barrier to entry to OTT providers. This extension and protection of the cable business model effectively "cabilizes" the Internet, thus eliminating competition, diminishing innovation, depressing investment in broadband deployment and ultimately eliminating jobs. In fact, the FCC recently concluded that Internet video and video devices are an important part of developing a National Broadband Plan.[63]

Applicants respond by arguing that online video is not a competitive platform to traditional cable,[64] that they will not own any must-have content for Internet video distribution, and that restricting consumers from accessing online video unless they can first prove that they subscribe to cable is actually "pro consumer." These arguments are not only factually inaccurate but also inconsistent with the public interest goal of increasing competition and innovation.

A. Online Video Is A Threat To Traditional Cable Television, Despite Applicants' Claims.

As CWA duly notes at length in its Petition, video programming on the Web is a significant threat to all MVPD distributors.[65] Despite Applicants' assertions now that online video is a complement to cable television, both Comcast and NBC have argued that online video is a competitive offering. Comcast has argued that online video presents a significant threat to its cable video franchise and provides consumers with "an interactive alternative to traditional TV set viewing."[66] Similarly, NBCU previously told the Commission that "[t]he Internet as a distributor of high-quality video programming has reached the tipping point."[67]

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[63] *Comment Sought on Video Device Innovation*, NBP Public Notice #27, GN Docket Nos. 09-47, 09-51, 09-137; CS Docket No. 97-80 (Dec. 21, 2009).

[64] Opposition at 86.

[65] Petition at 39.

[66] Comcast Comments in Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 13th Annual Report, MB Dkt No. 06-189, at 29-30 (rel.

Just last month, in a different proceeding before the Commission, NCTA recognized the competitive nature of online video distribution by identifying numerous, competing digital distribution platforms – from DBS providers such as DISH Network and DirecTV, telco TV providers such as AT&T and Verizon, to "over the top" video providers riding on personal computers, gaming stations and retail televisions.[68]

To demonstrate that online video is a complement to traditional video service, Comcast experts Drs. Israel and Katz would have needed to provide evidence that the demand for cable television increases with a decrease in the price of online video.[69] But they fail to provide any such evidence; rather what they offer is nothing more than conjecture.[70]

As Dr. Singer rightly notes, a growing body of evidence demonstrates that OTT video is emerging and will continue to grow as a challenge to the current model of multi-channel distribution of programming.[71] For example, a new Pew study found that 69 percent of adult Internet users – or approximately 52 percent of all Americans – have used the Internet to watch

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Jan. 16, 2009). In addressing Internet video, Comcast further indicated that "All of these modalities of communications are important to younger consumers, all are part of the paradigm shift to a 'what-you-want-when-you-want-it' world, and *all of them compete with traditional and not-so-traditional video distribution technologies* for time, attention, and dollars." *Id.* at 59 (emphasis added).

[67] Reply Comments of NBC Universal, *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, MB Docket No. 07-269, Aug. 28, 2009.

[68] Comments of NCTA, July 13, 2010, in ALLVID proceeding. *See also* Time Warner Comments ("Internet connected television sets give consumers the ability to instantly stream or download television programs and movies from a growing variety of sources, including integrated 'widgets.'").

[69] Singer Reply at 23 ¶ 28.

[70] *Id.*

[71] *Id.* at 22 ¶ 27.

or download video.[72] In addition, research company comScore, Inc. reported that nearly 178 million U.S. Internet users watched online video during December 2009.[73] During that same month, Hulu ranked second among U.S. online video sources on the Web, with more than 1 billion videos seen.[74] According to recent press reports, Hulu.com, an aggregator for online movies and television, has grown so successful that it may soon go public with an offering that could value the company upwards of $2 billion.[75] Indeed, Hulu posted more than 566 million ads in June, more than double what comScore calculated for YouTube.[76]

B. Contrary to Applicants' Claims, Hulu and Fancast Xfinity Are Must-Have Content For Online Competitors.

As CWA demonstrates, Comcast's acquisition of NBCU will give it control of 32 online properties. Key among them is Hulu.com, a hub of more than 1,700 primetime cable, television and movie videos. As a joint venture of NBCU, Fox (News Corp), and ABC Networks (the Walt

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[72] "The State of Online Video," Pew Internet & American Life Project, June 2010, available at http://pewinternet.org/Reports/2010/State-of-Online-Video/Summary-of-Findings.aspx?r=1 (accessed on Aug. 13, 2010).

[73] U.S. Online Video Market Continues Ascent as Americans Watch 33 Billion Videos in December, Press Release, comScore, Inc., Feb. 5, 2010, available at http://comscore.com/Press_Events/Press_Releases/2010/2/U.S._Online_Video_Market_Continues_Ascent_as_Americans_Watch_33_Billion_Videos_in_December (accessed on Aug. 16, 2010).

[74] *Id.*

[75] Andrew Ross Sorkin and Michael J. de la Merced, *Hulu Is Said to Be Ready for an I.P.O.*, N.Y. Times, Aug. 16, 2010, at A1, available at http://www.nytimes.com/2010/08/16/technology/16hulu.html?_r=2&ref=technology (accessed on Aug. 16, 2000).

[76] *Id.*

Disney Company),[77] it offers video content from those programmers as well as hundreds of others.

The Applicants claim that Hulu and Comcast's online Internet content portfolio, Fancast.com (Xfinity), are "only two of the hundreds of websites on which video programming is viewed online."[78] However, NBCU's online properties are easily distinguished from other sites because they provide "must-have" content for OTT providers. Because broadcast networks, as well as local news, regional sports and a library of video content, constitute must-haves in the traditional video space, it follows that Hulu's aggregation of online broadcast programming constitutes must-have programming for OTT providers.

Finally in an attempt to diminish Hulu's importance, the Applicants argue that NBC.com would post the same NBC content as Hulu. But if the merged entity were to deny access to Hulu, it would most likely block an OTT provider's access to NBC.com as well.[79]

As CWA made clear in its Petition, some of the most compelling content is available on Hulu.com[80] and through Fancast.com. The success of OTT business models depends on access to this must-have online content.

C. Applicants Would Expand Authentication and Tying Practices To Block Consumers From Choosing Their Own Content and Restrict New Online Providers From Creating a Portfolio of Content.

CWA's Petition and Dr. Singer's declaration describe how Comcast's practice of requiring customers to authenticate their cable subscription in order to access online content

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[77] Hulu's owners also include Providence Equity Partners. *See* http://www.hulu.com/about.

[78] Opposition at 114.

[79] Singer Reply at 26 ¶ 32.

[80] CWA Petition at 40.

amounts to a tie-in.[81] Put another way, under the TV Everywhere model, Comcast ties access to its online portal to its digital cable television service.

As CWA detailed in its Petition, Comcast's tie-in may impair the ability of in-region MVPD rivals, including OTT providers, to compete effectively by tying access to its online content portfolio to the purchase of Comcast cable television service.[82] The objective of Comcast's tie-in is to prevent any development of online video as an alternative mechanism for watching cable programming. This tie-in is likely aimed at impairing rivals that aggregate online video content in one portal and ride over the top of a broadband connection, called OTT or OTT providers, from evolving into rival MVPD suppliers in the future.

The Applicants critique CWA's conclusion that Fancast Xfinity constitutes an unlawful tying, claiming that because cable television and online video service belong in the same product market, a tying arrangement cannot exist. In defense of this assertion, the Applicants misapply *Jefferson Parish* to support the premise that tying cannot exist unless two separate product markets have been linked.[83] The Applicants further mischaracterize the *Jefferson Parish* decision by claiming that "no portion of [any] market which would otherwise have been available to other sellers has been foreclosed." Yet the Applicants' reliance on *Jefferson Parish* for the economic assertion that the tie-in hinges on whether Comcast's cable television and online video service constitute a single finished product is patently incorrect.[84] Instead, CWA's Dr. Singer points to Professor Einer Elhauge for the standard by which courts evalnate two

[81] Singer Reply at 28 ¶ 36.

[82] Petition at 44.

[83] Opposition at 205, n. 704 (*citing Jefferson Parish*, 466 U.S. at 21).

[84] Opposition at 205 n. 704.

offerings.[85] Professor Elhauge notes that "two items are a finished product limited to the law on refusals to deal and prices squeezes only if the defendant's buyers would not buy the items separately even without the conduct . . . If the defendant's buyers would buy the items separately absent the conduct, then the items are separate products subject to the law on tying and bundled discounts."[86]

Dr. Singer properly concludes that because consumers would purchase online video and cable television separately[87] and because OTT providers do not seek access to Comcast's online portal with the intent of reselling service at the retail level, Comcast's authentication policy constitutes tying.[88]

IV. THE PROPOSED TRANSACTION POSES HARM TO EMPLOYEES.

To ensure consumers benefit from competition, Comcast should be required to provide its rivals with its affiliated programming, specifically, the Commission should compel Comcast to make its programming available to all rivals at reasonable and non-discriminatory rates regardless of method of delivery. In its underlying Petition, CWA presented evidence that the proposed acquisition of NBCU will likely result in the loss of good jobs.[89] CWA noted that the

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[85] Singer Reply at 25 (citing Einer Elhauge, *Tying, Bundled Discounts and the Death of the Single Monopoly Profit Theory*, 123 HARVARD LAW REVIEW 399 (2009).

[86] Id.

[87] As CWA has stated in its Petition, Comcast has told the Commission that it considers online video to be a viable threat to its cable television franchise. Comcast Comments in *13th Annual Video Competition Report*, at 29-30 (noting that "many networks have jumped head-first into Internet video, providing consumers with an interactive alternative to traditional TV-set viewing.") Despite these comments, the Applicants claim that online viewing of video "makes up only a small fraction of total video viewing." Opposition at 202.

[88] Singer Reply at 31.

[89] Petition at 8.

Applicants fail to make any concrete, verifiable and enforceable commitments to maintain jobs. Comments filed by other interested parties underscore CWA's concerns. The Illinois Attorney General noted, the "merging companies argue that their merger will result in "efficiencies," but that often translates into job cuts."[90] Additionally, the Writers Guild of America, West, Inc. ("Writer's Guild") pointed to reductions in news and public affairs programming staffs across the industry as a result of prior consolidations.[91] The instant proceeding will be no different, Writer's Guild states: "The result will be less choice for both writers seeking employment within a shrinking pool of employers and consumers seeking diverse entertainment, news and information."[92]

Contrary to the Applicants' assertions, the Commission has determined that labor concerns fall within the scope of the policies and objectives of the Communications Act. "If an applicant has acted in violation of the public policy concerning labor relations, 'an analysis of the substance of these practices must be made to determine their relevance and weight'" with respect to the applicant's ability to use its requested license in the public interest.[93] If an applicant's conduct "portends a position toward station employees contrary to the public policy reflected by the [National Labor Relations Act] ... such conduct must be evaluated to determine whether the

[90] Responsive Comments by the People of the State of Illinois by Illinois Attorney General Lisa at 5, filed July 21, 2010.

[91] Comments of Writers Guild of America, West, Inc., June 21, 2010.

[92] Reply Comments of Writers Guild of America West, Inc. at 2, July 21, 2010.

[93] *In re Application of Gross Telecasting, Inc., for Renewal of Licenses of Stations WJIM, WJIM-FM, WJIM-TV, Lansing, Mich.*, Dkt. No. 20014, 55 FCC 2d 295 (1975)(*citing Violation by Applicants of Laws of U.S., supr., at 401. Cf. The Western Connecticut Broadcasting Co.*, 44 FCC 2d 673 (1973) ("*Gross Telecasting*").

facts preclude the public interest finding required by the Communications Act.[94] In recent merger proceedings, the Commission has considered the public interest benefits of a company's commitment to employees.[95]

Comcast/NBCU could significantly enhance the public interest benefits of the proposed transaction with positive and enforceable commitments that the transaction will not result in the loss of jobs, employment standards, or union representation and that the new entity will uphold the highest standards of workers rights.

V. THE COMMISSION SHOULD IMPOSE VERIFIABLE CONDITIONS TO PROTECT CONSUMERS FROM THE ANTI-COMPETITIVE HARMS OF THE PROPOSED TRANSACTION.

A. CWA's Remedies Would Protect the Public Interest.

The Applicants' assertions that the Transaction would benefit the public interest – including its voluntary public interest commitments – fail to ameliorate the anticompetitive harms to consumers of cable television and online video services and workers in the industry that would result from approval of the Transaction in its present form. The Commission should intervene to protect the public against anti-competitive abuses that would arise from this unprecedented media combination by adopting the following safeguards.

B. Remedies That Would Protect Competition in the Traditional Video Market.

1. Comcast-NBCU should be compelled to sell its affiliate networks to MVPDs on an unbundled basis, thereby barring Comcast from tying its marquee networks (an NBC affiliate,

[94] *Gross Telecasting*, 55 FCC 2d 296.

[95] *In re Applications of Puerto Rico Telephone Authority and GTE Holdings LLC*, Memorandum Opinion and Order, FCC 99-22 ¶¶ 57, 58 (Feb. 12, 1999) (finding that, where GTE Holdings pledge not to make any involuntary terminations of PRTC employees in order to provide job stability, "the public could benefit from GTE Holdings' commitments to ... PRTC's employees").

RSN or national sports programming) to lesser programming. In addition, to ensure reasonable wholesale prices, the Commission should compel Comcast to offer opt-out pricing of its networks to its own cable television subscribers.

Such a condition is necessary to reduce a vertically integrated MVPD's incentive and ability to inflate wholesale prices. Currently cable operators may demonstrate compliance with the Commission's program access rules by charging all rival MVPDs the same price for programming. A vertically-integrated cable operator can charge all of its rivals the same inflated price for an affiliated network because it will realize a gain from the higher costs incurred by rival MVPDs. Thus, a vertically-integrated cable operator can directly increase its rival MVPDs' costs by inflating its rivals' cost of program access. The program access dispute process often focuses on similar prices charged, but fails to address the vertically integrated cable operator's incentive to set artificially high benchmark rates. This competitive harm can be addressed by requiring Comcast to sell affiliated networks to MVPDs on an unbundled basis, and requiring Comcast to offer opt out pricing to its own MVPD customers at the same wholesale rates.

2. Comcast-NBCU should be prohibited from offering bulk programming discounts, either by express terms or through punitive pricing, which are frequently used to impair new entrants and smaller providers.

3. To discourage Comcast-NBCU from discriminating in its carriage decisions on the basis of affiliation, the Commission should refine its current program-carriage adjudication process to include: an expedited complaint process; a baseball-style arbitration process; and a swift timetable for resolution of complaints.

4. Comcast-NBCU should be barred from tying the purchase of the new entity's cable television service to its set-top box.

5. With respect to the NBCU O&O affiliates: (1) Comcast should be compelled to enter binding baseball-style commercial arbitration for disputes over retransmission consent; and (2) rival MVPDs should be allowed to carry the NBC affiliate during arbitration.

C. Remedies That Would Protect Competition in the Online Video Market.

6. The evidence presented above suggests that a primary motivation of the proposed transaction is to extend Comcast's market power into online content and to impair the ability of consumers to access online content and OTT providers to compete for Comcast's cable video subscribers. The Commission should consider the following remedies to address this potential abuse of market power. Comcast-NBCU should be barred from tying access to online content to the purchase of a cable video subscription. Online users who access the Internet via any broadband access provider should be permitted to access content on a standalone basis. Comcast must be required to discontinue its authentication requirement for accessing online video regardless of where the programming resides.

In addition, the Commission should compel Comcast to sell its Xfinity portal to all broadband users regardless of whether they subscribe to Comcast cable television. Comcast cable television subscribers who opt out of Xfinity from his or her cable television package should receive a rebate equal to the standalone retail price of Xfinity By adopting this approach, the Commission can avoid regulating the retail price for Xfinity and can induce Comcast to price its online portal reasonably.

Such measures would break the tie-in of cable and online services and allow online viewers who do not subscribe to Comcast cable television to access Applicant's must-have

online content. Because the Applicants did not dispute this remedy in CWA's Petition, the Commission should consider this an appropriate regulatory safeguard to encourage continued growth of alternative online video providers.

7. Comcast-NBCU should be barred from requiring an independent network to restrict its video programming from being carried online in order to gain carriage on the Comcast system. The Commission should apply the program access protections to OTT video providers, and it should extend those protections in the event that Comcast-NBCU's affiliated programming is ported or replicated online.

8. Given the pivotal role that Hulu.com plays as an aggregator of network television programming on the Internet, the combined company should be compelled to divest NBCU's partial ownership in Hulu.com within one year of the acquisition.

D. Employment Protections.

Quality programming and service depends on adequate staffing by career, skilled employees. The public interest benefits of the proposed merger should be tied to commitments by the Applicants to maintain or grow jobs and uphold the highest standards of employment and workers' rights.

9. Comcast-NBCU should commit to maintain or grow employment levels after the transaction.

10. For employees who have elected to have representation rights, the merged entity will respect and recognize the collective bargaining status of its employees that existed prior to transfer and will take no action to undermine that status.

11. Employees with collective bargaining agreements who will now work with the new entity will have their existing contract recognized by the new franchise owner.

12. The merged entity will take no action to undermine the rights of employees who seek union representation.

VI. CONCLUSION

CWA has demonstrated that proposed transaction threatens to harm consumers in the traditional and online video market. The Commission should adopt meaningful and enforceable remedies that CWA proposes to protect consumers and the public interest.

Respectfully submitted,

Kevin J. Martin
Jennifer A. Ceuta

Counsel for Communications Workers of America

/s/
Debbie Goldman
Communications Workers of America

August 19, 2010

CERTIFICATE OF SERVICE

I, Ryan King, hereby certify that on this 19th day of August, 2010, I caused true and correct copies of the foregoing Reply to Comcast-NBCU Opposition to be served by postage pre-paid first-class U.S. Mail on the following individuals:

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EXHIBIT 1

FOR PUBLIC INSPECTION

Before the
Federal Communications Commission
Washington, DC 20554

FILED/ACCEPTED

AUG 19 2010

Federal Communications Commission
Office of the Secretary

In the Matter of	)
	)
Applications for Consent to the Transfer of Control of Licenses	)
	)
General Electric Company, Transferor,	)
	)
To	)
	)
Comcast Corporation, Transferee	)

REPLY DECLARATION OF HAL J. SINGER

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Introduction

1. Counsel for Communications Workers of America (CWA) has asked me to reply to the economic arguments in Comcast's response to petitions to deny[1] and in the reply report of Drs. Israel and Katz.[2] Comcast and its economists would like to turn this proceeding into a referendum on vertical integration in the cable industry.[3] To deflect attention from the relevant

1. Comcast Opposition to Petitions to Deny and Response to Comments, July 21, 2010 [hereinafter *Opposition*].

2. Mark Israel & Michael L. Katz, Economic Analysis of the Proposed Comcast NBCU-GE Transaction, July 21, 2010 [hereinafter *Katz-Israel Reply*].

3. *Id.* ¶ 9 ("The literature concludes that, in the vast majority of cases, the pro-competitive effects of internalization dominate and thus vertical integration enhances welfare.") The phrase "double marginalization," the elimination of which is purportedly driving this merger, appears at least 13 times in the Israel-Katz Reply. *Id.* ¶¶ 9, 10, 26, 35, 43, 61, 62, 63, 66, 76, 78, 79, 139. Citing the NFL-DirecTV exclusive deal for out-of-market regular seasons games, Comcast's economists also argue incorrectly that "the decision of whether or not to enter into an exclusive arrangement is *unrelated* to whether an MVPD is vertically integrated with one or more networks." *Id.* ¶ 32 (emphasis added). It is more difficult to induce an upstream supplier to refuse to deal with a downstream rival by

inquiry—namely, whether Comcast would anticompetitively maintain its significant, downstream market power after obtaining NBCU's must-have-programming properties—Comcast's economists present empirical models showing how the *typical* vertically integrated firm behaves vis-à-vis rival multichannel video programming distributers (MVPDs). Comcast offers the Commission a cozy blanket that purports to show, among other things, that prior integration of broadcast networks with regional sports networks (RSNs) generally did not affect price[4] and that vertically integrated cable operators usually are no less likely to carry independent networks than non-vertically-integrated cable operators.[5] But this inquiry is not about vertical integration in the abstract. Rather, the inquiry concerns the likely conduct of a recidivist discriminator with significant downstream market power who is obtaining the distribution rights to must-have programming. As I explain in Part I of my reply report, the most relevant history to this case is Comcast's prior discriminatory conduct in Philadelphia—refusing to supply an affiliated RSN to all direct broadcast satellite (DBS) providers—and in Chicago—seeking a penalty price for an affiliated RSN that exceeds the independent monopoly price. Philadelphia and Chicago are two of ten markets implicated in the instant merger.

2. Comcast claims its past misconduct provides *zero* predictive power regarding the company's likely behavior in Philadelphia and Chicago after buying NBCU's owned-and-operated (O&O) broadcast affiliates. Comcast's rationalization brings to mind a repeat offender seizing on some idiosyncrasy of his recent crime spree: remove that peculiarity from the circumstances ("I have a weakness for oatmeal cookies/a full moon/blondes"), and the incentives to misbehave supposedly vanish. Trust us, Comcast implores: Regional sports is a unique type of

contract. Vertical integration allows for the complete internalization of the upstream profits and losses by the downstream firm, and it prevents future defection or re-negotiation by the upstream supplier

4. *Id.* at 95-102.
5. *Id.* at 110-11.

must-have programming. By arguing that Comcast's denying rival MVPDs access to a local NBC affiliate would not reduce the rivals' market share by even {{█}} percent—the trivial defection needed to satisfy the Commission's foreclosure model according to Comcast's original calculation—Comcast challenges the FCC's designating broadcast programming as must-have. However, that RSNs constitute one category of must-have programming while local broadcast networks constitute another is a distinction without a difference. We already know the outcome of this experiment.

3. The same monopoly-maintenance story applies to Comcast's tying of access to online content and Fancast Xfinity TV to its digital cable television service, except that the tying excludes not traditional MVPDs but rather nascent over-the-top (OTT) providers. By Comcast's including its Internet content portfolio at a zero imputed price in its digital cable television offer and by limiting access to its online portal to Comcast cable television subscribers, the company ensures that consumers will not be willing to pay a positive price for OTT service. Because these alternative online portals would not include Hulu's content, local NBC broadcast programming, and Comcast's RSN programming, consumers would perceive OTT service as inferior to Fancast Xfinity TV. To defend this anticompetitive strategy, Comcast and its economists once again argue that broadcast-network programming—here in the form of Hulu and NBC.com—do not constitute must-have inputs in the Internet space. Moreover, they argue without a shred of evidence that online video and traditional cable television services are and forever will be

complements[6] (and not substitutes) so that they can justify Comcast's tie-in with efficiency rationales. As I demonstrate in Part II, none of these arguments is convincing.[7]

4. Finally, Comcast's economists fail to address any of the merger-specific remedies I proposed in my original report. In Part III, I review the most important recommendations, including allowing Comcast cable television customers to opt out of a Comcast-affiliated network at the *wholesale* price of that network set by Comcast, and to opt out of Comcast's online portal at the *standalone* retail price—assuming of course that Comcast is compelled to sell access to its online portal to all comers on a standalone basis. The Commission should either deny the transfer of assets or so condition its approval to prevent Comcast's further anticompetitive discrimination lest MVPD competition suffer.

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6. Comcast's economists admit in passing that "[i]t is, of course, possible that online distributors offering services that (at least partially) *substitute* for traditional MVPDs will emerge in the longer term." *Id.* ¶ 190 (emphasis added). Presumably, we will all be dead by then.

7. It bears noting that Comcast's economists commit several other errors that are unrelated to the two topics—foreclosure of MVPD rivals and OTT rivals—covered here. For example, they mistakenly claim that Comcast "is actually *more* likely than other MVPDs to carry unintegrated networks operating in the same general programming categories as Comcast's own networks. *Id.* at 7 (emphasis in original). Setting aside the fact Comcast has been the target of discriminatory carriage complaints by, among others, MASN, Tennis Channel, and NFL Network—all of whom compete in the *same* general category of a Comcast network—and setting aside the blatant discrimination against rivals sports networks exhibited in Comcast's channel lineup in Washington, D.C., the empirical analysis offered by Comcast's economists to support this hypothesis is fatally flawed. Comcast's economists measure carriage *not* by the tier on which an independent sports network is carried (often on the sports tier), but instead by "the *percent of Comcast subscribers* [that] are actually served by headends that carry" the network. *Id.* ¶145 n. 197. If Tennis Channel were carried on a tier penetrated by {{█}} percent of Comcast's subscribers, as their data misleadingly imply, then Tennis Channel likely would not have launched a program-carriage complaint against Comcast. *Id.* Although it is difficult to tell from their description, to the extent that Comcast's economists included mom-and-pop cable operators in their control group, then the relative carriage propensities of "non-Comcast sports and women's networks" reported in Table VI.4. are meaningless. The proper comparison is with Comcast's largest in-region rivals: DirecTV, Dish Network, and Verizon. Finally, Comcast includes several Comcast-affiliated sports networks in its sample of "*non-Comcast* sports and women's networks," including MLB, NBA, and NHL. *See* notes below Table VI.4 at 123. For these reasons, their results purporting to show that Comcast has a *greater* propensity to carry unaffiliated sports and women's networks than its MVPD rivals are completely unreliable.

Moreover, Comcast's economists rely heavily on a *legal* argument concerning the fiduciary duties owed to GE by the joint venture. They speak of "duties being violated if directors and officers made business decisions that intentionally sacrificed joint venture profits in order to increase Comcast's MVPD profits." *Id.* at 29. But they are quick to point out that these duties are effective only "[a]s long as GE has an ownership interest in NBCU," which would disappear if GE exercises its option to sell its remaining interest in the joint venture in three-and-one-half years. *Id.* at 12. As economists, they have no business opining that the "fiduciary duty *terms* of the contract should be taken seriously and at face value." *Id.* at ¶ 27. They should leave the lawyering to Comcast's capable attorneys.

I. COMCAST'S LIKELY DENIAL OF ACCESS TO OR EXCESSIVE PRICING OF NBCU'S LOCAL BROADCAST AFFILIATES

5. The Commission's 2007 review of the program-access rules explained that Comcast's withholding affiliated RSN programming from DBS providers "had a material adverse impact on competition" in Philadelphia and that withholding "popular non-RSN networks" would similarly suppress competition:

> We find that access to this non-substitutable programming is necessary for competition in the video distribution market to remain viable. An MVPD's ability to compete will be significantly harmed if denied access to popular vertically integrated programming for which no good substitute exists. Because the exclusive contract prohibition applicable to satellite-delivered programming has been in effect since 1992, we do not have specific empirical evidence of the impact of withholding of satellite-delivered programming. However, for vertically integrated programming that is delivered terrestrially and therefore beyond the scope of Section 628(c)(2)(D), there is factual evidence that cable operators have withheld this programming from competitors and, in two instances – in San Diego and Philadelphia – *there is empirical evidence that such withholding has had a material adverse impact on competition in the video distribution market*. In the *Adelphia Order*, the Commission conducted an analysis which concluded that lack of access to RSN programming can decrease an MVPD's market share significantly because a large number of consumers will refuse to purchase the MVPD's service and will instead elect to purchase service from the cable operator that offers the RSN. The analysis concluded that, without access to the cable-affiliated RSN in Philadelphia, the percentage of television households that subscribe to DBS service in Philadelphia is 40 percent below what would otherwise be expected. In San Diego, the analysis concluded that lack of access to the cable-affiliated RSN results in a 33 percent reduction in the households subscribing to DBS service. *We also believe 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.*[8]

Indeed, the Commission seems to have anticipated precisely this merger: A rival MVPD's lack of access to popular non-RSN networks such as local broadcast networks would not have a materially different impact on the MVPD's subscribership than would lack of access to an RSN.

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8. *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Sunset of Exclusive Contract Provisions, Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Dkt. Nos. 07-29, 07-198, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 17791 ¶ 39 (2007) [hereinafter *2007 Sunset Order*] (emphasis added). Comcast's economists acknowledge the FCC's finding that DBS penetration in Philadelphia would be 40 percent greater but for Comcast's exclusionary conduct, but they immediately dismiss its relevance here. *Israel-Katz Reply*, ¶ 28. They later take issue with the FCC's conclusion that such foreclosure "has had a material adverse impact on competition in the video distribution market." *Id.* ¶ 29 (arguing that Comcast's refusal to supply Comcast SportsNet Philadelphia to DBS providers "does not necessarily represent anticompetitive foreclosure.").

Not surprisingly, Comcast and its economists go to great lengths to portray local broadcast networks as being not nearly as important as RSNs.

A. Comcast Alleges that its History of Restricting Access to Affiliated Sports Programming in Chicago and in Philadelphia Provides No Insight to Comcast's Likely Behavior Here

6. In their original economic report, Drs. Israel and Katz estimated the critical departure shares[9] at which Comcast would have an incentive to deny access to an NBC local broadcast affiliate.[10] They estimated that the critical departure shares under the "permanent foreclosure" simulation for the DMAs of Chicago, Hartford and New Haven, Miami-Ft. Lauderdale, Philadelphia, San Francisco-Oakland-San Jose, and Washington-Hagerstown at least ranged from {{ }} percentage points in Philadelphia to {{ }} percentage points in Hartford and New Haven.[11] Given the substantial distance between those estimates and the Commission's estimates of 33-to-40-percentage-point loss of market share after Comcast denied RSN programming to DBS providers, Comcast needed to identify an *alternative source of data* with which to calculate the actual departure shares here. In their reply report, Comcast's economists radically revised their estimates of the critical departure shares upwards; in light of "recent marketplace developments" described below, non-Comcast customers would now have to defect at roughly {{ }} the rate originally estimated by Comcast's economists to make Comcast's restricting content access profitable—conveniently large enough to withstand the kind of share shifts that occurred when rivals were denied access to RSN programming.[12]

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9 Critical departure share is the least percentage-point change in market share of foreclosed rivals after their customers defect to Comcast sufficient to make the anticompetitive behavior causing customers to switch profitable. *See* Declaration of Hal J. Singer In the Matter of Applications for Consent to Transfer License General Electric Company to Comcast Corporation, ¶185 [hereinafter *Singer Report*].

10. Mark Israel & Michael L. Katz, Application of the Commission Staff Model of Vertical Foreclosure to the Proposed Comcast-NBCU Transaction, Feb. 26, 2010, at 46 (Table 2) [hereinafter *Israel-Katz Broadcast Report*].

11. *Id*

12. *Israel-Katz Reply*, ¶ 9.

1. **Like regional sports programming, local broadcast programming is a must-have input**

7. The Commission has recognized that local broadcast programming is must-have programming.[13] The FCC found "substantial evidence in the record that a temporary withdrawal of regional sports programming networks *and local broadcast television* station signals would cause a significant number of customers to shift from their current MVPD,"[14] implying that local broadcast programming is another must-have input. It also found that local broadcast station programming is "highly valued by consumers, and entry into the broadcast station market is difficult."[15]

8. That RSNs may "rely on the intense loyalty of a relatively small subset of consumers (in a given DMA) to particular sports teams" while broadcast networks "rely on large-scale distribution to a broad range of viewers,"[16] as Comcast points out, does not meaningfully distinguish RSNs from local broadcast networks for the foreclosure analysis. That few former Dish Network customers switched to Comcast after *temporarily* losing access to a broadcast network that had always been available on DirecTV does not mean that few former Dish Network customers would switch to Comcast after *permanently* losing access to a broadcast network that had always been available on DirecTV. Indeed, the effects of the permanent loss of RSN programming on DBSs' market shares tells us much more about consumer behavior than the effects of the temporary loss of broadcast networks.

13. *In the Matter of General Motors Corporation and Hughes Electronic Corporation, Transferors, and The News Corporation Limited, Transferee, for Authority to Transfer Control*, MB Dkt. No. 03-124, Memorandum Opinion and Order, ¶ 60 (rel. Jan. 14, 2004).

14. *Id.* ¶ 87 (emphasis added).

15. *Id.* ¶ 201.

16. *Opposition* at 138.

9. The Commission should rely on more than just the market share or viewership share of content to determine whether it is must-have, despite the assertions of Comcast[17] and its economists.[18] The only meaningful definition of must-have content is that, without it, competitors could not constrain prices of those firms that do have it. To see why, suppose Comcast owns the only RSN in a given DMA. Estimating that Comcast has 100 percent of the market for regional sports adds no information to the competition inquiry. Likewise, if NBC is one of four local broadcast networks in a given DMA, but it performs poorly in a given year, measuring NBC's viewership share among local broadcast networks in that year is similarly meaningless; nor is it meaningful to claim that NBC's share of the purported market for local broadcast programming is one quarter. The FCC has correctly avoided this bean counting by designating certain types of programming as must-have. RSNs did not attain their must-have status because the telecasts of the Philadelphia Phillies, Flyers, and 76ers dominated the prime-time ratings in the Philadelphia DMA. Nonetheless, Dish Network's and DirecTV's lack of access to those games resulted in reduced market shares (relative to a world in which the DBS providers could have aired those games), and has significantly impaired their ability to restrain Comcast's prices there.[19] Similarly, lack of access to a local broadcast network would impair the ability of Comcast's rival to compete effectively.

10. Comcast and its economist fail to appreciate the critical linkage between a must-have input and exclusivity. Not all exclusive content deals are anticompetitive. The two critical aspects that make certain exclusive arrangements problematic are whether the content at issue is

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17. *Opposition* at 182 (noting that "the joint venture would account for only 13.7 percent of national broadcast and basic cable television viewing, and only 12.8 percent of basic cable television viewing.").

18. *Israel-Katz Reply* ¶ 216 ("We continue to believe that viewership shares provide a reasonable basis on which to assess of the relative importance of NBCU's content.").

19. *2007 Sunset Order*, ¶ 39. *See also* Redacted Letter from David K. Moskowitz, Executive Vice President and General Counsel, EchoStar Satellite L.L.C. to Marlene H. Dortch, Secretary, FCC, MB Dkt. No. 05-192 (filed Jan. 25, 2005) (citing an econometric study of the price effects by Robert Willig and Jonathan Orszag).

must-have and whether the distributor with exclusive access possesses downstream market power. For example, Comcast mistakenly considers its exclusive contract for regional sports programming—a must-have input controlled by a downstream monopolist—to be competitively equivalent to DirecTV's exclusive contract for out-of-market regular-season football games—a non-must-have input controlled by a firm that lacks market power.[20] Comcast would have the Commission believe that an MVPD in Chicago needs access to Atlanta Falcons early-season games (critical late-season games are generally available outside Sunday Ticket) to compete effectively for MVPD customers in Chicago.[21] In contrast, MVPD rivals seeking to compete against Comcast in Chicago actually require access to the Cubs, White Sox, Blackhawks, and Bulls—local must-have content that Comcast controls. This explains why Comcast has been able to impose extraordinary price increases in Chicago since it took control of those assets.[22] The same price effects would likely occur if Comcast were to control a local broadcast affiliate there.

2. The competitive circumstances that induced Comcast's exclusionary conduct in Philadelphia and Chicago are the same or worse

11. Irrespective of the content being acquired, a critical input in the Commission's foreclosure calculus is Comcast's local market share. It serves as a conservative proxy for the likelihood that a non-Comcast customer would return to Comcast *conditional on leaving her*

20. *Opposition* at 138 ("Likewise, Comcast is on record saying that it will make Comcast SportsNet-Philadelphia available to all competitors 'as soon as DirecTV relinquishe[s] its exclusive access to NFL Sunday Ticket,' indicating that Comcast's overall objective to bargain with DirecTV in support of an outcome that would increase overall access to sports content.").

21. To gauge the importance (lack thereof) of Sunday Ticket to DirecTV, note that approximately 2 million of DirecTV's 18 million subscribers (11 percent) purchase Sunday Ticket. *See* DirecTV's NFL Sunday Ticket HD Premium Questioned, *available at* http://www.televisionbroadcast.com/article/87834. As an aside, Drs. Israel's and Katz's argument that Comcast stands ready to license CSN Philadelphia to *Dish Network* as soon as *DirecTV* relinquishes its exclusive contract with the NFL is extraordinary. *Israel-Katz Reply*, ¶ 29. This sounds like a ransom demanded for a hostage.

22. In the Matter of Applications of Adelphia Communications Corporation, Comcast Corporation, and Time Warner Cable Inc., for Authority to Assign and/or Transfer Control of Various Licenses, MB Docket No. 05-192, Comments of DirecTV, Inc., July 21, 2005 at 20-21 (noting that in June 2006, Comcast demanded that DirecTV pay a rate for CSN-Chicago that was roughly 100 percent more than what DirecTV had been paying FSN Chicago for the same content).