was to provide a platform that is *in addition to* its traditional carriage of PEG channels on cable systems.[58] Second, while Comcast is not currently able to provide PEG VOD programming on a community-by-community basis, as a result of Commitment # 12, Comcast will test potential solutions that might allow for the cost-effective delivery of PEG programming on a more targeted basis.[59] In short, Applicants intend to work with local communities to develop VOD solutions that work for all concerned. Rollout of PEG services both On Demand and On Demand Online will enhance customers' access to PEG programming, and calls for regulations or conditions regarding how these yet-to-be-developed platforms are configured are both premature and unnecessary.

With regard to the Gay & Lesbian Alliance Against Defamation's ("GLAAD") suggestion that the merger should be viewed with a "critical eye" in light of NBCU's programming history on issues of importance to the LGBT community,[60] it is worth noting that broadcast licensees have broad discretion concerning their selection of programming responsive to their communities. They are required to contribute to the overall discussion of community issues but are not required or expected to respond to the issues of every individual community group.[61] In any event, GLAAD also commends NBCU for "show[ing] some improvement" and

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58 Opposition and Response at 54. ACT also noted that Applicants technically omitted "public access" from its description in Commitment # 12. Applicants said: "To enhance localism and strengthen educational and governmental access programming, Comcast will also develop a platform to host PEG content On Demand and On Demand Online within three years of closing." *Id.* Applicants clarify that, in their language, their intention was to include public access.

59 *Id.* at 55.

60 *See* Letter from Jarrett T. Barrios, President, GLAAD, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (July 20, 2010) ("GLAAD Response").

61 *See In Re License Renewal Applications of Certain Commercial Television Stations Serving Philadelphia, Pennsylvania*, Memorandum Opinion and Order, 5 FCC Rcd 3847, 3848 (1990), *aff'd on recon.*, 6 FCC Rcd 4191 (1991) (rejecting petition to deny license renewal for alleged failure to provide issue responsive programming to lesbian and gay communities, among others); *see also In Re License Renewal Applications of Certain Commercial*

for engaging the organization with respect to the concerns of the LGBT community.[62] GLAAD also states that it is "encouraged" by Comcast's involvement in the NBCU transaction given Comcast's long history of involvement with the LGBT community.[63]

V. APPLICANTS HAVE DEMONSTRATED THAT THE TRANSACTION WILL NOT HARM COMPETITION OR THE PUBLIC INTEREST AND NONE OF THE JULY 21 RESPONSES PROVIDES PERSUASIVE EVIDENCE TO THE CONTRARY.

A. The July 21 Responses Provide No Evidence That the Transaction Will Facilitate Anti-Competitive Foreclosure of Competing MVPDs.

Largely reiterating their initial comments and summarizing other party's filings, Greenlining Institute and the American Cable Association ("ACA") again allege that the transaction will cause harm with regard to retransmission consent and the wholesale provision of programming.[64] For example, Greenlining Institute makes the same claims regarding harms on July 21 as it did on June 21.[65]

Applicants have already fully addressed and refuted these arguments in their Opposition and Response. As Applicants detailed in that filing, the combined entity will have no increased ability or incentive to pursue anticompetitive foreclosure strategies against competitive MVPDs because it will not have market power to do so, and foreclosure would not cause a sufficiently

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Radio Stations Serving Philadelphia Pennsylvania, Memorandum Opinion and Order, 8 FCC Rcd 6400 (MB 1993) (same).

62 GLAAD Response at 4. Indeed, as GLAAD notes, NBCU's network Bravo "is credited by many with building its identity on programming successes like Queer Eye for the Straight Guy which launched a new wave of reality programming that reflected how LGBT culture influences mainstream culture." *Id.* at 5.

63 *Id.* at 5.

64 NJ Rate Counsel and the Illinois Attorney General, who, as noted above, commented for the first time on July 21, also recite alleged harms that were already raised by other commenters, and to which Applicants have already responded. *See* NJ Rate Counsel at 18-20, 24-26; Illinois Attorney General at 4-5.

65 *Compare, e.g.*, Greenlining Response at 7 *with* Greenlining Petition at 32 (repeating its prior arguments about wholesale bundling).

high rate of diversion from the competing MVPD to Comcast's cable service to offset the revenues that the combined entity would lose.[66]

With respect to retransmission consent, Applicants have demonstrated that any attempt by the joint venture to withhold retransmission consent for NBCU O&O stations from competing MVPDs as part of a foreclosure strategy would be unprofitable.[67] To provide further assurances, Applicants have also offered to extend key aspects of the program access rules to the rules governing retransmission consent.[68] As to program access, Applicants have established that the transaction will not enhance Comcast's incentive or ability to engage in foreclosure strategies with respect to licensing national cable networks to rival MVPDs.[69] Of course, the program access rules provide an additional safeguard against any competitive harm, and post-transaction, the NBCU cable networks will be subject to these rules for the first time. With respect to ACA's concerns about bundling of networks, Applicants have shown that criticism of wholesale transactions between network owners and MVPDs is neither new nor specific to the proposed transaction.[70]

Although ACA attempts to argue that these issues are transaction-specific, the reality is that these are industry-wide issues that ACA itself has repeatedly raised in pending Commission

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66 *See* Opposition and Response at Section IV.C; *see generally* Israel/Katz Vertical Foreclosure Report.

67 Opposition and Response at 133-153; Israel/Katz Vertical Foreclosure Report ¶¶ 4, 80, 85, 131-132.

68 *See* Public Interest Statement at 121.

69 Opposition and Response at 153-163; Israel/Katz Reply Report ¶¶ 77-79.

70 Opposition and Response at 211-218.

proceedings.[71] In fact, ACA's complaints in its advocacy before the Commission on wholesale bundling of networks concern numerous entities unrelated to the transaction.[72]

B. The July 21 Responses Provide No Evidence That the Transaction Will Facilitate Anti-Competitive Foreclosure of Competing Video Programming.

Certain commenters repeat their assertions that the transaction will facilitate anti-competitive foreclosure of competing video programming.[73] As noted above, however, these commenters offer no new evidence or analysis to support their concerns, which Applicants have convincingly refuted.

Applicants have already demonstrated that neither the facts nor economic theory support claims that the combined entity will pursue anti-competitive foreclosure strategies by withholding distribution opportunities from competing unaffiliated content providers.[74] Especially in light of the intensely competitive market for MVPD services (as the U.S. Court of Appeals for the D.C. Circuit recently recognized[75]), the combined entity will not have the ability or the incentive to pursue such strategies, which would not only be unprofitable but detrimental

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71 *See, e.g.*, ACA Comments, MB Docket No. 10-71 (May 18, 2010) (advocating for industry-wide changes to the retransmission consent rules); ACA Comments, MB Docket No. 07-198 (Jan. 3, 2008) (advocating for industry-wide changes to the program access and retransmission consent rules) ("ACA 07-198 Comments"). A survey of ACA's website demonstrates its longstanding industry-wide concern about each of the issues it raises in the instant proceeding. *See, e.g.*, ACA, Wholesale Unbundling, *at* http://www.americancable.org/issues/page/Wholesale_Unbundling ("What is ACA Doing About Wholesale Bundling? Currently, the FCC is reviewing whether revisions to the wholesale cable programming and retransmission consent rules would provide consumers with more choice and value. ACA has presented the FCC with multiple filings to demonstrate how the current marketplace harms both independent cable operators as well as consumers.")

72 *See, e.g.*, ACA 07-198 Comments at 7 (criticizing the alleged bundling practices of seven other cable network owners *besides* NBCU).

73 *See, e.g.*, Bloomberg Response at 3-14; Greenlining Response at 8.

74 *See generally* Opposition and Response at Section IV.D.

75 *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009).

to Comcast's MVPD business.[76] Furthermore, the record evidence shows that the opposite of what critical commenters assert is true – Comcast is *more* likely than other MVPDs to carry non-Comcast networks that operate in the same programming categories as Comcast networks.[77]

With respect to Bloomberg's claims in particular, Applicants have thoroughly debunked Bloomberg's theory of foreclosure of competing video programming.[78] Applicants demonstrated that Bloomberg's assertions represent an attempt to extract superior and unjustified terms of carriage from Comcast (as compared to the market-based terms that Bloomberg has negotiated with Comcast and other MVPDs), not only with regard to channel location but also tier placement and subscription fees.[79] In its July 21 filing, Bloomberg simply rehashes the unsupported assertions of a few other parties to support its bid to have the Commission intercede in the minutiae of Comcast's future carriage negotiations (and ignoring the safeguards provided by the existing program carriage rules).[80] Bloomberg's citation to WealthTV as its primary example of a network that has "already been the subject of discrimination from Comcast due to lack of affiliation"[81] – notwithstanding that the Commission's Chief ALJ found, after a full evidentiary hearing, that WealthTV "failed completely" to prove its claims of unlawful discrimination – is a telling indication that Bloomberg's most recent comments do nothing to

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76 Opposition and Response at 164-73.

77 Israel/Katz Reply Report ¶¶ 149-53.

78 *See* Opposition and Response at 164-73.

79 *See id.* at 173-75.

80 Bloomberg Response at 2-12.

81 *Id.* at 8 & n.22.

advance the Commission's consideration of the record.[82] In no transaction that Applicants have identified – indeed, in no Commission proceeding – has the Commission applied an evidentiary standard that assigned weight to multiple parties simply citing each other's unsupported and factually erroneous arguments. As Applicants and others have noted, to the extent Bloomberg or other commenters have concerns about the effectiveness and operation of the program carriage rules, those concerns are best addressed, if at all, in the Commission's relevant pending rulemaking proceeding.[83]

C. The July 21 Responses Provide No Evidence That the Transaction Will Facilitate Anti-Competitive Effects in the Nascent Online Video Distribution Business.

Certain parties again raise arguments that Applicants will have the ability and incentive to disadvantage or foreclose unaffiliated online video distributors by refusing to provide content or by providing it on discriminatory terms. These parties, however, do not raise any new issues or provide any new evidence that Applicants have not fully addressed. For instance, Bloomberg largely restates its previous arguments and those lodged in other parties' petitions and comments.

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82 Bloomberg commits a similar error in repeating MASN's complaints about its channel placement on Comcast systems in Washington, DC. *See id.* at 9-10. Applicants have refuted MASN's claims. *See* Opposition & Response at 176-78; *see also* Letter from Michael H. Hammer, Willkie Farr & Gallagher LLP, Counsel for Comcast Corporation, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56 (Aug. 13, 2010) (describing the practical basis of existing channel locations and the operational difficulties and disruption to customers involved in changing channel locations).

83 *See* Opposition and Response at 13 & n.17; *see also* Letter from Doron Gorshein, CEO, America Channel to Marlene Dortch, Secretary, FCC, MB Docket No. 10-56, at 2-3 (July 21, 2010) (noting that "Comcast has taken a leadership role among MVPDs in providing opportunities for independent programmers in a challenging economic environment" and stating that "we agree with HDNet and NFL that program carriage issues are best addressed on an industry-wide basis"). Of course, Comcast's recent experiences with the program carriage complaint process could well suggest that the program carriage reforms that are most needed are ones that facilitate the more rapid dismissal of complaints that demonstrably fail to prove unlawful discrimination, or that are barred for other reasons, such as a longstanding carriage agreement that governs the carriage at issue.

urging the Commission to "consider carefully these issues that echo Bloomberg's concerns."[84] These arguments, however, fail as a matter of economic theory and marketplace reality, and are inconsistent with the ways consumers use online video today and the manner in which the nascent marketplace for online video distribution is developing.[85]

Applicants have demonstrated that the transaction would not harm online video distribution in Drs. Israel and Katz's May 4 Online Video Report, and further refuted commenters' concerns in their July 21 Opposition and Response (including the accompanying Israel/Katz Reply Report).[86] Specifically, Applicants have provided comprehensive and detailed information regarding the nascent online marketplace and fully described how the combined entity will lack the market power to implement an online foreclosure strategy because it will have a quite modest share of linear cable networks and because the "withholding of even very popular programming is not sufficient to make an online distributor lose its viability."[87] Further, Applicants will lack the incentive to foreclose because online video is demonstrably complementary to, rather than a substitute for, traditional linear MVPD service and because foreclosure of competing online video distributors would not be profitable.[88] Those commenters

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84 *See* Bloomberg Response at 12-22 (discussing the arguments set forth by CFA (Cooper); MAP; Public Knowledge; EarthLink; the Alliance for Communications; DISH/EchoStar; Caucus for Producers, Writers, & Directors; AOL; Greenlining; and FACT).

85 Opposition and Response at 181-82.

86 *See generally* Israel/Katz Online Video Report; Opposition and Response at Section IV.E (discussing why the transaction will not cause anti-competitive effects in the nascent online video distribution business). It is telling that neither Bloomberg nor any other commenter seriously challenges the conclusions of Drs. Israel and Katz's analysis, which was submitted on May 4, 2010.

87 *Id.* at 183-84.

88 *Id.* at 184-88; Israel/Katz Reply Report at ¶¶ 191-204.

who repeated their concerns about online video on July 21 did nothing to refute Applicants' well-supported conclusions.

D. The Issues Raised by the Public Utilities Bureau of the Illinois Attorney General's Office Have Already Been Dealt With by Applicants, and the Transaction Is Supported by Numerous Supportive Letters Filed by Elected Officials, Community Organizations, and Residents from the State of Illinois.

The Public Utilities Bureau in the office of the Attorney General of Illinois filed comments expressing concerns about the transaction's alleged negative effects on competition and consumers in Illinois.[89] The concerns raised here have already been refuted by Applicants.[90] In addition, more than 130 letters from Illinois businesses,[91] community groups,[92] elected

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[89] Illinois Attorney General Response at 3.

[90] The Illinois Attorney General's comment recites the following allegations: (1) increased cable prices; (2) foreclosure of competing MVPDs; (3) harm to NBC over-the-air broadcast stations; (4) foreclosure of online video competition; (5) increased media concentration; and (6) job losses. *See id.* at 4-6. These issues have been rebutted, respectively, in Applicants' (1) Responses to Questions from Several Members of Congress at 25-26; (2) Public Interest Statement at 113-122; Israel/Katz Vertical Foreclosure Report; Opposition and Response at 128-163; and Israel/Katz Reply Report ¶¶ 11-32; (3) Public Interest Statement at 39-42; NBC Affiliates Agreement; and Opposition and Response at 18-25, 50-52; (4) Public Interest Statement at 122-126; Israel/Katz Online Video Report; Opposition and Response at 180-204; and Israel/Katz Reply Report ¶¶ 189-237; (5) Public Interest Statement at 7-10, 79-80; Responses to Questions from Several Members of Congress at 30-31; and Opposition and Response at 104-107; and (6) Responses to Questions from Several Members of Congress at 28.

[91] *See, e.g.*, Letter from Thomas W. Brannam, Manager, Future Cable Electronics, LLC, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Apr. 28, 2010); Letter from Christine Lee, President, North Star Cable Construction, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Apr. 16, 2010); Letter from Maureen Kelly, Chairman, Chicago Southland Chamber of Commerce, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Apr. 19, 2010); Letter from Michael A. Evans, Executive Director, Bolingbrook Area Chamber of Commerce, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 17, 2010); Letter from Gina Urso, Owner, Frontline Communications, Inc., to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 18, 2010); Letter from Gerald J. Roper, President & CEO, Chicagoland Chamber of Commerce, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 14, 2010); Letter from Rita Unzner, Director, Home Builders Association of Greater Chicago, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 21, 2010); Letter from Jordan Cutler, Director, Program Development, Illinois Science & Technology Coalition, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Aug. 16, 2010).

[92] *See, e.g.*, Letter from James Keane, President and CEO, Boys & Girls Clubs of Chicago, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 16, 2010); Letter from Christine Kenny, Executive Director, Literacy Works, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 15, 2010); Letter from Shelley Lewis, Executive Director, Little Angels, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 11, 2010); Letter from Laura S. Thrall, President and CEO, United Way of Metropolitan Chicago, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Apr. 15, 2010); Letter from Jennifer Smith, Northern Illinois Division Director, March of Dimes, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (July 7, 2010);

officials (including the Mayor of Chicago),[93] and diversity organizations[94] that have been posted to the docket are supportive of Applicants and the proposed joint venture. This broad base of support in Illinois was also evidenced by the fact that, at the Commission's July 13, 2010 workshop in Chicago, dozens of individuals offered specific, first-hand statements in support of Applicants and the proposed transaction. The proposed transaction will only enhance Applicants' ability to serve consumers across Illinois and the rest of the country.

E. The Concerns Raised by the Leased Access Producers Association Are Untimely, Not Transaction-Specific, and Without Merit.

The comments recently submitted by the Leased Access Producers Association ("LAPA") regarding the carriage of leased access programming on Comcast's cable system in Wilmington, Delaware[95] are untimely, not transaction-specific, and not factually grounded.

Letter from Bruce Weiss, Executive Director, Test Positive Aware Network, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Apr. 20, 2010).

93 *See, e.g.*, Letter from Richard M. Daley, Mayor, City of Chicago, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 21, 2010); Letter from Brandon W. Phelps, Illinois House of Representatives, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 15, 2010); Letter from Edward W. Paesel, Executive Director, South Suburban Mayors & Managers Association of Illinois, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 16, 2010); Letter from Christopher J. Lauzen, Illinois State Senate, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 18, 2010); Letter from Thomas J. Durkin, Village Administrator, Village of Crete, IL, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (July 26, 2010); Letter from Timothy J. Davlin, Mayor, City of Springfield, IL, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 15, 2010).

94 *See, e.g.*, Letter from Iris Y. Martinez, Illinois State Senator and President, National Hispanic Caucus of State Legislators, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 17, 2010); Letter from Steve Brunton, Executive Director, Chinese Mutual Aid Association, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Apr. 23, 2010); Letter from Lou Rago, President, Italian American Human Relations Foundation, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (May 3, 2010); Letter from Andy Mihelich, Executive Director, Spanish Community Center of Joliet, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (Mar. 23, 2010); Letter from Sol Flores, Executive Director, La Casa Norte, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 10, 2010); Letter from Ellen Rozelle Turner, Corporate Advisor, National Forum for Black Public Administrators, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 15, 2010); Letter from Nina M. Harris, Springfield Urban League, Inc., to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 21, 2010); Letter from Frank J. Aguilar, Chief Director Officer & President, Cicero Mexican Culture Committee, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 17, 2010).

95 Comments of Leased Access Producers Association, MB Docket No. 10-56 (filed Aug. 10, 2010).

Nonetheless, in the interest of a complete record, Comcast will briefly respond to the concerns raised by LAPA.

The vast majority of LAPA's allegations pertain to Comcast's alleged failure to comply with its Wilmington franchise agreement. As the Commission is aware, responsibility for these matters lies squarely with the franchising authority. Contrary to LAPA's wide-ranging and unsubstantiated contentions, Comcast is in full compliance with its franchise agreement. The franchising authority has confirmed, in writing, that "there are no outstanding items of non-compliance pending nor disputes in negotiation, between the City of Wilmington and Comcast" relating to the franchise agreement.[96] Comcast has worked closely and diligently with the City of Wilmington to ensure compliance with its franchise agreement and will continue to do so. LAPA's claims, therefore, are baseless.

LAPA's other concern pertains to Comcast's requirement that LAPA's members obtain insurance in connection with their provision of leased access programming. There is nothing about this requirement, and it is certainly not in any way targeted towards LAPA members; virtually every cable operator across the national requires some form of insurance from commercial leased access programmers. The Commission's rules expressly permit such a requirement,[97] and the Commission has provided considerable guidance over the years about the parameters of "reasonable" insurance requirements.[98] Comcast follows the Commission's rules

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[96] Letter from Norman D. Griffiths, President, Wilmington City Council, to David Breidinger, Senior Vice President, Government and Regulatory Affairs, Comcast Cable Eastern Division (Aug. 19, 2010) (attached hereto as Appendix C).

[97] "Cable operators may impose reasonable insurance requirements on leased access programmers." 47 C.F.R. § 76.971(d).

[98] *See, e.g., John P. Ruditis v. Time Warner Cable – St. Augustine, FL*, Memorandum Opinion and Order, 13 FCC Rcd 13882 (1998), *aff'd on recon.*, 13 FCC Rcd 22252 ¶¶ 2, 6 (1998) (general liability insurance requirement

and precedent, and its request for leased access insurance coverage from LAPA members is both lawful and reasonable.

Comcast recognizes that members of LAPA have provided leased access programming on the Wilmington cable system for over 20 years,[99] and Comcast – which has worked cooperatively with LAPA members in the past – will make every reasonable effort to work with LAPA and its members to continue their relationship. As LAPA's concerns are neither transaction-specific nor timely raised, the Commission should not consider them in connection with its review of the NBCU transaction.

F. ACA's Claims Concerning the Contents of Confidential and Highly Confidential Materials Are Misleading and Provide No Basis To Condition the Proposed Transaction.

As noted above, ACA reiterates points it made in its June 21 comments without offering new arguments or analysis. Unlike its fellow June 21 repeat commenters, however, ACA claims that information gleaned from Applicants' document productions to the Commission demonstrates that the harms posed by the transaction are "even more significant and widespread" than ACA initially described. Even assuming *arguendo* that ACA's initial showing of harm had

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not unreasonable; media perils liability insurance with coverage of $1 million not unreasonable); *Id.* ¶ 3 (noting that programming that was unrehearsed, original and included people unaware of being photographed imposed various risks on cable operator including copyright infringement and privacy violations); *Fal-Comm Productions v. TCI Cablevision of Woodhaven, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 10293 ¶ 10 (1997) ("Being named as an additional insured affords TCI-W significant additional protection."); *Frank J. Vitale v. TCI Cablevision of Woodhaven, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 2531 ¶¶ 6-7, 9 (1998), *aff'd on recon.*, 13 FCC Rcd 12441 (1998) (insurance can be required for part-time lessees; viewer may be offended, obscenity may be aired, and third party's rights may be violated as easily in ½ hour as in 24 hours); *Lorilei Communications, Inc. v. Heritage Cablevision of California, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 12073 (1999) (upholding right of cable operator to deny access for failure to produce insurance certificate that complied with operator's notice of policy cancellation requirements), *aff'd on recon.*, 15 FCC Rcd 2917 (2000); *Fred Campbell v. Time Warner Cable*, Memorandum Opinion and Order, 13 FCC Rcd 16702 (1998), *recon. dismissed*, 13 FCC Rcd 22252 (1998) (reasonable concern that the unrehearsed and ad hoc nature of Campbell's programming would pose liability risk that programmer did not have financial resources to back.).

[99] Comcast acquired ownership control of the Wilmington cable system in 1999.

not been fully refuted by Applicants' Opposition & Response, ACA's claims concerning the documents it cites are by turns hyperbolic, inaccurate, and misleading.

ACA claims that several statements contained in Applicants' respective document productions supply evidence that NBCU's programming assets "provide NBCU . . . with substantial market power" and constitute "'must have' programming that all MVPDs, including the ACA's members, effectively must carry to be competitive."[100] The statements that ACA cites, however, do not support its claims. Even considered in isolation, these statements at most suggest that the Applicants believe that NBCU's programming assets have economic value and offer quality content.[101] Needless to say, such statements are not evidence of market power, much less of any potential for anticompetitive foreclosure.[102]

When considered in context,[103] the documents that ACA cites demonstrate that developments since 2006 have made it especially unlikely that a foreclosure strategy involving NBCU content would be profitable. Over the past four years, the documents note, {{

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[100] ACA Response at 4-5.

[101] *Id.* at 6-8. {{

}} *Id.* at 6.

[102] In a similar vein, ACA cites statements that highlight {{

}} *Id.* at 8 & n.19; 53-COM-00000058. Neither of these statements supplies any support for ACA's contention that the proposed transaction is designed to enhance "market power and the potential to execute anticompetitive strategies." *Id.* at 8 (internal quotation marks omitted).

[103] Of the thousands of documents that Applicants have produced, ACA cites only seven documents prepared by GE/NBCU and two prepared by Comcast. (Three documents cited by ACA bear Comcast document control numbers, but the information contained in one of these (31-COM-00000569) was prepared by GE/NBCU.

}}[104] Other documents produced by NBCU to the Commission similarly {{ }}[105] ACA does not undertake to address these facts that undermine its foreclosure theory.

Other documents featured in ACA's pleading likewise fail to support the propositions for which ACA cites them. For example, ACA suggests that an NBCU document dated July 30, 2009 "confirms th[e] conclusion" that programming carried by NBCU's O&Os and network affiliates constitutes "must have" programming *for MVPDs*.[106] The document says nothing of the kind. Instead, it states that {{ }}[107] Nor does ACA provide any basis for the Commission to find that the NBCU cable networks should be considered "must have" for the purposes of fashioning a far-reaching program access condition, as ACA urges.[108]

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104 *See* 39nbcu0000003; 39nbcu0005863.

105 For example, in an NBCU document that ACA cites to show NBCU's supposed market power, NBCU states that, {{ }} 39nbcu0005852. Indeed NBCU's concern about the viability of the broadcast network is conspicuous throughout its regularly-prepared business plans. *See, e.g.* 39nbcu0008685 ({{ }}); 29nbcu0013781 ({{ }}); 29nbcu0013784 ({{ }}); 28nbcu0000429 ({{ }}); 28nbcu0000434 ({{ }}).

106 ACA Response at 5.

107 *See* 39nbcu0000059. {{ }}

108 ACA cites to a single Comcast document {{ }} *See* ACA Response at 7 (citing 31-COM-00000332). As discussed more fully below, it would be inappropriate to regard this document as reflecting the plans of Comcast management with respect to the proposed transaction.

In fact, any definition that treats as "must-have" the six NBCU cable networks identified as such by ACA[109] – USA, Syfy, MSNBC, CNBC, Bravo, and Oxygen (along with the NBC national broadcast network and the Comcast regional sports networks ("RSNs")) – would logically require *scores* of other cable networks to be considered "must have" as well.[110] Moreover, ACA's contention in this proceeding is contrary to its own assertion to the Commission only two years ago that all but four of those NBCU networks are not "must have" at all but rather "less desired (or *un*desired) channels."[111]

ACA also cites a 2008 NBCU document stating that {{

}} as evidence that "NBCU possess[es] significant market power by virtue of its O&Os . . . [and] wields that power against MVPDs to solidify and extend the power and reach of its cable programming networks."[112] Again, the facts belie this claim. {{

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109 ACA Response at 7.

110 *See* Mark Israel & Michael L. Katz, "Competitive Effects of the Comcast-NBCU-GE Transaction," at 3 (July 28, 2010) (attached to Letter from Michael H. Hammer, Willkie Farr & Gallagher LLP, Counsel for Comcast Corp., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56 (July 29, 2010)) ([[

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111 ACA 07-198 Comments at 5-6 (listing MSNBC, CNBC, Syfy, and Bravo in the "less desired (or *un*desired)" category, along with Chiller, Sleuth, and NBCU's additional Olympics programming) (emphasis in original).

112 ACA Response at 5-6 & nn.11–12.

Applicants previously explained, NBCU does not force any MVPDs to select any particular combination or bundle of channels, and NBCU generally will offer any of its non-broadcast networks on a standalone basis and negotiate a rate that reflects the standalone value of any such networks.[113]

ACA also argues that NBCU's proposal to {{

}}[114] As a threshold matter, this proposal, which predates the transaction, does not present transaction-specific issues. Furthermore, there is no evidence that NBCU's proposal {{

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ACA's pleading is also replete with efforts to mischaracterize evidence of pro-competitive benefits as evidence of anti-competitive harms. ACA argues, for instance, that a document discussing "[l]ocal clusters of Comcast and NBCU programming" is evidence that the combination of Comcast RSNs and NBC O&O stations will create horizontal competitive harms.[115] The sole document on which ACA relies for this argument is {{

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113 *See* Opposition and Response at 213.

114 *Id.* at 16-17 & nn.43-44.

115 *Id.* at 13-15. To support its clustering arguments, ACA purports to cite to "numerous Comcast internal documents," but all citations are to a single document with multiple pages (31-COM-00000298 – 31-COM-00000343).

}} in mid-2008.[116] It would be inappropriate to regard this document – created at least {{ }} – as reflecting the plans of Comcast management with respect to the proposed transaction. More fundamentally, the benefits to combining Comcast RSNs and NBCU O&O stations that the document identifies stem from transaction-specific synergies, not from any reduction in competition. ACA cites a statement that {{ }} as evidence of anticompetitive harm.[117] The very page that ACA cites, however, describes the *pro*-competitive ways in which a combined Comcast-NBCU might improve its profitability: namely, {{ }}[118]

Other pages of the same document elaborate on the pro-competitive benefits of operating NBC O&O broadcast stations and Comcast RSNs within the same designated market area ("DMA"). {{ }}[119] Far from indicating any potential for anticompetitive harm, the document reinforces the conclusions of Dr.

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116 *See id.* at 7, 14, 17, 21 (citing and quoting 31-COM-00000298 – 31-COM-00000343).

117 *Id.* at 15 (citing 31-COM-00000299).

118 31-COM-00000299.

119 31-COM-00000326. {{ }} 31-COM-00000327.

Rosston, who has explained that the combination of NBCU O&Os and Comcast RSNs can create efficiencies through consolidation of local advertising sales, by enabling RSNs and O&Os to share resources such as on-air talent and studio capabilities, and by allowing Comcast and NBCU to "provide more attractive advertising services to advertisers and consumers."[120]

None of these documents provides any support for ACA's contention that combining NBCU O&O stations and Comcast RSNs (which are not close substitutes for one another) will somehow enhance the parties' market power. Instead, as Drs. Israel and Katz have explained, that contention runs counter to economic logic and is devoid of empirical support.[121]

VI. CONCLUSION.

For the reasons discussed above, nothing in the July 21 Responses alters the weight of the record in this proceeding, and the continuing flow of supportive letters from leaders across America only serves to reinforce the affirmative case. An exhaustive record has been compiled that shows that the benefits of this transaction are real and substantial and that opponents' claims of harm are based on speculation and flawed analysis. With the pleading cycle having now reached its conclusion, Applicants respectfully request that the Commission expeditiously approve the Applications.

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[120] Rosston Benefits Report ¶¶ 72-74, 76.

[121] Israel/Katz Reply Report ¶¶ 94-128.

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APPENDIX A

ISSUES RAISED BY COMMENTERS ARE WITHOUT MERIT AND ARE OUTWEIGHED BY THE BENEFITS OF THE TRANSACTION

Areas of Concern (primary parties raising concern)[1]	Applicants' Response	Record Cites To Applicants' Response[2]
I. BENEFITS OF THE TRANSACTION		
The transaction will not create incentives for investment. (DirecTV)	• The transaction, by combining NBCU's programming with Comcast's multiple distribution platforms, will increase Comcast's and NBCU's flexibility to experiment with and develop new ways to make programming available to consumers. This, in turn, will make it more profitable for the companies to invest in more and higher value programming. The powerful incentive to invest in programming is one of the central public interest benefits of the transaction. • Comcast has a strong track record of investing in programming and will bring that approach to the new NBCU. Comcast management has reiterated numerous times since the transaction was announced that it intends to increase investment in NBCU's content post-closing. • The Commission has recognized that greater investment in programming benefits both consumers and the economy. • GE, NBCU's current owner, has a diverse portfolio of assets and has decided to focus its resources in other areas. Comcast has an exclusive focus on media and communications assets. The NBC Television	• Public Interest Statement at 36-54, Appendix 8. • Opposition & Response at 25-49. • Rosston/Topper Reply Report ¶¶ 14-19. • Rosston Benefits Report ¶¶ 8, 10-14.

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[1] The full names of commenters/petitioners that are abbreviated or identified by acronyms in this column are provided in Table A.

[2] The citations in this column are to Applicants' filings in MB Docket No. 10-56. The full citations are provided in Table B.

Areas of Concern (primary parties raising concern)[1]	Applicants' Response	Record Cites To Applicants' Response[2]
	Network and NBCU's cable networks will benefit from Comcast's increased focus and investment in content. • The transaction will give the combined entity incentives to invest in increased distribution of programming for children and families, a key Commission goal. Applicants have backed this up with commitments to: (1) increase the amount of children's content on Comcast's VOD and online platforms and on the NBC O&Os' digital spectrum (Commitment #3); (2) improve the on-screen ratings information across all NBCU's broadcast and cable networks (Commitment #4); and (3) expand their partnership with Common Sense Media, an organization dedicated to providing parents with information to make informed media and technology decisions (Commitment #5). • Similarly, the combined entity will expand the number of programs available to consumers on VOD for free or no additional charge (Commitment #9) and Applicants have committed that Comcast will continue to make the NBCU broadcast content available to its customers on VOD at no additional for at least three years after closing the transaction (Commitment #10).	
The transaction will not create incentives for innovation. (DirecTV, AAI, WGAW)	• It is difficult for distributors to negotiate contracts with unaffiliated content owners to promote new and innovative distribution platforms. Content owners are understandably concerned that new distribution platforms will undermine existing business models that provide the financial support necessary to create high quality programming. Contract negotiations are further complicated because technology, cost, and demand for programming are changing rapidly and because licensing and distribution of video are inherently complex.	• Public Interest Statement at 54-66. • Rosston Benefits Report ¶¶ 15-70. • Opposition & Response at 56-67. • Rosston/Topper Reply Report ¶¶ 6-13.

Areas of Concern (primary parties raising concern)[1]	Applicants' Response	Record Cites To Applicants' Response[2]
	• When distributors' and content owners' interests are not aligned, the parties often cannot reach agreements about new services and platforms or the agreements take much longer to reach than necessary. In either case, consumers are worse off. • These problems, often referred to as "transactional friction," have significantly delayed Comcast's ability to provide innovative new programming and platforms to consumers. For example, transactional friction made it difficult for Comcast to obtain the rights to a sufficient number of movies to create a compelling VOD offering, and this delayed for years the development of a robust VOD product. Applicants also showed how Comcast was able to break through that friction when it acquired an ownership interest in MGM, and how VOD has gone on to become immensely popular with consumers. • Today, transactional friction is delaying Comcast's ability to provide consumers with earlier in-home access to movies, a compelling online video offering, and other innovations that could provide the "anytime/anywhere" video future consumers are demanding. • When the transaction closes, the combined entity will have a variety of high-quality content. This will give Comcast the ability to experiment with new business models and the flexibility to make necessary adjustments to those models so that it can demonstrate to content owners the value of innovative platforms. • Once other content owners observe that these innovative platforms are viable and profitable, they will have a strong incentive to participate, thus accelerating the provision of new and exciting programming and increasing consumers' ability to view that programming when they want, where they want, and on the devices they want.	

Areas of Concern (primary parties raising concern)[1]	**Applicants' Response**	**Record Cites To Applicants' Response**[2]
	• As a result of the transaction, consumers will get more choice and more control over their viewing experience, and they will get it sooner rather than later.	
The transaction will not stimulate competition. (ACA, DirecTV, Dish Network, CFA *et al.*)	• The new NBCU's increased investment in programming will stimulate other programmers to increase their own investments to remain competitive, enhancing competition and further increasing benefits to consumers. • Likewise, Comcast's investment and innovation in new distribution platforms will spur other MVPDs to invest to maintain their competitiveness, and this will increase competition and consumer welfare.	• Public Interest Statement at 5, 37-38, 55-61. • Opposition & Response at 76-79. • Rosston Benefits Report ¶¶ 8, 69.
The transaction will not benefit localism. (DirecTV, CFA *et al.*, Greenlining Institute, NATOA, GMTC, ACD)	• The transaction will promote the Commission's longstanding localism goals by facilitating the creation of new local programming and making it more widely available to consumers, at more times, and on more platforms. • Applicants have undertaken specific obligations to increase and enrich the output of local news, public affairs, and other public interest programming on the NBC O&O stations, including the production and distribution of an additional 1,000 hours per year of local news and information programming (Commitment # 2). • In addition, Comcast has made commitments to enhance public, educational and governmental programming ("PEG") in the local communities it serves. For example, Comcast will develop a VOD platform for PEG programming (Commitment # 12). And, Comcast will not migrate PEG channels to digital on any system until the system has been converted to digital or the community agrees to	• Public Interest Statement at 39-42, 67-70, Appendix 8. • Opposition & Response at 50-56, 262-264. • NBCU Affiliates Association Agreement. • Non-NBCU Affiliates Associations Agreement. • Comcast Response to Information Request Nos. 61-62.

Areas of Concern (primary parties raising concern)[1]	Applicants' Response	Record Cites To Applicants' Response[2]
	migration (Commitment # 11). These PEG commitments will further advance the Commission's localism goals.	
Voluntary commitments are inadequate to protect over-the-air ("OTA") TV; the transaction will create incentives for Comcast to migrate sports and other popular programming from OTA TV to pay services. (CFA *et al.*, FACT Coalition, DirecTV, Illinois Attorney General)	• The transaction will place the ownership of NBCU's OTA TV business into a joint venture that will have greater incentives to expand and strengthen this business, to the benefit of the joint venture, its broadcast affiliates, and consumers. • Comcast has economic incentives to invest in NBCU programming and a strong track record of investing in programming. • In addition, Applicants have committed to continue to: (1) provide free OTA television through the combined entities' broadcast stations and through local broadcast affiliates; and (2) work with the local broadcast affiliates toward a business model to sustain OTA TV that can be workable in the evolving economic and technological environment (Commitment #1). • Comcast has engaged in constructive dialogue and reached agreements with the associations representing more than 750 local television stations affiliated not only with the NBC Television Network, but also with the three other major commercial television networks. • Comcast, NBCU, and the NBC Television Affiliates have entered into a binding agreement that will support and maintain the partnership between the NBC Television Network and its many valued local affiliates. Specifically, Comcast and NBCU have agreed to: 　○ Maintain the NBC Television Network for a period of 10 years – as made available for OTA broadcast by the NBC Television Network's broadcast station affiliates – as a premier general entertainment programming service and devote sufficient	• Public Interest Statement at 39-42, App. 8. • Opposition & Response at 18-25. • Rosston Benefits Report ¶¶ 10-14. • Rosston/Topper Reply Report ¶¶ 14-20. • NBC Affiliates Agreement. • Non-NBC Affiliates Associations Agreement.

Areas of Concern (primary parties raising concern)[1]	Applicants' Response	Record Cites To Applicants' Response[2]
	resources to program development to ensure that the NBC Television Network's program schedule remains competitive; ○ Continue to broadcast on the NBC Television Network, subject to certain conditions, major sporting events for which NBC holds broadcast rights as of the date of the agreement, and, with certain qualifications, refrain from migrating such events to any linear programming channel in which Comcast has an ownership interest; ○ In negotiating to acquire rights for national distribution of major sporting events on Comcast's networks, use commercially reasonable efforts to negotiate for reasonable distribution of such events on the NBC Television Network in a manner that is available to the NBC local affiliates; ○ Ensure that Comcast's cable systems remain solely responsible for negotiating retransmission consent agreements with individual NBC local affiliates. Such retransmission consent negotiations will be conducted separate from the NBC Television Network's affiliation negotiations with the NBC local affiliates; ○ Ensure that certain provisions relating to programming (*e.g.*, the amount and type of programming to be supplied to local network affiliates by the NBC Television Network) will remain part of the standard terms and conditions of affiliation offered to local network affiliates; ○ Ensure that the NBC Television Network will provide to local network affiliates primarily first-run programming on a primarily first-window basis;	