carry the NBC station.

24. Following the general framework above, I specify the relevant parameters for understanding negotiating outcomes: T , the total gains from trade (equal to the combined profits of NBC and MVPD₁ in the local market when NBC is carried by MVPD₁); F_A , NBC’s fallback payoff (NBC’s profits in the local market if MVPD₁ does not carry NBC); and F_B , MVPD₁’s fallback payoff (MVPD₁’s profits in the local market if it does not carry NBC):

$$(5) T = (b + r_c)Q_c(N = 1) + (b + r_2)Q_2(N = 1) + (b + P_1(N = 1))Q_1(N = 1)$$

$$(6) F_A = (b + r_c)Q_c(N = 0) + (b + r_2)Q_2(N = 0) + abQ_1(N = 0)$$

$$(7) F_B = P_1(N = 0)Q_1(N = 0)$$

Here,

b = broadcast ad revenues.

r_c = retransmission rate NBC receives from Comcast.

r_2 = retransmission rate NBC receives from MVPD₂.

a = share of MVPD₁’s “stayers” that watch NBC over the air or online if MVPD₁ does not carry NBC.

$Q_c(N = 1)$: Comcast subscribers, if MVPD₁ carries NBC.

$Q_1(N = 1)$: MVPD₁ subscribers, if MVPD₁ carries NBC.

$Q_2(N = 1)$: MVPD₂ subscribers, if MVPD₁ carries NBC.

$Q_c(N = 0)$: Comcast subscribers, if MVPD₁ does not carry NBC.

$Q_1(N = 0)$: MVPD₁ subscribers, if MVPD₁ does not carry NBC.

$Q_2(N = 0)$: MVPD₂ subscribers, if MVPD₁ does not carry NBC.

$P_1(N = 1)$: MVPD₁ price (to subscribers), if MVPD₁ carries NBC.

$P_1(N = 0)$: MVPD₁ price (to subscribers), if MVPD₁ does not carry NBC.

25. Equation (5) states that the joint gains from trade equal NBC's advertising and retransmission profits from subscribers of Comcast and MVPD₂, plus NBC's and MVPD₁'s joint profits from MVPD₁ subscribers when MVPD₁ carries NBC. Equation (6) states that NBC's fallback payoff equals the amount it receives in advertising and retransmission profits from subscribers to Comcast and MVPD₂ when MVPD₁ does not carry NBC, plus its advertising revenues from MVPD₁ subscribers who obtain the NBC station over the air or on line. Equation (7) states that MVPD₁'s fallback payoff equals its profits when it does not carry NBC.¹⁴

26. I can solve for $Payoff_A$ by substituting equations (5)-(7) into equation (3) to obtain NBC's payoff – what it receives assuming that it negotiates retransmission consent with MVPD₁:

$$(8) \quad Payoff_A = \frac{1}{2} * (Eq(6)) + \frac{1}{2} * (Eq(5) - Eq(7)), \text{ or}$$

$$(9) \quad Payoff_A = \frac{1}{2} [(b + r_c)Q_c(N = 0) + (b + r_2)Q_2(N = 0) + abQ_1(N = 0)] + \frac{1}{2} [(b + r_c)Q_c(N = 1) + (b + r_2)Q_2(N = 1) + bQ_1(N = 1) + P_1(N = 1)Q_1(N = 1) - P_1(N = 0)Q_1(N = 0)]$$

I then use Equation (9) to obtain an expression for r^* , the retransmission rate per subscriber that NBC receives from MVPD₁, by subtracting from NBC's payoff the amount that NBC collects directly (broadcast advertising revenues from all MVPDs plus retransmission revenues from the other MVPDs) and dividing by $Q_1(N = 1)$, the number of MVPD₁ subscribers when MVPD₁ carries NBC. I find that r^* is:

¹⁴ For notational simplicity, I assume throughout that marginal costs equal zero for both parties, so MVPD₁'s price equals its margin. When applying the model below, I use evidence on MVPD margins in my calculations.

$$(10) \quad r^* = \frac{1}{2} [d(r_c \alpha + r_2(1 - \alpha)) - (1 - d)(1 - a)b] + \frac{1}{2} [P_1(N = 1)d + (P_1(N = 1) - P_1(N = 0))(1 - d)]$$

Here, d is the departure rate, α is the share of switchers that moves to Comcast (the “diversion rate”), and $(1 - \alpha)$ is the share of switchers that moves to MVPD₂. These, in turn, can be written as:

$$(11) \quad d = \frac{Q_1(N=1) - Q_1(N=0)}{Q_1(N=1)}, \alpha = \frac{Q_c(N=0) - Q_c(N=1)}{Q_1(N=1) - Q_1(N=0)}, 1 - \alpha = \frac{Q_2(N=0) - Q_2(N=1)}{Q_1(N=1) - Q_1(N=0)}$$

27. The economic intuition behind Equation (10) is as follows. The first square bracketed term is what NBC’s retransmission rate would be if NBC received only its fallback payoff. The first part of this term is the share of NBC’s retransmission revenues from current MVPD₁ subscribers that is *not* dependent on coming to terms with MVPD₁; this is what NBC would continue to receive from subscribers that switch from MVPD₁ to Comcast or to MVPD₂ when NBC no longer is available on MVPD₁ (“switchers”). The second part of this bracketed term is the share of NBC’s broadcast advertising revenues (again, from current MVPD₁ subscribers) that *is* dependent on coming to terms with MVPD₁; this is what NBC loses from households that do not switch MVPDs and do not obtain the signal otherwise.¹⁵

28. The magnitude and sign of the first square bracketed term depends on NBC’s “fallback payoff.” That payoff is high when the departure rate is close to one, because then NBC continues to receive broadcast ad revenues and retransmission revenues from MVPD₁’s current subscribers, even if MVPD₁ does not carry NBC. In contrast, NBC’s “fallback payoff” is low when the departure rate is close to zero. Importantly, if the departure rate were zero or very low, then the bracketed term could be negative: NBC’s “fallback payoff” would involve NBC’s paying MVPD₁ some part of the advertising revenues associated with MVPD₁’s carriage of NBC.

¹⁵ This also could capture possible lower advertising price per viewer from reducing the total viewership of NBC programming (which Israel-Katz claim is meaningful). See, Israel-Katz Report ¶ 68.

29. The second square bracketed term in Equation (10) is what NBC would receive per current MVPD₁ subscriber if MVPD₁ only received its fallback payoff (i.e., all of the gains from trade accrued to NBC). It is equal to how much MVPD₁'s profits per current customer would fall if it did not carry NBC. The loss of profits to MVPD₁ come in two forms: a reduction in subscribers (the first term) and price concessions made to retain subscribers (the second term).

30. I can rewrite equation (10) as:

$$(12) \quad r^* = \frac{1}{2} [d(r_c \alpha + r_2(1 - \alpha)) - (1 - d)(1 - a)b] + \frac{1}{2} P_1(N = 1)dk$$

where

$$(13) \quad k = \frac{P_1(N=1)Q_1(N=1) - P_1(N=0)Q_1(N=0)}{P_1(N=1)(Q_1(N=1) - Q_1(N=0))}$$

In words, k equals one over the share of MVPD₁'s decrease in profits that is attributable to the reduction in MVPD₁'s quantity, holding constant its price.

31. This analysis provides two important results. First, r^* is increasing in d , the departure rate. A higher departure rate implies both that NBC's "fallback payoff" is better and that MVPD₁'s profits are more dependent on carrying NBC. Both of these effects would increase NBC's payoff when negotiating with an MVPD.

32. Second, if the departure rate is zero when MVPD₁ loses the NBC station but keeps the subscription price constant, then a negotiated retransmission rate necessarily will be negative. The economics behind this are simple: if $d=0$ when MVPD₁ keeps price constant, then MVPD₁'s demand is not dependent on carrying the NBC station and therefore MVPD₁ would not be willing to pay anything for the right to carry NBC programming. In that case, MVPD₁'s profits do not change when it does not carry NBC, and NBC's fallback payoff is poor. NBC has no leverage with which to induce MVPD₁ to pay a fee for content that does not increase MVPD₁'s profits. Instead, absent "must carry" provisions, NBC would have to pay MVPD₁ for access to viewers; MVPD₁ effectively would be able to extract from NBC some of the revenues that NBC collects from advertisers as a result of carriage on MVPD₁.

33. Thus, observations of retransmission fees that have been negotiated in the past provide evidence about the degree to which an MVPD’s demand from subscribers is adversely affected by the absence of NBC from the MVPD’s lineup and thus whether the departure rate holding the MVPD’s price constant exceeds zero. Because NBC receives positive retransmission fees – or, more generally, NBC chooses not to invoke the “must carry” provision that would force MVPDs to carry its O&Os at a zero fee – I know that MVPDs’ demand is dependent on carrying NBC stations. Indeed, as I show below, the “constant price” departure rate must exceed a minimum threshold. This is economic evidence that carriage of NBC stations provides additional revenue to MVPDs and that NBC’s fallback payoff is not extremely poor.

B. Applying the Bargaining Model To Estimate Departure Rates

34. The prevalence of positive retransmission rates for NBC stations is evidence that MVPDs’ demand from subscribers is sensitive to whether NBC stations are part of their lineup. As I now explain, given information about retransmission rates, broadcast advertising revenue, and MVPD margin, I can estimate the departure rate by solving for d in Equation (12):

$$(14) \quad d = \frac{2r^* + (1-a)b}{(r_c\alpha + r_2(1-\alpha)) + (1-a)b + P_1(N=1)k}$$

Equation (14) shows how the departure rate, d , depends on the (realized) retransmission fees, broadcast ad revenues, the MVPD’s margin, and the portion of the profit reduction that the MVPD would incur if it did not carry NBC that is accounted for by reduced quantity.¹⁶

35. NBC always can guarantee an outcome no worse than $r^*=0$ by invoking “must carry,” rather than retransmission consent, so assuming $r^*=0$ in Equation (14) provides a lower bound for the departure rate:

$$(15) \quad d > \frac{(1-a)b}{(r_c\alpha + r_2(1-\alpha)) + (1-a)b + P_1(N=1)k}$$

¹⁶ Since the terms in equation (12) are measurable empirically, I can estimate the departure rate that is reflected today in MVPDs’ payments for retransmission rights to NBC stations (which I do later in my report).

This lower bound is useful because historical retransmission negotiations have produced agreements where broadcast stations are paid through compensation that is not measured only in dollars, but instead involves required carriage of other new or less desirable networks or positioning on particular subscription tiers. In such cases, the retransmission fee r^* is implicit, but not directly observed, but a lower bound for the departure rate can be determined using equation (15).

36. I also can use these equations to infer “constant price” departure rates that would obtain if MVPD₁ did not change its price to subscribers in response to losing an NBC station. The “constant price” departure rate is informative, because it better measures how much MVPD₁’s demand decreases if it loses an NBC station. I obtain an analogous equation and bound for the “constant price” departure rate by simply multiplying both sides of equations (14) and (15) by k . If the share of the profit decrease from the elimination of an NBC channel from an MVPD’s lineup that is accounted for by the decrease in subscribers is X percent, then $k = 1/(.01*X)$ and I can obtain the “constant price” departure rate by dividing d by $(.01*X)$.

C. Estimating the Effect of the NBC-Comcast Merger on Retransmission Fees from the Bargaining Model

37. I now extend the analysis to examine how the proposed transaction will affect the departure rate and thus the likely retransmission fees paid by MVPDs for NBC programming. If NBC and Comcast are jointly operated, it could affect F_A (NBC’s fallback payoff) during negotiations over retransmission consent. As owner of NBC stations, Comcast could have a better fallback payoff because subscribers who switched from an MVPD to Comcast would give Comcast an incremental margin (from Comcast’s cable operations) to offset the loss of retransmission fees and broadcast advertising revenues. This is shown in Equation (16):

$$(16) \quad F_{1,I} = (b + P_c(N = 0))Q_c(N = 0) + (b + r_2)Q_2(N = 0) + abQ_1(N = 0)$$

38. The determination of the retransmission fee follows the same logic as above, with $P_c(N = 0)$ replacing r_c in Equation (12):

$$(17) \quad r_1^* = \frac{1}{2} [d(P_c(N=0)\alpha + r_2(1-\alpha)) - (1-d)(1-a)b] + \frac{1}{2} P_1(N=1)dk$$

Thus, the change in the retransmission fee as a consequence of the proposed transaction is the difference between Equations (17) and (12):

$$(18) \quad r_1^* - r^* = \frac{1}{2} d\alpha(P_c(N=0) - r_c)$$

IV. Estimating Departure Rates and the Effect of the NBC-Comcast Merger on Retransmission Fees From Economic Outcomes

A. Estimating Departure Rates

39. I next apply the framework by inserting values for the model's parameters into Equation (14) to derive the departure rate implied by these parameters. I make the following assumptions.

- $r^* = \{\{\quad\}\}$. This is the lower estimate used by Israel and Katz for projected retransmission fees.¹⁷
- $b = \{\{\quad\}\}$. This is the average value of advertising revenues per viewer for NBC's owned and operated stations in 2009 in the data used by Israel and Katz.¹⁸
- $a = 0.22$. This value for the share of an MVPD's "stayers" that watches NBC over the air or on-line if the MVPD does not carry NBC is assumed by Israel and Katz in their base specification.
- $r_c = r_2 = \{\{\quad\}\}$. I assume that retransmission fees are currently the same for all MVPDs.
- $P_1(N=1) = \{\{\quad\}\}$. I assume this value for the MVPD's average monthly margin per subscriber; [[

¹⁷ Israel-Katz Report ¶ 67.

¹⁸ The estimate of $\{\{\quad\}\}$ is the TV household weighted average of the seven DMAs where Comcast operates and NBCU has O&O's. The unweighted average is $\{\{\quad\}\}$. For advertising revenues: See Israel-Katz backup program 'an_critval.do'. For TV Households: See, Media Business Corp., Media Census: All Video By DMA, 3Q2009.

]].¹⁹

- $k = \{\{ \quad \}\}$. As I discuss below, the evidence from Klein et al.'s and Kunz's studies of the effects of local channels on DIRECTV's and DISH's subscriber levels, respectively, $\{\{$

$\}\}$. (See Appendix A for details of this

calculation.)

Using these assumptions yields an estimate of the departure rate associated with the loss of a single NBC station of $\{\{ \quad \}\}$ percent.

40. I obtain an estimate of the "constant price" departure rate by multiplying this value by k . My estimate of the constant price departure rate is therefore $\{\{ \quad \}\}$ percent. This means that approximately this percentage of the competing MVPD's subscribers would switch MVPDs if the MVPD did not offer NBC stations and the MVPD did not compensate for the loss of the NBC stations by a change in its pricing to subscribers. Current retransmission rates, given the values of the other parameters in the model above, imply that an MVPD's demand would decrease considerably (by roughly $\{\{ \quad \}\}$ percent) if it did not offer NBC stations.

¹⁹ For the fourth quarter 2009, SNL Kagan reported Comcast programming costs for a basic subscriber at $[[\quad]]$ and its video revenues as $[[\quad]]$. The difference between these is $[[\quad]]$. See, Ow, Michelle. "Bundling gains drive cable ARPU amid stagnant segment growth." March 30, 2010. SNL Kagan.; Ow, Michelle. "Programming costs expected to continue to rise in '10," June 2, 2010. SNL Kagan.

B. My Estimate of the Departure Rate Associated with the Elimination of an NBC Local Station from an MVPD’s Lineup Is Consistent With Other Economic Analyses of the Impact from Direct Broadcast Satellite (“DBS”) Providers Introducing or Losing Local Broadcast Stations

41. Previous economic analyses – one regarding DIRECTV’s *addition* of local service; another regarding DISH Network’s *loss* of network affiliates owned by Fisher Communications – provide evidence that loss of a broadcast signal can affect an MVPD’s subscribership. This evidence is consistent with my estimate of the departure rate above.

1. The Impact on DIRECTV of Adding Local-into-Local

42. A 2007 report by Benjamin Klein, Andres Lerner, and Emmett Dacey (“Klein et al.”) examined how much DIRECTV’s subscribership historically increased after DIRECTV began offering LIL service in particular DMAs.²⁰ Klein et al.’s estimates imply that the number of DIRECTV subscribers would have been about {{

}}, relative to a situation where DIRECTV, like DISH Network and the cable systems in the DMA, did offer local stations. The implied {{ }} percent departure rate from eliminating *all* local network affiliates in a DMA is consistent with my estimate of an economically significant departure rate from elimination of an NBC affiliate, but does not correspond well with Israel and Katz’ analysis and conclusions.

43. Klein et al.’s analysis uses monthly data on the number of DIRECTV subscribers, gross additions, and disconnects from January 2003 to March 2007.²¹ They use variation across DMAs in the timing of DIRECTV’s and DISH’s initial launch of LIL to estimate how DIRECTV’s subscribership trends are affected by DIRECTV’s launch of LIL.²² In many DMAs, DISH’s launch of LIL preceded DIRECTV’s launch, so there were periods when

²⁰ Klein, Benjamin; Lerner, Andres; and Dacey, Emmett, “*An Economic Analysis of DIRECTV Providing Local-Into-Local Service via Satellite in All 210 DMAs*,” MB Docket No. 07-18 (Aug 23, 2007).

²¹ “Gross additions” equal the number of new subscribers. Klein et al., uses the average disconnect rate (“AVD”), which “equals disconnects minus reconnects divided by the average of each month’s beginning and ending total residential subscribers” as their measure of disconnects. See, Klein et al. fn. 5.

²² Klein, et al. do not distinguish between situations where firms’ initial launch included all four networks or fewer than four networks.

DIRECTV was the only major MVPD serving a DMA that did not offer local channels. By comparing DIRECTV's subscribership trends before and after it introduced LIL in the 52 DMAs in which DISH launched LIL more than six months prior to DIRECTV's launch,²³ Klein et al. estimate how subscriber additions and disconnects were affected by adding LIL, given other MVPDs' local channel offerings.

44. Klein et al. find that the average monthly gross addition rate is {{ }} percent in the 18 months before DIRECTV's LIL launch, {{ }} percent in the 12 months after DIRECTV's launch, and {{ }} percent during the 13-30 months after DIRECTV's launch of LIL.²⁴ Thus, {{

}}. Moreover, {{

}}. Klein et al. also find that the average monthly disconnect rate, which averaged {{ }} percent during the 18 months before DIRECTV's LIL launch, {{ }} percent during the 30 months after DIRECTV's launch.²⁵ Thus, DIRECTV experienced a net loss of subscribers during the months before launch, when it was the only MVPD not offering local channels in the DMA (the disconnect rate exceeded the gross addition rate), but experienced a net gain of subscribers in those DMAs after launching LIL (the gross addition rate exceeded the disconnect rate).

45. I use the Klein et al. figures to estimate the share of its subscribers that DIRECTV would lose after 30 months if it were the only MVPD that did not offer all local network affiliates in a DMA.²⁶ I use Klein et al.'s estimates that the monthly gross addition rate was {{ }} percent and the monthly disconnect rate was {{ }} percent in the 18 months before launch – I assume that these rates apply when DIRECTV is the only MVPD not offering local channels – and their

²³ This is more than half of the 91 DMAs in which DIRECTV launched LIL between January 2003 and March 2006. According to Klein et al., there were 23 DMAs in which DISH launched LIL less than six months prior to DIRECTV's LIL launch. See, Klein et al. fn 6.

²⁴ Klein et al. Exhibit 2 (c).

²⁵ Klein et al. Exhibit 2 (d).

²⁶ This analysis assumes that, had DIRECTV not added LIL, the pre-introduction addition and disconnect rates would have been unchanged.

estimate that these rates are {{ }} percent and {{ }} percent, respectively, during the 18 months beginning one year after DIRECTV started offering LIL service. These estimates imply that DIRECTV would have {{ }} if it were the only MVPD that did not offer all network affiliates in the DMA.²⁷

46. The relevant issue for understanding the impact on a competing MVPD of the proposed Comcast-NBC merger is how loss of a single network would affect that MVPD. If each network contributes proportionately to the gain (or loss) of subscribers, then a reasonable estimate of the effect of losing one of, but not all, the “Big Four” LIL network signals on DIRECTV would be 25 percent of the total {{ }} percent estimated impact for all network affiliates, or {{ }} percent. As such, I view the Klein et al. results – which use a very different methodology and evidence – as supporting my conclusion that departure rates associated with the elimination of NBC from an MVPD’s lineup are economically substantial and much greater than Israel and Katz claim.

2. The Impact on DISH of the Fisher Dispute

47. Analysis submitted in connection with this proceeding provides evidence that loss of a broadcast signal can have a substantial impact on an MVPD’s subscribership. A June 2010 report submitted by Vincent Kunz, Senior Marketing Manager for Reporting and Analytics for DISH Network, examined the impact of the loss of a single Big-Four network station in seven DMAs (as part of the “Fisher” dispute discussed in Israel and Katz’ report) on DISH’s subscriber levels in these DMAs, relative to a set of control DMAs.²⁸ This is similar to the approach adopted by Israel and Katz. Kunz found {{

²⁷ My understanding is that DIRECTV charged subscribers for LIL service during Klein, et al.’s sample period. Therefore, the departure rate implied by this evidence corresponds to both the elimination of this option to subscribers – the elimination of the service and the charge to subscribers who added LIL. See, Klein et al. ¶ 35.

²⁸ “Declaration of Vincent Kunz,” submitted on behalf of DISH Networks LLC, June 7, 2010.

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48. Kunz's analysis {{

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49. {{

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²⁹ In the remaining DMA, {{

³⁰ Kunz ¶ 17.

³¹ Kunz Exhibit E.

³² Kunz Exhibit E.

³³ Kunz Exhibit C.

}}. See, Kunz ¶ 6.

50. {{

}} These patterns are similar to those found by Klein et al., and differ from those assumed by Israel and Katz in their empirical analysis:

{{

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C. Estimating the Effect of the Merger on Retransmission Fees

51. Equation (18) above illustrates that the effect of the proposed transaction on retransmission fees depends, among other things, on the diversion rate α . This parameter represents the share of customers that leaves an MVPD and switches to Comcast as a consequence of the MVPD's losing NBC from its lineup. In their analysis, Israel and Katz assume that, when an MVPD stops showing a broadcast station, its customers substitute to competitors in proportion to the competitors' shares. This would mean that, if Comcast competed with two other MVPDs in a geographic area, and the subscribership shares were 60, 20 and 20 percent, respectively, then 75 percent of the customers who substitute away from a competing MVPD when it loses a broadcast station would switch to Comcast ($= 60 / (20 + 60)$). I adopt this assumption below.

52. I assume that Comcast's average margin is $[[\quad]]$.³⁴ Assuming a $\{\{ \quad \}$ percent departure rate, equation (17) becomes

$$(19) \quad r_i^* - r^* = \{\{ \quad \} \} * \alpha$$

I use data on Comcast's share in the DMAs where it overlaps with NBCU's O&Os, and assume that MVPD₁ has a 10 percent share in each of these DMAs.³⁵ I find that the potential increase in retransmission fees would range from $\{\{ \quad \}$ in New York to $\{\{ \quad \}$ in Philadelphia.

³⁴ *Supra* note 19.

D. This Framework Can be Applied to Estimate the Impact on License Fees for National Cable Programming

53. My discussion in this report focuses on retransmission rates for NBC O&Os (which is also the focus of the Israel and Katz analysis). However, the framework that I present above also is useful in understanding the impact of the proposed merger on any individual network – or block of programming – controlled by the merging parties that, if not made available to one MVPD, would cause some of that MVPD’s subscribers to move to other MVPDs. Popular national cable networks, including USA Network, Bravo or MSNBC, may be sufficiently important to potential subscribers that, if withheld, they would cause a portion of an MVPD’s subscribers to move to a competing MVPD that offers that programming.

V. Israel and Katz Have Not Addressed the Primary Economic Impact of the Transaction on Competing MVPDs

54. I noted earlier that the question that Israel-Katz analyze – whether the likelihood of withholding increases because of the proposed transaction – is related to the question that I have addressed – how the proposed transaction will change the parties’ relative bargaining positions and the retransmission rate. However, my analysis more directly addresses the question of the likely impact of the transaction on MVPDs that compete with Comcast, because it emphasizes the transaction’s effect on prices (i.e., retransmission rates), which could be substantial even if the likelihood of foreclosure were to remain low and/or would not change substantially.

A. Changes in Retransmission Rates Are More Likely than Carriage Interruptions

55. Economics predicts that if the transaction has an impact, it largely should be through its effect on changes in retransmission rates, given the large gains from trade between the owner of NBC programming and MVPDs. The large gains from trade mean that the parties jointly stand to lose considerable value if they do not come to terms. This does not mean that the parties always will come to terms and engage in trade. If there is substantial uncertainty about the value

³⁵ Comcast shares as reported in Israel-Katz Report Table 1.

of the rights being licensed (for example due to large market shifts), or the parties have very different views of the total gains they can achieve through a transaction, then trade may not occur, at least for a period of time. However, in general, when both parties benefit from reaching agreement, they will do so.

56. Consistent with economic theory, while threats and public discussion about potential programming disruptions may have become more prominent, actual “withholding” of local stations has been relatively uncommon.³⁶ After the Comcast-NBCU merger, the gains from trade from licensing NBC stations to competing MVPDs likely will remain large (though they will be reduced somewhat), but terms to which the parties agree likely will change. In other words, I expect the transaction’s primary impact to be on prices (retransmission rates),³⁷ not quantity (foreclosure). This is because even though “withholding” occurs infrequently, the prospect and consequences of “withholding” affect the terms to which the parties agree.

57. The Israel-Katz analysis, which claims to follow the FCC’s earlier framework, does not address the possibility that retransmission rates could change after an NBCU-Comcast merger, but only how the likelihood of foreclosure would change after such a merger, *holding retransmission rates fixed*. Their analysis therefore understates the impact of the transaction on retransmission fees (by assuming this impact away), while overstating the impact of the transaction on another margin (the likelihood of foreclosure). Economic logic shows that if an NBCU-Comcast merger were to affect parties’ incentives in the way that the Israel and Katz analysis suggests, and if the joint gains from trade are as large as Israel and Katz’ assumptions imply, then it is likely that retransmission fees would increase whether or not withholding becomes more frequent. NBC and MVPDs would negotiate new fees such that it would remain in their mutual interest for the MVPDs to carry NBC.

58. Moreover, the FCC recognizes that application of the FCC Staff model of withholding understates the likely impact from a merger such as that proposed by Comcast and NBC. In the

³⁶ See CRS Report for Congress, “Retransmission Consent and Other Federal Rules Affecting Programmer-Distributor Negotiations: Issues for Congress” (Order Code RL34078), July 9, 2007 p. CRS-13.

³⁷ I use the term “retransmission rate” to include both explicit monetary compensation as well as other terms and conditions associated with retransmission agreement.

Appendix to its Order on the News/Hughes transaction in which it presented the model and described its implications, the FCC wrote the following:

Our analysis of the incentives to temporarily foreclose the local broadcast signals from rival MVPDs is only able to measure the effect of the first benefit, the additional profits that are earned when consumers switch to DirecTV. The effect of the increased credibility of withholding of retransmission on the compensation for retransmission of the local broadcast station's signal is difficult to quantify... Our analysis will provide an estimate of increased incentive and ability that is likely to occur due to the additional profit News Corp. earns when consumers switch from rival MVPDs to DirecTV, as such it is an estimate of the *minimum* increase in incentive and ability to obtain additional compensation from MVPDs.³⁸ (emphasis in original)

B. Israel and Katz Ignore Many Advantages of Using Data On Negotiated Retransmission Rates

59. There are advantages to using data on negotiated retransmission rates to infer departure rates and the implied impact on retransmission fees. One is that this provides much more data from which to evaluate the likely effect of the proposed transaction compared with the relatively few instances of temporary withholding of broadcast signals in general, and of NBC signals in particular.

60. Second, by using data on actual retransmission rates, there is no need to model separately the possibility of temporary and permanent withholding. The observed rates reflect the bargaining positions of the two parties and their implicit ability to deny access to each other's assets, and directly measures the relevant gain to MVPDs and to NBC stations from reaching an agreement.³⁹

61. Third, the framework provides a direct way to estimate how retransmission fees might change as a result of the proposed transaction. Israel and Katz claim to quantify "critical departure rates" necessary for the joint venture to find it profitable to deny competing MVPDs consent to retransmit broadcast signals, but they do not translate those "critical departure rates"

³⁸ *General Motors Corp., Hughes Electronics Corp. and The News Corporation Ltd.*, 19 FCC Rcd. 473, Appendix D, ¶ 12 (2004).

³⁹ My estimates are robust to several changes in the bargaining environment (such as permanent versus temporary withholding) as long as the gain to Comcast is a fixed fraction of the loss to a competing MVPD.

into an impact on payment for retransmission. Indeed, as I explain below, the empirical analysis that Israel-Katz perform to address the question how Comcast's subscribership changed when there were "temporary foreclosure" events affecting a competing MVPD is flawed and does not provide evidence that Comcast did not benefit during those events.

62. Thus, the Israel-Katz analysis does not provide a reasonable picture of how economic outcomes could change after an NBCU-Comcast merger. Their analysis does not account for the increase in retransmission rates that would result from temporary foreclosure. In their model, the value obtained from temporary foreclosure derives exclusively from Comcast's gain of additional subscribers, against which they net out the costs of such foreclosure. However, the motivation for threatening temporary foreclosure is the resulting increase in retransmission rates, a gain that Comcast can achieve when it bears *no* costs if it does not actually foreclose. This is a limitation of how Israel-Katz implemented the FCC's framework – they fail to incorporate the resulting increases in retransmission fees across all the geographic areas where Comcast operates as a factor in NBCU's decision whether to withhold either temporarily or permanently.

63. The merger also affects the incentive to publicize the possibility that programming might possibly be interrupted in the future. In the pre-merger scenario, NBCU gains no direct benefit from such an announcement (and would even lose if viewers value continuity of programming when making viewing choices), since the loss of subscribers to an MVPD provides no direct gain to NBCU. In contrast, news of an impending interruption would provide a direct benefit to Comcast if it prompted subscriber switching to avoid an impending disruption. As such, threats to withhold programming could potentially become more likely post merger.

VI. Katz' Previous Conclusion that Increases In MVPD Competition Led to Higher Retransmission Rates Is Consistent With My Analysis, And Inconsistent With the Conclusions in his Report in this Proceeding

64. On November 12, 2009, Michael Katz (with co-authors Jonathan Orszag and Theresa Sullivan) submitted an economic study to the FCC ("RTC Report") in which he analyzed how outcomes of retransmission rate negotiations would be affected by increased competition among

MVPDs in local markets.⁴⁰ In his RTC Report, Katz offers a framework, similar to the one I presented above, for analyzing negotiations between an MVPD and the owner of a local station for retransmission of the station's signal. According to Katz, retransmission "creates a valuable service to which both sides of the negotiation contribute and from which both potentially benefit,"⁴¹ with the station owner contributing the signal and the MVPD contributing distribution. If the two parties come to terms, this creates "incremental profits derived from additional advertising fees and subscriber fees."⁴² Katz states that "a negotiation over retransmission rights can thus be thought of as a negotiation over *how to divide the pool of incremental profits created by the retransmission of the broadcaster's signal to the MVPD's subscribers*"⁴³ (italics in original), which is the same framework that I presented above. Katz then explains that "under the negotiated agreement, each party will receive an amount equal to its disagreement profits plus some share of the gains from cooperation,"⁴⁴ a share that he later assumes (as is standard in bargaining models and as I do above) equals one-half. Again, this perspective is the same as mine.

65. Katz uses the bargaining framework to explain why economics predicts that retransmission rates would increase as competition among MVPDs has increased. Katz reasons that competition among MVPDs improves a broadcaster's "disagreement point," because subscribers are better able to substitute across the larger number of competing MVPDs, which reduces the broadcaster's potential lost profits from failing to reach agreement with a single MVPD. According to Katz, "[a]s competition among MVPDs has intensified, the relative bargaining strength of MVPDs in negotiations with local broadcast stations has been weakened. Now, an MVPD faces the prospect of losing more subscribers than it previously would have if it is unable to carry local stations. This is so because a subscriber who cannot get a local broadcast station from his MVPD can now go to a different MVPD to receive that signal, as well as other

⁴⁰ Michael L. Katz, Jonathan Orszag, & Theresa Sullivan, *An Economic Analysis of Consumer Harm from the Current Retransmission Consent Regime*, GN Docket No. 09-47 (Nov. 12, 2009) ("Katz 2009 RTC Report").

⁴¹ Katz 2009 RTC Report, ¶ 17.

⁴² Katz 2009 RTC Report, ¶ 17.

⁴³ Katz 2009 RTC Report, ¶ 18.

⁴⁴ Katz 2009 RTC Report, ¶ 20.

programming.”⁴⁵ The higher “disagreement point” increases the amount the broadcaster likely obtains when it negotiates retransmission rights with individual MVPDs. This is similar to the logic that I explained above for why a merger between NBCU and Comcast would improve NBC’s disagreement point and thus increase the amount NBC would receive in retransmission negotiations.

66. Thus, in November 2009, Katz argued that the departure rates associated with the elimination of a local station from an MVPD’s lineup are significant, and he supported his conclusion with his own analysis as well as with citations to other economic studies (including studies by the FCC). Now, however, Katz (with Israel) claims that he finds no empirical evidence of departure. Unlike his current report in support of the Comcast-NBC merger, Katz acknowledged in 2009 how changes in bargaining position caused by changes in competition can affect negotiated retransmission rates. His November 2009 report is consistent both with the analysis I presented above, and with the empirical analysis of Klein et al. {{ }}, which show that departure rates associated with the absence of local network stations from an MVPD’s lineup are significant. If departure rates were as low as Israel and Katz claim in their February 2010 Report, then Katz’ earlier conclusion that increases in competition among MVPDs have caused retransmission negotiations to become more favorable to broadcasters would not hold.

VII. Specific Critiques of the Israel and Katz Implementation and Empirical Analysis

A. Israel and Katz’ Empirical Analysis Is Inconclusive and Does Not Show that Historical Departure Rates Are Extremely Low

67. Israel and Katz attempt to estimate empirically the departure rate associated with elimination of an NBC station from an MVPD’s lineup using historical evidence from a small number of events in which an MVPD lost retransmission rights for broadcast signals. However, their data and methodology likely are not powerful enough to produce a reliable estimate.

68. According to Israel and Katz:

⁴⁵ Katz 2009 RTC Report, ¶ 36.

Our empirical results reveal no statistical evidence to support the proposition that significant numbers of consumers depart an MVPD that is temporarily unable to offer consumers access to a single broadcast network...Our conclusion therefore is that, although there are surely at least some subscriber departures away from a rival MVPD that loses access to a broadcast network such as NBC, the amount of such switching to Comcast is sufficiently small as to be undetectable in Comcast's share data.⁴⁶

69. Thus, Israel and Katz acknowledge that there likely was an impact, but that their data and analysis were insufficient to identify that impact. Israel and Katz perform two related empirical analyses to examine the impact on Comcast's subscribership when a competing MVPD temporarily lost the right to one of the four major broadcast networks. Evidence that Comcast's share of MVPD subscribership in the DMA increased as a result would indicate a positive departure rate from the affected MVPD. However, Israel and Katz have data on only a few episodes in Comcast's territory where an MVPD has access to all but one of the major networks, and most of these are very short periods. Thus, their analysis necessarily is based on a small number of events and their estimated effects are accordingly noisy. A second problem with their analysis is that the change in *Comcast's* share is only an indirect way of assessing the relevant departure rate associated with the affected MVPD. A more direct way of measuring the departure rate associated with, say, the absence of NBC on DISH is to assess how much it affects *DISH's* subscribership or share, not Comcast's (even if that is the ultimate value of interest). These weaknesses make the fact that Israel and Katz find no impact unpersuasive as support for their claim that the departure rate is small or zero.

70. In their first analysis, Israel and Katz use data on four episodes where one of Comcast's competitors lost access to one of the major networks as a consequence of a retransmission rate dispute. Three of these lasted three or fewer days, {{
}}. These episodes likely are uninformative as to the impact of "permanent foreclosure" or a one-month "temporary foreclosure." The fourth dispute (Fisher) lasted for six months and involved several DMAs in the Pacific Northwest where DISH stopped retransmitting Fisher-owned stations. This episode – the same episode that Kunz analyzes as described above – has more relevance in

⁴⁶ Israel-Katz Report ¶ 8.

understanding the departure rate relevant for evaluating the proposed Comcast-NBC merger than the other three disputes. Israel and Katz use data from the three “Fisher DMAs” where Comcast had subscribers: Eugene, Portland, and Seattle. In these DMAs, DISH lost access to one of the four major networks during the dispute.

71. Israel and Katz compare Comcast’s “penetration rate” (the number of subscribers divided by homes passed) in these markets to penetration rates in DMAs in central California unaffected by the dispute. {{

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72. The principal problem with Israel and Katz’s analysis is that their data and methodology may not offer sufficient power {{

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}}. A more reasonable interpretation, and one consistent with the analysis submitted in this proceeding by DISH, is {{

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73. In their second empirical analysis, Israel and Katz analyze the impact on Comcast’s penetration rate of DBS’s introduction of “local-into-local” service into new areas for only three of the four major networks, because the DBS company temporarily had not come to terms with one of the local affiliates. Israel and Katz identified ten “partial local-into-local” episodes, nine of which involved DISH, and only four of which they consider to be “confirmed.” These incidents lasted from one to twenty-two months. Again, they compare the affected DMAs with geographically proximate control DMAs in which there was no change in the availability of “local-into-local” stations during their period of study. {{

}} This suggests that other factors must be driving their empirical results.

74. Israel and Katz’ analysis also fails to consider broader evidence that is informative about the impact at issue here – the change in incentives from Comcast’s acquisition of NBC O&Os. One type of relevant evidence is how DBS companies’ introduction of “full LIL” affected Comcast’s subscriber levels. This evidence may not provide as direct a measure of the effect on an MVPD’s subscribership of eliminating only an NBC station from a competitor’s lineup, but it does offer some indication of the likely effect if, as seems reasonable, broadcast stations are not perfect substitutes.⁴⁹ Looking at events involving introduction of full LIL is useful for estimating the effect on Comcast of a loss of subscribers at another MVPD, because it provides a more powerful signal that can be measured more easily and there is no clear reason why the

⁴⁹ Israel and Katz explored an analysis of full LIL, though their analysis focused only on six DMAs and is not explained in any detail. They report that full LIL {{ on Comcast’s share of homes passed. See, Israel-Katz Report fn 125.

pattern of subscriber loss (i.e., the competing MVPDs to which the lost subscribers would move) would be different for full LIL and partial LIL.

B. Israel and Katz' Analysis of GE's Incentives With Respect to Foreclosure Strategies Is Incorrect

75. Israel and Katz note that GE will retain a 49 percent ownership interest in NBCU under the terms of the proposed transaction, and argue that this reduces (even eliminates) the likelihood that NBCU-Comcast will engage in foreclosure strategies. They claim that GE would bear some of the costs, but obtain none of the benefits, from foreclosure, because any net benefit to Comcast results from a sacrifice of NBCU's revenues from broadcast advertising and retransmission rights in order to obtain higher Comcast revenues from subscribers (in which GE does not share). Israel and Katz claim that, "as long as it has a significant stake in NBCU, GE has strong incentives to protect its ownership interest by seeing that the joint venture does not engage in costly foreclosure strategies, regardless of the benefits to Comcast Cable."⁵⁰ Later in their analysis, Israel and Katz state that "one could argue that this makes foreclosure impossible," and they suggest that the proper weight on MVPD profits in their application of the FCC model is zero.

76. Israel and Katz' analysis is incorrect. If foreclosure is profitable and in the joint financial interest of NBCU and Comcast, then Comcast and GE have an incentive to reach an agreement whereby GE is better off than without foreclosure. This could be done through agreement on other transactions between the entities. For example, Comcast could agree to more generous terms in retransmission negotiations with NBCU's O&Os, permitting an effective transfer of a portion of the incremental foreclosure-related profits from its MVPD business to NBCU and thus GE. It is in GE's interest to agree to foreclosure strategies that are jointly profitable for NBCU and Comcast, and then share in the incremental profits. GE's ownership interest in NBCU does not make foreclosure "impossible," as Israel and Katz suggest. The most reasonable assumption for the proper weight on MVPD profits in Israel and Katz' application of the FCC model is one,

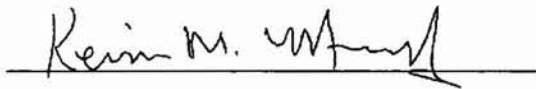
⁵⁰ Israel-Katz Report ¶ 16.

not zero,⁵¹ and there is no economic reason to make any adjustment to take into account GE's stake in NBCU. Moreover, the terms of the deal between NBCU and Comcast give Comcast the right to acquire all of GE's interest in NBCU over the next several years. If constraints from GE's minority stake prevent joint profit maximization by Comcast and NBCU, having Comcast acquire the remaining stake from GE would be a natural solution.

⁵¹ Former FCC chief economist William Rogerson made a similar argument in his economic analysis of the News-DIRECTV transaction. *See*, Rogerson Report, *supra* note 10.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed this 21 day of June, 2010.

A handwritten signature in cursive script, appearing to read "Kevin M. Murphy", is written over a horizontal line.

Kevin M. Murphy

APPENDIX A

ESTIMATE OF k

1. As described in the text, k is one divided by the share of the decline in profits that is accounted for by the decrease in the number of MVPD₁ subscribers, holding price constant. The total decline in profits can be written as:

$$(1) P_1(N = 1)Q_1(N = 1) - P_1(N = 0)Q_1(N = 0)$$

Adding and subtracting $P_1(N = 1)Q_1(N = 0)$ from this expression and rearranging, one obtains a decomposition where the first term represents the impact on profits from the decrease in the number of subscribers, and the second term represents the impact on profits from the decrease in the price the MVPD charges subscribers.

$$(2) P_1(N = 1)[Q_1(N = 1) - Q_1(N = 0)] + Q_1(N = 0)[P_1(N = 1) - P_1(N = 0)]$$

Dividing by $Q_1(N = 1)$, one obtains:

$$(3) P_1(N = 1) \left[1 - \frac{Q_1(N=0)}{Q_1(N=1)} \right] + \frac{Q_1(N=0)}{Q_1(N=1)} [P_1(N = 1) - P_1(N = 0)]$$

2. Both Klein et al. and Kunz provide data from which I can estimate k . As I discussed above, Klein et al.'s estimates imply $\{ \{$

$\} \}$, relative to a situation where DIRECTV

was the only MVPD not to offer local channels. Klein et al., report that DIRECTV charged \$3 per subscriber for local channels, that $\{ \{$ percent of existing DIRECTV subscribers chose to receive local channels and assumed that $\{ \{$ DIRECTV subscribers elect to subscribe to the local channels.⁵² Following Klein et al.'s estimates and assumptions, I assume $\frac{Q_1(N=0)}{Q_1(N=1)}$

$\{ \{$ $\} \}$, and $[P_1(N = 1) - P_1(N = 0)] = \{ \{$ $\} \}$. I adopt the

same assumption as in the text for MVPD margin – that $P_1(N = 1) = \{ \{$ $\} \}$. By

substituting these values into Equation (3), I obtain:

⁵² Klein et al. ¶ 33, ¶ 35, and fn 17.

{{ }}

The first term, or {{ }}, is the portion of the increase that is attributable to the increase in subscribership. This is {{ }}, and yields an estimate of k of {{ }}.

3. {{

}}

The first term is the portion of the increase that is accounted for by the increase in subscribership. This is {{ }}, and yields {{ }}.

⁵³ "*Declaration of Vincent Kunz*," submitted on behalf of DISH Networks LLC, June 7, 2010 ¶ 6 and ¶ 24.

ATTACHMENT 1
CURRICULUM VITAE OF PROFESSOR KEVIN M. MURPHY

Curriculum Vitae

Kevin M. Murphy

June 2010

Business Address:

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Education

University of California, Los Angeles, A.B., Economics, 1981
University of Chicago, Ph.D., 1986
Thesis Topic: *Specialization and Human Capital*

Honors and Awards

2008: John von Neumann Lecture Award, Rajk College, Corvinus University, Budapest
2007: Kenneth J. Arrow Award (with Robert H. Topel)
October 2005: Garfield Research Prize (with Robert H. Topel)
September 2005: MacArthur Foundation Fellow
1998: Elected to the American Academy of Arts & Sciences
1997: John Bates Clark Medalist
1993: Fellow of The Econometric Society
1989 – 1991: Sloan Foundation Fellowship, University of Chicago
1983 – 1984: Earhart Foundation Fellowship, University of Chicago
1981 – 1983: Fellowship, Friedman Fund, University of Chicago
1980 – 1981: Phi Beta Kappa, University of California, Los Angeles
1980 – 1981: Earhart Foundation Fellowship, University of California, Los Angeles
1979 – 1981: Department Scholar, Department of Economics, University of California, Los Angeles

Angeles

Other Affiliations Faculty Research Associate, National Bureau of Economic Research

Research and Academic Positions

July 2005: Present: George J. Stigler Distinguished Service Professor of Economics, Department of Economics and Booth School of Business, University of Chicago

2002: George J. Stigler Professor of Economics, Department of Economics and Booth School of Business, University of Chicago

1993 – 2002: George Pratt Shultz Professor of Business Economics and Industrial Relations, University of Chicago

1989 – 1993: Professor of Business Economics and Industrial Relations, University of Chicago

1988 – 1989: Associate Professor of Business Economics and Industrial Relations, University of Chicago

1986 – 1988: Assistant Professor of Business Economics and Industrial Relations, University of Chicago

1983 – 1986: Lecturer, Booth School of Business, University of Chicago

1982 – 1983: Teaching Associate, Department of Economics, University of Chicago

1979 – 1981: Research Assistant, Unicon Research Corporation, Santa Monica, California

Publications

Books

Social Economics: Market Behavior in a Social Environment with Gary S. Becker, Cambridge, MA: Harvard University Press (2000).

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Final Submission of Kevin M. Murphy, January 30, 2006, in the 2003 MSA Adjustment Proceeding.

Expert Rebuttal Report of Kevin M. Murphy, April 7, 2006, in High Pressure Laminates Antitrust Litigation, United States District Court for the Southern District of New York. Case No. 00-MD-1368 (CLB).

Deposition of Kevin M. Murphy, April 21, 2006, in High Pressure Laminates Antitrust Litigation, United States District Court for the Southern District of New York. Case No. 00-MD-1368 (CLB).

Trial Testimony of Kevin M. Murphy, May 16-17, 2006, in High Pressure Laminates Antitrust Litigation, United States District Court for the Southern District of New York. Case No. 00-MD-1368 (CLB).

Expert Report of Kevin M. Murphy, May 26, 2006, in Barbara Schwab, et al. v. Philip Morris USA Inc., et al., Eastern District of New York. Case No. CV-0401945.

Initial Submission of Kevin M. Murphy, August 7, 2006, in the 2004 MSA Adjustment

Proceeding.

Trial Testimony of Kevin M. Murphy, August 16-17, 2006, in *Applied Medical v. Ethicon, Inc., et al.*, United States District Court for the Central District of California. Case No. SACV 03-1329.

Expert Report of Kevin M. Murphy, August 28, 2006, in *Barbara Schwab, et al. v. Philip Morris USA Inc., et al.*, United States District Court for the Eastern District of New York. Case No. CV-0401945.

Final Submission of Kevin M. Murphy, December 8, 2006, in the 2004 MSA Adjustment Proceeding.

Expert Report of Kevin M. Murphy, December 11, 2006, *Tucker et al. v. Walgreens*, United States District Court for the Southern District of Illinois. Case No. 05-CV-440-GPM.

Supplemental Expert Report of Kevin M. Murphy, February 16, 2007, in *Conmed Corp. v. Ethicon, Inc., et al.*, United States District Court for the Southern District of New York. Case No. 03-CV-8800.

Expert Report of Kevin M. Murphy, June 4, 2007, in *Eolas Technologies Inc. and The Regents of the University of California v. Microsoft Corporation*, United States District Court for the Northern District of Illinois Eastern Division. Case No. 99-C-0626.

Expert Report of Kevin M. Murphy, July 2, 2007, in *Boston Scientific Corporation, Boston Scientific Scimed, Inc., Scimed Life Systems, Inc., and Schneider (Europe) GMBH v. Johnson & Johnson and Cordis Corporation*, The United States District Court for the Northern District of California San Francisco Division. Case No. C 02-790 SI.

Expert Report of Kevin M. Murphy, July 9, 2007, in *FTC v. Whole Foods Market, Inc. and Wild Oats Markets, Inc.*, United States District Court for the District of Columbia. Case No. 1:07-CV-01021-PLF.

Rebuttal Expert Report of Kevin M. Murphy, July 13, 2007, in *FTC v. Whole Foods Market, Inc. and Wild Oats Markets, Inc.* United States District Court for the District of Columbia. Case No. 1:07-CV-01021.

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Expert Report of Kevin M. Murphy, February 1, 2008, in the Matter of Allied Orthopedic Appliances, Inc., v. Tyco Healthcare Group L.P., The United States District Court for the Central District of California Western District.

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Central District of California Western District.

Expert Report of Kevin M. Murphy, March 7, 2008, in the Matter of Sun Microsystems, Inc., et al. v. Hynix Semiconductor, Inc., et al. (Consolidated), Unisys Corporation v. Hynix Semiconductor, Inc., et al., Jaco Electronics, Inc. v. Hynix Semiconductor, Inc., et al., Edge Electronics, Inc. v. Hynix Semiconductor, Inc., et al., All American Semiconductor, Inc. v. Hynix Semiconductor, Inc., et al., DRAM Claims Liquidation Trust, by its Trustee Wells Fargo Bank, NA Hynix Semiconductor, et al., The United States District Court for the Northern District of California San Francisco Division.

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Expert Report of Kevin M. Murphy, October 29, 2008, in the Matter of Fair Issac Corporation; and myFICO Consumer Services, Inc. vs. Equifax, Inc.; Equifax Information Services LLC; Experian Information Solutions Inc.; TransUnion, LLC; VantageScore Solutions LLC; and Does I through X.

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Solutions LLC; and Does I through X.

Deposition of Kevin M. Murphy, December 15, 2008, in the Matter of Insignia Systems, Inc. v. News America Marketing In-Store, Inc.

Rebuttal Expert Report of Kevin M. Murphy, December 26, 2008, in the Matter of Valassis Communications, Inc. v. News America Incorporated, a/k/a News America Marketing Group, News America FSI, Inc. a/k/a News America Marketing FSI, LLC and News America Marketing In-Store Services, Inc. a/a/a News American Marketing In-Store Services, LLC., The United States Third Circuit Court of Michigan Detroit Division. Case No. 07-706645.

Final Submission of Kevin M. Murphy, January 16, 2009, in the 2006 MSA Adjustment Proceeding.

Expert Report of Kevin M. Murphy, January 23, 2009, in the Matter of City of New York v. Amerada Hess Corp., et al., The United States District Court for the Southern District of New York. Report submitted on behalf of Citgo Petroleum Corporation.

Declaration of Kevin M. Murphy, January 29, 2009, in the Matter of Insignia Systems, Inc. v. News America Marketing In-Store, Inc.

Deposition of Kevin M. Murphy, February 10, 2009, in the Matter of Valassis Communications, Inc. v. News America Incorporated, a/k/a News America Marketing Group, News America FSI, Inc. a/k/a News America Marketing FSI, LLC and News America Marketing In-Store Services, Inc. a/a/a News American Marketing In-Store Services, LLC., The United States Third Circuit Court of Michigan Detroit Division. Case No. 07-706645.

Expert Report of Kevin M. Murphy, February 13, 2009, in the Matter of City of New York v. Amerada Hess Corp., et al., The United States District Court for the Southern District of New York. Report submitted on behalf of Citgo Petroleum Corporation regarding Citgo's share of total RFG supply at the New York Harbor.

Expert Report of Kevin M. Murphy, March 3, 2009, in the Matter of St. Francis Medical Center, on behalf of itself and all others similarly situated vs. C.R. Bard, Inc.

Deposition of Kevin M. Murphy, March 6, 2009, in the Matter of St. Francis Medical Center, on behalf of itself and all others similarly situated vs. C.R. Bard, Inc.

Expert Report of Kevin M. Murphy, March 17, 2009, in the Matter of ZF Meritor LLC and

Meritor Transmission Corporation v. Eaton Corporation., The United States District Court of Delaware. Case No. 06-CV-623.

Deposition of Kevin M. Murphy, April 6, 2009, in the Matter of ZF Meritor LLC and Meritor Transmission Corporation v. Eaton Corporation., The United States District Court of Delaware. Case No. 06-CV-623.

Declaration of Kevin M. Murphy, April 16, 2009, in the Matter of Sun Microsystems, Inc., a California corporation v. Hynix Semiconductor Inc., et al.

Declaration of Kevin M. Murphy, April 23, 2009, in the Matter of Sun Microsystems, Inc., a California corporation v. Hynix Semiconductor Inc., a Korean corporation, Hynix Semiconductor America Inc., a California corporation, et al.

Expert Report of Kevin M. Murphy, May 11, 2009, in the Matter of Jim Hood, Attorney General ex rel State of Mississippi v. Microsoft Corporation.

Expert Report of Professor Kevin M. Murphy, June 12, 2009, in the Matter of CITGO Petroleum Corporation v. Ranger Enterprises, Inc., United States District Court for the Western District of Wisconsin.

Expert Report of Kevin M. Murphy, June 24, 2009, in the Matter of Novell, Incorporated v. Microsoft Corporation.

Trial Testimony of Kevin M. Murphy, July 16, 2009, in the Matter of Valassis Communications, Inc. v. News America Incorporated, a/k/a News America Marketing Group, News America FSI, Inc. a/k/a News America Marketing FSI, LLC and News America Marketing In-Store Services, Inc. a/a/a News American Marketing In-Store Services, LLC., The United States Third Circuit Court of Michigan Detroit Division. Case No. 07-706645.

Declaration of Kevin M. Murphy, August 14, 2009, in the Matter of Ebay Seller Antitrust Litigation., United States District Court for the Northern District of California. Declaration submitted in support of defendant Ebay Inc.'s motion for summary judgment.

Expert Report of Kevin M. Murphy, August 21, 2009, in the Matter of Go Computer, Inc., and S. Jerrold Kaplan v. Microsoft Corporation.

Deposition of Kevin M. Murphy, September 16, 2009, in the Matter of Novell, Incorporated v. Microsoft Corporation.

Deposition of Kevin M. Murphy, September 21, 2009, in the Matter of Ebay Seller Antitrust Litigation., United States District Court for the Northern District of California. Deposition in support of defendant Ebay Inc.'s motion for summary judgment.

Expert Report of Kevin M. Murphy, September 29, 2009, in the Matter of Motor Fuel Temperature Sales Litigation., The United States District Court of Kansas. Case No. 07-MD-1840 (MDL 1840).

Trial Testimony of Kevin M. Murphy, October 1, 2009, in the Matter of ZF Meritor LLC and Meritor Transmission Corporation v. Eaton Corporation., The United States District Court of Delaware. Case No. 06-CV-623.

Declaration of Kevin M. Murphy, October 16, 2009, in the Matter of Ebay Seller Antitrust Litigation., United States District Court for the Northern District of California. Declaration in further support of defendant Ebay Inc.'s motion for summary judgment.

Expert Report of Kevin M. Murphy, October 20, 2009, in the Matter of Advanced Micro Devices, Inc., and AMD International Sales & Service, LTD v. Intel Corporation and Intel Kabushiki Kaisha., United States District Court for the District of Delaware.

Deposition of Kevin M. Murphy, October 24, 2009, in the Matter of Go Computer, Inc., and S. Jerrold Kaplan v. Microsoft Corporation.

Deposition of Kevin M. Murphy, October 26, 2009, in the Matter of Motor Fuel Temperature Sales Litigation., The United States District Court of Kansas. Case No. 07-MD-1840 (MDL 1840).

Expert Report of Kevin M. Murphy, December 14, 2009, in the Matter of Payment Card Interchange Fee and Merchant Discount Antitrust Litigation in the U.S. District Court for the Eastern District of New York.

Supplemental Expert Report of Kevin M. Murphy, December 21, 2009, in the Matter of Valassis Communications, Inc. v. News America Incorporated, a/k/a News America Marketing Group, News America FSI, Inc. a/k/a News America Marketing FSI, LLC and News America Marketing In-Store Services, Inc. a/a/a News American Marketing In-Store Services, LLC., The United States Third Circuit Court of Michigan Detroit Division. Case No. 07-706645.

Trial Testimony of Kevin M. Murphy, January 11, 2010, in the Matter of Go Computer, Inc., and S. Jerrold Kaplan v. Microsoft Corporation.

Supplemental Rebuttal Expert Report of Kevin M. Murphy, January 14, 2010, in the Matter of Valassis Communications, Inc. v. News America Incorporated, a/k/a News America Marketing Group, News America FSI, Inc. a/k/a News America Marketing FSI, LLC and News America Marketing In-Store Services, Inc. a/a/a News American Marketing In-Store Services, LLC., The United States Third Circuit Court of Michigan Detroit Division. Case No. 07-706645.

Deposition of Kevin M. Murphy, January 26, 2010, in the Matter of Valassis Communications, Inc. v. News America Incorporated, a/k/a News America Marketing Group, News America FSI, Inc. a/k/a News America Marketing FSI, LLC and News America Marketing In-Store Services, Inc. a/a/a News American Marketing In-Store Services, LLC., The United States Third Circuit Court of Michigan Detroit Division. Case No. 07-706645.

Declaration of Kevin M. Murphy, January 28, 2010, in the Matter of Automobile Antitrust Cases I and II.

Declaration of Kevin M. Murphy, April 2, 2010, in the Matter of the Application for the Determination of Interim License Fees for The Cromwell Group, Inc. and Affiliates, et al.

Deposition of Kevin M. Murphy, April 13-14, 2010, in the Matter of Payment Card Interchange Fee and Merchant Discount Antitrust Litigation in the U.S. District Court for the Eastern District of New York.

Supplemental Expert Report of Kevin M. Murphy, June 8, 2010, in the Matter of Valassis Communications, Inc. v. News America Incorporated, a/k/a News America Marketing Group, News America FSI, Inc. a/k/a News America Marketing FSI, LLC and News America Marketing In-Store Services, Inc. a/a/a News American Marketing In-Store Services, LLC., The United States Third Circuit Court of Michigan Detroit Division. Case No. 07-706645.

REDACTED – FOR PUBLIC INSPECTION

EXHIBIT B

**Before the
AMERICAN ARBITRATION ASSOCIATION**

In the Matter of Arbitration Between

_____)

Claimant,)

-and-)

_____)

Respondent.)

Case No. _____
_____, Arbitrator

CONFIDENTIALITY AGREEMENT AND PROTECTIVE ORDER

1. This Confidentiality Agreement and Protective Order (the "Agreement") is intended to protect trade secrets and other commercially sensitive confidential information contained in (i) documents that are produced, given or exchanged by and among the Parties, or produced by non-parties, and deposition testimony provided, as part of discovery in the Proceeding, and (ii) documents and testimony submitted as part of the record in the course of the Proceeding or any review of the Proceeding by the Commission or a court of competent jurisdiction.

2. Definitions.

(a) Arbitrator. "Arbitrator" means _____, or any successor arbitrator assigned to this proceeding.

(b) Authorized Representative. "Authorized Representative" means an individual who has signed and filed a Declaration in the form of Attachment A to this Agreement and is one of the following:

- (i) Outside Counsel of Record for a Reviewing Party to this Proceeding, or any associated attorney, paralegal, clerical staff member or other employee of Outside Counsel of Record's law firm reasonably necessary to render professional services in this Proceeding;
- (ii) Outside Experts engaged by a Reviewing Party to this Proceeding, or any associated clerical or support staff member or other employee of the Outside

Expert's firm reasonably necessary to render professional services in this Proceeding; and

- (iii) the Arbitrator, or any associated clerical or support staff member or other employee reasonably necessary to render professional services in this Proceeding.

(c) Commission. "Commission" means the Federal Communications Commission or any bureau or subdivision of the Commission acting pursuant to delegated authority.

(d) Confidential Information. "Confidential Information" means information, whether in oral or written form, so designated by a Designating Party (hereinafter defined) upon a determination in good faith that such information constitutes trade secrets or commercial or financial information privileged or confidential within the meaning of Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4) or any other *bona fide* claim of right or privilege. Confidential Information includes additional copies of, notes regarding, and information derived from Confidential Information. Confidential Information also includes transcripts of hearing sessions to the extent described in Paragraphs 5 and 6. Terms of this Agreement referring to Confidential Information apply equally as to Highly Confidential Information (defined below).

(e) Declaration. "Declaration" means a sworn declaration in the form of Attachment A to this Agreement.

(f) Designating Party. "Designating Party" means a person or entity that seeks confidential treatment pursuant to this Agreement for Confidential Information submitted in this Proceeding.

(g) Highly Confidential Information. "Highly Confidential Information" means Confidential Information so designated by a Designating Party upon a determination in good faith that such information would, if disclosed to a current or potential counterparty or competitor of the Designating Party, significantly disadvantage the current or future negotiating or competitive position of the Designating Party or any other party to this Agreement. Highly Confidential Information includes additional copies of, notes regarding, and information derived from, Highly Confidential Information. Highly Confidential Information includes, without limitation, the Protected Third Party Agreements (as defined below).

(h) Outside Counsel of Record. "Outside Counsel of Record" means the firms of attorneys, or sole practitioners, as the case may be, representing the Parties in this Proceeding, including their attorneys, paralegals, clerical staff and other employees of outside counsel, and vendors reasonably necessary to render professional services in this Proceeding. For the avoidance of doubt, Outside Counsel of Record shall exclude any employee of any of the Parties and includes the following law firms only:

[Insert Firm Name]

[Insert Firm Name]

(i) Outside Expert. “Outside Expert” means a person who, in addition to any other work for the Reviewing Party or others, is retained or employed as a *bona fide* expert to furnish testimony and/or technical or other expert advice or service, or who is otherwise engaged to prepare material for the express purpose of participating in this Proceeding, whether full or part time, by or at the direction of the Reviewing Party’s Outside Counsel of Record, as well as personnel associated with such person who provide support or clerical services or other employees of such expert’s firm reasonably necessary to render professional services in this Proceeding. For the avoidance of doubt, Outside Expert shall exclude any employee of any of the Parties.

(j) Parties. The “Parties” to this Proceeding are _____.
No other entity or natural person may become a Reviewing Party in this Proceeding absent the express, written consent of all of the Parties and the express, written authorization of each signatory hereto. No entity or natural person other than one of the Parties or a non-party who produces documents or gives testimony in this Proceeding may become a Designating Party in this Proceeding absent the express, written consent of all of the Parties and the express, written authorization of each signatory hereto.

(k) Reviewing Party. “Reviewing Party” means a Party whose Authorized Representative has signed a Declaration.

(l) Proceeding. “Proceeding” means only the proceeding to arbitrate the dispute between the Parties, known as Case No. _____, currently pending before the American Arbitration Association, and does not include the arbitration or adjudication of any other complaint or matter.

(m) Protected Third Party. “Protected Third Party” shall mean any entity other than the Parties that agrees in writing with the Parties to produce information for this Proceeding as a Designating Party subject to the terms of this Agreement.

(n) Protected Third Party Agreements. “Protected Third Party Agreements” shall mean agreements, together with any term sheets, amendments, extensions, modifications, addenda, and other agreements related thereto, between any Party and any Protected Third Party (or any subsidiaries or affiliates thereof).

3. Claim of Confidentiality. A Designating Party shall, prior to disclosing to any other party any Confidential Information, designate such information (excluding Highly Confidential Information) by placing the legend “CONFIDENTIAL” in a conspicuous place on the front page (or other appropriate place) of each document, record, or other material containing such information. The inadvertent failure to designate a document or data as Confidential Information

does not constitute a waiver of such claim and may be corrected by supplemental written notice at any time, accompanied by a copy of the document or data bearing the appropriate legend, with the effect that such document or data shall be subject to the protections of this Agreement from the time it is designated as Confidential Information.

4. Procedures for Claiming Documents and Data Are Highly Confidential.

(a) Documents or data comprising Protected Third Party Agreements (or any material contained therein or any copies or derivative works thereof) or other Highly Confidential Information shall be designated as Highly Confidential Information for purposes of this Agreement by affixing the legend “HIGHLY CONFIDENTIAL INFORMATION SUBJECT TO CONFIDENTIALITY AGREEMENT AND PROTECTIVE ORDER IN CASE NO. _____” to the front page of the document or, for data, to the outside of the container or medium in which the data is produced. A Designating Party shall, prior to disclosing to any other party any Highly Confidential Information, ensure that any Reviewing Party (and any representative thereof) is authorized under this Agreement to receive such Highly Confidential Information (including, without limitation, that such Receiving Party has executed the Declaration and that any applicable waiting period has expired). The inadvertent failure to designate a document or data as Highly Confidential Information does not constitute a waiver of such claim and may be corrected by supplemental written notice at any time, accompanied by a copy of the document or data bearing the appropriate legend, with the effect that such document or data shall be subject to the protections of this Agreement from the time it is designated as Highly Confidential Information.

(b) Highly Confidential Information submitted in writing to the Arbitrator shall be filed under seal and shall bear on the front page in bold print, “HIGHLY CONFIDENTIAL INFORMATION SUBJECT TO CONFIDENTIALITY AGREEMENT AND PROTECTIVE ORDER IN CASE NO. _____.” Such filings shall also comply with Paragraph 13 of this Agreement.

5. Confidential Information in Deposition Testimony, Oral Hearing Testimony and Oral Argument. If any Reviewing Party desires to include, utilize, or refer to any Highly Confidential Information in testimony or exhibits during the Proceeding or during a deposition in such a manner that might require disclosure of such material, it shall serve such Highly Confidential Information in a manner reasonably calculated to ensure that its confidentiality is maintained. Examination of a witness, or other oral presentation, concerning Highly Confidential Information shall be conducted in camera and closed to all persons except Authorized Representatives of Reviewing Parties and the Arbitrator, a witness then testifying, and any reporter engaged to transcribe the Proceeding. Persons present at the Proceeding may not disclose any Highly Confidential Information to any person that is not an Authorized Representative of a Reviewing Party, except that Highly Confidential Information may be used with a witness that has prior knowledge of such information obtained through lawful means.

6. Designation of Confidential Information in Transcripts.

(a) Deposition testimony relating to Protected Third Party Agreements or other Highly Confidential Information shall be designated as Highly Confidential Information by (i) a statement on the record, by counsel, at or before the conclusion of the deposition, or (ii) by written notice, sent by counsel to all parties within five (5) business days after the receipt of the preliminary transcript of the deposition. All deposition testimony shall be considered Highly Confidential Information until five (5) business days from the receipt by counsel of the preliminary transcript, so as to allow for possible designation under subparagraph (a)(ii).

(b) Any portion of the transcripts of oral testimony and oral argument during the Proceeding shall be considered Highly Confidential Information, unless otherwise expressly agreed to by all of the parties to this Agreement whose Highly Confidential Information is contained in any such transcript. The reporter of the Proceeding shall not provide transcripts to anyone other than Outside Counsel of Record for the Parties in this Proceeding and the Arbitrator.

7. Storage of Confidential Information at the Commission. The Arbitrator and any other person to whom Highly Confidential Information is provided shall place the Highly Confidential Information in a non-public file. Highly Confidential Information shall be segregated in the files of the Arbitrator, and shall be withheld from inspection by any person not bound by the terms of this Agreement, unless such Highly Confidential Information is released to the Commission or a court of competent jurisdiction pursuant to paragraphs 11 and 18 hereto.

8. Access to Confidential Information and Highly Confidential Information.

(a) Other than in accordance with Paragraphs 5, 11, and 18 of this Agreement, Confidential Information may be disclosed, summarized, described, characterized or otherwise communicated or made available in whole or in part only to Authorized Representatives. Before an Authorized Representative may obtain any access to Highly Confidential Information, such person must execute a Declaration.

(b) Notwithstanding anything herein to the contrary, Protected Third Party Agreements or summaries, descriptions, or characterizations of the substance thereof shall not be disclosed to any in-house personnel of a Party, including, but not limited to, any in-house counsel.

(c) Except as otherwise provided in this paragraph, Confidential Information shall not be disclosed to any other person. All persons who obtain Confidential Information in this Proceeding shall ensure that access to that Confidential Information is strictly limited as prescribed in this Agreement and is used only as provided in this Agreement. For the avoidance of doubt, all persons who obtain any Highly Confidential Information in this Proceeding shall comply with the procedures prescribed in paragraphs 4-13 of this Agreement concerning the ongoing designation and use of Highly Confidential Information as such, including, without

limitation, any testimony, transcripts, pleadings, or documents containing or derived from Highly Confidential Information.

(d) Prior to the disclosure of any Protected Third Party Agreement, a Protected Third Party may redact certain portions of such Protected Third Party Agreement (i) that are not relevant to this Proceeding; or (ii) to the extent relevant, as necessary to assure the highest level of confidentiality practicable to protect the Protected Third Party's confidential and proprietary information to the extent not inconsistent with the purposes of this Proceeding. Notwithstanding the foregoing, no Protected Third Party shall redact the terms of a Protected Third Party Agreement that relate to pricing (including surcharges, rebates, or other consideration (monetary or otherwise)), packaging, minimum content, or most-favored-nation protections.

(e) Highly Confidential Information shall only be disclosed to an Outside Expert according to the terms of this subparagraph. If Highly Confidential Information is disclosed to an Outside Expert, for the period extending from the date of the disclosure until [date two years from today], such Outside Expert will not work for any [regional sports network, broadcaster, national programmer, etc.], in connection with securing distribution on any of the Parties' systems; nor, for such period, shall such Outside Expert work for any party (i) in connection with any agreement for the distribution by a multichannel video programming distributor ("MVPD") of programming owned by a Protected Third Party; or (ii) in connection with a negotiation for acquisition of programming or distribution rights in situations where a Protected Third Party also is interested in acquiring or selling the relevant programming (regardless of whether the Protected Third Party previously had any rights to carry or license such programming). Before any Highly Confidential Information is disclosed to any such Outside Expert, each Outside Expert so retained or employed shall sign and file a Declaration to confirm that he or she has read this subparagraph, meets the requirements of this subparagraph, and is bound by the obligations set forth herein. Such Declaration shall be provided to the Parties and the Protected Third Party. Nothing in this paragraph shall preclude an Outside Expert from advising, assisting, or otherwise participating on behalf of a Reviewing Party or a Protected Third Party in future arbitrations or program access proceedings that are not adverse to a Protected Third Party (except for any Protected Third Party that is owned by, affiliated with, or under common ownership with a Reviewing Party) and that are initiated by any MVPD (and any following proceedings at the FCC or in federal court) relating to [RSN carriage agreements, retransmission consent agreements, national programming carriage agreements, etc.], subject to any and all restrictions on the use of confidential information applicable in this, as well as any such future, arbitration or proceeding.

(f) If Highly Confidential Information is disclosed to a person who is Outside Counsel of Record, and such person subsequently becomes an employee of any Party or Protected Third Party, such person shall not be allowed to work for such Party or Protected Third Party (i) in connection with any agreement for the distribution of the programming of a Protected Third Party by an MVPD; or (ii) in connection with a negotiation for acquisition of programming or distribution rights in situations where a Protected Third Party also is interested in acquiring or

selling the relevant programming (regardless of whether Protected Third Party previously had any rights to carry or license such programming) until [date two years from today]. Nothing in this paragraph shall preclude such counsel from advising, assisting, or otherwise participating on behalf of a Reviewing Party in future arbitrations or program access proceedings initiated by any MVPD (and any following proceedings at the FCC or in federal court) relating to [RSN carriage agreements, retransmission consent agreements, national programming agreements, etc.], subject to any and all restrictions on the use of confidential information applicable in this, as well as any such future, arbitration or proceeding.

9. Procedures for Obtaining Access to Confidential Information or Highly Confidential Information. In all cases where access to Confidential Information or Highly Confidential Information by Authorized Representatives is permitted pursuant to Paragraph 8, before reviewing or having access to any Confidential Information or Highly Confidential Information, each person seeking such access shall execute a Declaration, file it with the Arbitrator, and serve it upon the parties hereto by email through their counsel (as identified in the signature block hereto).

10. Disclosure of Confidential Information or Highly Confidential Information. An Authorized Representative may disclose Confidential Information or Highly Confidential Information only to other Authorized Representatives to whom disclosure is permitted under this Agreement.

11. Additional Disclosure. If any Party to this Proceeding seeks review of any decision or order issued by the Arbitrator before the Commission or a court of competent jurisdiction, such Party shall notify the Commission or such court of the existence and terms of this Agreement. In the event of an appeal to the Commission or a court, the unredacted version of any decision or order or pleading containing Highly Confidential Information shall not be filed unless reasonably necessary, in which case, prior to such disclosure, the Parties shall (i) cooperate to have the Highly Confidential Information sealed and any proceedings on review closed; and (ii) seek confidential treatment of such Highly Confidential Information to the maximum extent possible, including, without limitation, treatment in accordance with Sections 0.442 and 0.461 of the Commission's rules, 47 C.F.R. §§ 0.442, 0.461. In addition, a Party submitting Highly Confidential Information to the Commission or a court shall mark and identify such Highly Confidential Information in a manner consistent with Paragraph 13 hereof so as to alert the Commission or court that it is receiving Highly Confidential Information subject to this Agreement.

12. Use of Confidential Information and Highly Confidential Information. Confidential Information and Highly Confidential Information shall be used solely for the preparation and conduct of this Proceeding; shall not be used for any other purpose (including but not limited to competitive business purposes); and shall not be disclosed except in accordance with this Agreement. This Agreement shall not preclude the use of any material or information that is in the public domain or has been developed independently by any other person who has not had access to Confidential Information or Highly Confidential Information nor otherwise learned of

its contents through this Proceeding. Should the Arbitrator rely upon or otherwise make reference to the contents of any of the Highly Confidential Information in his decision in this Proceeding, he will do so by redacting any Highly Confidential Information from the version of his decision made available to the Parties (other than Outside Counsel of Record) and by making the unredacted version of the decision available only to the Commission or a court of competent jurisdiction in accordance with paragraph 11 hereof, and to those persons entitled to access to Highly Confidential Information under this Agreement.

13. Pleadings or Filings Using Highly Confidential Information. Parties may, in any pleadings or other documents that they file in this Proceeding, reference Highly Confidential Information, but only if they comply with the following procedures:

(a) Any portions of the filings that contain or disclose Highly Confidential Information must be physically segregated from the remainder of the filings and filed under seal in accord with the remainder of this paragraph. This requirement is satisfied when a Party files (1) a redacted version of the document; and (2) a non-public version of the document (of which only one copy should be filed) that contains the Highly Confidential Information and bears the legend set forth in Paragraph 13(c);

(b) The portions or versions of pleadings containing or disclosing Highly Confidential Information must designate the specific portions of the pleading containing such Highly Confidential Information;

(c) The cover page and each page of any Party's filing that contains or discloses Highly Confidential Information subject to this Agreement must be clearly marked: "HIGHLY CONFIDENTIAL INFORMATION SUBJECT TO CONFIDENTIALITY AGREEMENT AND PROTECTIVE ORDER IN CASE NO. _____"; and

(d) The Highly Confidential version of the pleading, to the extent it is required to be served, shall be served upon the Arbitrator and Outside Counsel of Record that have signed the Declaration. Such Highly Confidential versions shall be filed under seal, and shall not be placed in any public file or shared with any other party or person, except as expressly provided by this Agreement. Except as provided above, Parties may not provide courtesy copies of pleadings containing Highly Confidential Information to any other person.

14. Client Consultation. Nothing in this Agreement shall prevent or otherwise restrict Outside Counsel of Record from rendering advice to their clients relating to the conduct of this Proceeding or any subsequent administrative or judicial proceeding arising therefrom and, in the course thereof, relying generally on examination of Confidential Information or Highly Confidential Information; *provided, however*, that in rendering such advice and otherwise communicating with such client, Outside Counsel of Record shall not disclose Confidential Information or Highly Confidential Information except as consistent with this Agreement.

15. Violations of Agreement.

(a) Should a Party that has obtained access to Highly Confidential Information under this Agreement violate any of its terms, it shall immediately convey that fact to the Designating Party and to any Protected Third Party whose Highly Confidential Information has been utilized in violation of this Agreement, any of whom may choose to bring it to the attention of the Arbitrator or the Commission as appropriate. Further, should such violation consist of improper disclosure or use of Highly Confidential Information, the violating party shall take all necessary steps to remedy the improper disclosure or use. The violating party shall also immediately notify the Designating Party and any Protected Third Party whose Highly Confidential Information has been utilized in violation of this Agreement, in writing, of the identity of each party known or reasonably suspected to have obtained the Highly Confidential Information through any such disclosure. The Arbitrator retains full authority to fashion appropriate sanctions for violations of this Agreement, including but not limited to denial of further access to Highly Confidential Information in this Proceeding.

(b) The parties hereto agree that Highly Confidential Information is of special, unique and extraordinary character, and that a Protected Third Party's ability to pursue damages alone would be an inadequate remedy for a breach of this Agreement. In the event that any Protected Third Party believes that use of its Highly Confidential Information in violation of this Agreement has occurred or is about to occur, or that any other party hereto has breached or is about to breach this Agreement, such Protected Third Party shall be entitled to seek an injunction restraining any such violation or breach or threatened violation or breach and enforcement of this Agreement by a decree of specific performance requiring each party hereto to fulfill its obligations under this Agreement, in any such case without the necessity of showing economic loss or other actual damage and without any bond or other security being required. Protected Third Parties also shall have the right to seek appropriate relief from the Commission and, to the extent that the Commission's authority is so delegated, the staff of the Commission. Nothing in this Agreement shall limit any other rights and remedies available to a Protected Third Party at law or equity against any person using Highly Confidential Information in a manner not authorized by this Agreement.

(c) Each Protected Third Party shall have all of the rights and remedies identified herein only individually with respect to its own Highly Confidential Information; no Protected Third Party shall be required to act in concert or coordination with any other Protected Third Party to exercise its rights and remedies hereunder.

16. Termination of Proceeding. Within fifteen (15) days after final resolution of this Proceeding (which includes any administrative or judicial appeals), Authorized Representatives of Reviewing Parties shall make their best efforts to destroy all Highly Confidential Information as well as all copies and derivative materials made therefrom, and shall certify in a writing served on the parties hereto that such best efforts have been conducted to ensure that no Highly Confidential Information has been retained by any person having access thereto, except that the

Arbitrator and each Outside Counsel of Record representing a Reviewing Party may retain two paper copies and one electronic copy of all pleadings filed in this Proceeding and all transcripts created in connection with this Proceeding, regardless of whether such pleadings or transcripts contain Highly Confidential Information. Any Highly Confidential Information contained in any copies of pleadings or transcripts retained or in materials that have been destroyed pursuant to this paragraph shall be protected from disclosure or use indefinitely in accordance with this Agreement unless such Highly Confidential Information is released from the restrictions of this Agreement either through agreement of the parties or as otherwise expressly set forth herein. Authorized Representatives shall have a continuing obligation to destroy any previously undestroyed documents if and when they are discovered.

17. No Waiver of Confidentiality. Disclosure of Confidential Information or Highly Confidential Information as provided herein shall not be deemed a waiver by the Designating Party or any Protected Third Party of any entitlement to confidential treatment of such information. Reviewing Parties, by viewing these materials:

(a) agree not to assert any such waiver;

(b) agree not to use Confidential Information or Highly Confidential Information in any proceeding other than such as permitted herein unless obtained independently of this Proceeding; and

(c) agree that accidental disclosure of Confidential Information or Highly Confidential Information shall not be deemed a waiver of entitlement to confidential treatment of such information.

18. Subpoena by Courts, Departments, or Agencies. If a court or a federal or state department or agency issues a subpoena or orders production of Highly Confidential Information that a party has obtained under terms of this Agreement, such party shall promptly notify in writing each Designating Party, and any Protected Third Party whose Highly Confidential Information is affected, of the pendency of such subpoena or order. Consistent with the independent authority of any court, department, or agency, the party to whom the subpoena or order is directed shall not provide or otherwise disclose Highly Confidential Information prior to providing the Designating Party and Protected Third Party notice and waiting fifteen (15) business days so that the Designating Party and Protected Third Party shall have an opportunity to contest the validity of the subpoena or order of production through appeal or seek a confidentiality order or other protection against disclosure of any Highly Confidential Information.

19. Additional Rights Preserved. The execution of this Agreement is without prejudice to the rights of the Designating Party or any Protected Third Party to apply for additional or different protection where it is deemed necessary or to the rights of Reviewing Parties to request further or renewed disclosure of Confidential Information or Highly Confidential Information.

20. Effect of Agreement. This Agreement, which has been entered for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by all parties hereto, constitutes an agreement among the parties hereto and the persons executing the attached Declaration. This Agreement and its protections will continue in force indefinitely. This Agreement, together with all attachments, constitutes the full and entire understanding and agreement among the parties with regard to the subject matter hereof, and supersedes all prior agreements, understandings, inducements or conditions, express or implied, oral or written, relating to the subject matter hereof. The express terms hereof control and supersede any course of performance and/or usage of trade inconsistent with any of the terms hereof. This Agreement has been prepared by all of the parties hereto, and no inference of ambiguity against the drafter of a document therefore applies against any party hereto.

21. Severability. In the event that one or more provisions of this Agreement are held to be unenforceable under applicable law, such provisions shall automatically be replaced with one that incorporates the original intent of the parties to the maximum extent permitted by law and the balance of the Agreement shall be enforced in accordance with its terms.

22. No Third Party Beneficiaries. No provision of this Agreement shall confer upon any person other than the parties hereto any rights or remedies hereunder.

23. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original as against any party whose signature appears thereon, and all of which shall together constitute one and the same instrument. This Agreement shall become binding when one or more counterparts hereof, individually or taken together, shall bear the signatures of all of the parties reflected hereon as the signatories.

Dated: _____

[SIGNATURE BLOCKS FOR COUNSEL]

SO ORDERED AND ENTERED,

Dated: _____

Arbitrator

**Before the
AMERICAN ARBITRATION ASSOCIATION**

In the Matter of Arbitration Between

_____)

Claimant,)

-and-)

_____)

Respondent.)

Case No. _____
_____, Arbitrator

DECLARATION

I, _____, hereby declare under penalty of perjury that I have read the Confidentiality Agreement and Protective Order that has been executed by the parties and entered by the Arbitrator with respect to the above-captioned Proceeding, and that I agree to be bound by its terms pertaining to the treatment of Confidential Information and Highly Confidential Information submitted by parties to this Proceeding. I understand that the Confidential Information and Highly Confidential Information shall not be disclosed to anyone except in accordance with the terms of the Confidentiality Agreement and Protective Order and shall be used only for purposes of the above-captioned Proceeding (except as otherwise provided in the Confidentiality Agreement and Protective Order). In particular, I will not use the Highly Confidential Information for competitive commercial or business purposes, including competitive decision-making. I acknowledge that a violation of the Confidentially Agreement and Protective Order may be referred to the Federal Communications Commission. I acknowledge that this Declaration is also a binding agreement with the parties to the Confidentiality Agreement and Protective Order.

To the extent that I am an Outside Expert as described in paragraph 8(e) of the Confidentiality Agreement and Protective Order, I acknowledge that I have read subparagraph 8(e) of the Confidentiality Agreement and Protective Order and agree, in addition to the restrictions set forth above, to be bound by the obligations described in subparagraph 8(e). I understand and agree to comply with the procedures described in paragraph 16 of the Confidentiality Agreement and Protective Order regarding the destruction or return of all Confidential Information and Highly Confidential Information to which I have access as well as any copies and derivative materials made, including the continuing obligation to destroy any previously undestroyed documents if and when they are discovered.

REDACTED — FOR PUBLIC INSPECTION

(signed) _____

(printed name) _____

(representing) _____

(title) _____

(employer) _____

(address) _____

(phone) _____

(date) _____