

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

In the Matter of	)	
	)	
WAVEDIVISION HOLDINGS, LLC and ASTOUND BROADBAND, LLC	)	
<i>Petitioner,</i>	)	
	)	MB Docket No. 17-361
vs.	)	
	)	File No. CSR-8948-Z
COMCAST SPORTSCHANNEL	)	
PACIFIC ASSOCIATES, COMCAST	)	
SPORTSNET CALIFORNIA, LLC,	)	
COMCAST SPORTSNET	)	
NORTHWEST, LLC, and	)	
NBCUniversal Media, LLC	)	
<i>Respondent.</i>	)	

**OPPOSITION OF NBCUNIVERSAL MEDIA, LLC TO  
THE PETITION OF WAVEDIVISION HOLDINGS, LLC AND ASTOUND  
BROADBAND, LLC FOR DECLARATORY RULING AND REQUEST FOR WAIVER**

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NBCUniversal Media, LLC (“NBCUniversal”), on behalf of its affiliates Comcast SportsChannel Pacific Associates, Comcast SportsNet California, LLC, and Comcast SportsNet Northwest, LLC, hereby opposes the petition for declaratory ruling and request for waiver filed by WaveDivision Holdings, LLC and Astound Broadband, LLC (collectively, “Wave”).<sup>1</sup>

**INTRODUCTION AND SUMMARY**

Wave’s Petition is a procedurally and substantively flawed attempt to have the Commission interfere on Wave’s behalf in commercial negotiations and potential arbitrations

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<sup>1</sup> See *WaveDivision Holdings, LLC and Astound Broadband, LLC, Petitioners v. Comcast SportsChannel Pacific Associates, Comcast SportsNet California, LLC, and Comcast SportsNet Northwest, LLC, Respondents*, Public Notice, MB Docket No. 17-361 (Dec. 22, 2017); *WaveDivision Holdings, LLC and Astound Broadband, LLC, Petitioners v. Comcast SportsChannel Pacific Associates, Comcast SportsNet California, LLC, and Comcast SportsNet Northwest, LLC, and NBCUniversal Media, LLC, Respondents*, Petition for Declaratory Ruling (Dec. 19, 2017) (“Petition”).

between the parties. The issues that Wave complains about are also time-barred, meritless, and soon to become moot due to Wave's impending acquisition by a third party. The Commission need not and should not give the Petition any serious consideration, especially given the peculiar circumstances of this case.

In the Petition, Wave concedes that its allegations are essentially an untimely program access complaint over terms and conditions of affiliation agreements for regional sports network ("RSN") programming that Wave entered into over three years ago (the "RSN Agreements") and that have since expired. Wave even suggests that the Commission simply "waive" the one-year limitations period for such claims, which has long passed, and give Wave leave to file a program access complaint. Wave offers no authority for such extraordinary treatment – and there is none.

The Petition also asks the Commission to prejudge the terms of renewal agreements for the same RSNs. Wave again offers no authority for the Commission to provide such an advisory opinion, much less to place its thumb on the scale for how renewal negotiations should unfold, especially given the speciousness of Wave's claims.

Notwithstanding the Petition, Wave has separately sent notice of its intent to invoke arbitration for these same RSNs under the *Comcast-NBCUniversal Order*. Under that established process, the arbitrator is empowered to award the final offer that most closely approximates the programming's fair market value, which must be in the form of a three-year renewal agreement. This remedy, which the Commission adopted to ensure continued and nondiscriminatory access to RSN programming on fair market terms – and which itself is appealable by the non-prevailing party to the Commission – is plainly incompatible with Wave's request that the Commission prejudge some of those *same* terms, in isolation, by declaration here.

And, if these circumstances were not odd enough, Wave is about to be acquired by RCN Telecom Services, LLC and its controlling private equity owner, TPG Capital (together, “RCN”), which Wave only passing mentions in the Petition. Yet, as Wave is well aware, NBCUniversal and RCN recently entered into multi-year carriage agreements, which, upon completion of the acquisition, provide for carriage of the RSNs that are the subject of Wave’s Petition. Once the transaction is consummated, which is expected in a matter of days or weeks, RCN will own the Wave systems and will carry the three RSNs under the terms that RCN just successfully negotiated with NBCUniversal. Thus, even putting aside its substantial flaws, the Petition will then become moot.

Beyond these myriad shortcomings, Wave’s untimely program access claims are entirely meritless. Wave does not dispute – nor can it – that NBCUniversal’s minimum penetration terms in the RSN Agreements were consistent with terms on which numerous other distributors agreed to carry the RSN programming. Rather, the thrust of Wave’s claims is directed at NBCUniversal’s *pro-competitive* conduct of licensing its programming to numerous online video distributors (“OVDs”), and is driven by Wave’s desire to be shielded from competition by avoiding its contractual obligations. Such claims run counter not only to NBCUniversal’s legitimate business interest in licensing the RSN programming to any qualified distributor (including those that compete directly with both Comcast Cable and Wave), but also to the Commission’s own policy objectives in the *Comcast-NBCUniversal Order*.

In short, the Petition is asking the Commission to entertain unprecedented requests for relief that circumvent applicable rules, conflict with and undermine the Commission’s own arbitration remedy and policy goals, and will soon be mooted by other events. There is no basis

for the Commission to waste its time and resources to address the Petition. Accordingly, it should be dismissed.

## **I. WAVE’S PETITION IS TIME-BARRED.**

Wave’s Petition is, in essence, an untimely and meritless program access complaint. As Wave acknowledges, under the Commission’s statute of limitations provision, Wave had one year from entering into the RSN Agreements (in October 2013 for NBC Sports Northwest, and October 2014 for NBC Sports California and NBC Sports Bay Area) to bring a complaint challenging the terms of those agreements under the program access rules.<sup>2</sup> Instead, Wave filed the Petition in the *final* month of the contract terms, long after the limitations periods expired.

Wave suggests that the normal Commission rules should not apply to the Petition,<sup>3</sup> but that is incorrect. The Commission’s program access rules and procedures – including the one-year limitations period – apply to filings, like the Petition, that allege a violation of Section 628(b), just as they do to other program access complaints.<sup>4</sup> As the Commission has emphasized, the “rules that set forth the procedural requirements for program access complaints are clear that they apply both to Section 628(b) and Section 628(c) cases . . . . [and] these

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<sup>2</sup> See 47 C.F.R. § 76.1003(g)(1); *see also* Petition at ii, iii, vi & n.20, vii, 24. The other two triggering provisions for bringing a complaint under the program access rules – making an unlawful offer (unconnected to an existing agreement), or unreasonably refusing to deal – are not relevant here.

<sup>3</sup> See Petition ¶ 4 (claiming that “the Commission’s program access procedure for filing complaints does not address those situations arising out of conduct prohibited by 47 U.S.C. § 548(d)[, which authorizes the Commission to adjudicate claims under Section 548(b),] that occurs during the term of a programming agreement”). To the extent Wave is suggesting that something akin to the “discovery” rule should apply to its claims, *see id.* at vi, n.20, Wave’s repeated waiver requests show that it knows such an argument would be meritless. Wave, in fact, is raising untimely objections to the minimum penetration requirements that it agreed to at the *outset* of the contracts, which negates any theory that a later “discovery” date should apply. In all events, as shown in Section IV, Wave had no reasonable basis to come to an alleged “understanding” in 2014 or earlier that NBCUniversal would not license the RSN programming to OVDs during the terms of the RSN Agreements, which conduct Wave contends was the triggering event for its inability to comply with the minimum penetration terms. *See id.* ¶¶ 13-14, 37-38.

<sup>4</sup> In fact, the Commission codified the general statutory prohibition in Section 628(b) against unfair methods of competition or unfair or deceptive acts or practices as Section 76.1001(a) of its rules. *See* 47 C.F.R. § 76.1001(a).

procedural requirements are applicable to *every type of program access complaint*.<sup>5</sup> And the Commission has made clear that “the one year ‘statute of limitations’ . . . is applicable to *all types* of program access complaints.”<sup>6</sup> It makes no difference that Wave styled its program access complaint as a “petition for declaratory ruling”; that is form over substance.

Wave knows that its Petition is untimely, and thus expressly requests a waiver of the one-year limitations period.<sup>7</sup> But the Commission long ago determined “that public policy requires minimal regulatory interference with private contracts entered into by consenting parties.”<sup>8</sup> “By adopting a limitations period for program access complaints, the Commission inherently recognized that, following a reasonable period of time in which to raise allegations of discrimination *or unfair practices*, the parties to a programming agreement must operate under the terms thereof or negotiate amendments thereto free of the program access specter.”<sup>9</sup>

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<sup>5</sup> See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd. 1902 ¶ 109 (1994) (“*1994 Program Access Order*”) (emphasis added); see also *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, First Report and Order, 8 FCC Rcd. 3359 ¶ 41 (1993) (“[T]he language of Section 628(b) applies on its face to all cable operators . . . . Parties filing complaints under this provision must use the procedures and statute of limitations established [] for violations of Section 628(c)(2)(A) regarding undue or improper influence.”).

<sup>6</sup> *1994 Program Access Order* ¶ 110 (emphasis added); see also *1998 Biennial Regulatory Review – Part 76 – Cable Television Service Pleading and Complaint Rules*, Order on Reconsideration, 14 FCC Rcd. 16433 ¶ 5 (1999) (“The [program access] rules . . . explain that complaints based on allegedly discriminatory contracts must be brought within one year of entering into the contract . . .”).

<sup>7</sup> See Petition at ii, iii, vi & n.20, vii, 24 (requesting a waiver of the one-year statute of limitations to bring a program access complaint). Tellingly, Wave offers no plausible basis for granting its request, because none exists. See discussion *infra* note 10.

<sup>8</sup> *EchoStar Communications Corp. v. Fox Liberty Networks, LLC et al.*, Order on Reconsideration, 14 FCC Rcd. 10480 ¶ 14 (1999) (Cable Servs. Bur.) (“*EchoStar Reconsideration Order*”); see also *id.* (“All limitations periods and statutes of limitations are premised upon a recognition that, at some specified point in time, potential defendants should be able to proceed with their affairs without the looming possibility of liability.”).

<sup>9</sup> *Id.* (emphasis added); *EchoStar Communications Corp. v. Fox Liberty Networks, LLC et al.*, Memorandum Opinion and Order, 13 FCC Rcd. 21841 ¶ 20 (1998) (Cable Servs. Bur.) (“*EchoStar Order*”) (“While we recognize that there is some underlying tension between avoiding interference in the area of contractual agreements and the program access policy of fostering competition and diversity through fair access to vertically-integrated programming, we believe that the limitations period resolves some of this tension by providing a limited period of time to contest alleged unfair or discriminatory contracts and offers.”).

Granting Wave a waiver of the one-year limitations period, therefore, would be unprecedented and unjustifiable, and would contravene the policies embodied in the Commission's rules.<sup>10</sup>

## **II. THE PETITION IMPROPERLY ASKS THE COMMISSION TO REWRITE AND ABSOLVE WAVE FROM CONTRACTUAL COMMITMENTS THAT IT AGREED TO YEARS AGO IN COMMERCIAL NEGOTIATIONS.**

Wave concedes that, in 2005, 2008, and 2010, it agreed to minimum penetration commitments in the RSN Agreements, and then subsequently renewed those agreements with the same or similar minimum penetration commitments in 2010, 2013, and 2014.<sup>11</sup> When NBCUniversal determined that Wave was in breach of these commitments in the RSN Agreements, Wave agreed to address its non-compliance with them.<sup>12</sup> These voluntary commitments have enabled Wave to retain all of the benefits of continued distribution of the RSN programming.

Yet Wave now asks the Commission to declare that the parties' arrangements under the expired agreements are "unlawful," to absolve Wave's acknowledged breach of the contracts, to take back the cure that Wave itself tendered to keep the RSN programming, and to impose non-

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<sup>10</sup> NBCUniversal is not aware of any adversarial proceeding in which the Commission has "waived" the limitations period, and Wave cites none. And that is for good reason: Doing so would overturn the reasonable expectations and reliance interests of the adverse party – in this case, NBCUniversal – who would be severely prejudiced by such waiver. In fact, a judge on the Court of Appeals for the D.C. Circuit admonished the Commission for failing to adhere to the limitations period for program *carriage* complaints in a matter where the Commission incorrectly claimed the relevant rule was flexible. *See Comcast Cable Commcn's, LLC v. FCC*, 717 F.3d 982, 995 (D.C. Cir. 2013) (Edwards, J., concurring) ("[T]he FCC's current interpretation of the [program carriage limitations rule] is not only incomprehensible but it fails to credit the sanctity of the parties' contractual commitments."). Here, as Wave concedes with its "waiver" request, the one-year limitations period for program access complaints, and the Commission's own precedent, admit of no doubt that a counter-party's mere enforcement of a contractual term that is more than one year old cannot revive a stale claim as to that term.

<sup>11</sup> *See* Petition ¶ 9; *see also* Declaration of E. McRae Budill ("Budill Decl.") ¶ 4 (attached as Exhibit A).

<sup>12</sup> *See* Petition ¶ 22. Contrary to Wave's claims, it was not forced to give into NBCUniversal's "demands" to cure its breach. NBCUniversal simply sought compliance with the carriage terms, as agreed to by Wave. In addition, NBCUniversal proposed amendments and extensions of the RSN Agreements, including reduced minimum penetration terms, in a good-faith attempt to resolve the matter. Instead, Wave chose to continue with the existing contracts because it wanted to keep the RSN programming for its customers while retaining the option to arbitrate under the *Comcast-NBCUniversal Order* upon the contracts' expiration at the end of 2017. *See* Budill Decl. ¶¶ 14, 18.



market minimum penetration terms that permit Wave to exclude an unlimited number of subscribers from any minimum penetration commitment.<sup>13</sup> Wave cites no authority for such extraordinary relief, and there is none. Entertaining the Petition would violate the Commission’s longstanding policy against undue interference with private contracts and negotiations, which gives effect to an express congressional directive that the Commission should “rely on the marketplace, to the maximum extent feasible” in implementing the provisions of the 1992 Cable Act, including the program access provision.<sup>14</sup>

The “unlawful conduct” that Wave alleges is nothing more than NBCUniversal’s reasonable expectation that Wave should comply with the minimum penetration and other commitments it made under the RSN Agreements. As shown below in Section IV, there was no legitimate basis to challenge these market-based terms under the program access rules when the parties first entered into them. And there is certainly no legitimate basis for Wave to ask the Commission to interfere with and rewrite these same terms years later as the agreements were about to expire.

Further, the proposed minimum penetration terms that Wave seeks to obtain through Commission declaration would give Wave highly preferential terms that no other distributor has obtained in the marketplace, including in more recent carriage agreements.<sup>15</sup> This makes the timing and nature of Wave’s Petition even more inappropriate. The RSN Agreements Wave complains of have expired. Wave has notified NBCUniversal of its intent to invoke arbitration

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<sup>13</sup> See, e.g., Petition at 24.

<sup>14</sup> See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, 1463; see also discussion *supra* p. 5 and note 8 (citing *EchoStar Reconsideration Order* ¶ 14).

<sup>15</sup> See Budill Decl. ¶¶ 7-9, 17. While Wave repeatedly stresses that the RSNs at issue are “must-have” programming, see Petition at iv, ¶¶ 22, 34, 43, 55, it wants the benefit of access to this valuable, costly content at a price point that is contingent upon broad distribution but with the freedom to disregard the minimum distribution commitments that it – and other distributors – have made for the rights to exhibit the content.

under the *Comcast-NBCUniversal Order* (which should be moot shortly due to the RCN acquisition), and the parties are currently in the required 10-15 business day “cooling off” period. In the unlikely event that any such arbitration were to proceed to a hearing, pursuant to the Commission’s established process, an arbitrator will award a three-year contract with terms reflecting the RSN programming’s fair market value.<sup>16</sup> Wave would have a right to appeal the arbitration award to the Commission if it did not prevail, which only reinforces why the Petition is plainly incompatible with that process. While Wave apparently perceived some strategic advantage to filing the Petition and keeping it before the Commission notwithstanding these circumstances, the Commission should not prejudge the outcome of the parties’ negotiations – or any potential arbitrations – by entertaining the extraordinary and improper declaratory relief that Wave requests. Doing so would conflict with the Commission’s well-established policy favoring commercial negotiations, derail its arbitration remedy, and give Wave unfair competitive advantages over other distributors that carry the same RSN programming under comparable market-based agreements.

### **III. WAVE’S IMPENDING ACQUISITION BY RCN WILL MOOT THE PETITION.**

Even apart from the Petition’s myriad substantive and procedural problems, it will soon be moot. Wave will be acquired by RCN in a matter of days or weeks.<sup>17</sup> On December 29,

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<sup>16</sup> See *Applications of Comcast Corporation, General Electric and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, Memorandum Opinion and Order, 26 FCC Rcd. 4238, App. A § VII (2011) (“*Comcast-NBCUniversal Order*”); see also Budill Decl. ¶¶ 14, 18; Petition at vi, ¶¶ 21, 26-29 (discussing Wave’s desire to pursue arbitration). Although the Comcast-NBCUniversal conditions expired on January 20, 2018, assuming the RCN transaction does not close and Wave decides to pursue arbitration, it could still proceed under the arbitration provisions set forth in those conditions because it sent its notice of intent to arbitrate to NBCUniversal prior to the expiration of the conditions.

<sup>17</sup> See Budill Decl. ¶¶ 5, 18; see also Press Release, RCN, Grande and Wave Broadband Join Forces (May 22, 2017), <https://www.rcn.com/hub/about-rcn/newsroom/2017-press-releases/rcn-grande-and-wave-broadband-join-forces/>; Letter from Thomas Cohen, Counsel for RCN, Kelley Drye & Warren, LLP, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 10-56, 16-41, and 17-214, at 1 n.4 & Attachment (Dec. 11, 2017) (“RCN Ex Parte Letter”) (detailing combination with Wave). The Commission is well aware of this transaction, having approved

2017, NBCUniversal and RCN entered into a renewal agreement for the RSNs that RCN carries in its current systems, *as well as for the three RSNs at issue here*.<sup>18</sup> Once the RCN-Wave transaction closes, distribution of the three RSNs in the legacy Wave systems will be governed by the RCN agreement. Wave will have no right to, or interest in, the terms of its carriage of the RSNs (or pursuing arbitration). For this reason as well, the Petition should be dismissed.

#### **IV. WAVE’S UNTIMELY PROGRAM ACCESS ALLEGATIONS ARE MERITLESS AND CONTRARY TO COMMISSION POLICY.**

Wave’s untimely program access claims are also meritless. Contrary to Wave’s theory, NBCUniversal did not violate Section 628(b) by enforcing the minimum penetration terms in the parties’ expired RSN Agreements. These minimum penetration terms were not “historically unattainable” or unreasonable. Nor does their enforcement constitute an unfair practice or unfair method of competition that prevents or significantly hinders a multichannel video programming distributor (“MVPD”) from providing programming to its customers.<sup>19</sup>

Minimum penetration commitments are standard in the industry and a key part of the consideration that RSNs and other programmers negotiate for the rights to exhibit their content.<sup>20</sup> In fact, RSNs depend on broad distribution and some certainty in distribution over the life of their distribution agreements in order to offset the high cost of acquiring valuable RSN programming with both license fee and advertising revenues.<sup>21</sup> NBCUniversal’s minimum penetration terms in the RSN Agreements, in particular, were reasonable at the time Wave

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Wave and RCN’s license transfer applications last year. *See Notice of Non-Streamlined Domestic 214 Application Granted*, Public Notice, 32 FCC Rcd. 6725 (2017).

<sup>18</sup> *See* Budill Decl. ¶¶ 5, 18-19.

<sup>19</sup> *See, e.g.*, Petition ¶¶ 42-45.

<sup>20</sup> *See* Budill Decl. ¶¶ 8-9.

<sup>21</sup> *See id.* ¶ 8.

agreed to them, and consistent with contemporaneous agreements with other distributors.<sup>22</sup>

Wave presents no evidence to the contrary.<sup>23</sup>

Instead, the crux of Wave's program access claim is that NBCUniversal violated an alleged "understanding" that NBCUniversal would restrict access to its RSN programming to other MVPDs, and would not "undermine" Wave's ability to comply with the minimum penetration terms by licensing the RSN programming to OVDs that compete with Wave.<sup>24</sup> Of course, the licensing of programming to OVDs is outside the scope of the Commission's program access rules, and thus should be irrelevant to Wave's untimely Section 628(b) claims. But beyond this, Wave presents no evidence of any such "understanding," in the contracts

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<sup>22</sup> In response to similar allegations by RCN in another proceeding, Comcast Corporation, through its outside counsel, submitted detailed evidence to the Commission in 2015 showing that NBCUniversal's same minimum penetration term at issue here, including a capped broadcast basic exclusion, was not an "off market condition," as RCN claimed, but was "in fact a common and reasonable term" and that "NBCUniversal has reached arms-length agreements with MVPDs of all sizes that include the same or substantially similar terms." See Letter from Francis M. Buono, Counsel for Comcast Corporation, Willkie Farr & Gallagher LLP, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-57, at 2-4 (Mar. 18, 2015). RCN repeated similar allegations in a recent letter to the Commission filed in the pending video competition proceeding, as well as other proceedings. See RCN Ex Parte Letter at 2-4.

<sup>23</sup> In response to Wave's trade group representative's comments in the pending video competition proceeding, NBCUniversal has explained why nullifying a particular minimum penetration term, in isolation, provides a one-sided and not-bargained-for benefit to the MVPD. See Reply Comments of Comcast and NBCUniversal, MB Docket No. 17-214, at 3-4 (Nov. 9, 2017) ("[W]hat ACA is suggesting is that there be a government-mandated *uncapped* exclusion of broadcast basic – no guaranteed minimum carriage level at all – which allows the MVPD to down-convert as many higher-tier customers as it can to broadcast basic customers, to the extent it perceives doing so to be in its business interest. Thus . . . if the MVPD's broadcast basic tier were to grow to 30 percent of its customer base (i.e., 30,000 customers), that same 85 percent penetration rate [discussed above], excluding broadcast basic, would yield the programmer only 59,500 subscribers. Even a 90 percent penetration rate would yield only 63,000 subscribers. That is a far different economic proposition for the programmer – a 25-30 percent fall-off in subscriber fees and potential advertising revenue from the programmer's projections/expectations based on 85,000 subscribers. For ACA's members that wish to heavily market a broadcast basic tier, that is an awfully good deal: They get access to valuable programming for those subscribers who want it, at lower prices that contemplate broad distribution, but without then following through on the broad distribution that justified those lower rates in the first place. For the programmer, however, it is the *opposite* of a good deal – especially if produced not through fair and reasonable negotiations by private parties, but rather through one-sided government regulation.") (emphasis in original). NBCUniversal incorporates these comments in full by reference here.

<sup>24</sup> See Petition ¶¶ 13-14, 37-38.

themselves or otherwise, and, indeed, NBCUniversal did not agree – and would not have agreed, had it been proposed – to such an “understanding.”<sup>25</sup>

In addition, the *Comcast-NBCUniversal Order* adopted in 2011 (well before Wave renewed the RSN Agreements in 2013 and 2014) specifically addressed the increasing role and future growth of OVDs. The *Order* imposed various requirements to ensure that OVDs would have access to NBCUniversal programming,<sup>26</sup> including a prohibition on overly-restrictive alternative distribution method provisions that might impede the licensing of content to OVDs.<sup>27</sup> Indeed, as Comcast and NBCUniversal publicly reported to the Commission in February of 2014, “[a]greements with . . . OVDs have become a regular part of the Company’s program licensing business,” and “NBCUniversal continues to negotiate with OVDs for carriage of its linear programming networks.”<sup>28</sup> Given these facts, Wave’s claims that it was caught off-guard and unwittingly disadvantaged by NBCUniversal’s licensing of the RSN programming to OVDs are not credible.<sup>29</sup> Moreover, these same OVDs distribute the RSN programming in relevant markets to an equal or greater percentage of their customers than does Wave.

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<sup>25</sup> See Budill Decl. ¶ 17. In fact, the RSN Agreements specifically *disclaim* any extra-contractual understandings. See *id.*

<sup>26</sup> See, e.g., *Comcast-NBCUniversal Order* ¶¶ 74-90; *id.* ¶ 87 (“[W]e require Comcast-NBCU to offer its video programming to any requesting OVD on the same terms and conditions that would be available to a traditional MVPD . . . . By granting OVDs substantially similar rights to video programming as MVPDs, this condition generally protects them from discriminatory treatment aimed at keeping OVDs from competing directly with Comcast for video subscribers.”). The Commission separately has documented the growth of OVDs on an annual basis. See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighteenth Report, 32 FCC Rcd. 568 ¶¶ 153-187 (Media Bur. 2017) (noting, among other things, that “[t]he OVD marketplace continues to expand and change” and discussing the degree to which consumers are supplementing MVPD services with OVD services).

<sup>27</sup> See *Comcast-NBCUniversal Order*, App. A. § IV.

<sup>28</sup> Comcast Corp. and NBCUniversal Media, LLC, Third Annual Report of Compliance with Transaction Conditions, *Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, MB Docket No. 10-56, at 3-4 (Feb. 28, 2014).

<sup>29</sup> See, e.g., Petition ¶¶ 13-14 & n.44.

The OVD licensing requirements in the *Comcast-NBCUniversal Order* also align with NBCUniversal's own business imperatives to license its programming as widely as possible, including to legacy MVPD platforms and OVDs.<sup>30</sup> All of these OVDs *compete directly with Comcast Cable*, further refuting Wave's notion that NBCUniversal's market-based minimum penetration terms are intended to benefit Comcast Cable.

It is precisely this *pro-competitive* conduct on NBCUniversal's part that the Petition attempts to paint in a dim light. But the actual objectives of the Petition are clear enough: It is asking the Commission not only to award Wave preferential contract terms that no other distributor has obtained in commercial negotiations with NBCUniversal, but also to shield Wave from normal market forces and increasing OVD competition faced by all other distributors of the RSN programming. These improper requests are all the more extraordinary since they would have the Commission award a remedy based on a theory that effectively repudiates the conditions it adopted in the *Comcast-NBCUniversal Order* to promote greater competition for the distribution of RSN and other programming. Entertaining Wave's requested relief would likewise turn the pro-competitive policies of the program access regime on their head.<sup>31</sup> Like other federal policies, the program access statute and rules are intended to protect competition, not individual competitors like Wave.<sup>32</sup>

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<sup>30</sup> See Budill Decl. ¶ 17. Notably, minimum penetration terms are standard in NBCUniversal's RSN agreements with MVPDs and OVDs. See *id.* ¶¶ 9, 14.

<sup>31</sup> See *EchoStar Order* ¶ 20 (noting that the policy underlying the program access regime is to ensure "fair access to vertically-integrated programming").

<sup>32</sup> See, e.g., *Revision of the Commission's Program Access Rules*, Report and Order, 27 FCC Rcd. 12605 ¶ 12 (2012) (citing *Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306, 1313 (D.C. Cir. 2010)) ("The D.C. Circuit has . . . ruled that the Commission's analysis of the [exclusive contract] prohibition is appropriately focused on harm to competition and consumers, not harm to competitors."); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd. 17791 ¶ 61 (2007) ("In considering whether to allow the exclusive contract prohibition to sunset, our primary focus is on the impact that sunset would have on competition and diversity in the distribution of video programming generally, not on individual competitors . . .").

Finally, Wave's attempt to shift blame to NBCUniversal and cast itself as a victim of changed circumstances rings hollow for other reasons. Wave's failure to meet its contractual commitments in the now expired RSN Agreements is due to Wave's *own* business decisions to focus its marketing and promotional efforts on tiers of video service that do not include the RSNs, and to encourage its customers to *rely on OVDs* for additional programming beyond the broadcast basic tier.<sup>33</sup> In fact, Wave has gained many more broadband subscribers in the past three years than it has lost in video subscribers.<sup>34</sup> If anything, therefore, the licensing of NBCUniversal's programming to OVDs has made Wave's broadband services more attractive.

### CONCLUSION

For the foregoing reasons, Wave's petition for declaratory ruling and request for waiver should be dismissed.

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<sup>33</sup> See Budill Decl. ¶ 10; Wave, <https://residential.wavebroadband.com/tv/> (last visited Jan. 18, 2018) (promoting a "Local TV" package for \$10 plus fees and encouraging customers to add streaming options – e.g., "Like to Stream or interested in trying new ways to watch TV? Add Local TV and explore leading streaming services for movies, shows, events, and more."; "Just want to watch all your local TV channels and keep it simple? Get Local TV and consider adding a streaming partner for movies and more."). Indeed, in discussing Wave's new 1 Gbps broadband-only service to apartment buildings, Wave G, Wave's founder Steve Weed explained that "the company decided to promote 'OTT video to customers rather than launching our own cable service. We've been pretty successful at it. We found that customer penetrations are just as good when you don't have cable and customer satisfaction is very high.'" Mike Farrell, *Riding a Wave of OTT Options*, Multichannel News, May 24, 2017, <http://www.multichannel.com/blog/money/riding-wave-ott-options/413066>.

<sup>34</sup> See SNL Kagan, WaveDivision Holdings, LLC Cable Operating Metrics, <https://www.snl.com/web/client?auth=inherit#company/cableOperatingMetrics?id=4151119> (last visited Jan. 19, 2018).

Margaret L. Tobey  
*Regulatory Affairs, NBCUniversal*

Kerry Brockhage  
*Content Distribution, NBCUniversal*

300 New Jersey Ave., NW  
Suite 700  
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Respectfully submitted,

A handwritten signature in blue ink, appearing to be "M. P. H. S.", written over a horizontal line.

Michael D. Hurwitz  
David P. Murray  
Melanie A. Medina  
Brenna A. Sparks  
WILLKIE FARR & GALLAGHER LLP  
1875 K Street, N.W.  
Washington, D.C. 20006  
202-303-1000



**SUBSCRIPTION AND VERIFICATION**

I, Michael D. Hurwitz, do hereby declare and state under penalty of perjury that I have read NBCUniversal Media, LLC's Opposition to the Petition of WaveDivision Holdings, LLC and Astound Broadband LLC for Declaratory Ruling and Request for Waiver and to the best of my knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and it is not interposed for any improper purpose.

Dated: January 22, 2018  
Washington, DC



Michael D. Hurwitz  
Willkie Farr & Gallagher LLP  
*Counsel for NBCUniversal Media, LLC*

# **Exhibit A**

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

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	)	
WAVEDIVISION HOLDINGS, LLC and	)	
ASTOUND BROADBAND, LLC	)	
<i>Petitioner,</i>	)	
	)	MB Docket No. 17-361
vs.	)	
	)	File No. CSR-8948-Z
COMCAST SPORTSCHANNEL PACIFIC	)	
ASSOCIATES, COMCAST SPORTSNET	)	
CALIFORNIA, LLC, COMCAST	)	
SPORTSNET NORTHWEST, LLC, and	)	
NBCUniversal Media, LLC	)	
<i>Respondent.</i>	)	
<hr/>	)	

**DECLARATION OF E. McRAE BUDILL**

1. My name is E. McRae Budill. My business address is 1221 Avenue of the Americas, New York, New York 10020. I earned a B.A. from Yale University and hold a Masters of Business Administration from Harvard Business School.

2. I have over 25 years of experience in the programming industry. I joined NBCUniversal Media, LLC (“NBCUniversal”) in October 2012, as the President of TV Networks Distribution, Content Distribution. My responsibilities include distribution strategy and negotiation for carriage of NBCUniversal’s cable and broadcast programming portfolio, which is comprised of nearly two dozen NBCUniversal-affiliated national and regional networks. In this role, I oversee and lead negotiations for distribution agreements for NBCUniversal’s regional sports networks (“RSNs”) and national cable networks, the NBC and Telemundo owned-and-operated broadcast stations, and the associated on-demand content and online content. I also manage the NBCUniversal Content Distribution group’s partner marketing team.

3. Prior to joining NBCUniversal, I worked in the Cable & Communications Division of Cablevision Systems Corporation (“Cablevision”) from 1991 to 2012. I held a variety of programming positions at Cablevision, including, most recently, Executive Vice President of Programming. In that capacity, I was responsible for leading all content acquisition activities for the business. I oversaw and led the negotiating and licensing activities for linear channels (i.e., channels that offer scheduled programming on a particular day and time) and on-demand content, as well as for building Cablevision’s online “TV Everywhere” rights portfolio.

4. In 2013 and 2014, on behalf of NBCUniversal, I supervised the negotiation of the programming agreements at issue between WaveDivision Holdings, LLC and Astound Broadband, LLC (collectively, “Wave”) and Comcast SportsChannel Pacific Associates (“NBC Sports Bay Area”), Comcast SportsNet California, LLC (“NBC Sports California”), and Comcast SportsNet Northwest, LLC (“NBC Sports Northwest”) (together, the “RSN Agreements”). The RSN Agreements were originally executed in 2005 (for NBC Sports Bay Area), 2008 (for NBC Sports Northwest), and 2010 (for NBC Sports California). While new rates were set and other terms changed, the minimum penetration terms at issue did not change from the prior set of agreements in the most recent renewals of the RSN Agreements in 2013 and 2014.

5. I also have supervised and participated in NBCUniversal’s more recent negotiations with Wave to renew these RSN Agreements. The RSN Agreements previously were set to expire on December 31, 2017. The agreement for NBC Sports Northwest was originally set to expire on September 30, 2017, but, in mid-September, prior to expiration, the parties agreed to an extension until the end of the year. However, as explained below, the parties subsequently agreed to extend the RSN Agreements until the earlier of January 16, 2018 or the closing of Wave’s impending sale to RCN Telecom Services, LLC, which is owned by TPG

Capital (together, “RCN”). Once this transaction has closed, as expected, RCN will assume carriage of the RSNs in the legacy Wave systems pursuant to the terms of NBCUniversal’s recently renewed agreement with RCN (the “RCN Agreement”), and Wave will have no right to or interest in the terms of its carriage of the RSNs.

6. On January 16, 2018, Wave provided formal notice of its intent to arbitrate over renewal of the RSN Agreements pursuant to the *Comcast-NBCUniversal Order*.<sup>1</sup> That notice has triggered a standstill of the RSN Agreements and continued carriage of the RSNs by Wave pursuant to the terms of the expired agreements. The parties are now engaged in the 10-15 business day “cooling off” period mandated in the *Comcast-NBCUniversal Order*.<sup>2</sup> As noted, however, once RCN’s acquisition of Wave is consummated, the RSN Agreements with Wave will terminate and RCN’s distribution of the RSNs in the legacy Wave systems will be governed by the RCN Agreement.

#### **RSN Affiliation Agreements and Minimum Penetration Obligations**

7. The expired RSN Agreements include certain distribution commitments that Wave agreed to in the parties’ prior commercial negotiations and that are common in the industry. Among other things, RSN agreements, including Wave’s, typically require that the RSN be distributed in the distributor’s first or second most widely-distributed package of channels or “tier” and received by a minimum percentage of the distributor’s subscribers. These penetration commitments may exclude or “carve out” a portion of customers that subscribe only to a “broadcast basic” or “Lifeline” tier, which contains a limited number of channels and offers

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<sup>1</sup> See *Applications of Comcast Corporation, General Electric and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, Memorandum Opinion and Order, 26 FCC Rcd. 4238, App. A § VII (2011) (“*Comcast-NBCUniversal Order*”).

<sup>2</sup> See *id.* App. A § VII.A.6.

a low-cost option to consumers. But such carve outs are generally capped at a specified percentage of customers in order to ensure a minimum level of distribution of the RSN programming. The distributor then pays the programmer a monthly subscriber fee for each subscriber household that receives the RSN programming.

8. Such distribution commitments provide reasonable certainty with respect to the minimum amount of subscriber fees an RSN can expect to receive, as well as the subscriber base against which it can expect to sell advertising, and that certainty is a fundamental part of negotiations for the RSN rate over the life of the contract. Distributors typically exceed their minimum penetration requirements because their first or second most widely distributed package of channels reaches more than the minimum penetration of subscribers. These marketplace-based distribution commitments are a key part of the consideration that programmers, including NBCUniversal, negotiate with all distributors, particularly given the significant costs of acquiring professional sports exhibition rights and associated obligations for these rights. Professional sports teams license the exclusive right to televise their games to RSNs – typically at a high fixed cost, and on a long-term basis – pursuant to media sports rights agreements that reflect the widespread popularity and value of this programming. RSNs bear the risk of recovering those high costs; and the sports teams typically include provisions in their media rights agreements that require RSNs to seek broad distribution in packages of channels that reach a wide percentage of subscribers, thereby helping to support and grow the team’s base of fans. Broad distribution of the games also helps the RSN attract more viewers and is essential to the RSN business model, which relies on both affiliate fees and advertising revenue to offset the high fixed costs of the programming.

9. Penetration minimums are standard in NBCUniversal's RSN agreements with multichannel video programming distributors ("MVPDs") and online video distributors ("OVDs"). Based on my experience in the industry, I am aware that similar market-based distribution commitments are part of agreements between other programming services (including RSNs) and distributors across the country.

### **Wave's Breach of Its RSN Agreements**

10. NBCUniversal approached Wave in early 2017 regarding Wave's breach of its distribution commitments in the RSN Agreements. Specifically, Wave was not distributing the RSNs to the minimum number of its subscribers necessary to satisfy the applicable minimum penetration requirements to which it had agreed. It also came to our attention that Wave was actively focusing its subscriber marketing and promotional efforts on tiers of video services that did not include the RSNs, while encouraging its subscribers to purchase third-party streaming options for the RSNs and other content.<sup>3</sup>

11. On March 3, 2017, I authorized a letter to Wave from NBCUniversal, signed by Matt Schnaars, Senior Vice President, Content Distribution, notifying Wave of its breach and requesting that it come into compliance with the terms and conditions of the RSN Agreements within 30 days.

12. In a letter dated March 31, 2017, Wave responded by asserting a series of baseless and scattershot claims against NBCUniversal, and indicated that it intended to file a program access complaint against two of the RSN networks.

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<sup>3</sup> See Wave, <http://residential.wavebroadband.com/tv> (last visited Jan. 18, 2018) (promoting a "Local TV" package for \$10 plus fees and encouraging customers to add streaming options – e.g., "Like to Stream or interested in trying new ways to watch TV? Add Local TV and explore leading streaming services for movies, shows, events, and more."; "Just want to watch all your local TV channels and keep it simple? Get Local TV and consider adding a streaming partner for movies and more.").

13. NBCUniversal responded on April 10, 2017. We noted, among other things, that a program access complaint would be time-barred. We also noted that Wave's other allegations were frivolous. We emphasized NBCUniversal's desire to focus on renewal negotiations with Wave and our willingness to discuss ways to best resolve Wave's breach of the expiring RSN Agreements and the appropriate, mutually beneficial terms for renewal agreements.

14. Over the course of the next few months, NBCUniversal continued to engage in discussions with Wave in good faith, including sending Wave on May 16, 2017 a proposed amendment to its RSN Agreements and extension until December 31, 2018. NBCUniversal's proposal to Wave specifically offered revised minimum penetration terms that other MVPDs have accepted in recent arm's-length negotiations. Contrary to Wave's claims, these were not identical to the current terms. Rather, this offer represented a significant relaxation of the previous minimum penetration terms in the expiring RSN Agreements, and would have given Wave as favorable such terms as any other distributor, including distributors with many multiples of Wave's subscribers. Wave declined this offer, indicating that it would prefer to continue with the RSN Agreements and their year-end 2017 expirations in order to preserve the option to pursue the arbitration remedy prior to the expiration of the conditions in the *Comcast-NBCUniversal Order* on January 20, 2018.

15. Nonetheless, during this time, Wave remained in breach of the RSN Agreements and had not taken steps to cure its breach. On July 10, 2017, we informed Wave of NBCUniversal's intent to terminate the RSN Agreements due to Wave's material breach. On July 12, 2017, Wave offered to take steps to cure its breach and informed NBCUniversal that it would pay the outstanding amounts that it owed for the RSN programming for the relevant time periods.



16. NBCUniversal accepted Wave's good-faith steps to comply with its distribution commitments pending renewal of the agreements.

17. I am aware that Wave has alleged that NBCUniversal's dealings with Wave – including our expectation that Wave comply with the RSN Agreements – were designed to benefit Comcast Cable. Such allegations are not true. The terms of the expiring RSN Agreements, and our further discussions and negotiations with Wave, have been based solely on NBCUniversal's business interests, and without regard to Comcast Cable. Comcast Cable, like other MVPDs, has agreed to minimum penetration requirements for the NBCUniversal RSNs and is in full compliance with those contract terms. In addition, and as Wave has acknowledged, NBCUniversal has actively licensed its RSN and other programming to MVPDs and OVDs, including distributors that compete with Comcast Cable, under similar market-based terms. In this regard, Wave's claimed "understanding" in 2013 and 2014 when it renewed the RSN Agreements that NBCUniversal would license the RSNs only to MVPDs like Wave, and not to OVDs, is baseless. There was no such understanding; nor does it appear anywhere in the RSN Agreements, which in fact explicitly disclaim any extra-contractual understandings or reliance. Moreover, like our many programming competitors, NBCUniversal has strong incentives to license its programming as widely as possible – to MVPDs *and* OVDs alike. And the 2011 *Comcast-NBCUniversal Order* ensures that qualified OVDs – including those that are providing multiple live, linear network feeds – have access to the full suite of NBCUniversal programming, including NBCUniversal's RSNs in the relevant markets.

**Recent Negotiations with Wave and RCN and Wave's Notice of Intent To Arbitrate**

18. NBCUniversal has continued to engage in good-faith negotiations with Wave for renewal of the RSN Agreements. As noted above, the RSN Agreements were previously set to

expire on December 31, 2017. Given that the acquisition of Wave by RCN was expected to close in late January or early February of this year, NBCUniversal proposed an extension of the RSN Agreements until the earlier of March 2018 or the close of the transaction. Wave, however, was insistent that the extension end prior to the expiration of the conditions in the *Comcast-NBCUniversal Order* so that it might avail itself of the arbitration remedy. Contrary to Wave's claim, NBCUniversal did not attempt to deprive Wave of access to this arbitration remedy. Indeed, on December 29, 2017, Wave and NBCUniversal agreed to extend the RSN Agreements until the earlier of January 16, 2018 or the closing of the RCN-Wave transaction, thus preserving Wave's right to initiate arbitration under the *Comcast-NBCUniversal Order*.

19. Separately, on December 29, 2017, NBCUniversal and RCN successfully negotiated a renewal agreement for the RSNs that RCN carries in its current systems, as well as for the three RSNs that it will carry in the systems it acquires from Wave.

20. On January 16, 2018, Wave sent us a notice of intent to arbitrate in order to preserve this remedy under the *Comcast-NBCUniversal Order*, should the RCN acquisition not occur for any reason. If and once the RCN transaction is consummated, any need or basis for arbitration by Wave will be mooted, as the three RSNs carried in the Wave system will be governed by the terms of the new RCN Agreement.

*[Remainder of page intentionally left blank.]*

I declare, under penalty of perjury, that the foregoing is true and correct.



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E. McRae Budill

Dated: January 19, 2018  
New York, NY

**CERTIFICATE OF SERVICE**

I, Melanie A. Medina, hereby certify that on this 22<sup>nd</sup> day of January 2018, I caused true and correct copies of the foregoing NBCUniversal Media, LLC's Opposition to the Petition of WaveDivision Holdings, LLC and Astound Broadband LLC for Declaratory Ruling and Request for Waiver to be served via overnight delivery on the following:

Eric Breisach\*  
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James A. Penney  
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401 Parkplace Center, Suite 500  
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Melanie A. Medina  
Willkie Farr & Gallagher LLP  
*Counsel for NBCUniversal Media, LLC*

January 22, 2018

\*also served via e-mail